

MARCH 1997

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MARCH 1997

Review was granted in the following case during the month of March:

Secretary of Labor, MSHA v. Medusa Cement Corporation, Docket Nos. PENN 97-20-RM, PENN 97-25-RM. (Interlocutory Review of Judge Feldman's December 2, 1996 Order.)

Secretary of Labor, MSHA v. Broken Hill Mining Company, Docket Nos. KENT 94-1199, KENT 94-1200, KENT 95-240, KENT 95-310. (Judge Maurer, February 14, 1997.)

Secretary of Labor, MSHA v. Williams Natural Gas Company, Docket Nos. CENT 96-124-M, CENT 96-158-M. (Judge Feldman, February 7, 1997.)

United Mine Workers of America on behalf of William K. Burgess, et al. v. Secretary of Labor, et al., Docket Nos. SE 96-367-D, SE 97-18-D. (Judge Bulluck, February 11, 1997.)

Secretary of Labor, MSHA v. Bellefonte Lime Company, Docket No. PENN 95-467-M. (Judge Weisberger, February 26, 1997.)

Secretary of Labor on behalf of Kenneth Hannah, et al. v. Consolidation Coal Company, Docket No. LAKE 94-704-D. (Judge Melick, March 6, 1997. February 18, 1997 petition denied, March 28, 1997 petition granted.)

No cases were filed in which review was denied during the month of March:



**COMMISSION DECISIONS AND ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 7, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 94-518-R
	:	KENT 94-519-R
WHAYNE SUPPLY COMPANY	:	KENT 95-556

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raise the question whether a violation of 30 C.F.R. § 77.405(b)<sup>2</sup> by Wayne Supply Company ("Wayne"), which led to the death of a miner, resulted from the operator's unwarrantable failure. Administrative Law Judge Arthur Amchan determined that the miner was not Wayne's agent, that his conduct was nevertheless imputable to the operator because of Wayne's lack of supervision and training of the miner, but that his conduct was not sufficiently aggravated to support a finding of unwarrantable failure. 17 FMSHRC 1573 (September 1995) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the negative unwarrantable failure determination.<sup>3</sup> For the reasons set forth below, we vacate and remand.

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> Section 77.405(b) provides:

No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.

<sup>3</sup> The judge also determined that the operator did not violate the on-shift inspection requirement contained in 30 C.F.R. § 77.1713(a). 17 FMSHRC at 1583-84. The Secretary has not appealed that determination.

## I.

### Factual and Procedural Background

Whayne is a contractor that sells and services Caterpillar machinery and equipment in Kentucky and Indiana. 17 FMSHRC at 1575. On January 19, 1994, Whayne dispatched James Paul Blanton, an experienced field service technician with 16 years of service with Whayne, to Addington Mining Inc.'s Job #17A, a surface coal mine in Pike County, Kentucky. *Id.* at 1574-75; Tr. 244. On January 20, Blanton drove his Whayne truck to Job #17A. 17 FMSHRC at 1575. The truck was equipped with a crane (or "boom"), chain and cable "come-along" for securing raised loads. *Id.* at 1575, 1577. Addington personnel directed Blanton to repair a disabled Caterpillar D10N bulldozer. *Id.* at 1575. Blanton examined the D10N dozer and concluded that the torque converter was defective and needed to be removed. 17 FMSHRC at 1575; Tr. 155-56.

In order to gain access to the torque converter on the D10N bulldozer, one of three belly pans on the underside of the dozer had to be lowered. 17 FMSHRC at 1575 n.2. The belly pan is hinged on one side and secured to the bulldozer by three bolts each on two other sides. *Id.*; Tr. 51. When the belly pan is freed from the bolts, it swings down on its hinge. *Id.* The belly pan weighs about 500 lbs. 17 FMSHRC at 1576.

The normal practice for removing the belly pan in the field is to first dig a trench and place the vehicle over it. Tr. 61-62. Then a chain is run from the crane on the truck, passed under the belly pan and attached to the opposite bulldozer track to prevent the pan from falling abruptly when the bolts are loosened. 17 FMSHRC at 1575. An alternate method involves use of the come-along to secure a cable beneath the pan. *Id.* at 1577. After the pan is loosened from the bolts, the crane or come-along is used to slacken the restraint and allow the belly pan to safely swing open. *Id.* at 1575; Tr. 79-80, 160.

Consistent with this procedure, Addington employees dug a trench and then pushed the bulldozer over it so Blanton could begin removing the torque converter. 17 FMSHRC at 1575; Tr. 62-66. Blanton moved his truck so that the right rear portion, where the crane was located, was next to the bulldozer. 17 FMSHRC at 1575. The Addington employees left Blanton alone to repair the bulldozer. *Id.* at 1575-76. Shortly before noon, Blanton was discovered pinned under the belly pan, which had swung down on its hinges. *Id.* at 1576. Blanton was pulled from underneath the bulldozer but could not be revived, and probably died at the scene. *Id.*; Tr. 71-73, 138-39. Before the pan fell, Blanton had removed the nuts securing the pan to the bolts. Tr. 73-74; Gov't Ex. 6, p.4, ¶4. In addition to the nuts, an air hose, air gun or air wrench, power drill, socket and screwdriver were discovered under the dozer at the time of the accident. Tr. 27-28, 73-74, 139-40, 158. There was no evidence that Blanton had attempted to secure the belly pan with the crane and chain, cable come-along, or any other device. 17 FMSHRC at 1576. The crane was not "on," and was not extended, but instead was in the "down" position. Tr. 227-28.

Wayne gives its field mechanics general verbal instructions to minimize the time spent under raised equipment; however, its employees receive no formal training regarding the proper procedures for lowering belly pans in the field, nor does Wayne maintain a written policy on this subject. 17 FMSHRC at 1579; Tr. 216, 218, 349. Wayne did supply formal training on removing belly pans when the vehicle is in the shop; however, the procedure for removing belly pans in the shop differs from that used in the field. Tr. 216-17, 344-45, 383-85.

Wayne hires experienced mechanics for its field service positions, and relies heavily on on-the-job training for these employees. 17 FMSHRC at 1579. New field mechanics begin as “helpers” and are assigned to jobs with more experienced field technicians. Tr. 208-09, 372. After gaining experience in the field, field mechanics may be assigned to jobs alone, or with less experienced helpers. *Id.* The field mechanic tells the helper what to do when they get to the job. Tr. 245. Wayne field mechanics are dispatched by and receive performance evaluations from the field service foreman, a supervisor. Tr. 242-45, 254. Field mechanics are dispatched to a customer’s premises, and assigned by the customer to work on a particular piece of equipment. Tr. 212-13. Wayne field mechanics are not supervised by mining company employees while on mine property. *Id.* The field mechanic evaluates the problem and corrects it, without direct supervision from the field service foreman. Tr. 209, 254.

MSHA inspector Buster Stewart issued several citations and orders to Addington and Wayne on January 25, including Citation No. 4011760 to Wayne under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), for violating section 77.405(b). Gov’t Ex. 6, p.5. The citation alleged that blocking was not provided by Wayne to secure the belly pan. Gov’t Ex. 3. Stewart also drafted an Accident Investigation Report, which stated, *inter alia*: “The cause of the accident was the failure to use blocking material to prevent movement of the belly pan while work was in progress.” Gov’t Ex. 6, p.3.

Following an evidentiary hearing, the judge concluded that Wayne violated section 77.405(b).<sup>4</sup> 17 FMSHRC at 1577. He ruled that any negligence on Blanton’s part could be “imputed” to the operator if the operator has not “taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Id.* at 1578. The judge found that, although Blanton was not a “supervisory employee,” his negligence could be imputed to Wayne because the operator did not take “such reasonable steps in training and supervising Blanton[] that it should be completely absolved of responsibility for his violative conduct . . .” *Id.* at 1578-79. Examining Blanton’s conduct in light of his finding that “Blanton’s actions did not compromise the safety of others,” the judge found that Blanton’s conduct “defie[d] explanation” and characterized it as “‘thoughtless,’ rather than ‘inexcusable or aggravated.’” *Id.* at 1580 & n.6. He concluded that Blanton’s

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<sup>4</sup> The judge found that the crane on Blanton’s truck was working on the morning of January 20. 17 FMSHRC at 1576. The Secretary does not challenge this finding.

negligence did not rise to the level of unwarrantable failure. *Id.*<sup>5</sup> The judge rejected the Secretary's proposed \$50,000 penalty. *Id.* at 1582. Characterizing Whyne's negligence as "moderate," considering "both the 'thoughtlessness' of Mr. Blanton and the lack of formal training provided by Whyne Supply regarding belly pan removal[.]" the judge assessed a civil penalty of \$1500. *Id.*

## II.

### Disposition

The Secretary argues that, although the judge correctly determined Blanton's negligence was imputable to the operator due to Whyne's failure to properly train and supervise, the judge erred in failing to impute negligence on the ground that Blanton was Whyne's agent. S. Br. at 5-6. The Secretary contends that Blanton was authorized by Whyne to act on its behalf at the mine site, that experienced Whyne technicians "supervise themselves" on the job, and that they are therefore agents of Whyne. *Id.* at 8-11. The Secretary asserts that Blanton's conduct was well within the definition of aggravated conduct in that it was deliberate, the hazard was obvious, and the condition created was extremely hazardous. *Id.* at 11-15. He argues the judge's negative unwarrantable failure determination is inconsistent with his finding that Blanton's conduct defied explanation, and that the number of miners put at risk by the conduct in question is not determinative. *Id.* at 15-16. The Secretary asks that the Commission remand the matter for assessment of an appropriate civil penalty. *Id.* at 17.

Whyne responds that, inasmuch as the citation never charged it with responsibility for Blanton's negligence, it would be a breach of due process to increase the magnitude of the violation by reinstating the unwarrantable designation. W. Br. at 10-12. Whyne contends that Blanton was exercising the normal responsibilities of his rank-and-file position of field mechanic at the time of the accident, and was in no meaningful sense an agent of the operator at any relevant time. *Id.* at 13-25. Whyne asserts that, assuming *arguendo* Blanton's status as Whyne's agent, a comparison of the conduct of Whyne and Blanton shows that Blanton was principally responsible for the accident, and it would therefore be unfair to disturb the judge's negative unwarrantable failure conclusion as to Whyne. *Id.* at 25-31. Finally, Whyne argues that the Commission should uphold the judge's penalty assessment. *Id.* at 32-36.

#### A. Unwarrantable Failure

##### 1. Agency

Under section 104(d)(1) of the Act, the Secretary is authorized to issue a citation specifying that a violation was "caused by an unwarrantable failure of [an] operator to comply

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<sup>5</sup> In another holding not challenged by the Secretary, the judge concluded that section 77.405(b) does not require the use of cribbing or two chains. 17 FMSHRC 1580-82.

with . . . mandatory health or safety standards . . .” 30 U.S.C. § 814(d)(1). It is well settled that “an agent’s conduct may be imputed to the operator for unwarrantable failure purposes.” *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991) (“*R&P*”). However, in the context of evaluating negligence for penalty assessment purposes, the Commission has held that “[t]he conduct of a rank-and-file miner is not imputable to the operator.” *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995). In analyzing a miner’s duties to determine whether he is an agent, the Commission examines whether the miner was exercising managerial or supervisory responsibilities at the time the negligent conduct occurred. *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (October 1995).

The Secretary bases his contention that Blanton was Wayne’s agent on the grounds that (1) Blanton worked “mainly on his own without management supervision out in the field,” had “the responsibility and discretion while on the job to determine the problem and to take care of it without supervisory intervention or guidance” and essentially supervised himself, (2) he was hired with prior experience, “thereby not receiving any formal training from Wayne,” (3) he did not receive performance appraisals, (4) “he sometimes supervised junior technicians on bigger jobs,” and (5) “Wayne guarantees the labor of its field mechanics[.]” S. Br. at 9-10. The Secretary seeks to distinguish *U.S. Coal* on the basis that, in the present case, Blanton and the other Wayne field mechanics were “responsible for the operation of that part of the mine which the repairs were to be made.” S. Br. at 9-10 n.4.

We reject the Secretary’s argument as lacking legal and evidentiary support. Although the record evidence indicates that Blanton was a highly experienced repairperson who needed little supervision and helped less experienced employees, this does not convert him into a supervisor, much less a manager. *Cf. NLRB v. Aquatech, Inc.*, 926 F.2d 538, 549 (6th Cir. 1991) (“Although it is true that [the employee’s] considerable experience allowed him to train and guide workers in the performance of their jobs, [a]n individual does not become a supervisor merely because he possesses greater skills and job responsibilities than his fellow employees”) (quoting *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 248 (6th Cir. 1983)).<sup>6</sup> In addition, there is no evidence that Blanton exercised any of the traditional indicia of supervisory responsibility such as the power to hire, discipline, transfer, or evaluate employees. Nor was there evidence that Blanton “controlled” the mine or a portion thereof; rather, he merely carried out routine duties involving the repair of Caterpillar machinery. His duties for Wayne carried out at the customer’s premises are consistent with those of a non-supervisory leadperson.<sup>7</sup>

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<sup>6</sup> In addition, Blanton was covered by a union contract and therefore presumably part of a collective bargaining unit from which supervisors are excluded. Tr. 369, 374; *see* 29 U.S.C. §§ 152(3), 159(a).

<sup>7</sup> The Secretary’s assertions that Blanton was not trained by Wayne, and did not receive performance appraisals, are inaccurate. In addition to the on-the-job training Blanton would have received on removing belly pans in the field, the record shows that Wayne field technicians received formal training on repair in the shop and from Caterpillar itself. Tr. 216-17, 255-56.

Moreover, if Blanton were considered supervisory on the basis of his duty to evaluate a given problem and effect a repair without checking first with his supervisor, potentially all repair personnel would fall into this category. The essence of the repair function is to evaluate a problem and fix it. An employee need not check in with his supervisor at specified intervals in order to maintain his non-supervisory status.

The Secretary's assertion that Wayne's warranty of its field mechanics' work converts them into agents is also unpersuasive. As Wayne cogently points out (W. Br. at 21), an assembly-line worker may contribute to the production of a product that her employer warrants, and her employer may have to pay out under the warranty based on the employee's error, but this does not confer the status of agent on the worker.

In any event, as the Secretary concedes (S. Br. at 10 n.4), at the time the accident occurred, Blanton was performing the routine duties of a rank-and-file field mechanic. Thus, under *U.S. Coal*, Blanton was not an agent of the operator whose negligent conduct may be imputed to the operator. We find unsupported by record evidence the Secretary's attempt to distinguish *U.S. Coal* by comparing Blanton with a section foreman. Blanton was alone and not supervising any employees at the time of the accident.

In sum, substantial evidence supports the judge's conclusion that Blanton was not a supervisory employee. We therefore affirm the judge's conclusion that Blanton's conduct may not be imputed to Wayne on the basis of agency.<sup>8</sup>

## 2. Wayne's Conduct

Although an operator is not liable for aggravated conduct based on the actions of a rank-and-file miner, it may nevertheless be held responsible for an unwarrantable failure based on its own conduct. In *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (August 1982) ("*SOCCO*"), the Commission stated that, in the context of evaluating operator conduct for the purposes of penalty assessment,

where a rank-and-file employee has violated the Act, *the operator's* supervision, training and disciplining of its employees must

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Further, although Blanton's evaluation was not based on his supervisor's direct review of his work, his supervisor did evaluate Blanton based on feedback from customers and co-workers. Tr. 254.

<sup>8</sup> The judge merely noted that "Blanton was not a supervisory employee," without a further finding that he was not in any other sense an agent of Wayne. 17 FMSHRC at 1578. Such a conclusion is implied, however, by his reasoning that Blanton's conduct may be examined only on account of Wayne's own negligence. *Id.* at 1578-79.

be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct.

*Id.* at 1464 (emphasis in original). Although the Commission has not expressly held this doctrine applicable to the examination of operator conduct for unwarrantable failure determinations, its applicability in the unwarrantable failure context was implied by the holding in *R&P* that the conduct of a rank-and-file miner who acts as the operator's agent is imputable to the operator for unwarrantable failure purposes. Holding the operator responsible for its supervision, training and disciplining of employees is consistent with section 104(d)(1) of the Mine Act, which provides that a violation "caused by an unwarrantable failure of *such operator*" shall be so recorded on the citation.

The judge, however, mistakenly viewed *SOCCO* as announcing a theory of *imputed* liability. 17 FMSHRC at 1578. Based on this perspective, the judge, finding that Wayne was to some degree responsible for Blanton's conduct, went on to analyze *Blanton's* actions to determine whether *the operator* had acted unwarrantably. *Id.* at 1578-80. On review, the Secretary has adopted the judge's framework. He does not quarrel with the judge's view that, under *SOCCO*, a rank-and-file miner's conduct may be "imputed" to the operator. Nor does the Secretary dispute the judge's characterization of Wayne's supervision and training of employees,<sup>9</sup> or claim that Wayne's conduct, *in and of itself*, constituted aggravated conduct or more than ordinary negligence. Rather, he argues that the judge erred in evaluating *Blanton's* conduct as being less than aggravated. S. Br. at 15-16.

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<sup>9</sup> The judge's characterization of Wayne's conduct was vague. He stated that Blanton's negligence should be imputed to Wayne "because the record does not establish that Wayne Supply took such reasonable steps in training and supervising Blanton, that it should be completely absolved of responsibility for his violative conduct for negligence and penalty purposes." 17 FMSHRC at 1578-79. He went on to hold that "[i]n the absence of training in the proper procedure, the failure of a technician to secure the belly pan was not completely beyond Wayne Supply's control." *Id.* at 1579. In evaluating the operator's negligence for penalty assessment purposes, the judge stated:

The Secretary, in its narrative findings for a special assessment, characterizes Wayne Supply's negligence as "high." I would characterize it as "moderate." This assessment considers both the "thoughtlessness" of Mr. Blanton and the lack of formal training provided by Wayne Supply regarding belly pan removal. While I conclude that Wayne Supply may have relied too much on Mr. Blanton's prior experience, it certainly was not a ridiculous assumption that he knew not to place himself under a belly pan after the bolts had been loosened.

*Id.* at 1582.

We think the approach of the Secretary and the judge amounts to bootstrapping a conclusion of unwarrantable failure based on a rank-and-filer's conduct which, under Commission precedent, should not have been imputed to the operator. Nothing in *SOCCO* sanctions the imputation of negligence to the operator in these circumstances. Instead, *SOCCO* clearly focuses on *the operator's* conduct, while making clear that the rank-and-file miner's conduct may *not*, absent agency, be imputed to the operator.

Because the judge misstated the law of unwarrantable failure and failed to analyze the unwarrantable failure issue by focusing on Wayne's, as opposed to Blanton's, conduct, we vacate the judge's decision with respect to the issues of unwarrantable failure and penalty, and remand on the present record for analysis of Wayne's conduct in light of its training and supervision of Blanton.<sup>10</sup>

B. Remand

The judge's civil penalty assessment was infected with the same error that tainted his unwarrantable failure conclusion: he analyzed the negligence criterion with reference to both the conduct of Wayne and that of Blanton. On remand, in accordance with *SOCCO*, the judge must take care when assessing the civil penalty to examine only *the operator's* conduct.

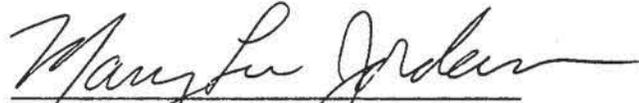
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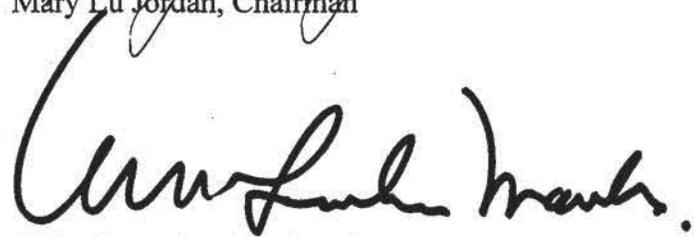
<sup>10</sup> Given our disposition, we do not reach the question whether *Blanton's* conduct constituted more than ordinary negligence.

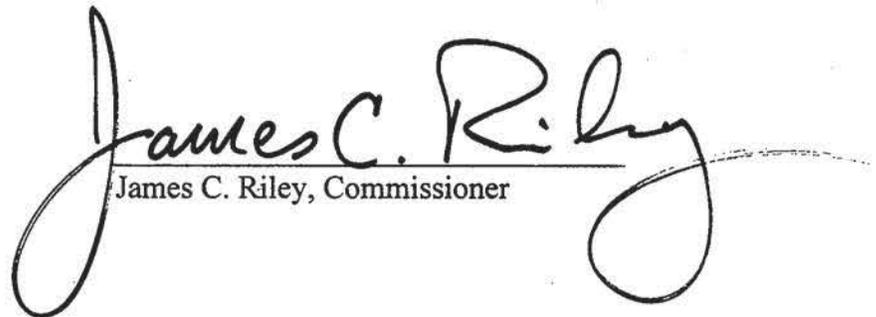
III.

Conclusion

For the foregoing reasons, we vacate the judge's negative unwarrantable failure determination and penalty assessment, and remand to the Chief Administrative Law Judge for reassignment,<sup>11</sup> reanalysis and penalty assessment, on the present record, consistent with this opinion.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

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<sup>11</sup> Judge Amchan has transferred to another agency.

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 12, 1997

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
v. : Docket No. SE 94-639  
KELLYS CREEK RESOURCES, INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is Commission Administrative Law Judge Avram Weisberger's decision that the conceded violation by Kellys Creek Resources, Inc. ("Kellys Creek") of 30 C.F.R. § 75.388(a)(2),<sup>2</sup> involving the failure to drill required boreholes, was not significant and substantial ("S&S") or the result of the operator's

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> Section 75.388(a) provides:

Boreholes shall be drilled in each advancing working place when the working place approaches--

- (1) To within 50 feet of any area located in the mine as shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined;
- (2) To within 200 feet of any area located in the mine not shown by surveys that are certified by a registered engineer or registered surveyor unless the area has been preshift examined; or
- (3) To within 200 feet of any mine workings of an adjacent mine located in the same coalbed unless the mine workings have been preshift examined.

unwarrantable failure.<sup>3</sup> 17 FMSHRC 1325 (August 1995) (ALJ). The Commission granted the Secretary's petition for discretionary review. For the reasons that follow, we reverse the judge's determinations that the violation of section 75.388(a)(2) was not S&S or the result of an unwarrantable failure on the part of Kellys Creek, and remand this matter for penalty reassessment.

## I.

### Factual and Procedural Background

Kellys Creek operated the No. 78 Mine in Whitwell, Tennessee. Tr. 12. On January 27, 1994, while using conventional mining, it inadvertently cut through from a working place into an adjacent sealed mine area. 17 FMSHRC at 1326; Tr. 17, 35. The flame in the safety lamp of foreman Jerry McGowan was extinguished when the cut-through occurred. Tr. 27-28. Because that was an indication that the oxygen level at the cut-through had fallen below 16%, the miners were immediately withdrawn from the mine and the local Mine Safety and Health Administration ("MSHA") office notified of the incident. Tr. 16-17, 19, 27-28.

Tommy Frizzell, then a Coal Mine Inspector and Ventilation Specialist in MSHA's Jasper, Tennessee, field office, went to the mine that day. 17 FMSHRC at 1326; Tr. 9, 19-20. Before entering the mine, Inspector Frizzell examined maps of the mine area in question at the Kellys Creek office trailer. Tr. 21-27, 30.

The sealed area in question was shown on the mine map then in effect to be an abandoned mine that had been previously sealed at three locations. Tr. 17-19, 46-47; Gov't Exs. 5, 5A. Most of the boundaries of the worked-out areas of the abandoned mine were denoted on the map by solid lines, but certain boundaries were denoted by broken lines, including some which were shown as being within 200 feet of the January 27, 1994 working place. Tr. 43-44; Gov't Exs. 5, 5A. Hollis Rogers, Kellys Creek's President, estimated that, at the time of the cut-through, mining operations were 90 feet away from the area denoted by broken lines. 17 FMSHRC at 1326-27; Tr. 124. The map confirmed Rogers' estimate. Tr. 44-45.

Once Inspector Frizzell was within 200 feet of the cut-through, he began inspecting the ribs for test boreholes. 17 FMSHRC at 1326; Tr. 32-33. When he found none, he asked foreman McGowan why boreholes had not been drilled in advance of the work. 17 FMSHRC at 1327; Tr. 38. McGowan told Inspector Frizzell that Rogers said "he didn't have to drill those test holes until he got within 50 feet of that area." 17 FMSHRC at 1327. Inspector Frizzell eventually

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<sup>3</sup> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is also taken from section 104(d) of the Act and refers to more serious conduct by an operator in connection with a violation.

determined that a cut the full width of the working place, approximately 17 ½ feet wide, had been made, which resulted in a hole into the sealed area measuring 3 feet wide and 6 to 8 inches high. 17 FMSHRC at 1326; Tr. 34-36.

Inspector Frizzell issued a citation alleging that Kellys Creek had violated section 75.388(a)(2) by failing to drill boreholes as the working place approached within 200 feet of an area of the mine not shown by certified surveys. 17 FMSHRC at 1326. The inspector designated the violation S&S and the result of the operator's unwarrantable failure. Gov't Ex. 4.

The operator stipulated to the violation. 17 FMSHRC at 1326. With respect to the S&S issue, the judge held that the likelihood of an injury-producing event, such as a fire, explosion, or exposure to low oxygen, would depend upon the manner in which the continuous miner was being operated, its distance to the sealed area, and the presence in the sealed area of low oxygen and explosive methane. *Id.* at 1328. Because the judge found those factors operated independently of failure to drill boreholes, he concluded the Secretary had not established that an injury-producing event was likely to have occurred as a result of the violation, and that the violation was therefore not S&S. *Id.* With respect to the allegation of unwarrantable failure, the judge concluded that the Secretary had also not established that the operator's negligence rose to the level of aggravated conduct. *Id.* at 1327. The judge refused to accept as conclusive Inspector Frizzell's testimony that the broken lines are a universal mine map symbol used by engineers that indicated the area in question was uncertified, and noted that on the mine map legend in this case a broken line was being used to indicate a line curtain. *Id.* at 1326-27. In addition, the judge was persuaded by evidence that the operator thought that only the 50-foot standard of section 75.388(a)(1) was applicable in this instance. *Id.* at 1327.

The Commission granted the Secretary's petition for discretionary review, which challenged the judge's findings that the violation of section 75.388(a)(2) was not S&S or the result of the operator's unwarrantable failure.<sup>4</sup>

## II.

### Disposition

#### A. S&S

The Secretary contends that the judge erred in his analysis of whether the violation was S&S by failing to address evidence showing that exposing miners to an environment devoid of the requisite boreholes was reasonably likely to result in an injury-producing event. S. Br. at 5. He alleges that exposing mine personnel to an atmosphere deficient in oxygen could reasonably

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<sup>4</sup> Kellys Creek did not participate in the case beyond the trial stage. The record shows that Kellys Creek ceased operations approximately 2 months before the hearing took place. Tr. 119.

be expected to result in serious injury and even death, and that in the instant case there was evidence of a low level of oxygen. *Id.* at 5-6. The Secretary also warns that the unplanned cut-through could have resulted in an inundation of water or methane, raising the possibility of an explosion. *Id.* at 6.

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission further explained:

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

*Id.* at 3-4 (footnote omitted). See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

The first and second elements of the *Mathies* criteria have been established, as the judge found that Kellys Creek violated section 75.388(a)(2) and thereby contributed to a measure of danger to safety. 17 FMSHRC at 1327. The issue on review is whether substantial evidence supports the judge's conclusion that the Secretary failed to establish the third element of *Mathies*, the reasonable likelihood of an injury-producing event.<sup>5</sup>

By tying the S&S determination solely to an analysis of the reasonable likelihood of injury resulting from low oxygen or methane ignition, the judge misapprehended the prophylactic purpose of the borehole requirement. The borehole drilling requirements of section 75.388 track

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<sup>5</sup> The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

and expand upon those imposed by section 317(b) of the Mine Act, 30 U.S.C. § 877(b). The borehole provision was originally enacted in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), and carried over without change to the Mine Act. Its legislative history is short, but telling: “The necessity of maintaining drill holes in advance of the face in any working place approaching abandoned mine openings known or suspected to contain dangerous quantities of water or noxious or explosive gases is obvious and such holes are required by law in many coal-mining States.” S. Rep. No. 411, 91st Cong., 1st Sess. 84 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 210 (1975).

Inspector Frizzell testified at trial that the purpose of borehole drilling in the vicinity of a sealed mine area is to attempt to safely detect in the sealed area the presence of water or an atmosphere containing methane or an abnormally low level of oxygen, referred to as “blackdamp.” 17 FMSHRC at 1327; Tr. 79-80.<sup>6</sup> He explained that if water, methane, or blackdamp were to escape in an unplanned cut-through in sufficient quantities, the result could be fatal to miners in the area. 17 FMSHRC at 1327; Tr. 80-82. Thus the 50-foot and 200-foot requirements of section 75.388(a) are essentially safety zones, with the size of the zone dependent upon the degree of certainty regarding the boundaries of the inaccessible area.

The text of section 75.388(a) makes plain that the borehole drilling requirements apply in lieu of the preshift examination required by 30 C.F.R. § 75.360, which by its nature cannot take place in inaccessible areas of a mine, such as areas that have been sealed off from a mine’s active workings. In its twin goals of preventing entry into sealed areas containing unknown hazards and promoting the timely ascertainment of those hazards, section 75.388 is similar in function to the preshift examination requirement; both standards seek to prevent the exposure of miners to undetermined hazards. In *Buck Creek Coal Co.*, 17 FMSHRC 8, 13-15 (January 1995), the Commission, describing the preshift examination requirement as one “of fundamental importance in assuring a safe working environment underground,” held that a preshift violation was S&S irrespective of the absence of a specific hazardous condition disclosed upon the inspector’s examination of the mine.

Here, substantial record evidence establishes both the violation of the prophylactic

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<sup>6</sup> When a borehole penetrates an area of the mine that cannot be examined, a certified person is required to determine, if possible: (1) airflow direction in the borehole; (2) the pressure differential between the penetrated area and the mine workings; (3) the concentrations of methane, oxygen, carbon monoxide, and carbon dioxide; and (4) whether water is impounded within the penetrated area. 30 C.F.R. § 75.388(d). Moreover, concern that blackdamp, accumulations of water, or concentrations of dangerous gases, such as methane, may lurk behind sealed areas of a mine prompted MSHA to require that a sampling pipe or pipes, as well as a water pipe, be installed as part of each mine seal constructed after November 15, 1992. 30 C.F.R. § 75.335.

borehole standard and presence of one of the hazards against which the standard is designed to protect: exposure of miners to dangerously low levels of oxygen. Had the operator been drilling boreholes within 200 feet of the area denoted on the mine map by broken lines, as required by section 75.388(a)(2), the near boundary of the sealed area would have been ascertained, the miners would have been safely alerted to the presence of low oxygen within that area, and the unplanned cut-through would have been avoided.

While 30 C.F.R. § 75.321(a)(1) requires an oxygen content of at least 19.5% in any mine area where persons work or travel, Inspector Frizzell testified that the oxygen level in the sealed area in question had been measured almost 3 months earlier at 10.68%. Tr. 75-78; Gov't Ex. 9. The cut-through was extensive enough that the flame in the foreman's safety lamp was extinguished when the cut-through occurred, indicating that the oxygen level at the cut-through had fallen below 16%. Tr. 27-28. Oxygen levels less than the required level constitute substantial evidence of a reasonable likelihood of an injury-producing event occurring. The dangers of low oxygen are well-known and obvious.<sup>7</sup>

Accordingly, we reverse the judge's determination that the third *Mathies* element was not established by the Secretary.<sup>8</sup> In addition, given the dangers outlined above, we find that the fourth element of *Mathies* has also been established, as injuries resulting from the hazard posed were reasonably likely to be of a reasonably serious nature.

#### B. Unwarrantable Failure

The Secretary argues that the judge erred in his analysis of the unwarrantable failure issue by failing to address material record evidence regarding the extent of the violation cited. S. Br. at 7-8. He asserts that the judge also failed to consider the operator's past history of compliance problems. *Id.* at 8. The Secretary also contends that the judge failed to take into account the operator's knowledge of the requirements for compliance with the standard in question, maintaining that the operator's specific experience and expertise in the field of mining should have alerted him to the dangers of unplanned cut-throughs. *Id.*

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<sup>7</sup> Miners exposed to air containing less than 16% oxygen may experience dizziness, a buzzing in the ears, blurred vision, rapid heartbeat, and headaches. 1 *Training Manual for Miners: Underground Mining* 160 (Nicholas P. Chironis ed., 1980).

<sup>8</sup> Commissioner Marks states that reversal and a finding of S&S is appropriate because the risk to the miners' health and safety was neither purely technical nor remote or speculative. Furthermore, and as indicated in his concurring opinion in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), notwithstanding his present adherence to the construction of S&S as set forth in *Alabama By-Products Corp.*, 7 IBMA 85 (November 1976), the case expressly cited with approval in the Senate Committee Report on the 1977 Mine Act (S. Rep. No. 181, 95th Cong., 1st Sess. 31 (1977)), he continues to "remain open to revisit this issue after it has been thoroughly briefed and argued." *U.S. Steel*, 18 FMSHRC at 875 n.6.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991).

Substantial evidence does not support the judge’s finding that the operator’s negligence did not constitute aggravated conduct. 17 FMSHRC at 1327. In making that finding, the judge failed to take into account the high degree of danger posed by a violation of the borehole drilling requirements. The Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See, e.g., Midwest Material Co.*, 19 FMSHRC 30, 34 (January 1997) (citing cases).

The Commission’s treatment of unwarrantable failure in the context of the analogous preshift examination requirements is instructive. In *Buck Creek*, the Commission held that the failure to comply with preshift examination requirements “was the result of aggravated conduct, constituting more than ordinary negligence” because “[b]y sending miners underground prematurely, Buck Creek exhibited ‘the serious lack of reasonable care’ that constitutes unwarrantable failure.” 17 FMSHRC at 15 (quoting *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (August 1994)).

Given that the borehole drilling requirements are designed to substitute for a preshift examination when the latter is not possible, we conclude that, by failing to comply with the borehole drilling requirements, Kellys Creek exhibited a similar “serious lack of reasonable care.” That failure to comply led to the dispatching of miners underground to mine coal in an area adjacent to a sealed mine whose boundaries were uncertain and whose oxygen level had been measured less than 3 months earlier at 10.68%, a level which borders on the deadly range. Tr. 75-78.

We are not persuaded by the operator’s defense that its agents thought they were in compliance with applicable law. In *Cyprus Plateau*, 16 FMSHRC at 1615-16, the Commission held that if an operator acted on the good-faith belief that its cited conduct was actually in compliance with applicable law, and that belief was objectively reasonable under the circumstances, the operator’s conduct will not be considered to be the result of an unwarrantable failure when it is later determined that the operator’s belief was in error. *See also Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628-29 (August 1994) (operator’s conduct was not aggravated where judge implicitly found that operator’s good faith belief that it was in compliance with regulations was reasonable under circumstances), *aff’d*, 81 F.3d 173 (10th Cir. 1996) (unpublished table decision); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996) (examining reasonableness of operator’s interpretation of regulation offered as defense to unwarrantable failure allegation).

The record in this case establishes that the operator believed the 50-foot standard of

section 75.388(a)(1) applied, instead of the 200-foot standard of section 75.388(a)(2). 17 FMSHRC at 1327. The Secretary did not challenge the good faith of the operator's belief, so we turn to the question whether the operator's belief was reasonable.

If the mine map in effect on January 27, 1994 established that all parts of the sealed area within 200 feet of the working place were "shown by surveys that are certified by a registered engineer or registered surveyor," borehole drilling was only necessary within 50 feet of the sealed area, pursuant to section 75.388(a)(1). However, if any part of the sealed area within 200 feet of the working place was "not shown by surveys that are certified by a registered engineer or registered surveyor," drilling should have begun 200 feet in advance of the uncertified or unsurveyed area under section 75.388(a)(2). Thus, for the operator to reasonably believe that the 50-foot provision applied, it would have to reasonably believe that it was not within 200 feet of an uncertified or unsurveyed area.

At trial, to establish that the operator should have known that its mining operations had advanced within 200 feet of an uncertified area, the Secretary relied entirely on Inspector Frizzell's testimony that the broken lines within the sealed area on the mine map are a universal symbol used to indicate an area that was not certified as accurate. 17 FMSHRC at 1326; Tr. 38-39, 43-44, 91. However, the judge correctly found that the legend on the MSHA-approved map being used by the operator indicated that broken lines were meant to signify a line curtain. 17 FMSHRC at 1327; Gov't Ex. 5. Read literally, therefore, the map did nothing to put the operator on notice that it was mining near an uncertified area.

The operator, however, was not reading the map literally. From Rogers' testimony it is apparent that he did not rely on the map legend in determining at what point section 75.388 would be applicable. Rather, Rogers believed that the broken lines represented an area in which surveyors could not "adequately" survey because an area of gob, or loose rock within the gob area, prevented them from entering any further. 17 FMSHRC at 1327; Tr. 120-21.<sup>9</sup> The Secretary claims that such an understanding is the equivalent of knowing that the area was not certified as having been accurately surveyed, because "[i]f surveyors and engineers could not enter the area in question, it follows that surveying and certifying were virtually impossible." S. Br. at 9.

We agree with the Secretary on this point. The import of Rogers' testimony is that he recognized that, with respect to the portion of the sealed area denoted by broken lines, the gob prevented a complete survey from being undertaken. In this case the mine map showed that the area recognized by Rogers as the gob area was between the seals and that part of the perimeter of the sealed area near which Kellys Creek was mining. Gov't Ex. 5. In addition, the map contains

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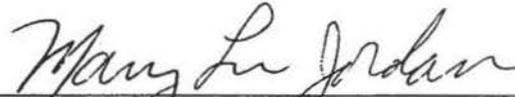
<sup>9</sup> It is not surprising that Rogers did not interpret the broken lines to indicate a line curtain, as it would be unusual for a line curtain to be within a sealed area of a mine. In addition, a post-citation version of the mine map did include the word "GOB" within the broken lines in question. Tr. 50-52; Gov't Exs. 6, 6A.

no survey marks between the gob area and the area being mined. *Id.* Thus, not only should the map have alerted Rogers that the extent of the gob area was uncertain, but it should also have meant to him that it was impossible to know with certainty the exact boundary of that part of the sealed area. Accordingly, Rogers should have recognized that there was no way of knowing from the map exactly how close to the sealed area Kellys Creek was mining. Under these circumstances, we conclude that it was unreasonable for Rogers to believe that the 50-foot standard of section 75.388(a)(1) applied instead of the 200-foot standard of section 75.388(a)(2). That belief therefore cannot serve as a defense to the unwarrantable failure charge. We accordingly reverse the judge's determination that the violation was not the result of the operator's unwarrantable failure.

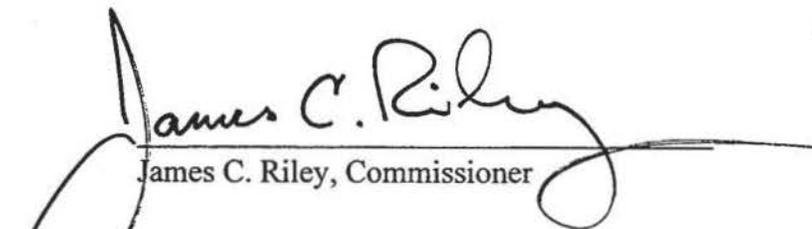
### III.

#### Conclusion

For the foregoing reasons, we reverse the judge's determinations that the violation of section 75.388(a)(2) was not S&S or the result of unwarrantable failure by Kellys Creek. We conclude that the violation was S&S and unwarrantable, convert the section 104(a) violation to a section 104(d)(1) violation, and remand this case for assessment of an appropriate civil penalty in light of our S&S and unwarrantable failure determinations.

  
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Mary Lu Jordan, Chairman

  
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Marc Lincoln Marks, Commissioner

  
\_\_\_\_\_  
James C. Riley, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 12, 1997

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

v.

DEL RIO, INC.

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Docket No. KENT 97-138  
A.C. No. 15-17432-03541

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 24, 1997, the Commission received from Del Rio, Inc. ("Del Rio") 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Del Rio.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. 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).

Del Rio states that it mailed its request for a hearing ("Green Card") to the Department of Labor's Mine Safety and Health Administration ("MSHA") one week late because the card was

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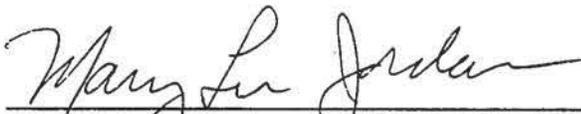
<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

inadvertently misfiled in its accounts payable file and the error was not discovered until after the expiration of the 30-day period for submitting the Green Card. Del Rio requests the Commission to reopen this matter and accept its late-filed Green Card.

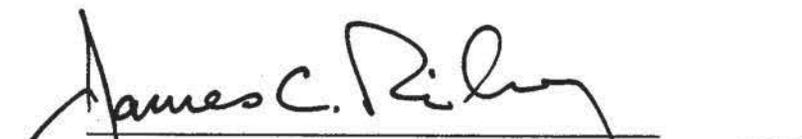
The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

On the basis of the present record, we are unable to evaluate the merits of Del Rio's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Del Rio has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Marc Lincoln Marks, Commissioner

  
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James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

March 12, 1997

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

v.

AMAX COAL COMPANY

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Docket No. LAKE 94-197

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") charging AMAX Coal Company ("AMAX") with violating 30 C.F.R. § 77.201<sup>2</sup> when the methane reading in an above-ground structure exceeded 1 percent. Former Commission Administrative Law Judge Arthur Amchan concluded that AMAX did not violate section 77.201 and vacated the citation. 17 FMSHRC 48 (January 1995) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's dismissal of the citation. For the reasons that follow, we reverse the judge and remand the case for further proceedings.

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> Section 77.201 provides, "The methane content in the air of any structure, enclosure or other facility shall be less than 1.0 volume per centum."

## I.

### Factual and Procedural Background

On February 2, 1994, MSHA Inspector Arthur Wooten entered the "head house" that was on top of Silo No. 1 at the Wabash Mine. 17 FMSHRC at 49. Silo No. 1 is used to store clean coal after preparation prior to shipping. *Id.* The house, which is approximately 16 by 20 feet, is enclosed and contains electrical equipment, including a 4160-volt conveyor belt, a 220 volt lubrication system, 480 volt heaters, and 120 volt lighting circuits. *Id.* at 50; Tr. 22, 30. The conveyor which carries coal to the silo enters the head house through an enclosure before dumping the coal through an opening into the silo. Tr. 48; Ex. R-50. The head house is constructed with tin sheeting placed over a steel framework. 17 FMSHRC at 50. The floor of the house is approximately 6 feet above the roof of the silo. *Id.* The roof of the silo has several holes in it for ventilation and access. *Id.* AMAX tests for methane in the head house on every shift. *Id.* In the twenty years that the house had been located on the silo, neither AMAX nor MSHA had ever detected measurable amounts of methane. *Id.*

As Wooten entered the head house, his methane detector activated, indicating a methane concentration in excess of 1 percent. Wooten took several readings that ranged from .4 to 1.4 percent. The highest readings were found near a light switch and the opening where the conveyor dumps coal into the silo. Both locations are about 3½ feet off the floor and about 1 foot away from the sides. AMAX's Safety Director, Charles Burggraf, who accompanied Wooten, opened several doors to dilute the methane, and the methane concentration dropped below 1 percent. *Id.* at 49.

Previously, on January 13, 1994, AMAX had experienced a brief ignition at the base of Silo No. 1, where coal was loaded into railroad cars. On February 1, another MSHA inspector had detected a methane concentration of 3.1 percent at the train loading area, about 200 feet below the head house. The next day -- the same day as the citation at issue -- the methane concentration at that location was 4 percent. *Id.* at 50.

Wooten issued a citation alleging a violation of section 77.201. *Id.* at 49. Wooten designated the citation significant and substantial (S&S). *Id.* at 50. In order to abate the violation, he required AMAX to remove two sides of the house to keep concentrations of methane below 1 percent. *Id.* at 49. AMAX accomplished this by shutting down its preparation plant and moving its five employees to the silo where they removed the head house sides. *Id.*

AMAX challenged the penalty assessment, and the case went to hearing. In his decision, the judge stated that the plain language of section 77.201 indicates that a methane reading of 1 percent or more establishes a violation. *Id.* at 50. However, the judge agreed with AMAX that the regulation must be read in context with other parts of section 77.201 and the Secretary's

enforcement policy for the provisions relating to methane accumulations in underground coal mines. *Id.* Section 77.201-2 specifies the corrective action that an operator is required to take when methane readings are 1 percent or higher.<sup>3</sup> The Secretary's Program Policy Manual guidelines for 30 C.F.R. § 75.323<sup>4</sup> specifies that an operator is in violation only if it fails to take corrective action when methane readings exceed 1 percent in underground coal mines. 17 FMSHRC at 51. The judge found that "any interpretation of 77.201 that makes a per se violation of a methane concentration of one percent or more to be an unreasonable one, to which I need not defer." *Id.* at 51. Because there was no evidence that AMAX either failed to act prudently to anticipate the presence of excessive methane or failed to take appropriate and timely corrective action, the judge vacated the citation. *Id.* at 51-52.

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<sup>3</sup> Section 77.201-2 provides:

If, at any time, the air in any structure, enclosure or other facility contains 1.0 volume per centum or more of methane changes or adjustments in the ventilation of such installation shall be made at once so that the air shall contain less than 1.0 volume per centum of methane.

<sup>4</sup> Section 75.323, which pertains to methane accumulations in underground coal mines, provides in pertinent part:

(b) Working places and intake air courses. (1) When 1.0 percent or more methane is present in a working place or an intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed--

(i) Except intrinsically safe atmospheric monitoring systems (AMS), electrically powered equipment in the affected area shall be deenergized, and other mechanized equipment shall be shut off;

(ii) Changes or adjustments shall be made to the ventilation system to reduce the concentration of methane to less than 1.0 percent; and

(iii) No other work shall be permitted in the affected area until the methane concentration is less than 1.0 percent.

## II.

### Disposition

The Secretary states that the main issue in this proceeding is whether the judge failed to give plain meaning to the regulation. S. Br. at 1, 4-6. The Secretary argues that, by invalidating the plain meaning of the regulation, the judge essentially acted outside his jurisdiction by engaging in rulemaking under the Administrative Procedure Act. *Id.* at 6-7. The Secretary further argues that, even if the meaning of section 77.201 is not plain and unambiguous, the judge failed to defer to the Secretary's reasonable interpretation of the regulation. *Id.* at 7-11. The Secretary contends that, by interpreting section 77.201 to require remedial action, the judge made superfluous the corrective steps described in section 77.201-1<sup>5</sup> and 77.201-2. *Id.* at 11-12. The Secretary contends that the judge's reliance on the Program Policy Manual guidelines for section 75.323 is misplaced because that section is dissimilar to section 77.201. *Id.* at 12-13. The Secretary explains that the regulations regarding underground mines differ from those involving surface structures because there is a "nonstatic environment" in underground mines, while conditions in surface structures that give rise to methane accumulations are in the operator's control. *Id.* at 13-14.<sup>6</sup> Finally, in response to AMAX's arguments, the Secretary argues that his interpretation of the regulation is entitled to deference, even though the interpretation was enunciated for the first time in litigation, and that the Commission has no independent policy making role under the Mine Act. S. Rep. Br. at 1-5.

AMAX's primary argument on review is that section 77.201 must be read together with other parts of the standard. A. Br. at 6-8. AMAX argues that section 77.201 "is merely a generalized goal within the standard." *Id.* at 8 n. 4. Further, AMAX asserts that a 1 percent methane concentration is not a hazard but rather requires corrective action to ensure that a hazardous condition does not develop. *Id.* at 10. AMAX relies on the caselaw and the Secretary's Program Policy Manual for the regulations in 30 C.F.R. Part 75, which pertain to methane accumulations in underground coal mines, as support for the position that a 1 percent reading is an "action level" at which steps must be taken to lower methane concentrations. *Id.* at

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<sup>5</sup> Section 77.201-1 provides:

Tests for methane in structures, enclosures, or other facilities, in which coal is handled or stored shall be conducted by a qualified person with a device approved by the Secretary at least once during each operating shift, and immediately prior to any repair work in which welding or an open flame is used or a spark may be produced.

<sup>6</sup> The Secretary further notes that the underground coal mine regulations contain an absolute prohibition against methane in bleeders and return air courses at more than 2 percent. S. Br. at 13 n. 7 (citing 30 C.F.R. § 75.323(e)).

10-13. AMAX further argues that the Secretary's interpretation of the regulation is illogical because it contains a more stringent requirement for addressing methane accumulations in surface structures than in underground mines, and that therefore it is unreasonable and not entitled to deference. *Id.* at 13-18. Finally, AMAX asserts that it acted quickly in response to the methane reading by opening the door to the head house to dilute the concentration. *Id.* at 18

The primary issue on review is whether AMAX violated section 77.201 because methane in an above-ground structure exceeded 1 percent.

The Commission has recognized that, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. *See, e.g., Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-43 (1984)). In determining the meaning of regulations, the Commission thus utilizes "traditional tools of . . . construction," including an examination of the text and the intent of the drafters. *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990) (interpretation of Mine Act provision). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

We conclude that the language of section 77.201 is clear and unambiguous. The first provision of that section states that the methane content of the air of any above-ground structure "shall be less than 1.0 volume per centum" (emphasis added). We reject AMAX's argument that, by applying the plain meaning of the regulation to prohibit methane accumulations above 1 percent, the other provisions of the standard are rendered superfluous. Section 77.201-1 provides for methane testing, and section 77.201-2 requires ventilation changes in a structure when methane exceeds 1 percent. Testing for methane and appropriate remedial action for accumulations above 1 percent are important steps in addressing the problem that methane presents. Our reading gives effect to all provisions in section 77.201, *see Morton Int'l, Inc.*, 18 FMSHRC 533, 536 (April 1996), while that of AMAX reads out of the regulation the prohibition against accumulations in excess of 1 percent.

AMAX further argues that section 77.201 cannot be read to prohibit methane accumulations above 1 percent, because the regulations pertaining to methane accumulations in underground mines do not. The judge, while acknowledging the plain meaning of the regulation, agreed with AMAX that the regulation must be read in accordance with the regulations regarding methane accumulations in underground coal mines. 17 FMSHRC at 50. The regulation at issue stands in marked contrast to the regulations involving methane in underground metal/nonmetal mines (30 C.F.R. § 57.22234), and in underground coal mines (30 C.F.R. § 75.323). In each instance, those regulations specify the corrective actions that are required when methane

accumulations exceed 1 percent but do not contain the same express prohibition regarding methane accumulations over 1 percent. For the same reason, AMAX's reliance on the Program Policy Manual provision for section 75.323 is also misplaced.<sup>7</sup>

Based on the foregoing, we conclude that the judge erred when he determined that AMAX did not violate the regulation when the methane in the headhouse exceeded 1 percent, and we reverse his decision.

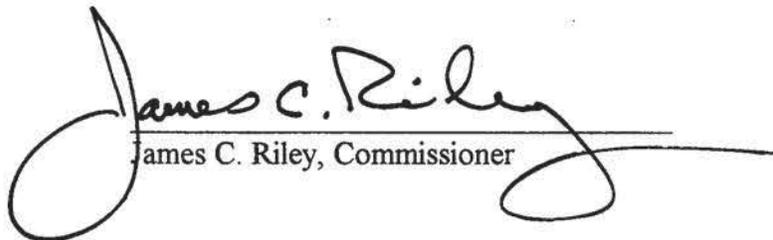
### III.

#### Conclusion

For the foregoing reasons, we reverse and vacate the judge's decision and remand the case to the Chief Administrative Law Judge for assignment to a judge for further proceedings to dispose of the S&S designation of the citation and to assess an appropriate penalty.<sup>8</sup>

  
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Mary Lu Jordan, Chairman

  
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Marc Lincoln Marks, Commissioner

  
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James C. Riley, Commissioner

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<sup>7</sup> Whether, as AMAX argues, such disparate treatment is illogical is not an issue that we need reach in light of our determination that section 77.201 is clear and unambiguous.

<sup>8</sup> Judge Amchan has since transferred to another agency.

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 14, 1997

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. KENT 94-1199
	:	KENT 94-1200
v.	:	KENT 95-240
	:	KENT 95-310
BROKEN HILL MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

## DIRECTION FOR REVIEW

### DECISION

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). The Secretary of Labor seeks a total civil penalty assessment of \$26,300 against Broken Hill Mining Company ("Broken Hill") for eight alleged violations of the mandatory safety standards found in 30 C.F.R. Part 75.

On January 9, 1997, a hearing was convened in Paintsville, Kentucky, before Administrative Law Judge Roy Maurer. Representatives of Broken Hill failed to attend the hearing, and the judge proceeded without them.<sup>2</sup> The Secretary presented evidence on the record regarding the alleged citations.

On February 14, 1997, the judge issued an order finding Broken Hill in default and concluding that the Secretary proved the violations by a preponderance of the evidence. 19 FMSHRC 318, 320 (February 1997)(ALJ). He ordered Broken Hill to pay the proposed civil penalty of \$26,300. For the following reasons, we grant review of the judge's decision sua

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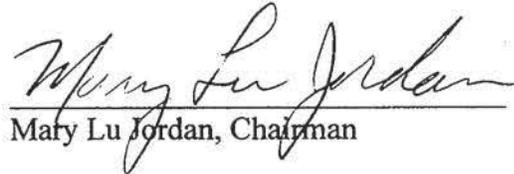
<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> A Notice of Hearing dated December 19, 1996 was received by Broken Hill on December 23, 1996, as evidenced by a green postal receipt card for certified mail. 19 FMSHRC at 319.

sponte, pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C § 823(d)(2)(B), and remand for further analysis.

The judge's decision contains no findings of fact or conclusions of law, as required by Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a). Consequently, we cannot ascertain from the decision which standards the operator allegedly violated, whether any injuries occurred, or whether the penalty assessed is appropriate. The Commission has made clear that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). See also *L & J Energy Co.*, 18 FMSHRC 118 (February 1996). Similarly, we have held that a judge must make findings of fact on the penalty criteria set forth in section 110(i) of the Mine Act that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Notwithstanding the operator's failure to appear at the hearing, the judge's terse decision fails to comply with this requirement.

Accordingly, we remand this case to the Chief Administrative Law Judge for reassignment<sup>3</sup> and entry of appropriate findings of fact and conclusions of law supporting both the liability and penalty determinations.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

  
James C. Riley, Commissioner

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<sup>3</sup> Judge Maurer has transferred to another agency.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 17, 1997

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

v.

JIM WALTER RESOURCES, INC.

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Docket Nos. SE 94-74  
SE 94-84  
SE 94-115

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY: Jordan, Chairman; Marks, Commissioner

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raise the issue of whether two violations of 30 C.F.R. § 75.1725<sup>2</sup> and three violations of 30 C.F.R. § 75.400<sup>3</sup> resulted from

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<sup>1</sup> Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> Section 75.1725, "Machinery and equipment; operation and maintenance," states in part:

(a) 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.

<sup>3</sup> Section 75.400, "Accumulation of combustible materials," states:

Coal dust, including float coal dust deposited on rock-

unwarrantable failure<sup>4</sup> by Jim Walter Resources, Inc. (“JWR”) to comply with those standards. Former Commission Administrative Law Judge Arthur J. Amchan concluded that the five violations were not a result of unwarrantable failure. 16 FMSHRC 2477 (December 1994) (ALJ). For the following reasons, we vacate and remand the judge’s unwarrantable failure determinations with respect to the section 75.1725 violations and we reverse his unwarrantable failure determinations as to the section 75.400 violations.

## I.

### Factual and Procedural Background

The five violations at issue stem from several inspections in 1993 of JWR’s No. 7 Mine in Tuscaloosa County, Alabama by the Department of Labor’s Mine Safety and Health Administration (“MSHA”). 16 FMSHRC at 2477. The violations concern JWR’s maintenance of conveyor belts and cleanup of coal dust accumulations. *Id.* In all five instances, JWR challenged MSHA’s enforcement actions and the matters were consolidated for hearing before Judge Amchan.

#### A. July 29, 1993 Belt Maintenance Violation (Order No. 3015087)

On July 29, 1993, MSHA Inspector Kirby Smith observed that the isolated portion of the East A conveyor belt was inadequately supported because the top rollers of the conveyor belt had slid together. 16 FMSHRC at 2484; Tr. 215-16. He also noted that the belt was misaligned due to missing bottom rollers, causing it to rub against its structure and fray. 16 FMSHRC at 2484. The flammable belt fibers became entangled in the rollers and created a friction point. *Id.*

The inspector issued an order under Mine Act section 104(d)(2), 30 U.S.C. § 814(d)(2), charging a violation of section 75.1725(a), and characterized the violation as significant and substantial (“S&S”)<sup>5</sup> and a result of JWR’s unwarrantable failure. 16 FMSHRC at 2484-85.

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dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

<sup>4</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . .”

<sup>5</sup> The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious in nature any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . .”

The judge found a violation of the standard and determined that the violation was S&S. *Id.* He concluded that the violation was not unwarrantable because, in the absence of evidence indicating the measures that a reasonably prudent employer would have taken with regard to the East A belt, the Secretary failed to establish JWR's aggravated conduct, a necessary element of the unwarrantable failure determination. *Id.* The judge found that, because JWR had received complaints from the union about the poor condition of the belt, JWR's violation was the result of "at least ordinary negligence." *Id.* The judge assessed a civil penalty of \$2,000. *Id.*

B. August 16, 1993 Accumulation Violation (Order No. 3182957)

MSHA Inspector Oneth Jones inspected the West B conveyor belt on August 16, 1996, at 8:05 a.m., and discovered a buildup of wet, damp and fine dry coal dust at the tailpiece and beneath the bottom belt. 16 FMSHRC at 2486; Gov't Ex. 1-B. Three rollers were turning in this accumulation, which measured 19 inches deep, approximately 20 feet long and extended wider than the belt. 16 FMSHRC at 2486; Gov't Ex. 1-B; Tr. 237-38. One of the rollers had heated to the extent that it was "hot to the touch." 16 FMSHRC at 2486. The inspector issued an order under section 104(d)(2) for a violation of section 75.400, alleging that the violation was S&S and a result of unwarrantable failure. *Id.*

The judge concluded that an S&S violation of section 75.400 had occurred, but that the violation was not a result of JWR's unwarrantable failure because the accumulation was not of sufficient extent. *Id.* at 2486-87. He also found it "unclear how long the condition cited had existed prior to Inspector Jones' arrival at the scene." *Id.* at 2486. The judge recognized that JWR had 192 violations in the preceding two years but determined that the number of past violations, "standing alone," did not establish JWR's aggravated conduct. *Id.* at 2486-87. He also found that although JWR had not initiated cleanup by the time Inspector Jones arrived, this failure did not amount to aggravated conduct. *Id.* at 2487. He assessed a penalty of \$1,000. *Id.*

C. August 17, 1993 Belt Maintenance Violation (Order No. 3015093)<sup>6</sup>

On August 17, 1993, at 3:50 p.m., while inspecting the East A conveyor belt, Inspector Smith noticed that the belt was out of alignment, running from side to side, and cutting into the metal support structure in several places. 16 FMSHRC at 2477-78; Gov't Ex. 1. Inspector Smith also observed that a number of rollers on which the belt moved were dislodged, damaged or stuck in a mud-like mixture of coal dust and water. 16 FMSHRC at 2478. He issued a section 104(d)(2) order for a violation of section 75.1725(a), designating the violation as S&S and unwarrantable. *Id.* at 2477-78.

The judge affirmed the violation, concluded that it was S&S, but determined that it was not a result of JWR's unwarrantable failure because the Secretary failed to "establish the standard of care from which the cited operator departed." *Id.* at 2479-80. Concluding that the violation

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<sup>6</sup> The judge inadvertently referred to this order as "No. 3015993." 16 FMSHRC at 2477.

was of high gravity due to the number of defective rollers and the methane liberation of No. 7 Mine, the judge assessed a civil penalty of \$2,000. *Id.* at 2480.

D. August 17, 1993 Accumulation Violation (Order No. 3015095)

At 4:00 p.m. on the same day, Inspector Smith arrived at the section 4 belt feeder<sup>7</sup> and found accumulations of loose coal and coal dust 6 to 42 inches in depth, 20 feet wide and 15 feet long. *Id.* at 2483; Gov't Ex. 3. The Section 4 belt feeder had been improperly positioned so that some of the coal from the ram cars was being dumped on the ground. 16 FMSHRC at 2483. The inspector issued a section 104(d)(2) order alleging an S&S and unwarrantable violation of section 75.400. *Id.*

The judge determined that JWR had violated section 75.400, and that the violation was S&S but not the result of unwarrantable failure. *Id.* He reasoned that, although the condition was noted in the preshift examination book, the evidence fell short of that necessary to establish more than ordinary negligence. *Id.* The judge assessed a \$500 civil penalty for the violation. *Id.*

E. September 2, 1993 Accumulation Violation (Order No. 3183157)

On September 2, 1993, at 7:50 a.m., Inspector Jones observed loose coal and coal dust, including float coal dust that had accumulated beneath the East A tailpiece. *Id.* at 2487; Gov't Ex. 2-B. The tailpiece was turning in the accumulation for a distance of three feet and generating airborne fine dry coal dust that was clearly visible. *Id.* The inspector, who had issued a citation for the same condition two weeks earlier, issued a section 104(d)(2) order, alleging an S&S and unwarrantable failure violation of section 75.400. 16 FMSHRC at 2487.

The judge determined that the violation occurred and that it was S&S. *Id.* He concluded that the violation was not a result of JWR's unwarrantable failure because he was not persuaded that the buildup occurred before the preshift examination, and because the record failed to establish "conduct sufficiently worse than ordinary negligence." *Id.* The judge assessed a penalty of \$1,000. *Id.*

The Commission granted the Secretary's petition for discretionary review challenging the judge's determinations that the five violations were not the result of JWR's unwarrantable failure.

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<sup>7</sup> The belt feeder transfers the freshly mined coal from ram cars coming from the working face to a belt conveyor. 16 FMSHRC at 2483.

## II.

### Disposition

#### A. Belt Maintenance Violations

The Secretary asserts that the judge applied an erroneous unwarrantable failure analysis by requiring the Secretary to establish the standard of care violated by the mine operator and detail what measures a reasonably prudent operator would have taken in order to prove aggravated conduct. S. Br. at 7. The Secretary argues that nothing in Commission law requires him to prove what behavior would not have constituted aggravated conduct, and that he need only prove that the operator's behavior amounted to aggravated conduct. *Id.* at 8. The Secretary submits that the judge also failed to adequately address evidence that demonstrated unwarrantable failure. *Id.* at 10-17, 20-23. JWR responds that the judge applied the proper analysis and that the Secretary erroneously seeks to equate unwarrantable failure with ordinary negligence. JWR Br. at 8-13, 17-19.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2003-04. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts to prevent or remedy the violative condition. *See Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992) (citations omitted); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1261, 1263-64.

We agree with the Secretary that, under Commission precedent, the Secretary is not required to prove what behavior would *not* have constituted "aggravated conduct." Therefore, we reject the judge's proposed test that "[t]o establish aggravated conduct, the Secretary must establish the standard of care from which the cited mine operator departed." 16 FMSHRC at 2480. In addition, with respect to the two belt maintenance violations, the judge failed to discuss any of the factors that comprise the unwarrantable failure analysis. Accordingly, with respect to Order Nos. 3015087 and 3015093, we vacate the judge's conclusion that these violations were not a result of JWR's unwarrantable failure. We remand for application of all the factors of the unwarrantable failure analysis in light of the record evidence.

Because we conclude that the judge erred by failing to apply the correct unwarrantable failure test, we do not reach the additional evidentiary issues raised by the Secretary. We note, however, that the judge's decision with respect to the July 29 and August 17 violations contains findings bearing on the unwarrantable failure factors. In both instances, the judge found that management had received complaints, prior to the violations, about the recurring belt problem. 16 FMSHRC at 2478, 2485. Whether an operator has been placed on notice that greater efforts are necessary for compliance is an element of the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1261. As to the August 17 violation, the judge's finding that there were 200 defective rollers on the belt bears on the extensiveness of the violation. 16 FMSHRC at 2478-80 & n.1. He also referred to a "number of defective rollers" that caused the July 29 violation. *Id.* at 2485. In reaching a determination of whether JWR's conduct was "aggravated," the judge on remand should consider this evidence in conjunction with evidence relating to the other unwarrantable failure factors.

#### B. Accumulation Violations

The Secretary asserts that the judge applied the same improper legal test, requiring the Secretary to prove the operator's standard of care, in the accumulation violations. S. Br. at 7 n.6. Alternatively, the Secretary contends that the judge failed to address or inadequately addressed record evidence that established that the violations were unwarrantable. *Id.* at 10-12, 17-20, 23-28. JWR disputes that the judge applied an incorrect legal analysis and contends that substantial evidence in the record supports the judge's determinations. JWR Br. at 12-16, 19-23.

With respect to the accumulation violations, we disagree with the Secretary that the judge required him to prove the standard of care from which the operator departed. The judge did not use the standard of care language in his discussion of the accumulation violations. Additionally, when analyzing an accumulation violation, not under review, from Docket No. SE 94-74, the judge properly stated that Commission precedent requires consideration of a number of factors in reaching an unwarrantable failure determination. 16 FMSHRC at 2482 (citing *Peabody*, 14 FMSHRC 1258; *Mullins*, 16 FMSHRC 192). In his discussion of the August 16 accumulation violation, he expressly applied the unwarrantable failure criteria and cited to *Peabody*. 16 FMSHRC at 2486. He utilized the factors of extensiveness, duration and prior warnings when evaluating whether the three accumulation violations were unwarrantable. *Id.* at 2483, 2486-87.

We next turn to the question of whether substantial evidence supports the judge's determination for each of the three violations. When reviewing the judge's factual determinations as to unwarrantable failure, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The substantial evidence standard of review requires that a fact-finder weigh all probative record evidence and that a reviewing body examine the fact-finder's rationale in arriving at his decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). We are guided by the

settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Id.* at 488.

1. August 16, 1993 West B Accumulation (Order No. 3182957)

The Secretary asserts that the judge based his negative unwarrantable failure determination on three erroneous grounds: that the accumulation was not sufficiently extensive; that it was unclear how long the condition cited existed; and that the operator’s 192 violations of section 75.400 in the preceding two years, “standing alone,” were not sufficient to support a finding of aggravated conduct. S. Br. at 23 (citing 16 FMSHRC at 2486-87). JWR counters that the judge properly weighed the evidence and concluded that the accumulation was not of certain duration nor sufficiently extensive to support an unwarrantable failure finding. JWR Br. at 19-21.

As to the extensiveness of the accumulation, the judge disregarded evidence that it took 15 miners 45 minutes for its cleanup. Tr. 243. An accumulation that requires 11 man-hours to clean up is extensive. The buildup of wet, damp, and fine dry coal dust at the West B conveyor belt tailpiece measured 19 inches deep, approximately 20 feet long and extended wider than the belt. The Commission has affirmed unwarrantable failure determinations involving accumulations of similar size to the one here. *See Peabody*, 14 FMSHRC at 1259 (unwarrantable accumulations with measurements of 15 feet long and 30 inches high; 4 feet long, 4 feet wide and 30 inches high; 4 feet wide and 24 inches high); *New Warwick Mining Co.*, 18 FMSHRC 1568, 1573 (September 1996) (unwarrantable accumulations of float coal dust 1/4 inch deep along section, loose coal 6 inches deep and coal mixed with rock 22 inches deep); *cf. Doss Fork Coal Co.*, 18 FMSHRC 122, 125 (February 1996) (vacating negative unwarrantable failure determinations for accumulations up to 26 inches deep in ten crosscuts). The record does not support the judge’s finding that the accumulation was not extensive and we reverse that finding.

The judge did not make an express finding as to the obviousness of the violation, but noted that the accumulation was in an area adjacent to the manbus stop and the oncoming and outgoing shifts passed by the area. 16 FMSHRC at 2486; Tr. 248. We conclude that, because the extensive buildup was in a conspicuous location in the mine, it was obvious.

With respect to the factor of prior warnings, the judge stated that, “standing alone,” JWR’s citation history, which showed that JWR’s Mine No. 7 had incurred 192 violations of section 75.400 did not persuade him that the violation was due to an unwarrantable failure. 16 FMSHRC at 2487. The judge’s statement is incorrect for two reasons. First, the prior violations were not “standing alone.” As we indicated previously, other factors such as the extensiveness and obvious nature of the violation were also present. *See, e.g., Mullins*, 16 FMSHRC at 195; *Quinland*, 10 FMSHRC at 709. Second, the judge overlooked that, on July 7, 1993, at a preinspection conference, Inspector Smith discussed with JWR management the extensive history that JWR had with respect to accumulation violations. Tr. 112-13. The Commission has

held that prior warnings and past enforcement actions concerning accumulations should engender in the operator a heightened awareness of a continuing problem. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1232 (June 1994). On this record, it is undisputed, and we conclude, that JWR had been placed on notice that heightened scrutiny was necessary to prevent accumulations.

No miner was cleaning the accumulation at the time of the inspector's arrival. 16 FMSHRC at 2487. Where an operator has been placed on notice of an accumulation problem, the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1263; *see also U.S. Steel Corp.*, 6 FMSHRC 1423, 1437 (June 1984) (unwarrantable failure may be proved by a showing that the violative condition was not corrected or remedied prior to issuance of a citation or order). JWR had been placed on notice of the need to exercise greater cleanup efforts. Accordingly, we reverse the judge's finding (16 FMSHRC at 2487), that JWR's failure to start cleanup of the accumulation by the time of Inspector Jones' arrival did not constitute aggravated conduct.

The judge's finding that it was unclear how long the cited condition existed (*id.* at 2486), rested on a credibility assessment of the testimony of JWR assistant foreman Phillips. Phillips, who accompanied Jones on the inspection, testified that a similar accumulation occurred quickly. Tr. 279-83, 286. Absent exceptional circumstances, the Commission will not disturb such credibility determinations. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1540-41 (September 1992); *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 25 (January 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984).

Although it may be unclear how long the accumulation at issue existed prior to the order, the undisputed evidence on the other unwarrantable factors establishes that JWR was on notice, through numerous prior cited violations and a warning, that greater efforts were necessary to control accumulations. Nevertheless, JWR permitted an obvious, extensive accumulation to build up at the West B conveyor belt and tailpiece and took no steps prior to the issuance of the order to abate the violative condition. Taken together, this evidence fails to support the judge's determination that the violation did not result from JWR's unwarrantable failure. Accordingly, we reverse, on substantial evidence grounds, the judge's determination.

2. August 17, 1993 Feeder Accumulation (Order No. 3015095)

The Secretary asserts that the judge failed to address or inadequately addressed record evidence on the unwarrantable factors of prior warnings and violations, obviousness, extensiveness, duration and abatement of the accumulation. S. Br. at 17-20. JWR responds that the judge properly determined that its conduct did not amount to unwarrantable failure for the primary reason that the record failed to show how long the accumulation had built up. JWR Br. at 14-16.

The judge's finding that the accumulation was not sufficiently extensive to support an unwarrantable failure finding (16 FMSHRC at 2483) is not supported by the record. At 20 feet

by 15 feet and nearly 4 feet at its greatest depth, the accumulation was substantial and extensive. As to obviousness, the accumulation was in an area that was well-traveled and by which both the day and evening foremen passed. Tr. 85-86, 142-43. As to duration, the judge noted, but seems to have placed no importance on, the fact that the preshift examiner recorded the condition. 16 FMSHRC at 2483. An operator's failure to rectify a condition noted in the preshift book is a factor to be considered in the unwarrantable failure analysis. *Peabody*, 14 FMSHRC at 1262.

The judge failed to discuss JWR's prior warnings and violations. It is undisputed, and we conclude, that JWR should have been placed on heightened awareness of its accumulation problem by the July 7 preinspection conference, the August 16 accumulation order issued just the day before, and the 192 prior citations for accumulations issued in the preceding two years. Further, as to abatement, the judge found "no evidence of abatement measures when Smith observed the violation." 16 FMSHRC at 2483.

The overwhelming weight of record evidence on the unwarrantable failure elements of extensiveness, obviousness, duration, prior warnings and violations and abatement, taken together, establishes JWR's aggravated conduct and renders unreasonable the judge's conclusion that the violation of section 75.400 was not unwarrantable. Accordingly, we reverse that determination on substantial evidence grounds.

3. September 2, 1993 East A Tailpiece Accumulation (Order No. 3183157)

The Secretary argues that the judge failed to address material evidence pertaining to the factors of prior warnings and violations and the duration and extent of the accumulation. S. Br. at 26-28. In particular, the Secretary contends that the judge failed to consider that the inspector issued a citation for the identical condition only nine days earlier and that JWR had made no efforts to improve the condition since then. S. Br. at 26-27. JWR counters that the judge's vacation of the unwarrantable failure designation is supported by the record which showed that this accumulation could have occurred rapidly and that JWR responsibly assigned miners to deal with accumulation problems. JWR Br. at 22.

As to extensiveness, the accumulation consisted of loose coal and coal dust, including float coal dust that had accumulated beneath the East A tailpiece. 16 FMSHRC at 2487; Gov't Ex. 2-B. The bottom belt was running in the material for a distance of three feet and causing coal dust to become airborne. *Id.* The suspended dust was highly visible. 16 FMSHRC at 2487. Additionally, the judge failed to consider that the material had compacted to the degree that its cleanup required 10 to 15 miners utilizing pry bars and working for approximately 45 minutes. Tr. 256, 267, 272. On this record, we conclude that the accumulation was extensive. The violation was also obvious; the judge noted that miners, as well as management personnel, passed by the cited location while getting on and off the manbus at the beginning of their shifts. 16 FMSHRC at 2487.

The factor of prior warnings and violations is significant for this violation. As the judge found, an identical citation had been issued for the same problem at the same location less than

two weeks earlier, on August 24, 1993. *Id.* Union representative Keith Plylar, who accompanied the inspector on the August 24 and September 2 inspections, testified without contradiction that when the earlier citation was issued, “it was stated . . . that [JWR had] a problem with the area and they [needed] to stay on top of it . . .” Tr. 274. The inspector and the union representative testified that management had not made efforts to improve the tailpiece condition at issue between the August and September violations. Tr. 257, 274. The judge failed to consider that this prior warning should have heightened JWR’s awareness that substantial effort would be necessary to prevent accumulations. *See New Warwick*, 18 FMSHRC at 1574; *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010-11 (December 1987) (unwarrantable failure premised upon the fact that inspector issued a citation for a similar violation in the same area). The prior citation, combined with the two preceding orders in this case and JWR’s two-year history of accumulation violations, permits no other conclusion than that JWR was placed on notice that it had a serious accumulation problem.

JWR asserts that it took appropriate steps to prevent accumulations because one or two miners were assigned to clean up the area. JWR Br. at 22. The judge makes no finding on this issue (16 FMSHRC at 2487), nor do we. However, even if JWR had stationed miners to the area, the record established that such efforts were inadequate because extensive combustible materials were still permitted to accumulate. *See Peabody*, 14 FMSHRC at 1263 (operator’s efforts to effectively deal with accumulations insufficient when operator assigned only one miner to clear the area).

Although the record does not reveal precisely how long the accumulation was in existence, undisputed evidence regarding the extensive and obvious nature of the violation, and the operator’s history of prior warnings and violations, viewed as a whole, establishes JWR’s aggravated conduct and fails to support the judge’s conclusion that JWR’s violation of section 75.400 on September 2, 1993, was not the result of unwarrantable failure. Accordingly, we reverse that determination on substantial evidence grounds.<sup>8</sup>

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<sup>8</sup> Our dissenting colleague believes we should not determine here whether the three accumulation violations were unwarrantable, but should instead remand the issue to the judge because we do not have “the benefit of knowing everything the fact-finder knew before he sat down to draft his opinion.” Slip op. at 13. Thankfully, the Mine Act does not require the omniscience demanded by our colleague. It permits us to modify a judge’s opinion “in conformity with the record,” 30 U.S.C. § 823(d)(2)(C), and does not require that we ascertain what the fact-finder actually “knew.” The judge’s decision, like ours, can only be based on record evidence. Our review of this record as a whole — particularly the undisputed evidence regarding the prior warnings and the extensive and obvious nature of the violation — leads us to conclude that there is not substantial evidence to support the judge’s finding that no aggravated conduct occurred. In such a case, the proper course of action is reversal, not remand.

III.

Conclusion

We vacate the judge's conclusion that the two belt maintenance violations in Order Nos. 3015087 and 3015093 were not a result of JWR's unwarrantable failure and remand this matter to the Chief Administrative Law Judge for assignment to a judge for analysis consistent with this opinion.<sup>9</sup> If on remand the judge determines that the violations resulted from JWR's unwarrantable failure, the judge should reassess the applicable civil penalties. As to the accumulation violations, we reverse the judge's negative unwarrantable failure determinations, reverse his modification of Order Nos. 3182957, 3015095, 3183157 to section 104(a) citations, reinstate those orders under section 104(d)(2) of the Mine Act, and remand for reassessment of civil penalties.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

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<sup>9</sup> Judge Amchan has since transferred to another agency.

Commissioner Riley, concurring in part and dissenting in part:

I concur with my colleagues with respect to the belt violations. I respectfully dissent with regard to their disposition of the accumulations violations.

While we agree that the judge failed to adequately develop and explain his conclusions, I believe that a remand and not a reversal is the appropriate response to an incomplete and insufficient evidentiary record.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), we determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2002-04. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.*; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time it had existed, whether the condition was obvious, whether the operator had been placed on notice that greater efforts are necessary for compliance and the operator’s efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

I am unable to uncover any case law which allows a judge to determine whether a violation is unwarrantable by analyzing “the best three out of five” criteria that he chooses to discuss in his decision. Judges cannot be permitted to “shortchange” the adjudicative process by discussing only the obvious and ignoring more subtle but nonetheless important distinctions. It is not enough to draw selective conclusions that each of the accumulations was or wasn’t large enough to literally trip over, or that each was wet or dry, or that each had been present for a day or an entire shift. In the absence of a proper application of all the factors which constitute a thorough unwarrantability analysis, disposition of this case comes down to the question of who is best equipped to complete the process.

When reviewing the Judge’s factual determinations as to unwarrantable failure, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The substantial evidence standard of review requires that a fact-finder weigh all probative record evidence and that a reviewing body examine the fact-finder’s rationale in reaching his decision. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951). An appellate body reviewing a judge’s factual findings will not affirm his findings if they are unreasonable, incredible or if there is dubious evidence to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

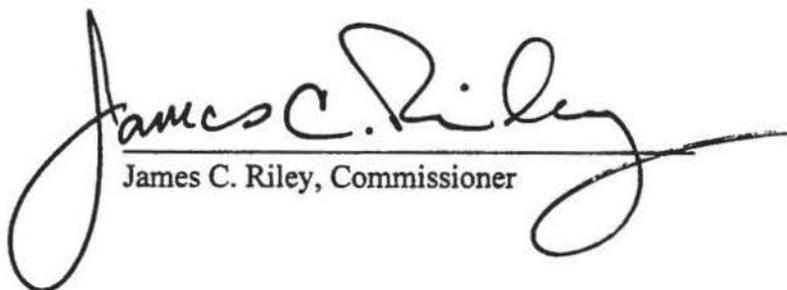
After careful examination of the record, I cannot affirm the judge’s findings as to whether various accumulations were unwarrantable because his analysis is incomplete and his

interpretation of the evidence is inconsistent with the record. However, while I am comfortable vacating his initial decisions, I cannot make the leap of faith embraced by the majority which appears willing to bridge gaps in the record to find the crucial elements of aggravated conduct, even if it requires engaging in creative fact-finding to unequivocally determine that each violative condition was due to an unwarrantable failure.

I see no compelling reason for this Commission to do the judges' homework for them. As fact-finders, the judges control development of the evidentiary record. Consequently, they have more exposure to the testimony and exhibits than members of the Commission do from a careful review of that record on appeal. The judges also have singular access to witnesses. However, the opportunity for enhanced perspective arising from proximity may have been squandered in this case because the judge failed to consider every element and drew a series of premature and, in the minds of every member of this Commission, improper conclusions. When a judge fails to adequately address the evidentiary record before him, a remand is necessary for fuller evaluation. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994).

Similarly, when a judge's conclusion is insufficiently explained, the Commission is unable to exercise meaningful review as to whether the conclusion is legally proper and supported by substantial evidence. In such situations a remand is required. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1916 (August 1984) (citing *The Anaconda Co.*, 3 FMSHRC 299, 299-302 (February 1981)). If I had the benefit of knowing everything the fact-finder knew before he sat down to draft his opinion, I might have been able to resolve the question of unwarrantability differently. The trouble is that no one knows exactly what he knows because the analysis on this issue is deficient. I am concerned that those hungry for guidance from the majority opinion, which finds unwarrantable failure, will find their plate as empty as those who might pick through morsels of wisdom offered by the judge who finds none.

After analyzing the facts and reviewing the record of this case, I have come to the conclusion that I can best do my job by allowing the judges to do theirs.



James C. Riley, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 19, 1997

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

v.

EASTERN ASSOCIATED COAL CORP.

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Docket No. WEVA 97-81  
A.C. No. 46-01456-04119

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 4, 1997, the Commission received from Eastern Associated Coal Corp. ("Eastern") 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Eastern.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. 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).

Eastern states that it failed to submit its request for a hearing ("Green Card") to the Department of Labor's Mine Safety and Health Administration ("MSHA") within 30 days

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

following receipt because a substitute employee who was working in its mailroom temporarily failed to refer the proposed assessment to its legal department, and that the error was not discovered until almost two months later. Eastern requests the Commission to reopen this matter. Attached as exhibits to Eastern's motion are copies of the certified mail receipt that accompanied the Proposed Assessment Form from MSHA, and affidavits from the employee in charge of its mailroom and an administrative assistant and an attorney in its legal department.

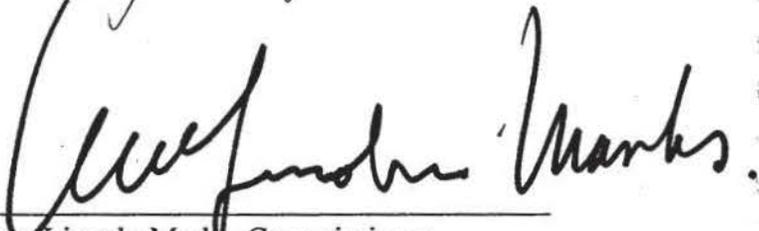
The Commission has held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994).

The Commission has observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Services, Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996).

On the basis of the present record, we are unable to evaluate the merits of Eastern's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Eastern has met the criteria for relief under Rule 60(b). If the judge determines that such

relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
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Marc Lincoln Marks, Commissioner

  
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James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 27, 1997

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. SE 95-459  
 :  
JIM WALTER RESOURCES, INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY: Marks and Riley, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), and involves the question whether Administrative Law Judge William Fauver erred in assessing a civil penalty by considering "deterrence," a factor not among those set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).<sup>2</sup> The judge assessed a civil penalty of \$15,000, more than double the penalty proposed by the Secretary of Labor. 18 FMSHRC 906, 912 (June 1996) (ALJ). The Commission granted the petition for discretionary review filed by Jim Walter Resources, Inc. ("JWR") challenging the

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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

<sup>2</sup> Section 110(i) provides in pertinent part:

The Commission shall have authority to assess all civil penalties provided in this [Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

penalty assessment. For the reasons that follow, we vacate the judge's penalty assessment and remand for reassessment.

I.

Factual and Procedural Background

JWR owns and operates the No. 7 mine, an underground coal mine in Alabama. 18 FMSHRC at 906; JWR Prehearing Resp. at 1, Stip. 1; Tr. 109, 163. On June 8, 1995, John Terpo, an inspector for the Department of Labor's Mine Safety and Health Administration, observed substantial accumulations of coal, coal dust and float coal dust around the West A belt line. 18 FMSHRC at 907. Twelve rollers were totally submerged in coal dust, and 32 were turning in combustible accumulations. *Id.* Three other rollers were locked up and "extremely hot." *Id.* At the seventh discharge point, the bottom belt was running on top of the accumulations, which at this point averaged two feet deep for about 300 feet. *Id.* Based on his observations, Inspector Terpo issued Order No. 3194917 under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), for violation of 30 C.F.R. § 75.400<sup>3</sup> based on extensive combustible accumulations in the West A belt entry. *Id.*<sup>4</sup> JWR admitted the violation, but challenged the inspector's designation of the violation as significant and substantial and resulting from JWR's unwarrantable failure.

The judge concluded that the violation was S&S and the result of JWR's unwarrantable failure. 18 FMSHRC at 908-10. With respect to the civil penalty, the judge specifically discussed three of the six penalty criteria: the operator's history of previous violations, negligence, and gravity. *Id.* at 910-12.<sup>5</sup> As to the operator's history of previous violations, the judge found that JWR had a "very poor record of violations of § 75.400[.]" that JWR's record in this regard had worsened over the previous two-year period, and that its "overall compliance history

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<sup>3</sup> Section 75.400 states:

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

<sup>4</sup> Inspector Terpo also issued JWR four citations for accumulations of combustible material on the two section belts that dumped material onto the West A belt, for failing to maintain the West A belt in safe condition, and for an inadequate preshift examination. 18 FMSHRC at 907. These citations are not at issue in this appeal.

<sup>5</sup> The judge introduced his discussion of the penalty factors by stating, "Section 110(i) of the Act provides the following six criteria for assessing civil penalties[.]" 18 FMSHRC at 910. However, he went on to discuss only three of the section 110(i) factors. *Id.* at 910-12.

under the Mine Act . . . is very poor.” *Id.* at 910-11. The judge also concluded that, in view of the “obvious, extensive and dangerous” accumulations, JWR’s negligence was high. *Id.* at 911. Based on the presence of extremely hot rollers, rubbing points creating friction due to contact between the belt and the steel belt structure, and substantial accumulations, the judge determined that the gravity of the violation was high. *Id.* The judge further stated:

Respondent’s prior history and the instant violation demonstrate a serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine. Respondent’s repeated violations of § 75.400 indicate that there has been no deterrent effect from prior civil penalties.

Considering Respondent’s very poor compliance history, the need for an effective deterrent, and the six statutory criteria as a whole, I find that a civil penalty significantly greater than the \$7,000 proposed by the Secretary should be assessed. Accordingly, I find that a civil penalty of \$15,000 is appropriate for the violation proved in this case.

*Id.* at 912.

## II.

### Disposition

JWR argues that in “[c]onsidering . . . the need for an effective deterrent, *and* the six statutory criteria as a whole,” the judge enhanced the penalty based on a factor, deterrence, not set forth in section 110(i). PDR at 2.<sup>6</sup> The Secretary responds that, although the judge may not rely on deterrence as “a penalty consideration that is in addition to the six statutory criteria,” in this case all the judge did was make explicit that he was assessing a penalty, based on the six criteria, that provided an effective deterrent. S. Br. at 7-8. The Secretary asserts that this is consistent with the deterrent purpose of penalties under the Mine Act. *Id.* at 6-7.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984)). In *Sellersburg*, the Commission stated that, in assessing a civil penalty, “[f]indings of fact on each of the statutory criteria” must be made by the judge “not only [to] provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also [to] provide the Commission and the courts . . .

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<sup>6</sup> JWR designated its petition as its brief.

with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.” *Sellersburg*, 5 FMSHRC at 292-93.

The Commission has also held that a judge may not go beyond the six criteria set forth in section 110(i). In *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (September 1996), the Commission vacated an assessment of civil penalties based in part on deterrence, stating:

[A]lthough deterring future violations is an important purpose of civil penalties, deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria. . . . Deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.

*Id.* at 1565 (citing *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (April 1994)).

The judge’s statements that “there has been no deterrent effect from prior civil penalties[,]” and that his penalty assessment was based in part on “the need for an effective deterrent, and the six statutory criteria as a whole[,]” 18 FMSHRC at 912 (emphasis added), indicate that he may well have considered deterrence as a separate factor in his analysis. Accordingly, we vacate his penalty assessment and remand with instructions to reassess the penalty considering only the six criteria set forth in section 110(i).

On remand, the judge should make specific findings on all six penalty criteria. Although stipulations in the record contain facts pertaining to the size of the operator’s business and the effect of the penalty on its ability to continue in business, the judge failed to make the requisite findings in his decision.<sup>7</sup> With respect to the criterion of the operator’s good faith attempts to achieve rapid compliance, the judge recited in his findings of fact and discussion of the unwarrantable failure issue that JWR assigned 20 miners to clean up the accumulations after notification of the order and that it took the miners seven hours to clean up the accumulations. 18 FMSHRC at 907, 910. He also stated:

The abatement work was prompt, but this must be considered in relation to the withdrawal order, which stopped the belt line until the accumulations were removed. There was no evidence of clean up work at the time the order was issued.

*Id.* at 910. Because the judge did not indicate how or whether these findings and conclusions relate to his penalty assessment, he should do so on remand.

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<sup>7</sup> The parties agreed that JWR is a large operator and that payment of the proposed assessment will have no effect on the operator’s ability to continue in business. JWR Prehearing Resp. at 1, Stips. 3, 5; S. Resp. to Prehearing Order at 1, Stips. 3, 5.

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and remand for reassessment.

A large, stylized handwritten signature in black ink, appearing to read "Marc Lincoln Marks". The signature is written in a cursive style with a prominent initial "M" and a long, sweeping underline.

Marc Lincoln Marks, Commissioner

A large, stylized handwritten signature in black ink, appearing to read "James C. Riley". The signature is written in a cursive style with a prominent initial "J" and a long, sweeping underline.

James C. Riley, Commissioner

Jordan, Chairman, dissenting:

The majority opinion effectively reads the deterrent function of civil penalties out of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). It vacates the judge’s penalty assessment, fearing that he might have “considered deterrence as a separate factor in his analysis.” Slip op. at 4.

To the contrary, I believe that the judge properly evaluated the role that deterrence must play in setting a penalty, and accordingly would affirm his penalty determination.<sup>1</sup> He did not include it among the initial criteria (set forth in the Mine Act) he used to determine the penalty. He did not include it as a “seventh penalty criterion” or a subsequent multiplier. Rather, he applied the statutory criteria, and, at the same time, rightfully acknowledged that the resulting penalty must provide an effective deterrent, consistent with Commission case law and the legislative history of the Mine Act.<sup>2</sup> He did state that the operator’s past history of violations showed that prior civil penalties had not effectively deterred safety violations. 18 FMSHRC 906, 912 (June 1996) (ALJ). But in taking this into consideration, he was simply articulating a basic premise of the Mine Act — that the point of a civil penalty is to ensure that the violation does not reoccur.<sup>3</sup> As the D.C. Circuit noted in *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989), “Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations.”

The record of past violations in this case is substantial. During the preceding two years, the Department of Labor’s Mine Safety and Health Administration issued 291 citations and orders to the No. 7 mine charging violations of this very same standard. 18 FMSHRC at 911.

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<sup>1</sup> Unlike my colleagues in the majority, I believe that there is no need to remand for further analysis of the six statutory criteria. The judge adequately addressed four of the criteria in his decision. The parties stipulated as to the remaining two criteria. Slip op at 4, n.7. Thus, we can enter findings on these questions instead of remanding them to the judge. See *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 262-68 (February 1997); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984).

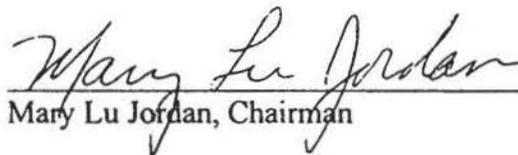
<sup>2</sup> In *Ambrosia Coal & Constr. Co.*, the Commission, quoting the legislative history of the Mine Act, noted that “the purpose of civil penalties is to ‘convinc[e] operators to comply with the Act’s requirements.’” 18 FMSHRC 1565, n.17 (September 1996) (also citing *Consolidation Coal Co.*, 14 FMSHRC 956, 965 (June 1992) (recognizing importance of civil penalties as deterrence)).

<sup>3</sup> In reviewing penalty regulations under the Mine Act’s predecessor legislation, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), the Supreme Court observed that a “major objective of Congress was prevention of accidents and disasters; the deterrence provided by monetary sanctions is essential to that objective.” *National Indep. Coal Operators’ Ass’n v. Kleppe*, 423 U.S. 388, 401 (1976).

Even more disturbing, however, is the fact that the violations increased rather than decreased during this time. From June 8, 1993, through June 7, 1994, JWR was issued 123 citations and orders charging violations of section 75.400. The following year the number of charges increased to 168. *Id.*

The judge carefully looked at this compliance history, took into account the instant accumulation violation, and found the operator to have demonstrated a "serious disregard for the safety requirement to prevent combustible accumulations in an underground coal mine." 18 FMSHRC at 912. He understood that in the process of employing the statutory criteria to set a penalty, he could acknowledge the need for deterrence, particularly in considering the factors of history and negligence. The judge simply applied the standards, and subsumed in that analysis was the proper realization that the final outcome must, consistent with fundamental Mine Act principles, discourage future health and safety violations.

My colleagues, however, seem to view any *express* reference to deterrence as an indication that the judge has gone beyond the six criteria set forth in section 110(i), 30 U.S.C. § 820(i). Apparently, our judges must treat the deterrent function of a penalty like the proverbial emperor's new clothes. Although it is an obvious consideration when assessing a penalty, the judges must never publicly acknowledge that fact.

  
Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 31, 1997

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of KENNETH HANNAH,  
PHILIP PAYNE, and FLOYD MEZO

v.

CONSOLIDATION COAL COMPANY

Docket No. LAKE 94-704-D

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners<sup>1</sup>

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

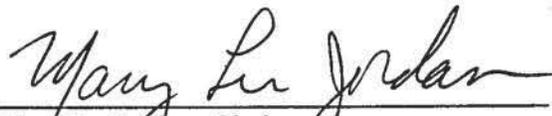
This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). On December 10, 1996, the Commission reversed Administrative Law Judge Gary Melick's determination that the miners' work refusal was unreasonable and unprotected and his finding that the operator's subsequent conduct did not violate the Mine Act and remanded this matter to the judge for computation of a backpay award and assessment of a civil penalty. 18 FMSHRC 2085 (December 1996). On February 5, 1997, the judge issued a partial decision, stating that the parties had agreed to the amounts of backpay and interest to be awarded, but that significant issues remained concerning the assessment of a civil penalty. 19 FMSHRC 435 (February 1997) (ALJ). On February 18, 1997, Consolidation Coal Company ("Consolidation") filed a petition for discretionary review of that decision. Thereafter, on March 6, 1997, the judge issued a final decision on the assessment of a civil penalty. 19 FMSHRC \_\_\_\_ (March 1997). On March 28, 1997, Consolidation filed an additional petition for discretionary review of the March 6, 1997 decision.

Consolidation's February 18, 1997 petition for discretionary review is denied.

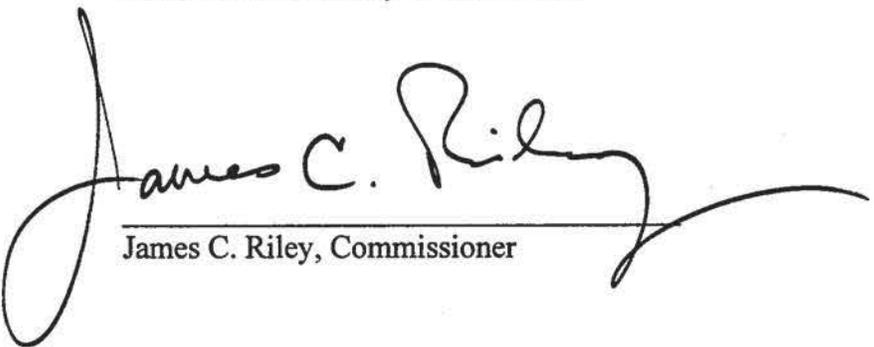
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<sup>1</sup> Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

Consolidation's March 28, 1997 petition for discretionary review is granted. In addition, pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), the Commission, on its own motion, directs review of the March 6, 1997 decision on the ground that it may be contrary to law in that the judge may have failed to make all the requisite findings under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), in assessing penalties against Consolidation.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Marc Lincoln Marks, Commissioner

  
\_\_\_\_\_  
James C. Riley, Commissioner

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**ADMINISTRATIVE LAW JUDGE DECISIONS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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MAR 6 1997

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. CENT 96-91-M  
Petitioner : A. C. No. 39-00170-05559  
v. :  
: Hobbs Potash Facility  
NEW MEXICO POTASH CORPORATION, :  
Respondent :

## DECISION

Appearances: Daniel Curran, Esq., Office of the Solicitor,  
U. S. Department of Labor, Dallas, Texas, for  
the Secretary;  
W. T. Martin, Jr., Esq., Carlsbad, New Mexico,  
for the Respondent.

Before: Judge Barbour

This is a civil penalty proceeding brought by the Secretary of Labor (Secretary) against New Mexico Potash Corporation (New Mexico Potash or the company) pursuant to sections 105 and 110 (30 U.S.C. § 815, 820) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. § 801 et seq. (1994)). The Secretary seeks the assessment of aggregate civil penalties of \$19,000 for two alleged violations of mandatory safety standards found in Part 57 of the Secretary's safety and health standards for underground metal and nonmetal mines (30 U.S.C. Part 57).

The case arises out of a fatal accident that occurred on September 7, 1995, at the company's Hobbs Potash Facility, an underground potash mine, located in Lea County, New Mexico. The accident involved the electrocution of a miner who was trying to remove an energized power cable from an auxiliary fan. After the accident, the Secretary's Mine Safety and Health Administration (MSHA) issued to the company citations for the violations. The citations included findings that the violations were significant and substantial (S&S) contributions to mine safety hazards.

The company denied liability. It argued that the victim's death was caused by his own negligence, that no action by the company contributed to the accident, and that the company should

not be penalized for the victim's actions. In the company's view, the imposition of civil penalties would violate the company's constitutional due process rights (Tr. 10-11).

A hearing was conducted in Lovington, New Mexico, at which the parties presented oral testimony and documentary evidence.

#### THE ACCIDENT AND THE INVESTIGATIONS

On September 7, Michael Buffington, a 28 year old miner, was working underground at the mine. A shift change was in progress. The old crew had left the area where Buffington was located. A new crew was on its way to the area. Buffington and others were preparing the area for the new crew (Tr. 29).

Eugene Galvan, an underground maintenance mechanic at the mine, went to the area. Galvan needed to weld some equipment prior to the arrival of the new crew. Buffington was about to take a break for lunch. As Buffington started to walk toward the dinner hole, Galvan asked him to "get ... some power to the welder" (Tr. 27). Buffington indicated that he would, and Galvan turned to go the welder. In order to energize the welder Buffington had to disconnect a power cable supplying electricity to the section's auxiliary fan and connect that cable to the welder.

The cable was approximately 175 feet long. It was energized and was carrying 480 volts of electricity (Tr. 58, 68). The cable was covered by a rubber outer jacket. Inside the jacket were four insulated conductors and one insulated ground wire (Tr. 50). The cable was attached to the fan at the nip. (A "nip" is defined as a "contact end of [a] cable" (U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 750)).

Galvan was on his way to the welder when he heard Buffington yell. Galvan turned, and he saw that Buffington, who was wearing cotton gloves, was holding the cable with both hands (Tr. 28, 112). Buffington continued to yell, and Galvan realized that something was terribly wrong.

Galvan ran about 150 feet to the circuit breaker panel where he was joined by the section foreman, Lupe Rodriguez (Tr. 27). The men shut off the electricity to the cable and Buffington fell to the mine floor. Galvan and Rodriguez rushed to his side and administered cardiopulmonary resuscitation. A short time later, the rescue squad arrived and Buffington was taken to the hospital, where he was pronounced dead.

The Eddy County Sheriff's Office and MSHA were advised of the accident. Jim Estrada, a deputy sheriff, went to the mine to investigate, as did MSHA Inspector Henry Mall and MSHA Special Investigator Ronald Mesa.

Estrada arrived first. When he got to the accident site, Buffington's body had been removed. That aside, the site was as it had been at the time of the accident. Estrada viewed the area. He noted especially that the ground where the accident occurred as "muddy" (Tr. 21). Estrada then left the mine and went to examine Buffington's body. While viewing the body, Estrada noted that there were burn marks on Buffington's left palm. (Tr. 24; Exh. P-7).

Mall and Mesa reached the mine shortly after Estrada left. First, they discussed the situation with company officials. Then, they proceeded underground. They were accompanied by Curtis Davidson, the company's safety director (Tr. 47). The accident scene had been cordoned off.

Mall and Mesa inspected the area (Tr. 48, 87-88; Exh. P-9). They agreed with Estrada that the floor in the area was muddy (Tr. 81). In addition to the mud, Mall observed puddles of standing water (Tr. 81).

During the course of the inspection, Mall picked up and examined the cable. It was not scraped or worn. This indicated to Mall that the cable had not been in use for very long, perhaps 2 or 3 days at the most. Davidson agreed with this assessment (Tr. 70, 79-80, 144; Exh. R-2).

While looking closely at the cable, Mall found a small tear in the cable's outer jacket. The tear was located approximately 2 1/2 feet from the fan (Tr. 79, 88). The tear was about 1 1/2 inch long (Tr. 79). The tear exposed one of the cable's insulated power conductors for approximately 3/4 to 7/8 of an inch (Id.; see also Exh's P-10, P-11). Five or six strands of the conductor's internal cooper wires had broken through the insulation and also were exposed. (Tr. 48, 69).

Mandatory safety standard 30 C.F.R. § 56.18002 requires a person designed by the operator to examine each working place at least once each shift for conditions that may adversely affect safety and to record the results of the examinations. Mall checked the report of the onshift examiner who inspected the area prior to the accident. Mall wanted to find out if the tear in the cable had been reported. It had not. Rather, the examiner reported that everything on the section was "okay" (Tr. 49).

Mall and Mesa took photographs of the accident site and the equipment that was involved in the accident. They also spoke with miners about what had happened (Tr. 49). Based upon their investigation, they concluded that when Buffington was asked to get power to the welder, he took a fatal procedural short cut. Instead of first disconnecting and locking out the power to the cable, Buffington picked up the energized cable and tried to pull or yank it out of the nip (Tr. 62-63). In the process, Buffington touched the exposed wires of the conductor (Tr. 63).

Mall also concluded the wet floor played a part in Buffington's death. In Mall's opinion, had the floor been dry, Buffington probably would have been severely shocked, but might not have been electrocuted (Tr. 81-82).

Mall and Mesa discovered they were not the only MSHA personnel to visit the area where the accident occurred. On September 7, shortly before the accident, another MSHA inspector, who was conducting a regular inspection at the mine, traveled through the area. The inspector was accompanied by Duane Morris, the company's underground safety supervisor (Tr. 143). Both men saw the cable, but the inspector issued no citations involving it.

Morris visited the area again after the accident. He believed that between the time he first saw the cable and the time Buffington picked it up, someone -- he did not know who -- moved the cable a short distance, perhaps 5 to 15 feet (Tr. 170-171).

Morris also testified that during the inspection, he and the MSHA inspector met Buffington. The inspector asked Buffington to tape a defective cable. (The defective cable was not the one that later was involved in the accident.) Morris and the inspector watched as Buffington followed all of the proper procedures. First, he deenergized the power to the cable. Next, he locked out the cable's circuit. Then, he applied the tape. There was no indication that just a short time later Buffington would fail to follow analogous procedures when he tried to disconnect the auxiliary fan's cable (Tr. 168).

Another person who investigated the accident and who visited the area where it occurred was Jerry Cline, a professional accident investigator hired by the company. When he came to the mine a few days after September 7, the area was still wet; or, as Cline put it, was still covered with "a thick coating of mud" (Tr. 215). Cline's view was that the wet floor "probably" enhanced contact between Buffington and the electrical current (Tr. 205).

Cline did not believe that wet conditions were hazardous in and of themselves, provided all "equipment [was] up to snuff" (Tr. 209-210). However, there were times when wet conditions required greater vigilance on an operator's part. Cline explained that a "lot of water" (Tr. 213) can cause the "degradation of . . . cables," and therefore that an operator must be more attentive to the maintenance of equipment when working in such areas (Tr. 213-214). Nonetheless, in Cline's opinion, the moisture where Buffington was electrocuted was not extensive enough to warrant intensified precautions by the company (Tr. 215).

Cline agreed that when cables are moved in an underground mine, they are subject to a "fairly abusive environment" (Tr. 206). He also stated that in general a cable should be inspected during the course of a shift if it is going to be moved, or if work is going to be done on the equipment it services (Tr. 205-206). However, if the cable is moved 25 feet or less, as the auxiliary fan cable apparently was, Cline did not believe it needed to be examined "unless there's something that happens during the move that gives . . . cause for concern" (Tr. 207).

Finally, in addition to inspecting the accident site, Mall and Mesa reviewed the company's training procedures and work rules to determine if they contributed to the accident. The men concluded they did not. Mall and Mesa agreed that New Mexico Potash properly trained its employees, including Buffington. They also agreed that had Buffington followed the company's rules, the accident would not have happened because the rules required power to be deenergized at the terminal and the cable's circuits to be locked out (Tr. 59-60, 104).

#### THE CITATIONS

As a result of their investigation, Mall and Mesa each issued a citation to the company. Mall issued Citation No. 4330836, which charges a violation of 30 C.F.R. §57.12004. Among other things, the standard requires an operator to protect electrical conductors that are exposed to mechanical damage. Mall believed the tear in the cable jacket, the exposed conductor, and the bare conductor wires evidenced a lack of the protection required.

Mesa issued Citation No. 4447563, which charges a violation 30 C.F.R. § 57.12014. Among other things, the standard requires a person moving an energized power cable to use insulated devices, unless other suitable means for moving the cable are provided. Mesa believed the company violated the standard when Buffington manually picked up the energized cable while wearing only cotton gloves (Tr. 97).

#### RESOLUTION OF THE ISSUES

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>	<u>Proposed Penalty</u>
4330836	57.12004	9/18/95	\$9,500

The citation states in part:

The 4/conductor type . . . 480 volt[,] 3 phase power cable was damaged exposing a bare copper conductor through the outer rubber covered jacket. A miner was electrocuted when he came in contact with the exposed bare copper conductor. The power cable was energized and was providing power to the face intake fan in area 289.

Section 57.12004 states in part:

Electrical conductors exposed to mechanical damage shall be protected.

#### THE VIOLATION

There is no doubt that the conditions alleged in the citation existed. The company does not dispute that the cable's jacket was torn, that an insulated conductor was exposed, and that strands of the conductor's copper wire extruded through the insulation (Tr. 48, 69). The cable was subject to mechanical damage in that it had to be moved from time to time and miners worked and operated equipment in its vicinity. Given the existence of the tear, the exposed conductor, and the bare copper wires, the cable and its conductors were not protected as required, and the cited standard was violated.

Although counsel for the company asserts the company is not culpable because the circumstances of the accident represent a "clear . . . case . . . of unforeseen employee misconduct" (Tr. 216), I find the argument inapposite to the issue of whether a violation of the cited standard occurred. The violation lies in the failure of the company, to protect adequately the cable's electrical conductors from damage. There is nothing in the record to indicate that Buffington's duties included protection of the cable's conductors or that Buffington was responsible for the failure to protect them. Rather, those duties lay with New Mexico Potash. Its failure to meet them establishes the violation.

### S&S AND GRAVITY

A violation is properly designated S&S, "if, based on the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonable serious nature" (*Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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 reasonable serious nature (*Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984); see also *Austin Power Co. v. Secretary*, 861, F.2d 99, 104-105 (5<sup>th</sup> Cir. 1988) (approving *Mathies* criteria).

Here, the Secretary has proven all four.

There was a violation of section 57.12007. The violation resulted in a discrete safety hazard. Failure to protect the conductors, meant that when the cable's outer jacket was torn and the conductor wires were exposed, miners working in the vicinity of the energized cable were subjected to the possibility of coming in contact with the "live" wires. Given the fact that the tear in the jacket was small, it was reasonably likely that miners would step on or near the cable and not realize that the conductor and conductor's wires were exposed. Further, if, like Buffington, they manually picked up the energized cable without

using a protective device it was reasonably likely they would come in contact with the conductor and its wires. In either situation, the miner involved was likely to be seriously injured or killed. In making this latter finding, I not only note that the cable was carrying 480 volts of electricity, but also that the area surrounding the cable was wet, a condition that Mall and Cline agreed enhanced the possibility of an electrocuted (Tr. 81-82, 205).

In addition to being S&S, the violation was very serious. It long has been held that the gravity of a violation is determined by analyzing the potential hazard to the safety of miners and the probability of the hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 120 (May 1972)). The potential hazard was serious injury or death due to electrical shock. Because the failure to protect the conductors in the cable resulted in the exposure of an insulated conductor and of several bare wires, in a wet area, and in the presence of miners who worked in the area, it was likely that as mining continued a miner would come in contact with the exposed conductor and wires and suffer a severe shock injury or worse.

I am mindful the record established New Mexico Potash trained its miners, including Buffington, in the proper procedures for handling and moving electrical cables, and that if such procedures always were followed, the hazard, although not totally eliminated, would have been greatly obviated. However -- and as the history of enforcement of the Act consistently has shown -- miners do not always act as instructed. They do the unexpected. They manually pick up cables without first locking out and disconnecting their circuits, or they move energized cables without using approved protective devices or without wearing safety gloves. While the company's training and work rules certainly diminished the likelihood that an accident would occur, they did not eliminate it, and the hazard caused by the inadequately protected conductors was so great that even if Buffington had acted as trained, I would still find this a very serious violation.

#### **NEGLIGENCE**

Negligence is the failure to exercise the care required by the circumstances. Here, several factors called for heightened caution on the company's part. Witnesses for the Secretary and the company agreed that because the cable was used in a muddy and wet area, there was an increased hazard to miners from an electrical defect (Tr. 81-82). While it is true that the cable looked to be in good condition and had been in use underground

for only a short period of time -- 2 or 3 days, at most (Tr. 58, 70, 144, 155) -- this did not mean management could relax its vigilance against possible cable defects, especially when the wet conditions under which the cable was used increased the likelihood that such defects could be lethal.

Mall testified that when miners are assigned to work around a cable, management "need[s] to check the work area" (Tr. 75). There was agreement among the witnesses that, as a general rule, cables experience a great deal of stress when used underground. As Cline observed, when cables are moved, they are subject to "a fairly abusive environment" (Tr. 206).

Morris saw the cable both before and after the accident and believed that the cable had been moved by as much as 15 feet prior to Buffington picking it up (Tr. 170-171). I credit this testimony. Although Cline did not think it necessary to examine a cable after such a short move, "unless . . . something . . . happens during the move that gives you cause for concern" (Tr. 207), and while there is no evidence that "something" happened when the cable was moved before the accident, given the wet conditions, the generally "abusive environment" to which the cable was subjected, and the extreme danger presented under such conditions when cable conductors are not adequately protected, I conclude that management should have checked for defects in the cable after it was moved and prior to assigning Buffington the task of connecting the cable to the welder. Failure to check the cable and to reinsulate adequately the conductor and wires represented a negligent failure to meet the standard of care required under the circumstances.

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>	<u>Proposed Penalty</u>
4447563	57.12014	9/8/95	\$9,500

The citation states in part:

A miner was fatally electrocuted when he . . . attempted to remove an energized 480 volt power cable from the face intake fan. The insulation had a break in it exposing the conductors. The miner made contact with the exposed conductors causing his electrocution. The miner was not using any suitable protective devices when he handled the power cable.

Section 57.12014 states in part:

When . . . [power cables energized to potentials in excess of 150 volts] are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for persons is provided by other means.

#### THE VIOLATION

The regulation is straight forward. It requires miners who move by hand energized power cables to use the devices specified, or to wear or otherwise to use suitable protection. The standard recognizes that handling a cable energized to a potential of more than 150 volts can be so dangerous that a miner must be protected from direct contact with the cable by placing an insulated barrier between the miner and the cable. This is in addition to the barrier that already is provided by the cable's interior insulation and its rubber jacket. The goal is to prevent the miner from being shocked, or at least to lessen the degree of any shock.

Buffington violated the standard. The record establishes that the cable Buffington manually moved was energized to 450 volts, and that he moved it without using the devices specified in the standard or without using other suitable protection.

In finding the violation, I recognize Mall testified that he did not believe Buffington was trying to "move" the cable when he picked it up (Tr. 60-64). However, Mall was using the word "move" in the sense of transporting the cable from one location to another and the regulation is not as restrictive in its use of the verb. While "move" means "to go . . . from one point or place to another," it also means a change of position or posture (Webster's Third New International Dictionary 1479 (1986)). Even though Buffington was not trying to carry the cable to another location, he brought himself within the regulation's scope when he picked up the cable and manually moved it from the floor into his hands; in other words, when he changed the cable's position.

As Mesa persuasively testified, to comply with the standard Buffington either should have used "a small rope" to pull the cable or should have worn "a pair of hot gloves" (Tr. 111). Buffington did neither. The only barrier between

Buffington and the cable was his cotton gloves. The company does not assert that the gloves were "suitable protection" within the meaning of the standard, and clearly, they were not.

Buffington's actions were due solely to his own conduct. Had he acted in accordance with his training and with the company's work rules, the violation and the accident would not have occurred (see Tr. 59-60, 104, 163, 201-202). There is no evidence that Buffington's prior actions placed the company on notice that he might pick up the cable without first complying with company safety procedures or with the regulation. Indeed, I accept Morris' testimony that shortly before his electrocution, Buffington's actions in taping a cable were in complete accord with company safety procedures. Nor is there evidence Buffington was disciplined previously for failing to obey work rules. Therefore, here, unlike the previous violation, the question of the company's liability for a violation caused by its employee's unforeseen and unforeseeable misconduct is presented squarely.

The Commission long has held that under the Mine Act an operator is liable for the violations of its employees without regard to fault. It has based this conclusion on the wording of the Act and the act's legislative history (see *Asarco, Inc., Northwestern Mining Dept.*, 8 FMSHRC 1632, 1634-35 (November 1986), aff'd 868 F.2d 1195 (10<sup>th</sup> Cir. 1989) (and cases cited therein)). The Commission has stated that the employee's misconduct and the operator's lack of fault are factors to consider in assessing a civil penalty rather than factors having an impact on liability (*Asarco*, 8 FMSHRC at 1636).

New Mexico Potash is fully cognizant of this holding, but asserts that the Commission and the courts have yet to address whether implementation of liability without fault under the Mine Act deprives a company of its Fifth Amendment right to due process. Because New Mexico Potash believes it does, it suggests that I take a "very bold step . . . and give exactly that opinion" (Tr. 222-223). (See *Kenny Richardson*, 3 FMSHRC 8, 21 (January 1981), aff'd 689 F.2d (6<sup>th</sup> Cir. 1982), cert. denied 461 U.S. 928 (1983) (Commission may resolve constitutional challenges raised against enforcement of the Act)).

I am respectful of the company's argument, but I decline the suggestion. The company's position is grounded in the general principle of law that there should be no individual liability for an act which ordinary human care and foresight can not guard against and that a consequent loss should rest where it chances to fall. However, above and beyond this principle lies the power of the legislature to enact laws for the general public welfare

and to impose obligations and responsibilities that would not otherwise exist. In such instances, the concept of constitutional due process requires that the means chosen be reasonably related to a legitimate end (*United States v. Jones*, 735 F.2d 785 (4<sup>th</sup> Cir. 1984), cert. denied 496 U.S. 918 (1984)).

Under the Mine Act, that "means" is imposition of a civil penalty on the operator whenever there is a violation of the Act or its regulations. The "end" is "the health and safety of the [the mining industry's] most precious resource -- the miner" (30 U.S.C. § 801(2)), through lessening "disruption[s] of production and the loss of income . . . as a result of . . . mine accidents" (30 U.S.C. § 801(d)). The end is accomplished by placing primary responsibility upon "operators . . . with the assistance of the miners" to "prevent the existence of . . . [unsafe and unhealthy] conditions and practices" (30 U.S.C. § 801(f)).

The drafters chose to retain in the Mine Act, the liability without fault structure of Mine Act's immediate predecessor, the Coal Mine Health and Safety Act of 1969 (30 U.S.C. § 801 et seq. (1976)) (*Western Fuels-Utah, Inc.*, 10 FMSHRC 256-260 (March 1988)). In requiring the operator to pay a civil penalty for each violation, the legislators expressed their belief that such penalties were necessary "to effectively induce compliance" (S. Rep. 181, 95<sup>th</sup> Cong. 1<sup>st</sup> Sess. at 16 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 604 (1978)).

While this assumption is perhaps debatable, it certainly is not unreasonable. A logical argument can be made that when an operator knows it will be liable for unanticipated employee negligence, it will go to additional lengths to try to reduce violations due to such negligence. For example, it will heighten scrutiny of its employees; or, it will intensify their training.

Therefore, arguments concerning the efficacy of liability without fault are for the legislature, not the Commission or the courts, to resolve. Hence, I conclude the Secretary is not barred constitutionally from seeking to impose a civil penalty on the company for Buffington's violation of section 57.12014 and that the company is liable as charged.

#### S&S AND GRAVITY

All of the criteria set forth in *Mathies* (6 FMSHRC at 3-4) have been met. There was a violation of the cited standard. By picking up and moving the cable without using the devices

specified in the standard, or without using other suitable protection, Buffington subjected himself to the danger that a defect in the energized cable could injure or kill him. Moreover, there was a reasonable likelihood that an injury would result, given the fact that the cable was indeed damaged to the point that an insulated conductor and some of its bare wires were exposed. Finally, the likelihood that the injury would be reasonably serious was attested to by the fate that befell Buffington.

In addition to being S&S, the violation was very serious. Picking up a power cable without using the devices specified in the standard or without using other suitable protection was folly. The standard, which is designed to prevent exactly what happened, recognizes this, as do the company's safety procedures. Given the conditions under which the violation occurred -- the wet floor and the exposed conductor and wires -- the tragedy that resulted was likely.

#### NEGLIGENCE

Mesa testified that he considered the fact that New Mexico Potash had a supervisor in the area as indicative that the company was negligent (Tr. 96). He amplified this testimony by stating that he believed the supervisor had the cable dragged into the area, that the supervisor knew there was going to be welding done and that the cable was going to be removed from the fan. Therefore, Mesa asked, "Why didn't the [supervisor] go back and kick the breaker?" (Tr. 109).

The issue, however, is whether the company was negligent in causing the alleged violation, and Mesa's testimony does not address how the failure of the company or its agents caused Buffington to manually move the cable without an approved device or other suitable protection.

As noted previously, there is no suggestion that the company's training program was defective or that New Mexico Potash should have known Buffington might act as he did. Supervisors can not reasonably be expected to monitor a miner's every move when there is no prior hint or suggestion his or her conduct may be in violation. For these reasons, I conclude that New Mexico Potash was not negligent.

**OTHER CIVIL PENALTY CRITERIA**  
**HISTORY OF PREVIOUS VIOLATIONS**

In the 24 months prior to September 8, 1995, 39 violations cited at the mine were assessed by the Secretary and paid by the company. The Secretary did not take a position on whether the number of previous violations was small, medium, or large, given the size of the company (Tr. 17).

I find that the overall number is small. However, I note that of the 39 violations, 11 violations, or approximately 28 percent, were violations of mandatory electrical standards (Exh. P-1), and I conclude that although the number of previous violations is small, the percentage of electrical infractions warrants somewhat larger penalties than I might otherwise have assessed for the electrical violations here at issue.

**BUSINESS SIZE**

There was disagreement over the number of miners employed at the Hobbs facility. Mall testified that 330 miners were employed (Tr. 119, 56), and Davidson testified that the number was 307 (Tr. 119). While the exact number of employees obviously fluctuated, I find that more than 300 miners worked at the mine and that the company was large.

**ABILITY TO CONTINUE IN BUSINESS**

The company did not introduce evidence to show that the penalties assessed would adversely affect its ability to continue in business, and I find that they will not.

**GOOD FAITH ABATEMENT**

The company abated the violation of section 57.12004 by removing the defective cable from service within the time set, and it abated the violation of section 57.12104 by timely instructing its workers on the proper procedures for handling cables. The company's actions constituted good faith abatement.

CIVIL PENALTY ASSESSMENTS

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>
4330836	57.12004	9/18/95

The violation was very serious and was caused by the company's negligence. Moreover, when combined with Buffington's violation of section 75.12014, the violation proved fatal to Buffington. In view of these factors, and given the company's large size, and its previous history of violations, a substantial penalty is warranted. I find that a civil penalty of \$9,000 is appropriate. I have mitigated the assessment to some extent to reflect the company's good faith abatement.

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>
4447563	57.12014	9/8/95

The violation was extremely serious. When combined with the violation of section 57.12004, the violation proved fatal to Buffington. In view of these factors, and given the company's large size, and its previous history of violations, a penalty like that assessed for the violation of section 57.12004 would have been appropriate. However, the company's total lack of culpability and its good faith abatement call for a significant mitigation of the penalty. I find that a civil penalty of \$1,500 is appropriate.

ORDER

New Mexico Potash **IS ORDERED** to pay a civil penalty of \$9,000 for the violation of section 57.12004 (Citation No. 4330836) and to pay a civil penalty of \$1,500 for the violation of section 57.12014 (Citation No. 447533). The payments are to be made to the Secretary within 30 days of the date of this decision, and upon their receipt, this proceeding **IS DISMISSED**.

  
David F. Barbour  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

MAR 6 1997

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 94-704-D  
ON BEHALF OF KENNETH H. :  
HANNAH, PHILIP J. PAYNE :  
AND FLOYD MEZO, : MSHA Case No. VINC CD 94-07  
Complainants : Rend Lake Mine  
v. : I.D. No. 11-00601  
: :  
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Ruben R. Chapa, Esq., Office of the Solicitor,  
U.S. Dept. of Labor, Chicago, Illinois, for the  
Complainants;  
Elizabeth Chamberlin, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for the  
Respondent;  
David J. Hardy, Esq., Jackson and Kelly,  
Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission on December 10, 1997, for the specific and limited purpose of the "computation of a backpay award and assessment of a civil penalty" against the Consolidation Coal Company (Consol).<sup>1</sup> Following remand, the Secretary, by proposed Amended Complaint, requested a single civil penalty of \$3,000 for the three

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<sup>1</sup> The parties had previously agreed to the amount of backpay and interest and those amounts were incorporated in a Partial Decision issued February 5, 1997. At oral argument held February 27, 1997, it was disclosed that Consol had not yet actually made these payments. Accordingly an Order addressing continuing interest charges accompanies this decision.

violations of Section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," found by the Commission.<sup>2</sup> Consol has objected to the proposed amendment. I find that, in any event, there is no need for any amendment of the complaint in order to properly dispose of the issues on remand.

First, I find that Consol waived any objection to the Secretary's non-compliance with Commission Rule 44(a) by its failure to have filed a timely objection at the initial hearings.<sup>3</sup> Since the Commission has specifically directed the undersigned to assess a civil penalty, *de novo*, the Secretary's motion to amend and proposed amendment is, for this additional reason, unnecessary and the issue is accordingly moot. In issuing its specific remand order it may be presumed that the Commission, too, found that the Secretary's non-compliance with Rule 44(a) had been waived by Consol.

Section 110(i) provides in part as follows:

In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the

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<sup>2</sup> The Commission found that each of the three Complainants was suspended in violation of the Act. In accordance with Section 110(a) of the Act a civil penalty must therefore be assessed for each of the three violations. The Secretary's position at oral argument, that only one violation occurred and only one civil penalty should be assessed, is inconsistent with this statutory mandate.

<sup>3</sup> Commission Rule 44(a) provides as follows:

A discrimination complaint filed by the Secretary shall propose a civil penalty of a specific amount for the alleged violation of Section 105(c) of the Act, 30 U.S.C. 815(c). The petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in Section 110(i) of the Act. 30 U.S.C. 820(i).

operator's ability to continue in business, the gravity of the violations, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

At oral argument held by teleconference on February 27, 1997, the Secretary acknowledged that there is no record evidence as to four of the six criteria.<sup>4</sup> Accordingly, the penalty in this case must necessarily be based upon the only two criteria for which there is record evidence, i.e. whether the operator was negligent and the gravity of the violations. In regard to the former issue, the Secretary acknowledges that Consol's actions were not egregious and that it was only "moderately negligent" (Oral Argument Tr. 6,27). The Secretary nevertheless maintains that a moderate level of negligence is appropriate because Consol administered an excessive degree of punishment to the three complainants who, she maintains, were "good workers" (Oral Argument Tr. 8,13.) The Secretary also acknowledged however that employees refusing to comply with lawful work orders may appropriately be suspended or dismissed and, presumably, such discipline would therefore not be excessive.

In this case I find that the operator acted in good faith in disciplining the Complainants for what it perceived in a good faith and reasonable belief to have been an unprotected work refusal. In addition no clear legal precedent governed the precise facts and Consol's position in this regard was upheld by the decisions of the arbitrator and administrative law judge. At worst, Consol's decision may be considered as an error in judgment as to whether the Complainants continued to entertain a reasonable and good faith belief in the claimed hazardous condition. Moreover Consol made its decision only after it was confirmed by the State inspector that such condition was not in

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<sup>4</sup> Namely, the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, the effect on the operator's ability to continue in business and the demonstrated good faith in attempting to achieve rapid compliance after notification of a violation.

violation of State law nor hazardous and only after this information was communicated to the Complainants.

It should also be noted in considering the operator's good faith and reasonableness that Consol officials along with some of the mine examiners themselves had, several weeks before this incident, been advised by the same State inspector that this same practice/condition was neither in violation of State law nor hazardous. Finally, the record shows that Consol officials, most notably Mr. Moore, were prudent and cautious in attempting to allay the Complainant's fears. It appears that Consol's shortcoming was its decision not to insist that the State inspector come to the mine site in person (even though he was available to communicate with the Complainants by telephone).

The Secretary also maintains that the alleged hazard underlying the work refusals appears to have been a violation of federal regulations governing ventilation plans. However the question of whether the alleged hazard, which was not a violation of Illinois law, was a violation of any federal regulation was not an issue litigated in this case. Moreover there is no basis from the record in this case to conclude that any federal regulation had been violated and accordingly no inference of operator negligence can properly be drawn as here suggested by the Secretary.

Finally, the Secretary maintains that operator negligence may be determined from the fact that the Commission has found that the miners exercised a reasonable good faith belief in refusing to work in the face of what they perceived to be hazardous conditions. While negligence may be inferred if clear legal precedent governed the precise factual situation presented thereby leading to the inference that Consol officials should have known that the disciplinary action they were taking was in violation of Section 105(c) of the Act, such was not the case herein. Consol's decision was clearly a close judgment call. It cannot therefore be inferred that Consol should have known that in disciplining the Complainants it was in violation of Section 105(c) of the Act. Under the circumstances I find that Consol is chargeable with but little negligence for the violations of Section 105(c) found by the Commission.

The Secretary further argues that the gravity of the violations was high in that these acts of discrimination would have a chilling effect on the future exercise by miners of their rights to refuse work and to report unsafe or unhealthful conditions. A Commission majority in *Secretary v. Tanglewood Energy, Inc.*, 18 FMSHRC 1320 at 1320-7321 (August 1996), recently held that determinations of whether a chilling effect resulted from a Section 105(c) violation should not be presumed but rather should be made on a case-by-case basis considering both objective and subjective evidence. In this case the Secretary has cited no evidence that could support such a finding. In searching the record I, likewise, find no objective or subjective evidence of a chilling effect. The Secretary has failed to sustain her burden of proving her allegations of high gravity.

Under the circumstances I find that a civil penalty of \$10 is appropriate for each of the three violations found by the Commission.

The Secretary has additionally requested an order directing that a certain notice be posted at the subject mine and the expungement of Complainants' "employment records of any and all references to the discipline issued . . . including, but not limited to, records pertaining to the arbitration action and the Section 105(c) action brought pursuant to the Mine Act". These requests are clearly beyond the scope of the Commission's specific remand order and I am therefore without jurisdiction to rule on them. I note, however, that both requests are for appropriate remedies customarily granted in cases such as this and upon subsequent remand I would grant the requests. The Complainants' employment records should be expunged of references to discipline issued as a result of actions found protected under the Act. This would clearly include the decision of the arbitrator (Operator's Exhibit No. 1) which was based upon the same "work refusal" which is also the basis for the instant cases. I would therefore assume the parties would reach agreement on these issues without the need for further Commission intervention.

ORDER

Consolidation Coal Company is directed to pay: (1) civil penalties totaling \$30 to the Secretary of Labor within 30 days of the date of this decision and (2) the agreed upon back pay to each of the Complainants plus interest to the date of actual payment.



Gary Melick  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MAR 7 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 95-194-M  
Petitioner : A.C. No. 46-00007-05550  
v. :  
: Docket No. WEVA 95-221-M  
CAPITOL CEMENT CORP., : A.C. No. 46-00007-05551  
Respondent :  
: Docket No. WEVA 95-321-M  
: A.C. No. 46-00007-05554  
:  
: Martinsburg Plant

DECISION

Appearances: Pamela S. Silverman, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Arlington, Virginia, for the Petitioner;  
Dana L. Rust, Esq., and E. E. Matthews, III, Esq.,  
McGuire, Woods, Battle and Boothe, LLP,  
Richmond, Virginia, for the Respondent.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to challenge two citations and a withdrawal order issued by the Secretary of Labor to the Respondent, Capitol Cement Corporation (Capitol), under Section 104(d)(1) of the Act and to challenge the civil penalties proposed for the violations charged therein.<sup>1</sup> The general issue

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<sup>1</sup> Section 104(d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation

before me is whether the violations and the charging documents at bar should be affirmed and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

"Section 104(d)(1)" Citation No. 4294023 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.12016 and charges as follows:

On 10/21/94 an employee suffered a disabling injury (electrical burns) when he inadvertently contacted a 480 VAC energized circuit (overhead crane hot rail) while checking the rail mounting bolts in the clinker shed. Electrically powered equipment shall be de-energized and locked out before work is done on such equipment.

The cited standard provides as follows:

Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

"Section 104(d)(1)" Order No. 4294024 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.15005 and charges as follows:

It was learned during the investigation of a disabling injury (electrical burns) which occurred on 10/21/94 that

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Footnote 1 Continued

given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, 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.

the injured employee was not wearing a safety belt and line where there was a danger of falling. This violation was not a contributing factor to the injury.

The cited standard provides in relevant part that "safety belts and lines shall be worn when persons work where there is danger of falling."

It is undisputed that on October 21, 1994, an accident occurred at the clinker shed in Capitol's Martinsburg plant in which shift supervisor Gregory Bonfili suffered disabling electrical burns. He inadvertently contacted a 480 volt alternating current energized circuit on the overhead crane "hot rail" while checking the rail mounting bolts. The clinker shed within which the crane operates is 600 feet long, 80 feet wide and 75 feet high. It is used to store material and two cranes with clamshell buckets run on rails across the building powered by "hot rails". It is approximately 60 feet from the crane runway to the ground but the height varies depending on the amount of stored material.

At the beginning of the shift, crane operator Charles Cook found that his crane was shaking and therefore called the maintenance department. When no one appeared to correct the problem Cook called his foreman, Bonfili, who climbed onto the craneway to investigate. Bonfili told Cook to cut the power to the crane. However, as noted by the issuing Inspector, Edward Skvarch of the Mine Safety and Health Administration (MSHA), de-energizing the crane alone does not in fact de-energize the "hot rail" since they are on separate power feeds. The disconnect switch for the "hot rail" is located in the same building but one level below the crane. While investigating the problem Bonfili reached over the side and contacted the 480 volt energized "hot rail" suffering significant burns. There is no dispute that the "hot rail" was not de-energized or locked out and that Bonfili, while on the 3 foot craneway some 50 feet above ground, was not wearing a safety belt. (Respondent's Brief p. 11).

Skvarch opined that the violations were "significant and substantial". In the former case he opined that it could reasonably be expected that a person working in close proximity to the "hot rail" could suffer fatal electrocution. In the latter case he opined that working on a three-foot cat walk 50 feet above ground without a safety belt could also reasonably be expected to result in fatal injuries. The inspector concluded that in both cases the violations were also the result of high negligence and "unwarrantable failure" because the injured party himself was a supervisory agent of the operator committing an "obvious serious violation in the presence of a subordinate."

Respondent does not dispute the violations nor that they were "significant and substantial" and serious but contests only that the violations were the result of its "unwarrantable failure" or negligence and disputes the amount of proposed penalties. (Respondent's Brief p. 11). "Unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* At 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194-194 (February 1991).

The Secretary maintains in her brief, as to the violation charged in Citation No. 4284023, that it was the result of "unwarrantable failure" because "[i]t is undisputed that Mr. Bonfili failed to de-energize and lock-out the power to the craneway prior to performing work thereon in direct violation of 30 C.F.R. § 56.12016." At oral argument the Secretary further maintained that all three violations were the result of "unwarrantable failure" because they were obvious and dangerous and because they were committed by foremen who are held to a high standard of care in safety matters. See *Midwest Material Company*, 19 FMSHRC 30, 35 (January 1996).

In this regard it is undisputed that after Bonfili rode back-and-forth on the crane in an effort to identify the source of the problem but before working in the vicinity of the "hot rail" Bonfili directed the crane operator only to de-energize the crane. It may reasonably be inferred from Respondent's training records that Bonfili knew that de-energizing the crane alone would not also de-energize the "hot rail". Moreover he failed to lock out any of the power sources.

The violation was also obvious, extremely dangerous and committed by a foreman held to a high standard of care. The violation was therefore the result of "unwarrantable failure" and high negligence. *Midwest Material* at p. 35. Under the circumstances, the Secretary has clearly sustained her burden of proving the necessary aggravating circumstances to justify "unwarrantable failure" and high negligence.

The Secretary similarly alleges that the violation charged in Order No. 4294024 was the result of "unwarrantable failure" because "[i]t is undisputed that Mr. Bonfili failed to wear a safety belt and line while working where there was a danger of falling, in direct violation of 30 C.F.R. § 56.15005." Clearly it again may reasonably be inferred from Respondent's training records that Bonfili knew that the failure to use a safety belt under the circumstances of this case was a violation.

Respondent next argues, citing the so-called *Nacco* defense, that, in any event, the negligence of shift supervisor Bonfili is

not imputable. See *Nacco Mining Company 3* FMSHRC 848, 849-850 (April 1981). Under the *Nacco* defense the negligence of a supervisor is not imputable to the operator if the operator can demonstrate that no other miners were put at risk by the supervisor's conduct and that the operator took reasonable steps to avoid the particular class of accident. The Commission has emphasized however that even an agent's unexpected or willful and intentional misconduct may result in a negligence finding where his lack of care exposed others to risk or harm. *Id* at 851; *Rochester and Pittsburgh Coal Co. 13* FMSHRC 189, 197 (February 1991).

In this case it is clear that, by his negligent misconduct, Bonfili not only put himself at risk but also placed crane operator Charles Cook at risk. According to MSHA Special Investigator Charles Weber, when Cook saw what happened when Bonfili contacted the 480 volt "hot rail", he exited the crane, ran along the exposed craneway some 50 feet above ground and down to the next level to cut power to the "hot rail". In running along the exposed craneway, Cook was thereby exposed to the hazard of falling from the 50 foot craneway and suffering potentially fatal injuries. It may also reasonably be inferred from the record evidence that if Bonfili had slipped or otherwise lost control on the exposed craneway without a safety belt and was thereby placed in a precarious position and Cook had therefore come to his rescue he too would have been exposed to a falling hazard with its potentially fatal consequences. It may reasonably be inferred therefore that the negligence of Bonfili in failing to de-energize the "hot rail" and in failing to wear a safety belt, indeed exposed crane operator Charles Cook to the significant risk of fatal injuries. Accordingly the *Nacco* defense is inapplicable on these facts and Bonfili's negligence may be imputed to the Respondent.

In assessing a civil penalty herein I do consider, however, what appears to have been a responsible training program in effect before the incident herein and that Bonfili's actions were contrary to Respondent's own work rules. I also note that, consistent with Respondent's written disciplinary rules, Bonfili was subjected to a five day suspension and written warning for his violations of the company safety rules. Bonfili was further advised that further disregard for these rules would lead to more progressive discipline up to and including discharge (Respondent's Exhibit No. 11). Finally, there is no evidence to suggest any negligence in the hiring of Bonfili. Thus, while the violations were of a serious nature and the negligence of Bonfili is imputable to Respondent, these factors warrant some mitigation of the penalty amount. Considering all the criteria under Section 110(i) of the Act I find that civil penalties of \$2,500 for the violation charged in Citation No. 4294023 and \$1,250 for the violation charged in Order No. 4294024 are appropriate.

"Section 104(d)(1)" Citation No. 4294714 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 12016 and charges as follows:

On March 15, 1995, a shift supervisor was injured when his right hand and arm became caught between the No. 2 collecting belt and head drum. The supervisor was attempting to "train" the belt by installing duct tape to lag the east side of the head drum while the belt was running. The pulley guard had been moved out of position, and the conveyer had not been de-energized and locked out as is required when doing such work. There is an unwarrantable failure violation.

As previously noted, that standard provides as follows:

Electrically powered equipment shall be de-energized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the lower switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only the persons who installed them or by authorized personnel.

Inspector Skvarch discovered the instant violation while reviewing injury reports at the mine on April 18, 1995. The record shows that shift supervisor Arthur Lozano injured his hand while using duct tape to "train" a conveyer belt. The injury resulted in four days of restricted duty for Lozano but Skvarch opined that, by placing his hand in close proximity to the moving belt, Lozano subjected himself to permanently disabling injury. Skvarch also opined that it was reasonably likely that Lozano could have suffered the loss of a finger or hand. This evidence is undisputed and I therefore find this violation also to be "significant and substantial" and serious. Skvarch also found the violation to have been the result of high operator negligence and "unwarrantable failure" on the grounds that Lozano, as shift supervisor, was the operator's agent and intentionally committed a serious and obvious violation. Respondent again claims the Nacco defense. *Nacco Id.* pps. 849-850.

Jeffrey Miller was working as a general laborer on March 15. He had been directed to assist Lozano. He was shoveling beneath the belt when Lozano told him "come here, I want to show you a trick". Miller testified that he did not know what Lozano planned to do but observed that Lozano placed his hand between the head pulley and the moving belt. Lozano's left arm was then caught and pulled into the head pulley. The belt was then shut down.

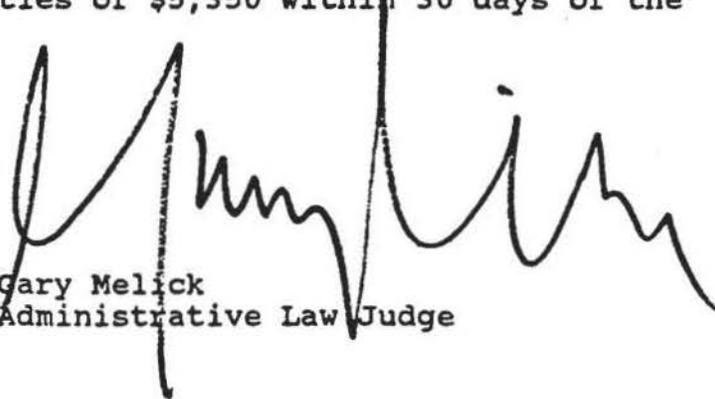
This violation was of an obvious and dangerous nature and was committed by a shift supervisor, a person held to a high degree of care. Even without the cited regulatory standard it shows reckless disregard to do what the shift supervisor did here. The violation was clearly the result of aggravated circumstances constituting "unwarrantable failure" and high negligence. *Midwest Material* p. 35.

Miller testified, however, that he was not placed in any danger by Lozano's action. MSHA Special Investigator Charles Weber disagreed, observing that Miller was only 3 or 4 feet from Lozano when Lozano was pulled into the moving belt. Weber observed that if Lozano had been further engaged by the belt Miller may then have attempted to extract Lozano from the belt thereby also exposing himself in the same way thereby also suffering potentially serious injuries. I agree that Weber's analysis may reasonably be inferred from the evidence and, under the circumstances, I must again conclude that the *Nacco* defense is inapplicable. In assessing a civil penalty however I also consider in mitigation the absence of negligence in Lozano's hiring, the operator's training program, and the fact that Lozano was disciplined with a 3-day suspension for violating its safety rules. I also note that Lozano was warned that further disregard of company safety rules would lead to more serious discipline, up to and including discharge.

Considering the criteria under Section 110(i) of the Act I find that a civil penalty of \$1,600 is appropriate for this violation.

ORDER

Citation No. 4294023, Citation No. 4294714 and Order No. 4294024 are hereby affirmed. Capitol Cement Corporation is directed to pay civil penalties of \$5,350 within 30 days of the date of this decision.



Gary Melick  
Administrative Law Judge

**Distribution:**

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**/jif**

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

MAR 10 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, (MSHA), : Docket No. CENT 96-123-M  
Petitioner : A. C. No. 41-00072-05501 R5U  
v. :  
: Plant & Quarry  
SOUTHERN REFRACTORIES, INC., :  
Respondent :

## DECISION

Appearances: Jennifer W. Hilburn, Esq., Office of the  
Solicitor, U.S. Department of Labor,  
Dallas Texas, for the Petitioner;  
Joe D. Gregory, Esq., Gregory & Gregory,  
Grapevine, Texas, for the Respondent.

Before: Judge Feldman

This matter concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent, Southern Refractories, Inc. (SRI), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). SRI is a refractory sales and installation company. Briefly stated, SRI removes and replaces old and worn refractory material in preheaters and kilns. Refractory material typically consists of a concrete mixture, called "castable," which lines the interior ceiling and walls of the preheater or kiln.

The assessment petition that serves as the basis for this proceeding sought to impose a total civil penalty of \$353.00 for five alleged violations of mandatory safety standards in Part 56, 30 C.F.R. Part 56, cited in Citation Nos. 4448249 through 4448253. This case was heard in Fort Worth, Texas, on November 19 and November 20, 1996. The parties' post-hearing findings of fact and conclusions of law, as well as their reply briefs, have been considered in the disposition of this proceeding.

At the beginning of the hearing, the Secretary moved to withdraw Citation No. 4448253, and the respondent agreed to pay a reduced civil penalty of \$56.00, rather than the \$75.00 penalty initially proposed, for Citation No. 4448249 based on a reduction in the degree of the respondent's. During the hearing, the

respondent also agreed to pay the \$50.00 civil penalty proposed for Citation No. 4448252 in view of the Secretary's agreement to reduce the degree of the respondent's negligence from moderate to low. (Tr. 330).

Bench Decision Concerning  
Citation No. 4448251

Citation No. 4448251, citing an alleged violation of the mandatory standard in section 56.13021, was vacated in a bench decision entered at the culmination of the hearing. The bench decision is finalized below.

Section 56.13021 provides, in pertinent part, that "suitable locking devices shall be used at connections ... between high pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard." (Emphasis added). The refractory service process (discussed in further detail below), involves the process of "chipping" away castable material inside preheaters and kilns by using pneumatic air guns. SRI's air guns are powered by compressed air. The compressed air is fed through an incoming hose into the main line in each of two Y-type quick connectors. Each connector splits the compressed air into two outgoing hoses that carry the compressed air to the air guns. On March 5, 1996, MSHA inspector Mike Davis observed that a clip used to lock an outgoing hose to the Y-connector was missing.

At the hearing, Davis acknowledged two conditions that are required to sustain the cited violation. Namely, the incoming hose to the Y-connector must be connected to the air compressor to create the potential "connection failure," and, the outgoing hoses must be at least 3/4-inches in inside diameter. The Secretary has failed to satisfy his burden of establishing that either of these conditions existed at the time of the cited violation. At the time of the inspection, SRI foremen, Jack Kennedy, advised Davis that the air guns had been taken out of service for cleaning, and that the incoming air hose was not attached to the compressor. However, Davis did not check the compressor, which was located outside of the preheater, to determine if the hose was connected. Thus, the evidence is inadequate to support a finding that the missing clip constituted the requisite connection failure hazard to support the cited violation.

Moreover, SRI asserts, although the incoming hose off the compressor is 3/4-inch inside diameter, the split outgoing hoses are only 1/2-inch inside diameter. In support of its assertion, SRI demonstrated a Y-type quick connector at the hearing that had a 3/4-inch incoming fitting and two 1/2-inch outgoing fittings. SRI

explained this is a standard Y-connector design so that the compressed air supplied through the ¾-inch hose can be efficiently transferred to the two narrower ½-inch hoses without a diminution in air pressure.

In addition, as demonstrated at trial, it is difficult to determine the inside diameter of the subject high pressure air hoses solely through observation because of the thickness of the outer jackets. At trial, Davis admitted he did not compare the cited hose to other ¾-inch or ½-inch hoses to obtain a basis for comparison to ensure the outgoing hoses were, in fact, ¾-inch inside diameter. Thus, the Secretary has failed to establish, by a preponderance of the evidence, that section 56.13021 applies. Consequently, Citation No. 4448251 is vacated.

Preliminary Findings of Fact  
for Citation No. 4448250

Remaining for disposition is the Secretary's proposed \$128.00 civil penalty for Citation No. 4448250 that alleges a significant and substantial (S&S) violation of the mandatory safety standard in section 56.11001, 30 C.F.R. § 56.11001. This standard requires that "[s]afe means of access shall be provided and maintained to all working places." The Secretary alleges SRI failed to provide its employees with safe access to the inside of the preheater during the castable removal process.

MSHA's concern with respect to the hazards associated with the removal of castable in this case was heightened as a result of a fatal accident, involving SRI employees, that occurred at another location on February 9, 1996, shortly before the issuance of the subject citations on March 5, 1996. In that incident, which occurred at the North Texas Cement Company (NTCC) mine site in Midlothian, Texas, an entire portion of castable liner around a portal door opening, measuring approximately 12 inches thick, by 10 feet wide, by 12 feet long, fell and struck SRI employees, killing one and seriously injuring another.<sup>1</sup> The cause of this accident is still under MSHA investigation.

Refractory is material that will withstand extreme heat and abrasion, and is typically used in preheaters and kilns. As noted above, SRI is a distributor of refractory product, buying directly from manufacturers and selling to end-users for use in

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<sup>1</sup>Although the NTCC accident has been referred to as a double fatality, one victim was killed as a result of the castable collapse. The other victim of this accident died during the course of treatment for his leg injuries. However, the cause of death apparently was not related to the accident.

refractory linings in various heat enclosures. Refractory material includes "castable", which is a concrete mixture anchored to steel base plates, that lines the interior ceiling and walls of the preheater or kiln, where bricks cannot be used because of curvature. SRI contracted with Texas Lime Company (TLC), located in Cleburne, Texas, to recondition TLC's No. 5 preheater. The preheater is used to preheat limestone before the limestone is heated in the kiln.

In resolving the issue of "safe access", the construction and dimensions of TLC's No. 5 preheater are significant considerations. The preheater is constructed in a circular pattern with an outer circle of 29'4" in diameter and an inner circular roof area of 20'4½" in diameter. The inner, circle roof is wrapped with ten bullnose modules constructed of refractory castable material. Limestones, ranging from baseball to softball in size, enter the preheater from ten conveyor belts that drop limestones onto the ten bullnose modules located around the perimeter of the preheater.

The inner circle height from I-beams to the preheater floor is approximately 4 feet. However, this distance is diminished by SRI's placement of a temporary platform over the preheater floor that is installed in order to level the slope in the floor. Thus, the pertinent distance from the I-beams to the platform below is no more than 3½ feet.

The outer circle height from the bottom (lowest part) of the bullnose modules to the preheater floor is approximately 30 inches. Each bullnose module is approximately 20 inches thick at the bottom and extends up the outer diameter of the inner circular roof area a distance of several feet. Each module is 7½ inches in length at the outer perimeter. Each module is separated by a dry joint. Thus, removal of a castable bullnose module with jack hammers does not compromise the structural integrity of the adjoining modules.

The refractory castable material comprising the bullnose modules is anchored to steel base plates by a system of two alternating types of anchors: (i) V-type stainless steel alloy anchors welded to steel base plates; and (ii) refractory or ceramic, ribbed brick anchors held in place by stainless steel alloy clips welded to steel base plates. The ribbed brick anchors are located on 12 inch centers with V-type anchors welded to the base plates between the brick anchors. The castable includes small nail-like brads mixed with the concrete material to provide added strength.

The inner circular roof is constructed primarily of ceramic brick (3" x 4" x 9" long) hung from steel I-beams placed on 8 inch centers. An expansion joint separates the ceiling from the bullnose modules to prevent the ceiling, which expands during the heating process, from pushing against, and damaging the bullnoses. Thus, removal of the ceramic ceiling bricks does not compromise the structural integrity of the bullnose modules.

Because the round ceiling is constructed with 3" x 4" brick rectangles, castable plugs 9" in depth are poured to finish out the smooth circle in order to form the expansion joint between the inner diameter roof and the modules. Layers of lightweight castable and insulating castable are poured over the brick and castable plugs.

SRI contracted with TLC to remove the complete brick ceiling section of the No. 5 preheater that was supported by the 8 inch centered I-beams. This was accomplished by SRI personnel knocking the castable and brick out from above while they stood on the I-beams outside, and on the top of, the preheater. SRI also contracted to remove the castable liner material from 4½ of the 10 bullnose modules surrounding the inner most preheater ceiling area.

All of the brick, and approximately ninety-eight percent of the insulating castable, were removed while working from the roof using a nail bar, chipping hammer and brick hammer. The small portion of the remaining castable roof, that could not be accessed from above because of a walkway located over a portion of the preheater, was removed from below by standing or kneeling on the preheater floor.

SRI's foreman, Jack Kennedy, testified regarding his method for determining whether castable is safe to work under. Initially, Kennedy observes the castable to determine if there are any cracks, missing or sagging pieces, or any indications the castable has pulled away from the steel anchored base plates. Next, he "sounds" the castable, by hitting it with a two-pound hammer in several places, to see if it sounds hollow or has a ring to it. Kennedy stated both he, and the TLC plant inspector, had "sounded" the bullnose module castable prior to entering the No. 5 preheater. MSHA inspector Davis conceded that he has used the same "sounding" methods "a thousand times" to determine if castable is stable and well secured. (Tr. 222-23).

On February 29, 1996, Inspector Davis began an inspection of TLC's limestone facility in Cleburne, Texas. On March 5, 1996, during the course of his TLC inspection, Davis arrived at the preheater area where he was informed by TLC's plant engineer,

Tom Hoff, that SRI was replacing castable in the No. 5 preheater. Davis proceeded to inspect SRI as an independent contractor performing refractory service on mine property.

Hoff accompanied Davis to the top of the preheater where Davis met Kennedy. Davis observed that SRI employees had already removed a majority of the ceramic ceiling (roof) section of the preheater. Davis was informed the center portion of the ceiling had been removed by SRI personnel from the top while they stood on top of the I-beams. At this time, Davis observed men inside the preheater, standing in the center on the work platform that was installed to level the preheater floor. The men were chipping the castable liner with jack hammers from the inside of the circle in an outward direction towards the outside of the preheater ring. The castable material lined the ceiling, as well as the outer walls, and was approximately 12 to 14 inches thick.

Davis subsequently observed an SRI employee climb out from the shell of the preheater through an opening in the ceiling where the castable or brick had been removed. The employee exited the preheater by hoisting himself up a distance of approximately 3½ feet onto the I-beams in an area where the I-beams, normally spaced 8 inches apart, had been moved to create an opening of approximately 2½ to 3 feet. The employee then walked approximately 3 to 4 feet on the I-beams to a walkway, where he stepped over the walkway handrails and exited on the walkway. Davis testified that Kennedy had informed him that employees had been accessing the preheater in this manner for several hours.

Davis concluded that an employee entering or exiting in such a manner could fall from the I-beams to the preheater floor below. Davis concluded a slip and fall hazard of approximately 4 to 6 feet existed depending on whether the employee fell from the I-beams, or, from the walkway as he was attempting to climb over the handrail. Davis took a photograph of the area where the I-beams had been separated which was admitted into evidence as Exhibit P-7.

Based on his observations, Davis issued Citation No. 4448250 for SRI's alleged failure to provide a safe means of access to the workplace by allowing men to enter the preheater through the overhead framework in violation of section 56.11001. Davis considered this condition to be S&S in nature. To abate the citation, Davis required SRI to install a ladder from the preheater floor to the walkway by removing a cross piece from the handrail and securing the ladder to the walkway.

Davis was then advised that the primary means of access to the preheater was by using an access door to traverse an 8 foot sectional ladder that had been placed down a vertical passageway.

Davis observed the passageway had only elbow room from side to side in that it was only approximately 42 inches in width. The area behind the ladder was wide open space into the preheater. As Davis descended, he felt the second rung below the slip joint, located approximately 6 feet above the preheater floor, bow under his weight of 170 pounds. Davis concluded the ladder was not sturdy enough for commercial use. Thus, Davis concluded it was reasonably likely the ladder will fail, causing an employee to strike his head on the castable, metal liner or base of the ladder. Consequently, Davis included this condition in Citation No. 4448250 as further evidence of the cited section 56.11001 violation.

As Davis reached the bottom of the ladder, he observed employees chipping remaining castable (that could not be reached from above because of the walkway) from the center of the preheater toward the exterior wall and expansion joint. The castable hung down 12 inches from the ceiling. Davis estimated the castable was approximately 3 to 4 feet deep from the inside edge of the castable to outside wall. It is not clear whether Davis was observing removal of 9 inch castable plugs, removal of bullnose modules, or both.

As Davis observed these individuals working, he noticed others accessing the preheater by climbing down the access door ladder, and then crawling under the castable material to be removed so that they could turn around and chip the castable in the direction of the outside perimeter wall. Davis concluded there was no means of exiting the preheater by the ladder in the access door without traveling under castable that had already been compromised during the ceiling removal process. Davis' conclusion was based on his belief that there was no area of castable that was undisturbed during the demolition process because the entire center area (inner circle ceramic brick ceiling) had been removed. Thus, Davis felt the perimeter castable on the bullnose modules had been compromised. However, as discussed below, Davis' conclusion concerning the lack of the modules' structural integrity, fails to consider the effect of dry joint between each bullnose module as well as the expansion joint between the ceiling and the bullnose modules.

Davis did not believe chipping away castable was hazardous because employees were using pneumatic air guns to chip straight ahead at the castable, and, the castable over their heads had already been removed from above. Davis explained, however, that it was hazardous for employees to crawl underneath castable that was in the process of being chipped away.

Davis concluded that SRI "could have blocked and braced that area of the castable that they were crawling under" to provide a safe system of temporary support. (Tr. 138-39). In view of the

recent fatality of an SRI employee at NTCC, Davis concluded that it was reasonably likely that an SRI employee entering or exiting the preheater under castable will suffer serious or fatal injuries by a sudden castable collapse. Consequently, Davis determined that SRI's failure to designate a discrete access area for travel under castable, by providing temporary structural support, constituted an additional failure to provide safe access in violation of section 56.11001 in Citation No. 4448250.

Further Findings and  
Conclusions of Law

Safety standards cannot possibly contemplate every condition encountered during the mining process. Thus, as a general proposition, mandatory safety standards must be broadly adaptable to a myriad of circumstances. Kerr McGee Corp., 3 FMSHRC 2496, 2497 (November 1981). Here, MSHA seeks to broadly apply its safe access standard to the refractory industry.

The policy of broadly applying mandatory standards is outweighed by the due process requirement that application of a mandatory regulatory safety standard must afford an operator adequate notice. Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (December 1982). Thus, standards, as applied, cannot be "so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." Id. When faced with whether MSHA's application of a standard provides adequate notice, the Commission has concluded that the test is whether a reasonably prudent person familiar with the mining industry (*i.e.*, the refractory industry), and the protective purposes of the standard, would have recognized the specific prohibition or requirement of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990).

Section 56.11001 states that "[s]afe means of access shall be provided and maintained to all working places." Citation No. 4448250 cites three distinct conditions that allegedly constituted unsafe access to the preheater floor (the workplace). Namely, use of a ladder that was too light and bowed at the expansion joints; traveling under castable to position oneself to chip away at the castable material; and climbing through overhead framework to access the preheater floor. Thus, the Commission's "prudent person" test must be applied to determine if these conditions were properly cited under section 56.11001.

## The Sectional Ladder

Obviously, a ladder is a fundamental means of accessing a workplace. Consequently, the application of the safe access standard to the condition of a ladder creates no due process notice issues. Thus, with respect to the fact of occurrence of the cited violation, use of an unsafe ladder to access a workplace would constitute a violation of section 56.11001.

In determining whether the ladder was properly characterized by Davis as "unsafe," the Commission has stated that equipment is "unsafe" when a reasonably prudent person familiar with industry standards, and the factual circumstances surrounding the allegedly hazardous condition, would recognize a hazard warranting corrective action. 4 FMSHRC at 2129. I credit Davis' testimony that the 8 foot ladder in preheater access door was a sectional ladder that bowed under Davis' weight at the second rung below the slip joint. Although subjective in nature, I also credit Davis' conclusion that this sectional ladder was not fit for its intended use. In this regard, the respondent does not contend that the ladder was rated as a Type I ladder manufactured for heavy duty commercial applications. Since the ladder was not intended for heavy use, the Secretary has met his burden of establishing a lack of the requisite "safe access" mandated by section 56.11001.

A violation is properly designated as significant and substantial (S&S) in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury or an illness of a reasonably serious nature. Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1 (January 1984); United States Steel Mining Company, Inc., 7 FMSHRC 1125 (August 1985). Although Davis felt the ladder bow under his weight, the subject ladder, photographed in Exhibits R-9 through R-12, is constructed of steel and does not appear to be defective. In this regard, Davis did not observe any structural defects in the ladder's rungs. The sensation of "give" on a ladder's rung, especially near a slip joint, does not mean that it is reasonably likely that a failure of the rung will occur. Although the ladder was a technical violation, in that it did not provide "safe access" as contemplated by section 56.11001, the evidence fails to establish that continued use of the ladder was reasonably likely to result in serious injury. Consequently, although the fact of the section 56.11001 violation with respect to this ladder shall be affirmed, Citation 4448250 shall be modified to delete the S&S designation.

### Traveling Under Castable

The Commission has noted there are various factors that dictate what a reasonable person would do under particular circumstances. In this case, the pertinent factors include accepted safety standards in the refractory service field, considerations unique to the refractory industry, and the circumstances at the No. 5 preheater. See U.S. Steel Corp., 5 FMSHRC 3, 5 (January 1983).

Here, the castable was anchored with a system of steel based plates and steel hangers and clips, not unlike the pouring of reinforced concrete. The castable was further strengthened with steel nails in the concrete mixture. This method of castable installation is the industry standard. With the exception of the NTCC accident, it has never been known to fail.

In this regard, SRI called several witnesses to testify that they had never heard of castable falling down in large pieces. Kennedy testified, in his 27 years of experience in the industry, he has never seen or heard of a large structural failure. Likewise, Mike McPherson, who was employed for 34 years by A.P. Green, a company that develops, markets and installs refractory products, was not aware of any other incident comparable to the NTCC accident where castable fell in large pieces. Mark Stanfield, President of SRI, testified in his 38 years in the refractory business, he has never known of a failure similar to that which occurred at NTCC. Finally, Gerald Forrester, SRI's safety consultant, attended MSHA health and safety conferences arising out of the NTCC incident. Forrester stated MSHA officials were unaware of any previous event like the NTCC accident.

In view of the un rebutted testimony of McPherson and Forrester, the Secretary has failed to show that the unexplained systematic failure of castable at NTCC is a basis for a blanket prohibition of travel under any castable, under any circumstances, during the removal process. The enclosed work environment in a preheater or kiln is analogous to the environment in underground mining. While this case concerns the issue of safe access to a preheater rather than travel under unsupported roof, the similarities are inescapable. By analogy, surely MSHA would not assert that travel under roof supported by roof bolts in a given mine should be prohibited simply because of an isolated roof fall of a roof supported by roof bolts at another mine site.

In this case, it is important to note that the respondent was not cited because SRI employees were observed crawling under a discrete section of castable that had been compromised by the "chipping" removal process. Rather, Davis considered all

castable to have been compromised as a consequence of the ceramic brick ceiling removal. The perimeter castable comprised the bullnose modules. However, only 4½ of the 10 bullnose modules were replaced. These bullnose modules, under which personnel crawled a distance of approximately 20 inches in order to reach the inner circle so as to work in an outward direction, were separated from each other by dry joints. The bullnose modules were also separated from the ceramic brick ceiling by an expansion joint.

Despite the utilization of separation joints in the bullnose module construction design, Davis did not view the bullnose modules as separate units. (Tr. 155). In addition, because "the entire core" consisting of the ceramic bricks and the expansion joint had been removed from the inner perimeter of the bullnose modules, Davis did not consider any portion of the bullnose castable to be "untouched." (Tr. 151).

However, the evidence fails to support Davis' concern that virtually all of the bullnose castable had been compromised. Rather, given the circular configuration of the preheater, SRI employees could access the preheater under various areas of castable where little or no removal activity had occurred, or, under areas where castable had been removed. As noted, the respondent was not cited because personnel accessed the preheater under a particular, identifiable area where the structural integrity of the castable was in doubt.

In his reply brief, the Secretary asserts the NTCC fatality placed SRI on notice that greater safety measures were required. However, the accident at NTCC was an isolated, and as yet unexplained, event. Moreover, the circumstances in this case are significantly distinguishable from the NTCC case. NTCC involved a kiln that was lined entirely with castable material. Thus, the victims in NTCC were surrounded by castable. The injuries occurred as a result of a systematic failure of an entire section of castable. While that NTCC accident is apparently still under MSHA investigation, the structural failure due to metal fatigue of the steel clips and/or V-type anchors, as a cause of the collapse of an entire castable section, has not been ruled out.

By contrast, in this case, Davis testified that he did not consider the removal of castable in the No. 5 preheater as hazardous because the air hammer removal is a "chipping" process "that doesn't generally bring down really large pieces." (Tr. 131). Davis also did not consider this chipping process dangerous because the preheater ceiling had been removed. Thus, unlike NTCC, employees were not surrounded by castable. Thus, SRI's abatement in NTCC, which required use of remote controlled equipment, in an enclosed kiln where a large area of castable had already failed, is not relevant to the issue of notice in the

instant case, where only relatively small areas of castable were being removed. Thus, I do not view the circumstances surrounding the fatal accident as comparable or otherwise material in this case.<sup>2</sup>

Finally, MSHA's difficulty in identifying a suitable mandatory standard that would provide adequate notice to a person familiar with the refractory industry that travel under castable is prohibited is illustrated by Citation No. 4447554 issued on April 9, 1996, as a result of the NTCC fatality.<sup>3</sup> That citation initially charged SRI with a violation of the mandatory standard in section 56.16009 that requires "[p]ersons [to] stay clear of suspended loads." Apparently, however, MSHA concluded that castable is not properly characterized as a "suspended load" because the citation was ultimately amended to reflect an alleged violation of section 56.11001 for failure to provide safe access. Thus, MSHA's uncertainty with regard to the proper mandatory standard to apply, is a further indication that its enforcement efforts in this case have failed to provide SRI with the notice required to pass constitutional muster.

Accordingly, I am unpersuaded that a reasonably prudent person familiar with the refractory castable removal process would have recognized that crawling under castable, a material comparable to reinforced concrete,<sup>4</sup> constituted unsafe access to working places as contemplated by section 56.11001. Consequently, this basis for the cited section 56.11001 violation in Citation No. 4448250 shall be deleted.

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<sup>2</sup>On March 3, 1997, SRI filed a written objection to the copy of Citation No. 4447554 issued on April 9, 1996, that was submitted as an attachment to the Secretary's March 1, 1997, reply brief. This citation concerns the NTCC fatality. SRI objects to this citation, which was not proffered at trial, as being outside the record. The citation merely documents record testimony and does not unduly prejudice or surprise SRI. While not admitted as an exhibit, the citation is relevant in this proceeding and shall be accepted as part of the Secretary's reply brief. Accordingly, SRI's objection is overruled.

<sup>3</sup>Although the fatality occurred on February 9, 1996, prior to the March 5, 1996, issuance of the subject citations, Citation No. 4447554 was issued after the citations in issue. Thus, it is the occurrence of the accident, rather than Citation No. 4447554, that is relevant on the question of notice.

<sup>4</sup>Forrester, a former materials engineer with the Army Corps of Engineers, equated the structural strength of castable with that of concrete bridges and highways. (Tr. 513-14, 525).

Use of Overhead I-Beams to  
Access the Preheater

We next address whether the prohibition in section 56.11001 is applicable to accessing and departing the preheater floor by traversing the I-beam framework under these circumstances. As an initial matter, it should be noted that the primary, and normally exclusive, access into the preheater is by way of a ladder in the vertical passageway leading from the access door. The I-beams were used as a secondary means of accessing the preheater floor only after the ceiling bricks had been removed. The I-beams are less than 40 inches above the temporary platform that had been installed to level the preheater floor.

Ordinarily, the Secretary's interpretation of his own regulations should be given deference ... unless it is plainly wrong" so long as it is "logically consistent with the language of the regulation and ... serves a permissible regulatory function." Buffalo Crushed Stone, 19 FMSHRC \_\_ (February 1997) (citations omitted). It follows that the Commission normally should not substitute its own reasonable interpretation of a mandatory standard if the Secretary's interpretation of that standard is also reasonable. Thunder Basin Coal Company, 18 FMSHRC 582, 592 (April 1996) (citations omitted).

However, the Commission's deference policy is not without its limitations. While it is difficult to quarrel with the goal of "safe access," the Secretary's application of such a broadly worded mandatory standard cannot be so obscure as to deprive an operator of adequate notice of the condition or practice sought to be prohibited. Ideal Cement, 12 FMSHRC at 2415-16; see also Thunder Basin, 18 FMSHRC at 592 (dissenting opinion of Commissioner Marks).

The refractory removal process is a demolition project. Such projects do not always lend themselves to conventional means of passage such as stairs, ladders or platforms. I am unconvinced that a person familiar with the refractory service industry would recognize that entering the preheater, as a secondary means of access, from I-beams above, to the preheater platform floor less than 40 inches below, was a violation of the safe access provisions of section 56.11001. Such access would facilitate the transfer of tools and equipment, and may be a preferred method of entry to climbing down a ladder in some instances.

Significantly, the Secretary has not alleged that standing on the I-beams to remove the ceiling brick from above was unduly hazardous or otherwise prohibited conduct.<sup>5</sup> Accordingly, I conclude that section 56.11001 cannot be applied to prohibit this method of accessing the platform that was temporarily installed over the sloped preheater floor:

The Secretary has proposed a civil penalty of \$128.00 for Citation No. 4448250. Given the deletion of two of the three conditions that were cited as a basis for the section 56.11001 violation, the deletion of the S&S designation, the low gravity (which is also reflected by the relatively small civil penalty initially proposed by the Secretary), and the moderately low degree of the respondent's negligence, a civil penalty of \$75.00 shall be imposed.

As a final note, I recognize the Secretary's legitimate concerns regarding hazards that are unique to the refractory service industry. However, there is no mandatory standard that addresses the methods by which castable should be removed, or, that requires supplemental support of castable during the removal process. These safety concerns can best be addressed through the notice and comment provisions in the rulemaking process.

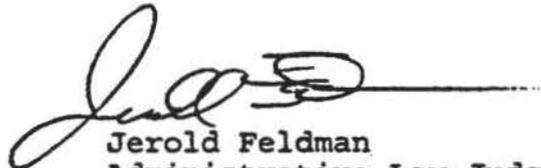
#### ORDER

IN VIEW OF THE ABOVE, the parties' settlement agreement wherein the respondent has agreed to pay a civil penalty of \$56.00 for Citation No. 4448253, and a \$50.00 civil penalty for Citation No. 4448252, IS APPROVED. The Secretary's motion to vacate Citation No. 4448253 IS GRANTED. Pursuant to the bench decision, formalized herein, Citation No. 4448251 IS VACATED. IT IS ORDERED that Citation No. 4448250 as modified herein, including deletion of the significant and substantial designation, IS AFFIRMED. The respondent shall pay a civil penalty of \$75.00 for Citation 4448250.

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<sup>5</sup>Applying the Secretary's theory of this case, accessing the ceiling of the preheater, *i.e.*, the workplace, via the I-beams to remove the ceramic tiles, would be prohibited by section 56.11001. Such an approach ignores the unique circumstances inherent in demolition work.

ACCORDINGLY, IT IS FURTHER ORDERED that the respondent pay a total civil penalty of \$181.00 in satisfaction of the subject citations. Payment shall be made to the Mine Safety and Health Administration within 30 days of the date of this decision. Upon timely receipt of payment, this matter IS DISMISSED.



Jerold Feldman  
Administrative Law Judge

Distribution:

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\mca

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

**OFFICE OF THE ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10TH FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041**

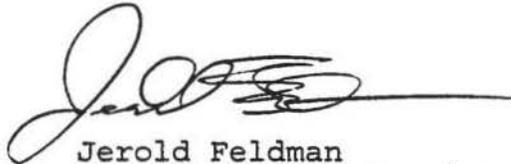
March 21, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION, (MSHA), : Docket No. CENT 96-123-M  
Petitioner : A. C. No. 41-00072-05501 R5U  
v. :  
: Plant & Quarry  
SOUTHERN REFRACTORIES, INC., :  
Respondent :

**ORDER CORRECTING DECISION**

Before: Judge Feldman

This order corrects the decision released in this proceeding on March 10, 1997. 19 FMSHRC \_\_\_. The decision erroneously ordered the respondent to pay a \$56.00 civil penalty in satisfaction of Citation No. 4448253. However, Citation 4448253 was vacated. The decision **IS HEREBY CORRECTED** to reflect that the respondent **IS ORDERED TO PAY** a civil penalty of \$56.00 in satisfaction of Citation No. 4448249 instead of Citation No. 4448253.



Jerold Feldman  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 12 1997

WHAYNE SUPPLY COMPANY, : CONTEST PROCEEDING  
Contestant :  
v. : Docket No. KENT 94-518-R  
: Order No. 4011758;1/25/94  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Job No. 17A  
ADMINISTRATION (MSHA), :  
Respondent :

ORDER OF DISMISSAL ON REMAND

Before: Judge Melick

This Contest Proceeding is moot. The Secretary failed to seek timely review of this proceeding before the Commission. The decision of the administrative law judge vacating the underlying order is therefore final. Under the circumstances this case on remand is dismissed.



Gary Melick  
Administrative Law Judge  
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 12 1997

STEVE NAPIER, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. KENT 96-269-D  
: MSHA Case No. BARB CD 96-03  
BLEDSOE COAL CORP., :  
f/k/a BITUMINOUS - LAUREL : No. 4 Mine  
MINING, INC., : Mine ID 15-11065  
Respondent :

**DECISION**

Appearances: Neville Smith, Esq., Manchester, Kentucky,  
for the Complainant;  
Julie O. McClellan, Esq., Marco M. Rajkovich, Jr.,  
Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky,  
for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based on a Complaint filed by Steve Napier alleging that he was discriminated against by Bledsoe Coal Corporation (Bledsoe) in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 (The Act). Pursuant to notice the case was heard in Richmond, Kentucky on October 30, and 31, 1996. On December 13, 1996, Complainant filed a Brief and a Proposed Decision containing Proposed Findings of Fact, and Respondent filed Proposed Findings of Fact and a Brief. On January 8, 1997, Complainant and Respondent each filed objections to the other party's proposed findings of fact.

II. Bledsoe's Operation

Bledsoe Coal Corporation operates the Number 4 Mine, an underground coal mine. Bledsoe's roof control plan provides for entries, 20 feet wide, to be cut to a maximum depth of 40 feet. In normal mining operations, after the entry is cut by the continuous miner, it is bolted by a Fletcher single head bolter by drilling holes in the roof and installing bolts at four foot centers in the sequence illustrated in Respondent's Exhibit No. 1.

### III. Complainant's Evidence

Steven Napier had more than five years experience as a roof bolter prior to October 19, 1995, operating a Galix 300, and Fletcher single head bolter. During that period of time, Napier never received any complaints from any of his employers concerning his roof bolting. Jerry Pierson, a mine foreman at Union Mining where Napier had worked as a bolter, testified that he would judge Napier ". . . as equal, if not better, as anybody that ever worked for me" (Tr. 190).

On October 19, 1995, Napier was interviewed by Ron Helton, mine manager at Bledsoe's No. 4 mine, for a position at Bledsoe as a bolter. Helton told Napier that he was being hired "on a 90-day trial" (Tr. 37), and that he was required to insert 200 to 250 bolts per 8 hour shift.

Napier commenced employment with Bledsoe on Thursday, October 5, 1995. On the first day that Napier actually worked, he removed rock from a roof fall that had left a void of 30 feet into the roof. He was then assigned to work as bolter on a Fletcher single head bolter in the third shift, which began at 3:00 p.m., and ended 11:30 p.m. According to Napier, in general, during the time he worked as a roof bolter at Bledsoe none of his supervisors voiced any complaints about his work. Napier testified that about a week prior to October 25, Clifford Sams, who was his Section Foreman for two or three days, told him that he (Napier) ". . . was doing alright as far as he [Sams] could see" (Tr. 105). According to Napier, in the same time period Harold Hacker, the mine General Foreman, watched him bolt for about five minutes and said "keep the good work up" (Tr. 103).

According to Napier, during the time he worked for Bledsoe, until October 25, 1995, he had seen draw rock on a couple of occasions in the mine. Each time he saw the draw rock he pulled it down himself.

Napier testified that prior to October 25, the canopy on his the bolter had been removed. Napier indicated that a mechanic, whose first name was Rodney and whose last name Napier did not know, told him that the bolter could not clear the low roof with the canopy on. According to Napier, he asked Rodney to put the canopy on, and Rodney complied, but later on it was removed again.

According to Napier, during the time that he was working underground until October 25, he saw entries that had been cut between 42 to 60 feet.<sup>1</sup>

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<sup>1</sup>Napier's testimony is confusing regarding the depth of the cuts that he observed that exceeded 40 feet. He indicated that

On October 25, 1995, Napier worked the third shift which was extended four hours into the morning of October 26. For the first eight hours of Napier's shift, his supervisor, was James E. Owens, the section foreman. According to Napier, sometime during the shift, he noted draw rock in the roof of the Number 4 entry. He had also noted that the entry extended 60 to 65, feet rather than 40 feet as provided by the roof control plan. Napier testified that he brought these two conditions to the attention of Owens, and that Owens told him that ". . . if I complained or said anything else about a deep cut, that I would be fired right on the spot, and for me to get my butt back up to work" (Tr. 85). Napier testified that when he was traveling out of the mine in a scoop bucket, Owens told him that ". . . if he would hear me say anything about a deep cut, that he would fire me" (Tr. 96). Napier then left the mine and went home.

The next day, when Napier arrived at the mine, another foreman, Clifford Sams, told him that Clyde Collins, Bledsoe's Superintendent, wanted to see him. Napier related that he went to see Collins, who asked him how many bolts he had put up the prior shift. Napier said that he told Collins that he put up 200 to 250 bolts. According to Napier, Collins told him that he had received reports that Napier had not been keeping his work up. According to Napier, Collins told him that he was fired.

#### IV. Discussion

##### A. Napier's Position

It is Napier's position in essence, that Collins disciplined him on October 26, because of information furnished by Owens that Napier was not competent to perform his work.<sup>2</sup> Napier argues

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Footnote 1 cont'd.

an evening that was not October 25 he saw a deep cut. He said he counted 19 rows and the deep cut was about 76 foot (Tr. 138). He agreed with Respondent's counsel that it "would be seventy-six foot cut because there's generally one four foot per bolt . . . ." (Tr. 138). However, at a point later on in his cross examination he was asked whether he counted the rows and he indicated that the bolt machine operator told him that "I've got 19 rows of bolts in this place here" (Tr. 139).

<sup>2</sup>It is significant to note that there is no evidence that Collins had the authority to fire Napier. Collins' testimony that he did not have such authority was not contradicted or impeached. Further, there is no evidence that Collins had knowledge of any safety complaints made by Napier. Moreover, Napier was not subject to any disparate treatment. The same evening that Collins spoke to Napier, he also told another

that Owens wanted to get rid of him because he had complained about draw rock, and a deep cut. Napier cites Owen's testimony that a supervisor who permitted deep cuts at Bledsoe would be fired. It is thus argued that since Owens had just returned from a week off for permitting a safety violation to have occurred in his section, he would have been fired if Bledsoe's management would have become aware of a deep cut.

#### B. Applicable Case Law and Analysis

The Commission, in Braithwaite v. Tri-Star Mining, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, Tri-Star, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Pasula, 2 FMSHRC at 2800; Robinette, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

Hence, in order for Napier to prevail, he must first establish that he had engaged in protected activities. In general, Napier testified to having observed draw rock, and entry cuts in excess of 40 feet. He also testified that he had to operate a roof bolter without a canopy. These conditions could be found to be within the preview of safety concerns. However,

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Footnote 2 cont'd.

employee, Steve Sizemore, that he was not doing his job, and instructed him to talk to Ron Helton, Bledsoe's General Superintendent who had the authority to fire employees.

although Napier testified to having observed these conditions prior to October 25, at no time prior to October 25, did he bring to the attention of any of Bledsoe's agents the existence of these conditions, or his concerns in these regards.

According to Napier, on the last night that he worked, i.e., October 25, he did complain to Owens regarding the deep cut, and draw rock that he had observed. Napier said that in response, Owens told him "that if I complained or said anything else about a deep cut, that I would be fired right on the spot, and for me to get my butt back up to work" (Tr. 85). On the other hand, Owens, when asked regarding this complaint, stated that Napier never complained to him about deep cuts or draw rock. I observed the demeanor of Napier and Owens, and found Owens to be more credible on this critical point. Also, Napier failed to produce any witnesses to support his observations of draw rock and deep cuts<sup>3</sup>, and his having reported these conditions to Owens. According to Napier, when he complained to Owens on October 25, about the deep cuts and the draw rock, Joe B. Smith and another roof bolter by the name of Lonnie Hill, were located approximately eight feet away. However, neither Hill nor Smith corroborated Napier's version. Hill was not called to testify on Napier's behalf, and Smith testified that he did not hear Napier report deep cuts to Owens.

Further, in general, Napier's testimony concerning the length of the deep cut taken on October 25, and the number of bolts he installed that shift is both confusing and contradictory, and hence unreliable. Initially, Napier was asked how many 30 inch holes he had drilled and he stated "I would say approximately 120 that night" (Tr. 62). He said that all of these 120 holes were in the No. 4 heading (Tr. 63). Later on his testimony he indicated that he had drilled holes in a break (Tr. 69). Napier indicated that the second time the miner went into the Number 4 heading, it made a cut that was between 60 and 65 feet deep. He was asked how many rows of bolts he had put in this heading, and he indicated that he put up 15 or 16, but he was not positive, and that "I didn't count the bolts that day" (Tr. 89). A little bit later on in the questioning, he was asked how many bolts he put in, and he said that after he put 40 bolts, he put up 10 or 12 more rows, each row consisting of four bolts (Tr. 90). On cross examination, he was asked whether it was

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<sup>3</sup>In this connection, I note that Joe B. Smith, a miner operator who worked on the second shift, testified that he had never taken any deep cuts. Also, Bledsoe's witnesses, Owens, and David Wayne Osborne, who worked in the 002 Section, and Sams who worked in the mine daily in October 1995, all testified that they never saw any deep cuts.

correct that he put up 40 bolts, and then put up 10 to 12 more rows which would have made it an 80 foot deep cut, and he answered as follows (Tr. 143):

A. Well, I said between 10 and 12. I bolted 10 rows -- 5 rows up, I think. That's when I came back and I bolted the two. That's when they had me to back out because they was going to cut the break through. Okay. After they cut that break through, then that's when they went back up in there and cut that heading again. And I wasn't even done with it yet.

Q. But you're not sure how many more rows of bolts you put up?

A. No, not exactly sure, no.

Q. Well, then how do you know how deep the cut was? I mean were you just looking at it and you were thinking that it was probably 60 to 65 feet?

A. Right (Tr. 143-144).

In subsequent questioning, on cross-examination, he indicated that he put up 19 rows in the heading (Tr. 144-145). In follow-up questioning he was asked whether he counted the 19 rows and he indicated that he did (Tr. 145-146). Continued cross-examination further confuses the matter. His testimony is as follows:

Q. Now on this night, the night before you were sent into see Clyde Collins, first you said that there was about 60 or 65 and you were just judging by looking, but now is your testimony that you weren't just judging by looking, that you actually counted and you put up 19 rows? I just want to make sure I understand you.

A. Right. I put up about 18 or 19 rows, but I didn't add them up to see if it was actually 76 foot. I just knew it was over 40 foot, and I figured, you know, without adding up, it was about 60, 65 foot. I didn't add it up to make sure it was deep. But I really didn't think nothing else about it.

HON. AVRAM WEISBERGER: You didn't really think what?

\* \* \*

MR. NAPIER: I said I really didn't think too much

about it. I just didn't add it up to make sure that it was 76 feet. You know, I just took a guess that's what it was without adding them up.

Q. Are you saying that you counted bolts that night or not?

A. Yes.

Q. You did count them?

A. Right.

Q. There were 19 rows?

A. 19 rows.

Q. So you weren't just judging by looking when you're saying there was 19 rows of bolts?

A. Right (Tr. 146-147).

The redirect examination of Napier in these regards is also confusing. The pertinent testimony is as follows:

Q. . . . [W]ould you, again, explain the sequence of mining in the Number 4 heading and how you got this 60 to 65 foot figure and these other figures that you've testified about?

A. Okay. When they cut it, they cut it about 60 to 65 foot. That's by me just visually looking at it.

Q. That's the first time they cut it?

A. Right.

Q. Okay.

A. Okay --

**HON. AVRAM WEISBERGER:** You're referring to the area that's in by the break that has 3 R and 4 R in it in Complainant's Exhibit 1?

**MR. NAPIER:** Right. And when I started bolting, I put like five rows up. Then I backed up and --

Q. And that was five rows of two bolts?

A. Right.

Q. Okay.

A. And then I backed up and I started putting two more rows up. The rest of it up here --

HON. AVRAM WEISBERGER: Excuse me. You're going fast. You started then on the two rows on the right?

MR. NAPIER: Right.

HON. AVRAM WEISBERGER: Okay

MR. NAPIER: That's when Eddie told me to back up and start drilling my 30-inch holes because they was going to cut 4 right.

HON. AVRAM WEISBERGER: Where did he tell you to drill the 30-inch holes?

MR. NAPIER: Back in the breaks, back behind.

HON. AVRAM WEISBERGER: In the breaks 3R and 4R, or in the breaks with the 'X'? <sup>4</sup>

MR. NAPIER: Where the 'X' is, the piece where I left off at.

HON. AVRAM WEISBERGER: Sir?

Q. Then what happened?

A. After they cut 4 right, they backed up and went right back into 4 heading again, which was not completely bolted. That's when they cut another 10 or 12 rows deep up in it there.

Q. So that when you first looked at the 4 heading inby the yellow line that's drawn on Exhibit 1 of the Complainant, you estimated it to be 60 to 65 feet deep?

A. Right.

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<sup>4</sup>See Complainant's Exhibit 1

- Q. And then after you did that partial bolting, then the company went back in and cut that same one deeper before it was completely bolted?
- A. That's right.
- Q. And then did you -- was that when you counted rows, or did you ever count rows? I'm not sure about that.
- A. I -- I counted them as -- at the end of the shift when I backed out. When I -- when it was time to go home, that's when I counted by rows back out.
- Q. And did you count them to the point where you had initially bolted the five rows and the two rows?
- A. Yes, sir.
- Q. Did you include that in the count?
- A. Yes. (Tr. 179-181).

Hence, the record evidences confusion and lack of clarity in Napier's testimony regarding the sequence of events on October 25, the depth of the cut that had exceeded 40 feet, when this cut was taken, and the basis for Napier's conclusion that the depth of the cut exceeded 40 feet. I find that this lack of clarity in Napier's testimony tends to taint the credibility of the balance of his uncorroborated testimony, especially that of his alleged conversation with Owens which was contradicted by Owens.

For all the above reasons, I find that Napier has failed to establish that he was engaged in protected activity, i.e., that he communicated safety concerns about draw rock, the lack of a canopy, and deep cuts to Owens. Further, there is no evidence that Napier at any time communicated safety concerns to any of Bledsoe's agents. Although Napier testified that he was fired by Collins, Napier did not allege that he had communicated any safety concerns to him. For these reasons, I find that Napier has failed to establish a prima facie case. (See, Pasula, supra.) As such, his claim of discrimination must fail.

V. Order

It is ORDERED that Napier's Complaint be dismissed, and that this case be DISMISSED.

  
Avram Weisberger  
Administrative Law Judge

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/mh

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 12 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. WEST 96-253
	:	A.C. No. 48-01215-03525
S & M CONSTRUCTION INC., Respondent	:	Docket No. WEST 96-254
	:	A.C. No. 48-01215-03526
	:	Coal Creek Mine

## DECISION

Appearances: Tandra Leonard, Esq., Margaret A. Miller, Esq., (On Brief), U.S. Department of Labor, Office of the Solicitor, Denver, Colorado, for the Petitioner;  
Stephen Kepp, S & M Construction, Gillette, Wyoming, and J. Stan Wolfe, Esq., Gillette, Wyoming (On Brief), for the Respondent.

Before: Judge Weisberger

### Statement of the Case

These cases are before me based upon petitions for assessment of penalty filed by the Secretary of Labor (Secretary), alleging violations of various mandatory safety regulations set forth in Title 30 of the Code of Federal Regulations by S & M Construction Incorporated ("S & M"). A hearing was held on October 22, 1996, in Gillette, Wyoming. On December 9, 1996, the Secretary filed a Post-Hearing Brief. On December 11, 1996, S & M filed Proposed Findings of Fact and Conclusions of Law. On December 26, 1996, S & M Filed a Reply Brief.

#### I. Docket No. WEST 96-254

S & M performs mining operations at the Thunder Basin Coal Company's Coal Creek Mine. After coal is mined and crushed, it is transported to a 200 foot high silo for storage. In order to remove coal dust from the air at various coal transfer points in the operation, a fan pulls the air filled with coal dust through a duct from the silo to a baghouse. The baghouse is approximately 38 feet high, 10 feet in diameter, and is located at the top of the silo. When the air filled with coal dust enters the

baghouse, the coal dust is filtered out of the air by way of 368 ten foot long bags that hang vertically inside the baghouse. A rotating air jet knocks the dust from the bag, and the dust then drops down through a funnel shaped cone where it is expelled from the baghouse through a rotating valve. If the coal dust is not expelled properly throughout the valve, it can accumulate inside the baghouse. If the accumulation of dust reaches a level of five feet and eight inches from the floor of the baghouse, a sensor located at that level inside the baghouse shuts off power to the fan so that air laden with coal dust is no longer being drawn to the baghouse.

On August 27, 1995, Inspector Herbert A. Skeens, inspected the subject site pursuant to an investigation of a fire that had occurred there the previous day. He observed sparks falling from the horizontal beam inside the silo. He issued a section 107(a) withdrawal order covering the silo, an adjacent silo, and a conveyor, but did not allege the violation of any specific mandatory safety standard.<sup>1</sup>

Skeens set forth the following sequence of events based on his investigation<sup>2</sup>: the sensor had tripped the fan on Monday, August 21, 1996; miners tried two to three times to reset the power to the fan without checking to diagnose and repair the problem; several hours later they succeeded in getting the power running but that the sensor tripped the power to the fan again on August 22, 1996; miners tried several times to restart the power without diagnosing or trying repair the problem, but were unsuccessful; the baghouse was unattended from August 22 until August 26; on August 25, a miner detected the smell of burning coal and suspected a fire; the coal silo was emptied and water was sprayed into the silo; and on August 26, smoke was discovered coming from the top of the silo, and firefighters were called from the neighboring black thunder mine, but they could not control the fire. The Campbell county fire department was then called and extinguished the fire in the baghouse.

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<sup>1</sup>S & M did not file any notice of contest of the Section 107(a) withdrawal order pursuant to 29 C.F.R. § 2700.22. Also, the petition for assessment of civil penalty filed by the Secretary seeks a penalty in this case only for Citation No. 4058552 which was issued alleging a violation only of 30 C.F.R. § 77.404(a), but not alleging a violation of Section 107(a) of the Act. Accordingly the propriety of the issuance of the Section 107(a) withdrawal order is not an issue before me, and will not be discussed.

<sup>2</sup>Those persons furnishing information and/or present during the investigation are listed in the appendix to Skeens' Accident Investigation Report (Exhibit P-6).

Skeens issued a Citation alleging a violation of 30 C.F.R. § 77.404(a), which provides as follows: "[m]obile 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."

It appears to be the position of the Secretary as argued by Counsel in her post-hearing brief, and as articulated by Skeens in the citation he wrote and in his testimony, that the baghouse was not in a safe condition. This conclusion appears to be based upon the existence of the following "facts": the sensor had been tripped on August 21 and August 22, coal dust had accumulated in the baghouse to at least the level of the sensor i.e., five feet and eight inches, and that the resulting accumulation was not cleaned up. However, the Secretary has failed to establish the existence of these facts based upon competent evidence. Skeens did not have any personal knowledge of the existence of these conditions. His testimony regarding these conditions was based solely upon information he gathered during an investigation, and inferences he drew from that information. In support of her case, the Secretary did not proffer the testimony of any persons having personal knowledge regarding the existence of the above conditions that are relied upon. Nor is there any competent documentary evidence in the record to support the Secretary's position. S & M introduced in evidence six pages of handwritten notes (Defendant's Exh. R-1) which, according to its representative, are part of an Activity Report prepared by the control room operator. However, the person or persons who prepared this report were not called to testify, and hence there is no explanation in the record for any of the entries, some of which are ambiguous. I thus find that the Secretary has failed to establish by way of competent evidence, the existence of the facts she relies upon to establish the violation herein.<sup>3</sup>

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<sup>3</sup>I take cognizance of the serious hazards created by an accumulation of coal dust inside a baghouse. As explained by the Secretary's expert, Thomas Koenning, the seam in which the coal mine at issue is located is considered to be highly susceptible to spontaneous combustion. Also, in the past five years there had been five baghouse fires in the county in which the subject mine is located. In each of these instances, the baghouse had been shut down for a period of a few days with an accumulation of coal left inside the baghouse, and then spontaneous combustion had occurred. It would thus appear that the serious hazard of spontaneous combustion was created by a dangerous accumulation. However, S & M was not cited for allowing coal dust to accumulate. (c.f., 30 C.F.R. § 77.202). Instead the Secretary chose to cite S & M for violating Section 77.404(a) which does not deal with accumulations, but requires that machinery and equipment be maintained not free of accumulations, but in "safe operating condition." (Emphasis added.). There is no evidence

For all these I find that the Secretary has failed to establish that S & M violated Section 77.404(a). Accordingly, Citation No. 4058552 shall be dismissed, and Docket No. WEST 96-254 shall be dismissed.

II. Docket No. WEST 96-253

A. Citation No. 9894926, and Order No. 4058625

1. Background

Sometime prior to September 19, 1994, a designated work position 001-0375 (375) had been established for a 14G Caterpillar road grader at the Campbell Creek Mine operated by S & M. Respirable dust sampling taken on September 14, 1994, for the designated work position 375, designated work position 368, a rubber tire dozer, and designated work position 310, indicated that the former two were in compliance but that the designated work position 310, a Caterpillar scraper, was not in compliance. Stephen Kepp, S & M's Safety Director, indicated that the Caterpillar scraper was then removed from service, and was removed from the mine property. According to Kepp, in subsequent telephone conversations with Leo Boatwright, of the McAlister, Oklahoma MSHA office, the former advised him that the designated work position that had been established for the Caterpillar scraper was abandoned. Kepp indicated that Boatwright also informed him not to worry about any citations that would be subsequently computer generated.

A computer generated notice to S & M from MSHA, dated February 7, 1995, advised that MSHA had not received valid samples for the designated work occupation 375 for December-January 1995. A similar notice was generated April 10, 1995, for the period February-March 1995. On June 7, 1995, a similar notice was generated for the period April-May 1995. On June 8, 1995, Citation No. 9894915 was issued alleging that there was no dust sample received for the period April-May 1995, for the designated work position, 375. This citation was abated on August 16, 1995, based on a valid sample taken on July 20, 1995.

On October 13, 1995, Citation No. 9894926 was issued to S & M alleging that 30 C.F.R. § 71.208 was violated as there was no sample taken for the designated work position 375 in the Bi-monthly period August-September 1995. The citation set November 15, 1995, as the termination date.

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footnote 3 cont'd.

that the baghouse was not in safe working condition. There is no evidence that there was any defect in any element of the baghouse affecting its operation.

On December 5, 1995, Skeens issued a section 104(b) Order (No. 4058625), alleging that no apparent effort had been made to collect a respirable dust sample on the designated work position 375. Skeens subsequently modified the order to allow the Caterpillar grader to be operated for the collection of a dust sample on the designated work position 375. However, Skeens subsequently reinstated the order on the ground that a respirable dust sample had not been taken. This order was finally terminated on January 30, 1996.

## 2. Discussion

It appears to be S & M's argument that, since sampling of the grader on September 14, 1994, indicated that it was in compliance with the applicable standard, no designated work position should have been subsequently established. For the reasons that follow, I find this argument to be without any merit.

30 C.F.R. § 71.208(e) provides, as pertinent, that the MSHA District Manager shall designate work positions at each mine for Respirable dust sampling. 30 C.F.R. § 71.208(f), provides that a designation of a work position for sampling is to be withdrawn upon a finding that ". . . the operator is able to maintain continuing compliance with the applicable respirable dust standard . . . ." Section 71.208(f) *supra*, goes on to specifically sets forth the required basis for this finding as follows: "[t]his finding shall be based on the results of samples taken during at least a one-year period under this part and by MSHA".

The record does not contain any evidence to establish that in at least a one-year period results of sampling by MSHA indicated compliance for the designated work position 375. Accordingly, it was clearly proper for MSHA to continue requiring sampling on the designated work position 375.

30 C.F.R. § 71.208(a) provides, in essence, that the operator shall take one valid respirable dust sample from each designated work position during each bi-monthly period. The bi-monthly periods are set forth as follows: February 1 - March 31, April - May 31, June 1 - July 31, August 1 - September 30, October 1 - November 30, and December 1 - January 31. S & M has not presented any facts or argument to challenge the allegation set forth in the citation at issue that no samples were submitted for the bi-monthly period August - September 1995. In essence, S & M argues that Kemp was confused regarding the requirement to sample for work occupation 375. In this connection, Kepp referred to a conversation that he had with Boatwright who advised him that the designated work position of the Caterpillar

scraper was being abandoned, and that he should not be concerned about any citations that would be subsequently computer generated.

The regulatory scheme set forth in Title 30 imposes strict liability upon an operator. (Asarco, Incorporated-Northwest Mining Dept., 8 FMSHRC 1632 (1986) aff'd, 868 F2d 1195 (10<sup>th</sup> Cir, 1989)). The operator is not allowed to escape compliance based upon any confusion. I thus reject S & M's argument.

I find that it has been established that no samples were submitted for the period August-September 1995. Accordingly, the citation at issue was properly issued, as S & M did violate Section 71.208 supra.

Citation No. 9894926 set a termination date of November 15, 1995. S & M did not comply with this date. S & M did not submit any sample between October 13, 1995, the date of the citation and the termination date of November 15, 1995.

S & M has not specifically challenged the issuance of the 104(b) order. The time set for termination was more than 30 days beyond the date of the original citation. There is no evidence in the record of any technical or other difficulty that would have prevented S & M from submitting samples by November 15, 1995.<sup>4</sup>

Based on all the above, I find that it has not been established that there was any abuse of discretion in the issuance of the Section 104(b) order, that it was properly issued, and that S & M did violate the Section 104(b) order.

### 3. Penalty

In essence, it is the position of S & M that any penalty to be assessed should be reduced on the ground that there was no negligence on its part relating to the violation. S & M takes the position that it was of the opinion that it was not required to sample the 375 designated work occupation, because the sampling on September 14, 1994, of that position did not exceed the pertinent standard. However, subsequent to that date, S & M was put on notice that it was required by MSHA to submit testing for that position, and that such testing had not been received for the following bi-monthly periods: December-January 1995, February-March 1995, and April-May 1995. Also, in response to the issuance of citation on June 8, 1995, based upon the failure to submit a sample for the bi-monthly period April-May 1995,

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<sup>4</sup>Although no one at S & M's mine was qualified to take a sample, Julie Hart, who was certified, worked at a neighboring mine.

S & M had a valid sample taken on designated work position 375 on July 20, 1995. Hence, when the instant citation was issued on October 13, 1995, based on the failure to have submitted a sample for the period August-September 1995, S & M clearly should have known of its responsibility in this regard. I do not put much weight on Kepp's testimony that, in telephone conversations with Boatwright, the latter told him not to worry about any subsequent citations that might be computer generated, as the designated work position that had been established for the Caterpillar scraper had been abandoned. This alleged statement by Boatwright has no bearing on the obligation of S & M to submit a sample for the designated work position at issue, i.e., 375, the 14G grader. I thus find that S & M's negligence was relatively high. However, in reviewing the history of violations, Exhibit P-1, I conclude that the number of violations from April 18, 1994 to February 6, 1996, 35, is not inordinately high. According to Skeens, and not contradicted or impeached by S & M, the designated work position at issue had previously been tested, and a dust reading of 1.0 m.g. per cubic meter was the result. I accept Skeens' uncontradicted testimony that dust samples at the mine site at issue "have been found to contain as high as 12-percent quartz silica" (Tr. 130). (Emphasis added). Further, I accept Skeens' testimony that exposure to quartz silica can cause lung disease. I find that the level of gravity of the violation was moderate. Taking all of these factors into account, I find that a penalty of \$1,000 is appropriate.

B. Citation No. 4058621

1. Violation of 30 C.F.R. § 72.620

On December 5, 1995, while in the Pit area, Skeens observed a truck mounted drill, drilling into overburden consisting of rock, shell and dirt. When Skeens was about 1,000 feet away from the drill, he saw a cloud of dust billowing around the rear of the drill. He estimated that the cloud of dust was approximately 15 feet by 15 feet. When Skeen approached the drill, he saw that the operator was sitting on the seat of the drill located on the cab, but both doors were opened, and the operator was hanging out the side of the cab. According to Skeens, the helper was standing within a few feet of the hole that was being drilled. Skeens said that both the operator and the helper were covered with yellowish-brown dust. According to Skeens, no dust control measure was being used.

Skeens issued a Section 104(d)(1) citation alleging a violation of 30 C.F.R. § 72.620 which provides as pertinent, as follows: "[h]oles shall be collared and drilled wet, or other effective dust control measures shall be used when drilling non-water soluble material." It appears to be S & M's position, as a defense to this matter, that the testimony did not establish the

contents of the dust flowing from the drill hole. S & M also asserts that the water dust suppression although not being used was operable. Kepp testified that on the previous day the operator using the water system " . . . had plugged the hole" (Tr. 174).

Kepp who was present during Skeens' inspection, did not contradict the latter's testimony that, in essence, dust control measures were not being used. Nor did he contradict Skeens' testimony that the material being drilled was non-water soluble. Nor did Kepp did indicate that the holes were in any way collared or being drilled wet. I thus accept Skeens' testimony, and find that S & M did violate Section 72.620 supra.

## 2. Significant and Substantial

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

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

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

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

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

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

As discussed above, the evidence establishes that Section 77.620 supra, was violated by S & M. (See, II(B)(1), infra). Further, S & M did not object to the introduction in evidence of two statements issued by MSHA (Exhibits P-20 and P-21), which explain that exposure to dust containing silica from drilling can cause silicosis. Hence, the second element of Mathies has been met. According to Skeens, as observed by him, the drill operator and the helper were both exposed to the cloud of dust produced because drilling took place in the absence of dust control measures. Kepp testified that the two individuals involved "don't pay a great amount of attention to personal hygiene," (Tr. 173), and accordingly argued that any dust on them did not necessarily get there on December 5. I find this testimony too hypothetical and reject it. I also take cognizance of Kepp's testimony as follows regarding the placement of these individuals:

The weather conditions that particular day were a brisk wind blowing out of the north at 20 to 25 miles an hour. I remember this very well, because I was cold. The drill was -- the motor carrier was facing west.

That means that the drill operator and the helper would have been north of the bore hole. Therefore, any dust cloud that would have been generated by the drill would have blown to the south and away from the two individuals (Emphasis added.) (Tr. 173-174).

I find this testimony as to where the location of the two individuals would have been, and where the location of the cloud dust would have been, to be hypothetical, and insufficient to contradict the specific eyewitness testimony of Skeens as to his observations of the individuals, and their locations relative to the cloud of dust. Skeens assumed that the miners in question were exposed to silica dust. However, the record does not establish this fact. Here is no evidence regarding the composition of the dust cloud and the specific overburden material that was being drilled. Keep, in discussing his allegation that the drill operator had plugged the hole using the water system the previous day stated that this occurred "because the drill was working in overburden in a clay material" (Tr. 174). This statement alone is insufficient to establish the composition of the overburden. Skeens was asked what the material consisted of, and he stated as follows: "[i]t was a

combination of rock and shale and dirt. I don't know the exact identity of the strata" (Tr. 158).

However, it is significant to note the uncontradicted testimony of Skeens that dust samplers collected at the mine have been found to contain as high as 12 percent quartz silica. In addition, I note the following: the testimony of Skeens that exposure to quartz silica can cause lung disease, the significant size of the cloud dust at issue, and the proximity of the exposed miners to the cloud dust as observed by Skeens. Within this context, I find that the third and fourth elements in Mathies, supra, have been met. Accordingly, I find that the violation was S & S.

### 3. Unwarrantable Failure

In an earlier inspection on March 19, 1995, Skeens had observed an independent contractor drilling blast holes. He said that dust was being generated, although no miners were exposed. According to Skeens, in the presence of Kepp he talked to the miners ". . . about compliance with 72.620" (Tr. 161). According to Skeens, he spoke to the independent contractor as follows: "And I told them if they didn't get some dust control on that drill it was a matter of time until they were going to get caught, because they were gambling on which direction the wind blew" (Tr. 162).

Also, according to Skeens, the dust cloud at issue was seen by him when he was 1,000 feet away. Hence, it was obvious that dust control measures were not in use. Skeens indicated that when he asked one of the miners present how long the drill had been "belching drill dust", the response was "[a]bout six months" (Tr. 167). This miner was not called to testify. I thus do not place much weight upon Skeens' hearsay testimony in this regard. The Secretary relies on Skeens' testimony that on November 17, 1994, Inspector Doug Liller went to the mine, and distributed literature concerning the hazards of exposure to silica. However, Skeens did not have any personal knowledge of these facts, as Skeens was not present when Liller went to the mine. The Secretary did not call Liller to testify to establish these facts. I thus place no weight upon Skeens' hearsay testimony in these regards.

In contrast, Kepp testified that S & M had owned that drill for six months; that it is incorrect that it was not operated for six months with no dust control measures being used; and that S & M had "to take the drill down because the water pump did freeze up; it broke. And the drill did not work until the water pump was replaced" (Tr. 175). He also indicated that on the previous day the operator using the water system "had plugged the hole" (Tr. 174). I observed Kepp's demeanor, and found him credible. I find that there is insufficient evidence that the

violative condition had existed for a length of time as to establish that S & M's negligence was more than ordinary.

Within the above framework, I find that the level of S & M's did not reach aggravated conduct. As such, the violation did not result from its unwarrantable failure (c.f., Emery Mining Corp., 9 FMSHRC 1997 (1987)).

#### 4. Penalty

I find that the miners in question were working in close proximity to the dust that contained silica. Hence I find that the violation was of a high level of gravity.

For the reasons set forth above, II (C) (3), I find that S & M was negligent to only a moderate degree in connection with the violation. I find that a penalty of \$2,000 is appropriate for this violation.

#### C. Order 4058624.

##### 1. Violation of 30 C.F.R. § 77.1605

On December 5, 1995, Skeens observed approximately six scrapers on the top of a coal highwall. Skeens observed the scrapers driving perpendicular to the edge of the highwall, and then making a U-turn. The high wall was 22 feet high, and there was a "nearly vertical" (Tr. 178), drop off at the edge of the highwall. There was no berm provided on the outer bank of the highwall.

Skeens issued an order under Section 104(d) (1) alleging a violation of 30 C.F.R. § 77.1605(k) which provides that "[b]erms or guards shall be provided on the outer bank of elevated roadways." According to Kepp, the scrapers were being operated on the horizontal surface of a coal seam. They were being used to remove the final amount of the overburden off the coal so it could be drilled and shot.

There is no evidence in the record as to whether, as understood in the mining industry, the term "elevated roadway", encompasses the area in question. It is manifest that the requirement of a berm in Section 77.1605(k) is to prevent a vehicle from over traveling the edge of the highwall. Clearly this hazard arises when vehicles traverse the area in question in order to remove overburden. The common meaning of the term "roadway," as set forth in Webster's Third New International Dictionary (1986 Edition), is as follows: "1(b) the part of a road over which vehicle traffic travels". Clearly vehicles travel the area in question. I find that it would be contrary to

the regulatory intent of Section 77,1605(k), supra, to carve out an exception, and not require berms in a situation where trucks travel in order to remove overburden. Hence, I find that it has been established that S & M did violate Section 77.1605(k).

## 2. Significant and Substantial

In support of its position that the violation was significant and substantial, the Secretary argues that the highwall could have failed, and that ". . . any type of steering or brake problem, if it occurred on one of those scrapers making a turn that close to the edge, could create some big problem for the operator, and probably result in an accident." (Tr. 184). According to Skeens, he had observed trucks within 12 feet of the edge of the coal bench. However, he did not testify as to the distance that he observed trucks normally operating in relation to the edge of the highwall. Nor is there any other evidence in the record as to how close to the edge of the highwall the trucks traveled in their normal operation. There is no evidence that the truck's brakes, or any other mechanical part was defective. Within the framework of this evidence, I find that although the record establishes that a scraper could have traveled over the edge of the highwall, it has not been established that the such an event was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial.

## 3. Unwarrantable Failure

A Section 104(d)(1) order can be upheld only if there had previously been issued a valid citation under Section 104(d)(1) of the Act. As set forth above, II (C)(1) infra, the previously issued citation under Section 104(d)(1), is not upheld. Hence, the instant order issued under Section 104(d) shall be reduced to a Section 104(a) citation.

## 4. Penalty

According to Skeens, on December 5, he had spoken to one of the supervisors who told him that he knew that a berm was required, but that he had removed it earlier that shift. Kepp indicated that a supervisor was in the area, and was guiding and directing scraper operators as they came into the cut area. It is not clear from the record whether this statement is based upon an actual observation of Kepp on December 5, or upon his description in general of mining practices. In essence, Kepp argued that S & M was not negligent since when it was cited it was in the final stage of its operation, i.e., cleaning the top of coal in preparation for a shot.

I find that since the berm was intentionally removed, S & M's conduct herein constituted a high degree of negligence. Further, considering the height of the edge of the highwall from the ground below, and the fact the drop off was steep, I find that should a vehicle have overtravelled the edge of the highwall, a serious injury could have resulted. I find that a penalty of \$2,000 is appropriate.

D. Order No. 4058628

1. Violation of 30 C.F.R § 1606(c)

On December 6, 1995, Skeens observed that a rear tire of a trailer attached to a truck had an area of missing tread on the surface of the tire that makes contact with the road. Skeens indicated that he was able to see the nylon cords and belts that are normally covered by the tread. Skeens was concerned about the hazard of a blowout of this tire, and issued a order under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 1606(c) which provides that "[e]quipment defects affecting safety shall be corrected before the equipment is used."

Two front tires and four rear tires were located on the truck. Four rear tires, two on each side, were located on the trailer. The cited tire was the outside rear tire of the trailer. The outside diameter of the tire was 100 inches, the width of the tread of the tire was approximately 27 inches, and the circumference of the tire was 330 inches. The area of the tire tread that was missing and that revealed the inner nylon cords and belts was 13 inches wide, and extended for 72 inches. The tire contained approximately 90 pounds of air per square inch.

Essentially, it appears to be S & M's position, that if the area of the tread that was missing was penetrated by some object, the tire would become flat and would not suffer any explosive blowout. In support of this position, Kepp testified that since the tire was on the trailer, it was not subject to the stresses of steering or acceleration. Accordingly, it is S & M's position that the tire was safe. In contrast, Skeens cited an instance where a worn truck tire had blown, and referred to studies ". . . where tires have thrown pieces of debris 300 yards" (Tr. 210).

Considering Skeens' uncontradicted testimony that the air pressure in the tire was 90 pounds per square inch, and that the area where the nylon cords were exposed extended for a considerable portion of the radius of the tire, I find that the defect to the tire noted by Skeens did affect safety. Since it was being used and the defect was not corrected, I find that S & M did violate Section 77.1606(c) supra.

## 2. Significant and Substantial

According to Kepp, in essence, the likelihood of an injury causing event was remote since the cited tire was located on the trailer, and not subject to the stresses of acceleration and steering. He also noted that the truck is usually driven at speeds from only two to three miles an hour, up to 20 miles an hour. However, he conceded that "rocks and bits of coal" are "present on the roadway" "on occasion" (Tr. 227). Also, he conceded that tires with a bulge can blow out. Further, Kepp indicated that the driver of the truck in question, and the loader/operator, would be exposed to the tire in question approximately 20 times a day. Considering also the extent of the area of the missing tread, and the fact that the inner cords and belts were visible, I conclude that it has been established that the violation was significant and substantial.

## 3. Unwarrantable Failure

According to Skeens, the defect in the tire in question was obvious. Kepp indicated that it had been torn in an accident two days prior to the issuance of the citation in question on December 6. Also, Kepp indicated that he became aware of this defect on either December 5 or December 6. Yet no efforts were made to remove the tire from the surface. Indeed, the truck was allowed to continue to operate with the defective tire. Within this context, I find that the level of S & M's negligence to have been more than ordinary, and to have reached the level aggravated conduct. Thus I find that it has been established that the violation was as a result of S & M's unwarrantable failure. (See, Emery, supra).

## 4. Penalty

I find that should the tire had blown, a serious injury could have resulted if a person would have been in close proximity to the tire. Also, as discussed above, I find that the level of S & M's negligence to have been of a relatively high degree. I thus find that a penalty of \$2,000 is proper for this violation.

### D. Citation No. 3588975.

#### 1. Violation of 30 C.F.R. § 208(c)

On January 10, 1996, S & M was notified by MSHA that five additional dust samples were required for the designated work position surface area No. 0010, occupation code 375, and that these samples had to be received no later than February 1, 1996.

On February 7, 1996, MSHA supervisory mine inspector Larry Keller learnt that the five additional samples had not been submitted by February 1. He issued a Citation to S & M alleging a violation of 30 C.F.R. § 71.208(c).

Section 71.208(c), provides, as pertinent, that upon a notification from MSHA that dust samples taken from a designation work position exceeded regulatory requirements, ". . . the operator shall take five valid respirable dust samples from that designated work position within 15 calendar days. The operator shall begin such sampling on the first day on which there is a normal work shift following the day of receipt of notification."

According to Kepp, the equipment in question, the 14G Caterpillar blade, needed a certain part and was not available for use from on about January 14, 1996, through January 30. According to Kepp, dust samples were taken on January 30 and January 31, 1996. Kepp indicated that there was no production on February 1, and February 2, due to extreme cold weather, and there was no production on February 3 and 4, as those days constituted a weekend. Dust samples were taken on February 5, February 6 and February 7. (Defendant's Exhibit R-4).

I have considered Kepp's testimony. However, since S & M did not take five samples within 15 calendar days of being notified of this requirement, ie., January 10, S & M did violate Section 71.208(c).

## 2. Significant and Substantial

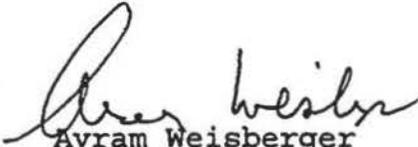
The violation at issue contributed to the hazard of silicosis. Dust samples collected at the mine have been found to contain as high as 12-percent quartz silica. However, according to Kepp, whose testimony was not contradicted, S & M did take five dust samples on five consecutive production shifts in which the equipment at issue was available. As such, I find that there was not a reasonable likelihood that an injury producing event i.e., lung disease, was reasonably likely to have occurred. I thus find that the violation was not significant and substantial (See, Mathies, supra).

## 3. Penalty

I accept Kepp's testimony, as it has not been contradicted, or impeached, that, in essence, five samples were taken, on five consecutive production shifts in which the equipment in issue was available. I thus find that there was no negligence on S & M's part. I find that it has not been established that the gravity of the violation was more than low. I find that a penalty of \$20 is appropriate for this violation.

### III. Order

It is ORDERED as follows: 1. Citation No. 3588975, and Order No. 4058624 are reduced to Section 104(a) citations that are not S & S; 2. Citation No. 9894926 and Order Nos. 4058625 and 4058628 are affirmed as written; 3. Citation No. 4058552 is dismissed; 4. Citation No. 4058621 is reduced to a Section 104(a) S & S violation; and 5. S & M shall, within 30 days of this decision, pay a civil penalty of \$7,020.

  
Avram Weisberger  
Administrative Law Judge

#### Distribution:

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/mh



These are consolidated civil penalty cases under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

On June 5, 1995, Inspector Roger Nowell, of the Rapid City, South Dakota, Mine Safety and Health Administration Office, conducted an inspection at Bob Bak Construction's Crusher No. 3 Mine. Inspector Nowell was accompanied by his supervisor, Tyrone Goodspeed. The mine operation produces and processes sand and gravel sold in and substantially affecting interstate commerce.

During the inspection, Inspector Nowell issued nine § 104(a) citations, one § 104(d)(1) unwarrantable failure citation, four 104(d)(1) orders, and one combined imminent danger order and citation under §§ 107(a) and 104(a) of the Act.

Inspector Guy L. Carsten inspected the mine on September 11-12, 1995, to determine, among other things, whether the conditions cited in the outstanding citations and orders issued on June 5, 1995, had been abated. During this inspection, Inspector Carsten issued a § 104(a) citation for working in the face of a § 104(b) closure order.

On December 21-22, 1995, Inspector Nowell and Electrical Inspector Lloyd Ferran inspected the mine, issuing two § 104(a) citations, one of which was for operating in the face of an imminent danger order issued on June 5, 1995. They also issued six § 104(d)(2) unwarrantable failure orders.

As a result of the three inspections, Respondent was issued 24 citations and orders totaling \$23,951 in proposed civil penalties. The cases were heard in Pierre, South Dakota.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, probative, and reliable evidence establishes the Findings of Fact and further findings in the Discussion below.

#### FINDINGS OF FACT

##### I

#### INSPECTION ON JUNE 5, 1995

#### Combined Order/Citation No. 4643116

1. Inspector Nowell issued this combined imminent danger order/citation under §§ 107(a) and 104(a) of the Act, alleging a violation of 30 C.F.R. § 56.14101(a)(1), which provides:

(a) Minimum requirements: (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

2. Upon his arrival at the Crusher No. 3 mine, Inspector Nowell observed a Michigan front-end loader (Serial Number 438-C452C) backing up. Inspector Nowell approached the vehicle to talk to the operator, who lowered the bucket to try to stop the vehicle. The loader did not stop but gradually coasted to a halt. Inspector Nowell questioned the operator about the brakes. The operator, who was also the foreman, informed him that the brakes were not functioning properly. Inspector Nowell observed that another employee was on foot nearby (the employee regularly worked around the crusher), another front-end loader was operating in the same area and the working conditions were very noisy.

3. Inspector Nowell performed a brake test on the front-end loader by asking the foreman to drive forward and apply the brakes. This was on fairly even ground. The test was done with the bucket up and empty. The brakes failed to stop the vehicle, which coasted to a gradual stop. Inspector Nowell further questioned the foreman about the brakes, and the foreman said that he had reported the condition of the brakes to the owner, Mr. Bob Bak.

4. The loader routinely traveled up a ramp six to eight feet high to load the crusher feed. After coming down the ramp the loader would travel on uneven to rough terrain to return to the pit for another load.

5. The crusher was very noisy, requiring the employees nearby to wear hearing protection devices.

6. Inspector Nowell concluded that the loader brakes were defective and created an imminent danger.

**Order No. 4643209**

7. Inspector Nowell issued this order under § 104(d)(1) of the Act, concerning the same Michigan front-end loader, alleging a violation of 30 C.F.R. § 56.14132(a), which provides:

Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

8. Inspector Nowell observed that when the loader operated in reverse the backup alarm did not work. He found that the wires to the backup alarm were not connected. Another loader was operating in the same area, and the crusher operator regularly worked on foot to clean around the crusher, in the vicinity of the front-end loaders. As stated, working conditions were very noisy.

9. Inspector Nowell asked the foreman, who operated the cited loader, how long the alarm had not been functioning, and the foreman stated, "at least five months" and that the owner, Bob Bak, knew of the defect. Bob Bak testified that the switch for the alarm "was on order and it wasn't there and I couldn't put it in" (Tr.5).

10. Inspector Nowell found that the violation alleged in the order was significant and substantial and due to an unwarrantable failure to comply with the safety standard.

Order No. 4643211

11. Inspector Nowell issued this § 104(d)(1) order concerning the same front-end loader, alleging a violation of 30 C.F.R. § 56.14100(c), which provides:

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

12. Inspector Nowell asked the foreman, who was operating the loader, why he was not wearing the seat belt provided in the vehicle. The foreman stated that he could not wear the seat belt "due to the poor condition of the seat" (Tr. 49).

13. The seat was worn to the point that very little foam rubber remained and the metal edges of the seat frame were visible and protruding. The seat condition made proper wearing of the seat belt hazardous because of the metal edges.

14. The front-end loader operated on uneven and rough terrain and traveled a steep ramp to load the crusher trap feed. Another loader operated in the same area, and an employee regularly worked on foot near the loaders. Inspector Nowell

concluded that if the loader operator was not wearing a seat belt, he was more likely to be injured in case of an accident.

15. The inspector found that the violation cited in the order was significant and substantial and was due to an unwarrantable failure to comply with the cited safety standard.

Order No. 4643214

16. Inspector Nowell issued this § 104(d)(1) order concerning the same front-end loader, alleging a violation of 30 C.F.R. § 56.14101(a)(2), which provides:

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

17. Inspector Nowell observed that the parking brake on the front-end loader was inoperable.

18. The loader traveled on uneven to rough terrain and traveled up a steep ramp to load the crusher feed. Inspector Nowell asked the foreman-operator of the front-end loader how long the parking brake had been inoperable, and the foreman said he had "reported the defect to the owner" (Tr. 56).

19. Inspector Nowell found that the violation cited in the order was significant and substantial and was due to an unwarrantable failure to comply with the cited safety standard.

Citation No. 4346204

20. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.18013, which provides:

A suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency.

21. Inspector Nowell found that there was no communication system at the site for use by the employees in the event of an emergency. There was no phone line, cellular phone, or business band radio on the property. Inspector Nowell concluded that in the event of an accident, somebody would be required to leave the mine site and go to the nearest phone, wherever that might be, to care for assistance. The delay in getting assistance, depending on the type of accident, could contribute to the death or critical condition of an injured person. If only two employees were on the site and one had to go for help, there would only be the injured person left.

Citation No. 4643207

22. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.12032, which provides:

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

23. The citation alleges the following condition or practice:

Two cover plates were not provided for a 440 V-AC outlet and a breaker box at the main outside electrical control panel for the conveyor belts.

The uncovered fixtures were exposed to rain, dust, and dirt and could inadvertently be contacted by an employee operating other breakers and switches, exposing the person to a severe shock hazard.

24. Respondent admits the facts alleged in the citation.

25. Inspector Nowell found that it was reasonably likely that a person would be injured from the hazard he observed. Without cover plates, the AC outlets and breaker box were exposed to rain, dirt, and dust and could inadvertently be contacted by somebody. An electric shock of 440 volts could reasonably be expected to result in a fatal or very serious injury.

Citation No. 4643216

26. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.14107(a), which provides:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

27. A belt and chain drive unit beneath the crusher trap feed was not guarded. An old piece of screen was installed at the entrance to the trap feed, apparently as a barricade. However, the screen was almost covered with overfill material and did not prevent access to the belt and chain drive. The inspector found that the area around the belt and chain drive had a substantial buildup of overfill material that would require clean up work.

**Citation No. 4643210**

28. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.14100(d), which provides:

Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to, and recorded by, the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

29. Inspector Nowell observed that the same front-end loader involved in the above orders and citations had an inoperable windshield wiper and severely cracked windshield that impaired the visibility of the operator. Also, the wiper blade had been removed. It was raining on the day of the inspection. A crusher operator was working on foot in the area of the loader, and another front-end loader was operating in the same area. The defective wiper and missing wiper blade were not recorded by the company.

30. Inspector Nowell discussed the condition with the foreman, Lawrence Roghair, who was also the operator of the loader. The foreman stated that the loader was bought that way and they "didn't think anything of the defect" (Tr.74).

**Citation No. 4643212**

31. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.14107(a), which provides:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

32. Inspector Nowell found that a shroud originally provided to guard the Michigan front-end loader radiator fan blades had been removed. He concluded that this was a violation of § 56.14107(a). He found that it was unlikely that an injury would occur because there would be no reason for anyone to be around the engine when the loader was running. The engine and fan blades were about the head level of an average person.

**Citation No. 4643213**

33. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.14100(b), which provides:

Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

34. Inspector Nowell found that the lights on the front-end loader involved in the above orders and citations were broken, misaligned or otherwise not kept in operational condition.

**Citation No. 4643120**

35. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.15003, which provides:

All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the fee.

36. Inspector Nowell found that protective footwear, such as hard-toed safety boots, were not worn by the crusher operator. Respondent admits the facts alleged in the citation but claims financial hardship as to the proposed penalty.

**Citation No. 4343203**

37. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.20008, which provides:

Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to the mine personnel.

38. Inspector Nowell found that there were no toilet facilities at the mine site.

39. Respondent admits the facts alleged, but claims financial hardship as to the amount of the proposed penalty.

**Citation No. 4643205**

40. This § 104(a) citation alleges a violation of 30 C.F.R. § 56.12028, which provides:

Continuity and resistance of grounding systems

shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent test shall be made available on request by the Secretary or his duly authorized representative.

41. Inspector Nowell found that Respondent had failed to test and record continuity and resistance of grounding systems on the electric motors, portable extension cords, hand held tools and main power tools.

42. Respondent admits the facts alleged, but challenges the amount of the proposed penalty.

**Citation No. 4643118**

43. This § 104(d)(1) alleges a violation of C.F.R. § 56.14132(a), which provides:

Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in a functional condition.

44. Inspector Nowell observed a 175B Michigan front end loader (Serial No. 438-C452C) moving in reverse and the backup alarm was not working. He asked the loader operator how long the backup alarm had not been functioning. The operator stated that the backup alarm had not worked for about three weeks, and that he had told the owner, Bob Bak, of this defect. Bob Bak testified that a switch for the alarm "had been on order, it had just been back ordered ... and I guess I just kind of lost track of it" (Tr. 20).

**Order No. 4643208**

45. This § 104(d)(1) order alleges violation of 30 C.F.R. § 56.14103(b), which provides:

(B) If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

46. Inspector Nowell found that the windshield on a Michigan 175B Front End Loader (Serial No. 438-C202) was badly damaged with cracks radiating outward and downward. Another vehicle operated in the same area and an employee on foot worked in the same area. It rained on the day of the inspection.

47. The loader was operated by Foreman Lawrence Roghair, who stated the cracked window condition had existed for five months and he had told the owner, Bob Bak, about it. The defect was readily observable.

## II

### INSPECTION ON SEPTEMBER 11-12, 1995

#### Citation No. 4643458

48. Inspector Guy L. Carsten issued this § 104(a) citation, alleging a violation of § 104(b) the Act, which provides:

(b) If, upon a 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 (1) 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.

49. Inspector Carsten issued a § 104(b) non-compliance closure order (Order No. 4643454) on September 11, 1995 for failure to abate a violation that was cited on June 5, 1995 (failure to provide adequate toilet facilities, Citation No. 4643203).

50. On September 12, 1995, Inspector Carsten returned to the mine site and observed a mine employee operating a bulldozer on mine property.

### III

#### INSPECTION ON DECEMBER 21-22, 1995

##### Order No. 4643593

51. On December 21, 1995, Inspector Nowell conducted another inspection at Bob Bak Crusher No. 3 mine as a result of a hazard complaint. Inspector Nowell was accompanied by Inspector Lloyd Ferran, an electrical inspector. During the inspection Inspector Nowell issued the above § 104(d)(2) order, alleging a violation of 30 C.F.R. § 56.15002, which provides:

All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

52. Inspector Nowell found that the owner of the company, Bob Bak, was not wearing a hard hat while at the mine site in areas where there were hazards of falling objects.

53. Respondent admits the facts alleged in the order, but challenges the amount of the proposed penalty.

##### Order No. 4643594

54. Inspector Nowell issued this § 104(d)(2) order, alleging a violation of 30 C.F.R. § 56.15003, which provides:

All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

55. Inspector Nowell found that the owner of the company, Bob Bak, was not wearing hard-toed protective footwear while at the mine site in areas where there were hazards of foot injuries.

56. Respondent admits the facts alleged in the order, but challenges the amount of the proposed penalty.

##### Order No. 4643596

57. Inspector Nowell issued this § 104(d)(2) order, alleging a violation of 30 C.F.R. § 56.14101(a)(1), which provides:

Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. This standard does not apply to equipment which is not originally equipped with brakes unless the manner in which the equipment is being operated requires the use of brakes for safe operation. This standard does not apply to rail equipment.

58. Inspector Nowell found that a fuel truck did not have operable service brakes. The inspector performed a test on the brakes and found that when he pushed in on the brake pedal, it freely went all the way to the floorboard and he had to reach down and pull it back up. The truck was transported on a trailer to the mine site, driven off the truck and parked. When the company moved to another site, the truck was driven onto the trailer and transported to the new site.

**Order 4643776**

59. Inspector Lloyd Ferran issued this § 104(d)(2) order, alleging a violation of 30 C.F.R. § 56.12016, which provides:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. Suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work. Such locks or preventive devices shall be removed only by the persons who installed them or by authorized personnel.

60. Inspector Ferran observed an employee working on the stacker conveyor and found that the conveyor had not been de-energized and the power switch had not been locked out and tagged.

**Citation No. 4643777**

61. Inspector Nowell issued this § 104(a) citation, alleging a violation of 30 C.F.R. § 56.12001, which provides:

Circuit breakers shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

62. A generator had an oversized fuse that did not protect two #8 cables from excessive overload and thereby becoming brittle, starting a fire, or causing electrical shock to employees.

63. Respondent admits the facts alleged, and does not challenge the proposed penalty.

**Order No. 4643778**

64. Inspector Lloyd Ferran issued this § 104(d)(2) order, alleging a violation of 30 C.F.R. § 56.12030, which provides:

When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

65. Inspector Ferran observed a deteriorated phase wire on the main 480-volt power cable that was feeding the portable distribution boxes. The electrical conductor was brittle and some of the insulation was falling off. The concentric piece was broken, allowing the cable to move in and out with a high risk that the phase wire would contact metal parts and cause an electrical shock.

66. Inspector Ferran found that the hazard was increased by the fact that there was snow on the ground.

67. Inspector Ferran talked with the owner, Bob Bak, about this condition. Mr. Bak told him that he was aware of the cited condition but he just had not had time to correct it. Mr Bak told the inspector that it had been this way for a few days.

**Order No. 4643779**

68. Inspector Lloyd Ferran issued this § 104(d)(2) order, alleging a violation of 30 C.F.R. § 56.12008, which provides:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

69. The bushing on the main 480-volt power cable (which fed the portable distribution boxes) did not fit properly. This was

the same power cable involved in Order No. 4643778. The inspector found that the concentric knock-out was broken and not secured to a point that would prevent movement of the cable and prevent contact with metal parts of the distribution box. The inspector talked with the owner, Bob Bak, and was told that Mr. Bak had seen this problem but had not had time to correct it. Mr. Bak told the inspector that it had been this way for a few days.

#### Citation No. 4643592

70. Inspector Nowell issued this § 104(a) citation, alleging a violation of § 107(a) of the Mine Act, which forbids using equipment that is under an imminent danger withdrawal order.

71. In the December inspection, Inspector Nowell observed a 175B Michigan front-end loader parked with the motor running. The loader was under an outstanding § 107(a) imminent danger withdrawal order issued on June 5, 1995.

72. The owner, Bob Bak, told the inspector that the loader was used only to move the stacker conveyor and was not being used to move sand and gravel. Mr. Bak told inspector Nowell that some abatement work had been done and the brakes still would not stop the loader. He also said that his mechanic quit and he needed the loader.

#### DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

##### I

#### GENERAL PRINCIPLES

#### Significant and Substantial Violation

The S&S terminology is taken from § 104(d) of the Act, and refers to violations that are of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard ...." The Commission has defined an S&S violation as one that presents 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 (1981); and Mathies Coal Co., 6 FMSHRC 1 (1984).

The Commission has stated that an evaluation of the

reasonable likelihood of injury should be made assuming continued normal mining operations without abatement of the violation. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (1985). In Mathies Coal Co., *supra*, the Commission outlined four factors that must be present to establish an S&S violation:

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.

See also Buck Creek Coal, Inc. v. Secretary of Labor, 861 F.2d 99, 103 (5<sup>th</sup> Cir. 1988) (approving the Mathies test).

The Mathies test refers only to a "safety hazard," but Mathies does not purport to eliminate health hazards from S&S violations. For example, in Buffalo Crushed Stone, Inc., 19 FMSHRC \_\_\_\_ (February 18, 1997) (slip opinion p. 7), the Commission repeats its longstanding definition:

A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

In United States Steel Mining Company, Inc., 18 FMSHRC 862 (1996), the Commission held that "The term 'reasonable likelihood' does not mean 'more probable than not.'" Its ruling is explained as follows:

We agree with the judge that the third element of the Mathies test does not require the Secretary to prove it was "more probable than not" an injury would result. See 16 FMSHRC at 11900-93. The legislative history of the Mine Act indicates Congress did not intend that the most serious threat to miner health and safety, imminent danger, be defined in terms of "a percentage of probability." S.Rep. No. 181, 95<sup>th</sup> cong., 1<sup>st</sup> Sess. 38 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human

Resources, 95<sup>th</sup> Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 626 (1978). We do not find error in the judge's conclusion that, because an S&S violation under the Mine Act is less serious than an imminent danger, it is also not to be defined in terms of percentage of probability. 16 FMSHRC at 1191. Furthermore, Commission precedent has not equated "reasonable likelihood" with probability greater than 50 percent. A "more probable than not" standard would require the Secretary, in order to prove a violation is S&S, to prove it is likelier that not that the hazard at issue will result in a reasonably serious injury. We reject such a requirement.

The S&S definition is part of a special enforcement chain in § 104(d) of the Act, but is not necessary to prove a "serious violation." See, e.g., Consolidation Coal Company, 18 FMSHRC 1541, 1550 (1996).

#### Unwarrantable Violation

Like an S&S violation, the term "unwarrantable" violation derives from § 104(d)(1) of the Act, which refers to "an unwarrantable failure of [the] operator to comply with ... mandatory health or safety standards...." The Commission has defined "unwarrantable failure to comply" as meaning "aggravated conduct constituting more than ordinary negligence ... characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.'" Emery Mining Corp., 9 FMSHRC 1997, 2004-04 (1987); Rochester & Pittsburgh Coal Corp., 13 FMSHRC 189, 193-94 (1991); Ambrosia Coal & Construction, 18 FMSHRC 1552, 1560 (1996).

#### Imminent Danger

Section 3(j) of the Mine Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated...."

The Commission and the courts have held that, because an inspector must act quickly when he or she perceives a condition to be dangerous, an inspector's findings and decision to issue an

imminent danger order<sup>1</sup> should be supported unless there was an abuse of discretion or authority. In Old Ben Coal Corp v. Interior Board of Mine Operations Appeals, 523 F.2d 25, the Court of Appeals for the Seventh Circuit stated:

Clearly, the inspector is in a precarious position. He is entrusted with the safety of miners' lives, and he must ensure that the statute is enforced for the protection of these lives. His total concern is the safety of life and limb. . . . We must support the findings and the decisions of the inspector unless there is evidence that he has abused his discretion or authority.

In Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2164 (1989), the Commission stated: "Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists." This principle was reaffirmed by the Commission in Utah Power & Light Co., 13 FMSHRC 1617, 1627 (1991); and Island Creek Coal Company, 15 FMSHRC 339, 345 (1993).

The Commission held in Rochester & Pittsburgh, *supra*, that:

\*\*\*[A]n imminent danger is not to be defined "in terms of a percentage of probability that an accident will happen." \*\*\* Instead, the focus is on the "potential of the risk to cause serious physical harm at any time"

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<sup>1</sup>Section 107(a) of the Act provides for imminent danger orders, as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 104 or the proposing of a penalty under section 110.

[quoting the legislative history of the Mine Act]. The [Senate] Committee stated its intention to give inspectors "the necessary authority for the taking of action to remove miners from risk."

In Utah Power & Light, the Commission stated that "imminent danger" means the "hazard to be protected against must be impending so as to require the immediate withdrawal of miners." 13 FMSHRC at 1621. "Where an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required." 13 FMSHRC 15 1622.

In Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, 491 F.2d 277, 278 (4<sup>th</sup> cir. 1974), the Court stated:

\*\*\*[T]he Secretary determined, and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated."

#### Civil Penalties

Under § 110(i) of the Act, the Commission and its judges assess all civil penalties under the Act. The Commission or presiding judge is not bound by the penalty proposed by the Secretary. Penalties are assessed de novo based upon six criteria provided in § 110(i): (1) the operator's history of previous violations, (2) the appropriateness of the penalty to the size of the business, (3) the operator's negligence, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the operator's good faith in abatement of the violation. Secretary of Labor v. Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd Sellersburg Stone Co. v. FMSHRC, 736 f.2d 1147 (7<sup>th</sup> Cir. 1984).

In evaluating the fourth factor, "in the absence of proof that the imposition of authorized penalties would adversely affect [an operator's ability to continue in business], it is presumed that no such adverse effect would occur." Spurlock Mining Company, Inc., 16 FMSHRC 697, 700 (1994), quoting Sellersburg Stone Co., 5 FMSHRC 287. The burden of proof is on the operator. If an adverse effect is demonstrated, a reduction in the penalty may be warranted. However, "the penalties may not

be eliminated . . . , because the Mine Act requires that a penalty be assessed for each violation." Spurlock Mining, supra, 16 FMSHRC at 699, citing 30 U.S.C. § 820(a); Tazco, Inc., 3 FMSHRC 1895, 1897 (1981).

Tax returns and financial statements showing a loss or negative net worth are, by themselves, not sufficient to reduce penalties because they are not indicative of the ability continue in business. Spurlock Mining, Inc., 16 FMSHRC at 700, citing Peggs Run Coal Co., 3 IBMA 404, 413-414 (1974).

The purpose of civil penalties is to induce the operator and others similarly situated to comply with the Act and safety and health regulations. To be successful in the objective of inducing effective and meaningful compliance, "a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. No. 181, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 40-41 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 628-29 (1978).

The ability to continue in business is only one of six criteria. Since the other criteria must also be considered, it would be inappropriate to rule that penalties should be nominal or reduced by a set percentage whenever an operator establishes that the proposed penalties would have an adverse effect on its ability to continue in business. Penalties must still be assessed for each violation, with a deterrent purpose. For example, if an operator is financially unsound and cannot pay its debts and taxes, § 110(i) still does not exempt it from penalties "sufficient to make it more economical . . . to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance." S. Rep. supra.

## II

### RULINGS ON CITATIONS AND ORDERS

#### Combined Order/Citation No. 4643116-- Defective Brakes on Front-End Loader

I find an S&S violation of § 56.1401(a)(1) due to high negligence. I also find that the facts warranted the inspector's issuance of an imminent danger order.

Respondent contends that § 56.14101(b)(2) requires a

detailed brake test before a violation may be charged under § 56.14101(a)(1) and that the inspector failed to comply with this requirement.

I find that Inspector Nowell conducted a reasonable brake test before issuing the order/citation. He had the foreman drive the loader on fairly level ground and apply the brakes. The brakes did not stop the vehicle, which coasted until it came to a gradual stop. This test confirmed the inspector's opinion that the brakes were unsafe. He formed that opinion when he first saw the loader in operation, because the operator, who was the foreman, used the bucket to try to stop the vehicle and it still did not stop but coasted to a gradual stop.

The brake test clearly showed that the brakes were not capable of holding the loader on the highest incline traveled during the normal workday. It was not necessary to make a more detailed test under § (b)(2) in order to cite a violation of § (a)(1) of the regulation.

I find that the facts sustain the inspector's issuance of a § 107(a) imminent danger order. Operating the front-end loader with defective brakes in a high-noise area where an employee worked on foot and another vehicle operated, and operating it on a steep ramp, showed a reasonable basis for the inspector's finding that the hazard "could reasonably be expected to cause death or serious physical harm before it [could] be abated" (§ 107(a)).

**Order No. 4643209--Inoperable  
Backup Alarm on Front-end Loader**

I find an S&S violation of § 56.14132(a) due to an unwarrantable failure to comply with the standard.

Bob Bak testified that "we had a problem with the switch and it was on order" (Tr. 5). The foreman told the inspector that the backup alarm had been defective "at least five months" and that Bob Bak knew about it. Tr. 46. The extensive period of this violation -- at least five months -- shows a "serious lack of reasonable care" constituting an unwarrantable failure to comply with the safety standard. Emery Mining Corporation, 9 FMSHRC 1997, 2003-04 (1987).

Operating a front-end loader without a backup alarm in a high-noise area where an employee worked on foot and another vehicle operated constituted a significant and substantial violation. The conditions were reasonably likely to cause a serious injury.

**Order No. 4643211 -- Failure to Provide  
Suitable Seat Belt on Front-end Loader**

I find an S&S violation of § 56.14100(c) due to an unwarrantable failure to comply with the standard.

The foreman, who was operating the front-end loader, knew that the exposed metal edges of the seat frame prevented proper use of the seat belt. Because of this condition, Respondent failed to provide a suitable seat belt and was in violation of the safety standard. The foreman knew about the condition and stated that the owner, Bob Bak, also knew about it. The condition developed over a long period. Failure to correct it showed a serious lack of reasonable care and therefore an unwarrantable failure to comply with the standard.

The vehicle traveled over uneven to rough terrain, up a steep ramp, and operated in the same area where an employee worked on foot and another vehicle operated. In the event of a collision or an emergency requiring the front-end loader to swerve or brake suddenly, the failure to provide a suitable seat belt was reasonably likely to contribute significantly and substantially to a serious injury. The violation was therefore S&S.

**Order No. 4643214 - Inoperable  
Parking Brake on Front-end Loader**

I find an S&S violation of § 56.1401(a)(1) due to an unwarrantable failure to comply with the standard.

The same front-end loader with defective service brakes (cited in Order/Citation No. 4643116) had an inoperable parking brake. The same rulings as to the service brake violation, above, apply here. The parking brake violation was S&S and due to an unwarrantable failure to comply with the standard. Had the emergency brake been working properly, it may have prevented an accident or reduced its impact if the operator needed to stop the vehicle quickly. The violation was reasonably likely to contribute significantly and substantially to a serious accident and injury. The foreman and owner had longstanding knowledge of this uncorrected violation, which was due to a serious lack of reasonable care.

Citation No. 4643204 - No  
Communication System at Mine

I find a non-S&S but serious violation of § 56.18013 due to ordinary negligence.

Bob Bak testified that the mine was within "two miles of town, and I didn't feel there was a problem" (Tr. 7). However, the safety standard requires a "suitable communication system at the mine to obtain assistance in the event of an emergency." There was no phone line, cellular phone, or business band radio on the property. The citation noted Respondent's contention that "an employee on site does have a CB radio," but concluded "this cannot be relied on" and "there is no base station withing range." The violation was abated by installation of a cellular phone in the foreman's car. The phone was found to be operational.

I find that this was a clear violation that could readily have been avoided, as shown by the action taken to abate it.

Although the inspector marked this violation as non-S&S on the citation form, I find this to be a serious violation. Time is often critical in a medical emergency. Reducing an injured employee's chance of receiving prompt medical attention is a serious violation.

Citation No. 4643207 - No Cover Plates on Electrical  
Outlet and Breaker Box

I find an S&S violation of § 56.13031 due to ordinary negligence.

Respondent does not dispute this violation.

Without cover plates on the 440-volt outlet and breaker box, the wire connections, fixtures, and fuses were exposed to rain, dirt, and dust and could have been inadvertently contacted by someone. I find that the violation was reasonably likely to result in a serious injury. The violation was therefore S&S.

Citation No. 4643216 - No Guard Over Moving Machine  
Parts

I find an S&S violation of § 56.14107(a) due to ordinary negligence.

Respondent contends that a wire screen served as a barricade to prevent contact with the belt and chain drive beneath the trap feed. However, the inspector observed and a photograph (Exh G-11) plainly shows that the screen was almost covered up with overflow material and was not effective as a barricade. The exposed moving machine parts presented a reasonable likelihood of resulting in a serious injury. The violation was S&S, and could have been prevented by the exercise of reasonable care. It was therefore due to ordinary negligence.

**Citation No. 4643210 -**  
**Inoperable Windshield Wiper and Missing Wiper Blade**

I find an S&S violation of § 56.14100(d) due to ordinary negligence.

At the hearing, Bob Bak stated that he "bought [the loader] used, the windshield wipers did not work when we got it, we do not work in the rain, if there is snow, so there was no need for it [the wiper]" (Tr. 8). The foreman told the inspector that "the loader was bought that way and they didn't think anything of the defect" (Tr. 74). The citation additionally alleges, and the inspector testified, that the loader also had a badly damaged windshield, which impaired operator visibility and was more hazardous when it rained. It was raining on the day of the inspection. An employee was working on foot nearby and another vehicle was operating in the area. There was a reasonable likelihood that this violation would result in serious injury.

**Citation No. 4643212 - Failure to Guard Radiator**  
**Blades**

I find a non-S&S violation § 56.14107(a) due to ordinary negligence.

The inspector testified that the front-end loader was manufactured with a shroud to guard the radiator blades but the shroud was missing. He found a non-S&S violation, stating that injury was unlikely because "there would really be no reason for somebody to work in the area, be around the fan blade when the loader is running" (Tr. 76). The radiator was elevated, about the head level of an average person. Injury was not likely, but a guard was required.

**Citation No. 4643213 - Front-End Loader Lights Not**  
**Operable**

I find a non-S&S but serious violation of § 56.14100(b) due

to ordinary negligence.

Respondent admits the facts alleged.

Bob Bak testified that "the lights were not operable when I bought [the front-end loader], but we don't work at night, so there was no need for lights" (Tr. 10).

This is the same front-end loader that had defective service brakes, an inoperable parking brake, inoperable windshield wipers, a cracked windshield, and an inoperable backup alarm. The inspector testified that it rained on the day of the inspection.

The inspector found that, assuming the vehicle operated only during daylight hours, the violation was non-S&S. I find that this was still a serious violation. There are various conditions that may render headlights an important safety factor during "daylight" hours, e.g., sudden or heavy rain, fog or dust. In such conditions, headlights are an important safety protection to show the location and movement of vehicles.

**Citation No. 4643120 - Failure to Wear Suitable Protective Footwear**

I find an S&S violation of \$ 56.15003 due to ordinary negligence.

Respondent does not dispute this violation, but claims financial hardship as to the amount of the proposed civil penalty.

**Citation No. 4643203 - Lack of Toilet Facilities**

I find a non-S&S but serious violation of \$ 56.13028 due to ordinary negligence.

Respondent does not dispute this violation, but challenges the amount of the proposed civil penalty.

**Citation No. 4643205 - Equipment Grounding Systems Not Tested and Recorded**

I find an non-S&S but serious violation of \$ 56.13028 due to ordinary negligence.

Respondent does not dispute this violation, but disputes the amount of the proposed civil penalty.

Citation No. 4643118--  
Inoperable Backup Alarm on Front-end Loader

I find an S&S violation § 56.14132(a) due to an unwarrantable failure to comply with the standard.

The loader operator told the inspector that the backup alarm had not worked for about three weeks and that he had told the owner, Bob Bak, of this defect.

Bob Bak testified that a replacement backup alarm switch "had been on order, it had just been back ordered ... and I guess I just kind of lost track of it (Tr. 20).

I find that the operation of the loader without an operable backup alarm, the period of the violation, and the failure to take the loader out of service rather than operate it in violation of the standard, showed a serious lack of reasonable care.

The loader operated in a high-noise area where another vehicle operated and an employee worked on foot. These conditions presented a reasonable likelihood of a serious injury.

Order No. 4643208--  
Cracked Windshield on Front-end Loader

I find an S&S violation of § 56.14103(b) due to an unwarrantable failure to comply with the standard.

The inspector observed that a front-end loader operated by the foreman had a badly cracked windshield that obscured the operator's visibility. He also found that the hazard was increased when it rained. It rained on the day of the inspection.

The foreman told the inspector that the window had been cracked for about five months and he had told the owner, Bob Bak, about it.

Bob Bak testified that there were cracks in the windshield but he disagreed that they obscured visibility. I find that the cracks did obscure visibility and were a hazard.

The long period of the violation shows a serious lack of reasonable care.

The loader operated in an area where another vehicle

operated and an employee worked on foot. The violation was reasonably likely to result in a serious injury.

**Citation No. 4643458 -**  
**Operating Mine in Violation of**  
**§ 104(b) Closure Order**

I find a non-S&S but very serious violation of § 104(b) of the Act due to high negligence.

Respondent was cited on June 5, 1995, for failing to provide toilet facilities at the mine. After a delay of over two months without abatement, the inspector issued a § 104(b) closure order on September 11, 1995. The order prohibited any work at the mine until the earlier citation was terminated based upon a finding by MSHA that the violation had been abated.

The next day, he returned to the mine and found that an employee was operating a bulldozer at the mine, in clear violation of the closure order. The owner knew the mine was operating despite the order. He stated that he had ordered a toilet and it had not arrived. After the inspector issued Citation No. 4643458, the owner promptly bought a toilet, that day, and installed it the next morning in order to abate the violation and have the closure order terminated.

**Order No. 4643593 - Hard Hat Not Worn**

I find an S&S violation of § 56.15002 due to an unwarrantable failure to comply with the safety standard.

Respondent does not dispute this violation, but challenges the amount of the proposed civil penalty. The owner was not wearing a hard hat in a location where one was required.

**Order No. 4643594 - Failure to Wear Suitable**  
**Protective Footwear**

I find an S&S violation of § 56.15003 due to an unwarrantable failure to comply with the safety standard.

Respondent does not dispute this violation, but challenges the amount of the proposed civil penalty.

The violation was committed on December 21, 1995, by the owner, Bob Bak, who had been cited for a violation of the same safety standard on June 5, 1995. His conduct showed a serious lack of reasonable care.

**Order No. 4643596 -**  
**Inoperable Brakes on Fuel Truck**

I find an S&S violation of § 56.14101(a)(1) due to an unwarrantable failure to comply with the standard.

Respondent contends that a violation was not proved because there was "no testimony as to the weight of the fuel truck, its stopping distance on the day of the inspection, or that anyone had been injured as a result of the alleged condition of these brakes." Respondent's Brief, p.12. I credit the inspector's testimony that he "pushed in on the brake pedal, the brake pedal freely went all the way to the floorboard and as a matter of fact I had to reach down and pull it back up" (Tr. 90). I find that the brakes were inoperable. Where a basic brake test shows the brakes are inoperable, there is no necessity to perform a more detailed brake test under § 56.14101(b)(2) in order to prove a violation of § 56.14101(a)(1).

Bob Bak testified that the fuel truck was transported on a lowboy trailer to the mine site, driven off the lowboy, parked for fuel storage, and was not moved until the company moved to a new site. It was then driven onto the lowboy and transported to the new site. Inspector Nowell testified that although the truck was driven a minimal distance, the lack of brakes in driving onto and off the lowboy trailer was a safety hazard. Driving a truck without brakes onto and off a trailer could cause the driver to lose control of the vehicle and have an accident. The lack of brakes had a reasonable likelihood of contributing significantly and substantially to a serious injury.

Respondent's conduct in having an employee drive a fuel truck without operable brakes onto and off a trailer showed a serious lack of reasonable care and therefore an unwarrantable failure to comply with the standard.

**Order No. 4643776 - Failure to Deenergize and**  
**Lock Out Power Circuit to Conveyor**

I find an S&S violation of § 56.12016 due to an unwarrantable failure to comply with the standard.

Inspector Ferran observed an employee working on the stacker conveyor when the conveyor was not deenergized and the power switch had not been locked out and tagged.

The owner, Bob Bak, testified that a padlock to lock out the

power switch was available "by the parts trailer" and the crusher operator neglected to use it. Tr. 14-15. However, the inspector found no lock in the area of the power switch and Bob Bak was assisting the employee who was working on the conveyor. I find this violation was S&S. Working on a conveyor that had not been deenergized, locked out and tagged was a dangerous practice that presented a reasonable likelihood of serious injury.

I also find that the violation was due to an unwarrantable failure to comply with the safety standard. The owner was present and assisting the employee who was working on the conveyor. The failure to deenergize the conveyor and lock out and tag its power switch showed a serious lack of reasonable care.

**Citation No. 4643777 - Failure to Protect Power  
Circuit from Overload**

I find a non-S&S but serious violation of § 56.12001 due to ordinary negligence.

Respondent does not dispute this violation.

I find that the violation was serious, although non-S&S. The electrical inspector testified that if there were a phase fault the No. 8 cables would not be protected by the required fuse. If the faulted circuit "pulled 190 amps for a long period . . . it would have deteriorated the cable" and an employee could have been electrocuted with 480 volts. Tr. 149-150; Exh. G-25.

**Order No. 4643778 - Inadequate Insulation of Power  
Circuit**

I find an S&S violation of § 56.12030 due to an unwarrantable failure to comply with the standard.

Inspector Ferrar, an electrical inspector, found that a main 80-volt phase wire feeding the distribution boxes was deteriorated and the concentric insulation piece was broken, allowing the deteriorated cable to move in and out with a high risk of contacting metal parts of the equipment. He pointed out the hazard to the owner, Bob Bak, who told him that he was aware of the problem, that it had been that way for a few days but that he just had not had time to correct it. Tr. 137. Exh G-26. The owner's knowledge of the violation and failure to correct it demonstrated a serious lack of reasonable care.

**Order No. 4643779 - Inadequate Insulation of  
Power Cable**

I find an S&S violation of § 56.12008 due to an unwarrantable failure to comply with the standard.

Respondent does not dispute this charge but challenges the amount of the proposed civil penalty.

The bushing on the main 480-volt power cable did not fit properly and the concentric knock-out was broken, permitting the cable to move with a high risk of coming into contact with the metal part of the distribution box. Bob Bak told the inspector that he knew about the condition but just had not had the time to correct it. The electrical inspector testified that there was a risk that the power cable would be pulled out and come into contact with the metal frame of the distribution box and electrocute anyone touching it. The owner's direct knowledge of the violative condition and failure to have it corrected shows a serious lack of reasonable case.

**Citation No. 4643592 - Operating  
Front-end Loader in violation of an Imminent Danger  
Withdrawal Order**

I find an S&S and very serious violation of § 107(a) of the Act due to high negligence.

On December 21, 1995, Inspector Nowell observed a front-end loader parked with its motor running. The loader was under an imminent danger withdrawal issued on June 5, 1995. The owner, Bob Bak, told the inspector that they only used the loader to move the stacker conveyor and were not using it to move sand and gravel. He said the mechanic had quit and the company needed the loader. The brakes on the loader had not been repaired.

The imminent danger order prohibited use of the loader until the order was terminated based on a finding by MSHA that the brakes had been repaired. The order required Respondent to notify MSHA when the repairs were completed so that an inspector could test the brakes and determine whether the vehicle was ready to be returned to service. The company had not contacted MSHA about this vehicle.

Respondent's violation of the imminent danger order was deliberate and is a very serious violation. Of approximately 800 federal safety and health inspections that Inspector Carsten had conducted in his 20 years experience, the two citations against

Respondent for disregarding withdrawal orders were his first encounter of this type conduct by an operator.

#### CONCLUSIONS OF LAW

1. Respondent's mine operations are subject to the Act.
2. Respondent violated the cited sections of the Act and regulations as found above.

#### CIVIL PENALTIES

##### I

#### Respondent's Claim that the Proposed Penalties Will Adversely Affect Its Ability to Continue in Business

Respondent submitted a December 31, 1995, balance sheet for Bob Bak Construction and Federal tax returns of Robert A. Bak and Elsie J. Bak for tax years 1993, 1994, and 1995, in support of its contention that the proposed penalties will adversely affect its ability to continue in business.

These documents indicate that Bob Bak Construction is a sole proprietorship owned and operated by Robert A. Bak. Bak Construction's reported income progressed from a loss of \$54,999 in 1993, to income of \$65,147 in 1994, and income of \$83,020 in 1995.

The adjusted gross income in the Baks' joint tax returns shows a loss of \$339,509 in tax year 1993, a loss of \$276,664 in tax year 1994 and a loss \$192,059 in tax year 1995. The Baks' substantial progress in reducing the carryover loss corresponds with the pattern of increased income of the business for those years.

The business balance sheet as of December 31, 1995, shows a minus net worth of \$124,127. However, the evidence indicates that Bak Construction is an ongoing business with increasing net business income and that the Baks are making substantial progress in reducing their carryover loss. No net worth statement has been submitted for the Baks as individuals.

I find that Bak Construction has not proved by a preponderance of the evidence that the proposed penalties would have an adverse affect on its ability to continue in business.

However, in light of its financial condition, amortizing the payment of penalties is appropriate.

## II

### Findings as to the Six Statutory Criteria

#### Size of Operator

Respondent is a small-sized operator.

#### History of Violations

There are three focus points here: The history before the June 1995 inspection, the history before the September 1995 inspection, and the history before the December 1995 inspection.

The history before the June 1995 inspection is presumed to be neutral, since there is no evidence as to this period.

The history before the September 1995 inspection includes the June 1995 violations. This history is poor. There were 15 citations and orders in June 1995. Of the 15 violations found in June, six were due to high negligence or an unwarrantable failure to comply, 10 were S&S violations and 1 contributed to an imminent danger. This history is a negative factor regarding penalties for violations after the June inspection.

The history before the December 1995 inspection includes the June 1995 violations and the violation found in the September inspection. The September violation was a deliberate violation of a mine closure order, which adds to the poor history of the June violations. This is an increased negative factor regarding penalties for violations after the September inspection.

#### Negligence

Of the 24 violations, 14 were due to high negligence or an unwarrantable failure to comply and 10 were due to ordinary negligence.

#### Gravity

Of the 24 violations, 17 were S&S violations and 1 contributed to an imminent danger. Of the 7 non-S&S violations, 6 were serious violations.

**Efforts to Achieve Compliance After  
Notification of a Violation**

After notification of the violations, Respondent made a reasonable effort to achieve compliance with the exception of three violations. Those were the toilet facilities violation and the two violations caused by disregarding a closure order.

**III**

**Assessment of Civil Penalty for Each Violation**

I have considered the findings as to the six statutory criteria, above, in relation to each violation and the individual findings of fact and discussion as to each violation, above, in assessing a civil penalty for each violation. The following penalties are assessed:

<u>Order or Citation</u>	<u>Civil Penalty</u>
4643116	\$1,000
4643209	1,000
4643211	500
4643207	235
4643214	500
4643204	50
4643207	235
4643216	189
4643210	189
4643212	50
4643213	50
4643120	412
4643203	382
4643205	724
4643118	1,000
4643208	1,000
4643458	1,000
4643593	800
4643594	800
4643596	500
4643776	1,200
4643777	50
4643778	1,200
4643779	1,200

4643592

**Total**

2,000<sup>2</sup>  
**\$16,266**

Considering Respondent's financial condition, I find that a schedule of 12 monthly payments to pay the total civil penalties is appropriate.

**ORDER**

WHEREFORE IT IS ORDERED that:

1. Respondent shall pay total civil penalties of \$16,266 in 12 monthly payments of \$1,355 each, due on May 1, 1997, and the 1<sup>st</sup> day of each successive month until the total amount is paid.
2. If Respondent fails to make any monthly payment when due, the total remaining civil penalties shall become due the following day, with interest accruing from that date until the full amount is paid. The applicable interest rates will be those announced by the Executive Secretary of the Commission.



William Fauver  
Administrative Law Judge

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<sup>2</sup>In the case of Citation No. 4643592, the penalty has been raised to \$2,000 from the \$1,000 proposed by the Secretary. In increasing the penalty, I considered that this was a second violation disregarding a closure or withdrawal order and the order violated was an imminent danger order. The first violation was on September 12, 1995, when the operator disregarded a \$ 104(b) closure order. The September citation put the operator on clear notice that closure orders and withdrawal orders must not be violated. The second violation occurred in December 1995, when an imminent danger order was violated. Violations of withdrawal orders and mine closure orders are very serious and warrant a strong deterrent penalty.

Distribution:

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 20 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
Petitioner : Docket No. YORK 96-24-M  
v. : A.C. No. 06-00636-05518  
: New Milford Plant  
ADVANCE STONE INCORPORATED, :  
Respondent :

DECISION APPROVING SETTLEMENT

Before: Judge Bulluck

This case is before me upon petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Petitioner has filed a motion to approve settlement agreement and to dismiss the case. A reduction in penalty from \$554.00 to \$229.00 is proposed. The citations initial assessments, and the proposed settlement amounts are as follows:

<u>Citation No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
4426541	\$252.00	\$104.00
4426542	50.00	21.00
4426544	252.00	104.00
TOTAL	\$554.00	\$229.00 <sup>1</sup>

I have considered the representatives and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is GRANTED, and it is ORDERED that Respondent pay a penalty of \$229.00 within 30 days of this order.

*Jacqueline R. Bulluck*  
Jacqueline R. Bulluck  
Administrative Law Judge

<sup>1</sup>Motion for Approval of Settlement and Order contains mathematical error totalling penalty at \$225.00, whereas \$229.00 is corrected sum.

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 26 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 94-639
Petitioner	:	A.C. No. 40-02934-03549
v.	:	
	:	Mine No. 78
KELLYS CREEK RESOURCES INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

On March 12, 1997, the Commission issued a decision reversing my determination (17 FMSHRC 1325 (August 1995)), that the violation conceded by Kellys Creek Resources, Inc. ("Kellys Creek"), was not significant and substantial and was not the result of its unwarrantable failure, and remanding this matter for penalty reassessment.

Based on the Commission's finding that the violation was as the result of Kellys Creek's unwarrantable failure, I find that the level of Kellys Creek's negligence to constitute more than ordinary negligence, and to be aggravated conduct. I previously found that the violation constituted a very high level of gravity. I reiterate this finding in light of the Commission's determination that the violation was S & S. On the other hand, the level of the penalty to be assessed should be reduced taking into account its effect on Kellys Creek's ability to continue in business for the reasons set forth in Kellys Creek Resources, 17 FMSHRC 1085, 1092, (June 29, 1995). Taking all the above into account, I find that a penalty of \$500 is appropriate.



Avram Weisberger  
Administrative Law Judge

**Distribution:**

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**Mr. Hollis Rogers, Kellys Creek Resources, Inc., Route 4, Box 662, Whitwell, TN 37397  
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**/mh**

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 26 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 94-51-M
Petitioner	:	A. C. No. 30-00012-05522
v.	:	
	:	Wehrle Quarry
BUFFALO CRUSHED STONE,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

On February 18, 1997, the Commission issued a decision in this case (19 FMSHRC \_\_\_) in which it, *inter alia*, remanded this matter to me for determination whether the violation of 30 C.F.R. § 56.14109(a)<sup>1</sup> by Buffalo Crushed Stone, Inc. ("Buffalo"), was S&S, and assessment of a civil penalty. The Commission further reversed my initial holding (16 FMSHRC 2154, (October 1994)), that Buffalo's violation of 30 C.F.R. § 56.11009<sup>2</sup> was not S&S, and remanded the matter for reassessment of the civil penalty.

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<sup>1</sup>Section 56.14109 states, in relevant part:

Unguarded conveyors next to the travelways shall be equipped with --

(a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor drive motor . . . .

<sup>2</sup>Section 56.1109 states:

Walkways with outboard railings shall be provided wherever persons are required to walk alongside elevated conveyor belts. Inclined railed walkways shall be nonskid or provided with cleats.

I. Violation of Section 14109(a).

A. Significant and Substantial

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

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

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

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

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

The record establishes that a portion of the stop cord at issue had become slack, and had fallen two inches below a conveyor belt. This condition, found by the Commission to have been violative of Section 56.14109(a) supra, contributed to the hazard of a miner who falls coming in contact with a moving conveyor belt. Thus, the evidence establishes the first two elements of S&S set forth in Mathies, supra. The next issue for resolution is whether the Secretary established that the third element set forth in Mathies, supra, i.e., the likelihood of an injury producing event -- a miner falling in the area where the stop cord was slack.

In general, the evidence adduced at the hearing relating to the issue of S&S, and the likelihood of an injury consists of the following testimony by the MSHA Inspector:

Q. Now, in terms of your evaluation of this condition, you've indicated that injury would be reasonably likely. What's the basis for that?

A. Any time the stop cord is not where it's supposed to be, even for a short length of distance, you've got the possibility of someone slipping and falling or slipping and falling and not having immediate access to either grab the cord and deactivate the equipment or to automatically hit the cord during their fall on the way down and deactivate the equipment. So over time, although this was a short length of distance, over time, if any stop cord is out of place, I believe there's a reasonable likelihood that that could occur and I marked it as such.

Q. You've also indicated that the type of injury that could reasonably be expected would be lost work days or restricted duty. What's your basis for that conclusion?

A. An arm, for example, that's caught up between a conveyor belt and the troughing that the belt rides on could have devastating injury, burn type frictional type injury to an arm, for example.

Q. You've indicated that the condition was significant and substantial. What's your basis for that conclusion?

A. In my judgment, a reasonable likelihood existed because the cord was not intact everywhere along the belt as it should be. With a reasonable likelihood and with the possibility of a permanent injury, by definition the violation was significant and substantial.

Q. You've indicated that the number of persons affected would be one. What's that based on?

A. If anyone were injured because of the stop cord being out of place, it would be one person (Tr. 46-48).

In addition, the Inspector testified on cross-examination as follows:

Q. Okay. In your opinion, if there was a gentleman on that catwalk, a medium sized man or average sized, somewhere between me and you I would guess, fell up against that conveyor, the likelihood of him not being able to pull that cord in your opinion is -- would be what?

A. I think there would be a reasonable likelihood of him not being able to pull the cord before becoming entangled (Tr. 89).

Thus, the Inspector opined as to what could occur should a miner fall, and not to be able to grab the stop cord. However, no evidence was adduced regarding the likelihood of a miner falling in the area of the cord that was cited. There is no evidence in the record of the conditions in the area which would have made a fall reasonably likely to have occurred. I find that the Secretary has failed to establish the third element set forth in Mathies supra. Accordingly, I conclude that it has not been established that the violation of Section 56.14109(a) supra was S&S.

#### B. Penalty

There is no evidence in the record that the Secretary had, prior to the inspection at issue, communicated to Buffalo her interpretation that Section 56.14109(a), supra, requires that a stop cord be tight and located "somewhere near the side edge of the belt to as much as four inches above the side edge of the belt" (Tr. 44, 115). As such, the Secretary had not previously communicated to Buffalo that a stop cord located below the side edge of the belt, the condition cited herein, would be considered a violation of Section 56.14109(a), supra. I note that Section 56.14109(a), supra, does not require a particular placement for the stop cord. Hence, I find that Buffalo was not negligent to any degree. As such, the penalty for this violation is to be mitigated to a high degree.

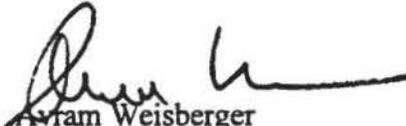
According to the testimony of the Inspector, the type of injury to be expected as result of their violation is as follows: "An arm, for example, that's caught up between a conveyor belt and the troughing that the belt rides on could have devastating injury, burn type frictional type injury to an arm, for example" (Tr. 47). I accept the Inspector's testimony in this regard, as it was not contradicted or impeached. I find that the level of gravity of this violation was moderate. The condition cited was timely abated. Considering the lack of Buffalo's negligence, I find that a penalty of \$20 is appropriate.

#### II. Reassessment of a penalty for the Violation of 30 C.F.R. § 56.11009

I take cognizance of the holding of the Commission that this violation was S&S (Slip op. P. 7-8, supra). Further, Buffalo did not impeach the Inspector's testimony that should one fall on an inclined walkway that was not provided with cleats, possible head injuries or fractures of fingers or wrists can result. Thus, I find that the violation was of a moderate level of gravity. The Inspector could not determine how long the cited conditions had existed. The Secretary did not contradict or rebut the testimony of Buffalo's witness Rashford that it was intended by Buffalo to replace the cited catwalk. I find that Buffalo's negligence was of a low level. I find that a penalty of \$50 is appropriate.

III. Order

It is ordered that within 30 days of this decision, Buffalo pay a total civil penalty of \$20 for the violation of section 56.14109(a), and \$50 for the violation of Section 56.11009, supra.

  
Avram Weisberger  
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

MAR 28 1997

JAMES C. TYSAR,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. LAKE 96-146-DM
	:	NC MD 96-04
AKZO NOBEL SALT, INC.,	:	
Respondent	:	Cleveland Mine
	:	Mine ID No. 33-01994

**DECISION**

Appearances: James C. Tysar, Parma, Ohio, *pro se*, Complainant;  
Mark N. Savit, Esq., and Ruth L. Ramsey, Esq.,  
Patton Boggs, L.L.P., Washington, D.C., for the Respondent.

Before: Judge Koutras

**Statement of the Proceeding**

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant filed an initial complaint with the U.S. Department of Labor, Mine Safety and Health (MSHA), and after investigating the complaint, MSHA informed the complainant of its decision not to pursue the matter further. The complainant then filed his complaint *pro se* with the Commission.

The complainant has been employed by the respondent for over nine years, and at the time his complaint was filed he was employed as a laborer. The complainant alleges that he was discriminated against and suspended from work for three days on October 6, 1995, because of his refusal to perform a job assignment in a mine area that he believed was unsafe. The complainant seeks to recover back pay for the three-day suspension, two days of missed overtime, and expungement of the suspension action from his personnel records.

The respondent filed a timely answer to the complaint denying any discrimination and taking the position that the complainant was suspended for insubordination for refusing to carry out a work assignment and order by his supervisory foreman. A hearing was held in Cleveland, Ohio, and the parties appeared and participated fully therein. The parties filed post hearing briefs, and I have considered their arguments in the course of my adjudication of this matter.

## Issue

The issue presented in this case is whether or not the respondent discriminated against the complainant by suspending him for three days after he refused to carry out a work assignment and order by his supervisor to perform a job task that the complainant believed was unsafe.

### Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.
2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1), and (2) and (3).
3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

### Background

The record reflects that on October 6, 1995, Mr. Tysar and co-worker Christopher Brown were working as laborers on the midnight shift on the second floor of the mine warehouse under the supervision of Surface Shipping Production Foreman James Mook. Mr. Mook assigned them the task of cleaning (shoveling) salt off the CFC scalping screen feed conveyor belt located on the second floor. There is a dispute as to whether they were assigned to clean the entire belt line or whether their work assignment was confined to only the belt tailpiece area.

The belt in question is an elevated inclined belt approximately 20 feet long and 3 to 4 feet wide, that passes over and in front of an elevator that opens directly beneath a portion of the belt. The belt section to the left of the elevator as one is directly facing the elevator is approximately 13 feet above the floor, and the tail piece section to the right of the elevator is approximately 10 feet above the floor, and 6 to 10 feet from the elevator.

The assigned cleaning task called for Mr. Brown, the junior laborer, to shovel the belt from an elevated "man basket" secured to the end of a forklift, with Mr. Tysar operating the forklift. The belt was de-energized and locked out, and Mr. Brown would have performed the cleaning from the man basket which was equipped with hand rails and a locked gate. He was also provided with a safety belt and lanyard.

After securing the man basket to the forklift, and while preparing to move the forklift into position to begin cleaning the belt, a maintenance vehicle with two mechanics in it exited the elevator under the overhead belt line and passed by Mr. Tysar and Mr. Brown. Mr. Tysar contacted Mr. Mook and expressed his concern that he and Mr. Brown might be at risk if they were cleaning the belt area in front of the elevator doors and a vehicle exited and struck the forklift while Mr. Brown was in the raised man basket.

Mr. Mook responded to Mr. Tysar's concern, and in the course of their discussion at the job scene, Mr. Tysar informed Mr. Mook that he wanted the elevator shut down and taped off while he and Mr. Brown cleaned the belt in order to insure against another vehicle driving out of the elevator and possibly striking the forklift while Mr. Brown was suspended in the air cleaning the belt in front of the elevator doors.

Mr. Mook maintained that his belt cleaning assignment was confined to the belt tailpiece area in order to facilitate the repair and replacement of a belt wiper, and that Mr. Tysar and Mr. Brown would have no reason to be in front of the elevator doors while cleaning the tailpiece. Mr. Tysar and Mr. Brown maintained that they were assigned to clean the entire belt line, and that at some point while doing this job, the forklift would be parked in front of the elevator doors.

Mr. Tysar estimated that the belt cleaning job would take less than an hour, and Mr. Mook rejected his request that the belt be shut down and taped off while he and Mr. Brown cleaned the belt. Mr. Mook indicated that the elevator was needed to bring in parts and supplies, and he maintained that he offered Mr. Tysar two alternatives to shutting down and taping the elevator, namely, an offer to inform the other employees of the work being done by Mr. Tysar and Mr. Brown, and a suggestion that Mr. Tysar position himself next to the forklift, with the brake set, so that he could observe the elevator and warn anyone exiting that he and Mr. Brown were working in the area. Mr. Tysar denies that these offers were made, and even if they were, he indicated that he would reject them because he believed that disabling the elevator and taping off the area was the only acceptable means of insuring his safety. Mr. Mook then gave Mr. Tysar and Mr. Brown a direct order to proceed with their job assignment, and when they refused, Mr. Mook suspended them. They subsequently filed their complaints, and Mr. Brown withdrew his complaint shortly before the scheduled hearing. His case was dismissed.

#### Complainant's Testimony and Evidence

James C. Tysar, the complainant in this matter, testified that he is employed by the respondent as a laborer, has been employed by the company for over nine years, and serves as a safety committeeman. He stated that although he and Mr. Brown refused an order by Mr. Mook to do the assigned job, his refusal was based on a safety concern and Mr. Mook's refusal to grant his request to make his work area safe by taking the elevator out of service.

Mr. Tysar stated that he suggested to Mr. Mook that he call the plant safety director, but instead, Mr. Brian Bonjack, a maintenance foreman, appeared on the scene, and Mr. Tysar believed that Mr. Bonjack "was called as a witness because Mr. Mook intended to suspend us" (Tr. 23). Mr. Tysar stated that Mr. Bonjack had no knowledge of the events leading to his suspension, and was there to witness his confrontation with Mr. Mook. Mr. Tysar explained his work assignment and safety concerns as follows at (Tr. 49-51):

THE WITNESS: All right. My foreman, Jim Mook, gave myself and Mr. Chris Brown a job to do on the second floor of the warehouse. Our job was to - - my job was to operate a forklift with Mr. Brown in a caged-in platform which was attached to the forks of the fork lift. I was supposed to raise him up into the air to the level of the conveyor belt, which we were told to clean the decking on; Mr. Brown was told to clean the decking.

This particular conveyor belt runs on an angle, about a 45-degree angle directly above - - well, three feet out and directly above the doors of a freight elevator.

As we were getting into position to do this job, the doors of the elevator opened up and a maintenance vehicle pulled out of the elevator doors at a pretty good rate of speed.

So, I contacted Mr. Mook, and I explained to him the situation as far as our concern for our safety, being getting bumped into or knocked over while Mr. Brown was up in the air. And I requested that he tape off the elevator doors - - caution tape the elevator doors on the first floor - - so that nobody gets on the elevator and gets off on the second floor. I also suggested that he might put a "Do Not Operate" tag on the button of the elevator so that nobody pushes the buttons to operate the elevator.

Mr. Mook decided that it would be better that I put Mr. Brown up in the air on a platform, set the emergency brake and go stand by the little window in the door and look to see if the elevator is coming up.

JUDGE KOUTRAS: The door of the elevator?

THE WITNESS: Yes.

JUDGE KOUTRAS: The window in the door of the elevator is what he expected you to do?

THE WITNESS: Yes. But that scenario there would have put me directly under where Mr. Brown was working. If Mr. Brown dropped a shovel, I could get hit with a shovel.

I just thought that the best course of action to make our work area safe was to disable the elevator or to prevent people from using the elevator while we were doing this job.

Mr. Tysar further explained his safety concerns as follows at (Tr. 25):

JUDGE KOUTRAS: How would the forklift get bumped?

THE WITNESS: Because our job was to clean belt decking, which the belt decking ran over the top of the elevator doors.

JUDGE KOUTRAS: You felt that that would be bumped by a piece of equipment coming out of the elevator?

THE WITNESS: I felt that it could be. I'm not saying that it would be. I'm saying that there was a very good probability. The maintenance people were using the elevator at the time. The elevator is always in use. Electricians use it, mechanics use it, people come and go.

Mr. Tysar believed it would have taken Mr. Mook 10 to 15 minutes to tape off the elevator, and the belt cleaning job would not have taken more than an hour (Tr. 26). He confirmed that he told Mr. Mook that he refused to do the work out of concern for his personal safety (Tr. 34). He and Mr. Brown were then escorted off company property, and he was suspended for three days, and Mr. Brown was suspended for only one day because he had a better work record (Tr. 35). Mr. Tysar confirmed that he filed a grievance with his union regarding his suspension, but did not prevail (Tr. 42-44; 303-304).

Mr. Tysar believed that the best course of action to make his work area safe was to disable the elevator or prevent people from using it while he and Mr. Brown were working (Tr. 51). He explained that Mr. Brown was expected to clean hardened salt buildup on the belt decking in between the rollers and on the belt bottom, and they would be positioned in front of the conveyor that was ten feet off the floor on a 45-degree angle directly above the elevator door (Tr. 53).

Mr. Tysar stated that in response to his complaint, Mr. Mook suggested that he lift Mr. Brown up in the air, set the forklift park brake, and then get off the forklift and look through the window of the elevator door (Tr. 54). Mr. Tysar believed he would be at risk if the forklift tipped over, depending on the size and weight of the vehicle leaving the elevator, and Mr. Brown could have dropped a shovel or shoveled salt down on him if he were standing under the belt looking through the elevator window. He further believed that Mr. Brown would be at risk if he were knocked out of the forklift basket if the forklift tipped over (Tr. 54).

Mr. Tysar confirmed that his confrontation with Mr. Mook took place while he and Mr. Brown were preparing to clean the belt. Mr. Brown would have been on the forklift cleaning the belt decking with a shovel. The platform had rails around it, with a locked gate, and the salt would be shoveled into a dumpster below the belt (Tr. 55-56).

Mr. Tysar confirmed that that he disagreed with Mr. Mook's suggestion that he look through the elevator window and leave the forklift in a locked position while Mr. Brown was cleaning, and there was no overhead protection between the bottom of the belt and the floor level (Tr. 57). He stated that he had no idea what Mr. Mook expected of him once he looked through the elevator window (Tr. 58). He believed that Mr. Mook should have responded to his complaint in a diplomatic manner rather than punishing him for his complaint, and he stated as follows at (Tr. 59, 61-62):

JUDGE KOUTRAS: So, that was the dispute?

THE WITNESS: Yes, that was the dispute.

JUDGE KOUTRAS: The foreman said, "No, we're going to do it this way," and you said, "No, we're going to do it my way." And that was the end of it.

THE WITNESS: Yes, I saw it as a power struggle.

\* \* \* \*

THE WITNESS: In some cases when some people that are given a position with power or authority, they handle it well and some people - -

JUDGE KOUTRAS: How do you think someone else would have handled that situation?

THE WITNESS: Well, everybody has their own personalities and dispositions. What I'm saying is that he may have had a personal problem with me. I don't know. But I was doing my job as a union safety committeeman, and I was also taking responsibility for my own personal safety and Mr. Brown's safety, even if I wasn't a union safety committeeman.

Mr. Tysar stated that he and Mr. Brown would have been no more than four feet from the elevator doors. The doors were 10 feet wide, and the belt line was approximately 15 or 20 feet long. He stated that he and Mr. Brown were to clean the belt, starting at one end and cleaning the entire decking. At one point in time they would be directly in front of the elevator doors, and at other times "a little to the right or to the left" (Tr. 64).

Mr. Tysar believed that other pieces of equipment would have been on the elevator on the midnight shift, and maintenance personnel were working during that time. He described the area as the second floor of a warehouse with bins and mixers on that floor, and confirmed that the elevator was the only means for vehicles to reach the second floor (Tr. 67-68). He believed that

Mr. Mook did not want to inconvenience the maintenance department by shutting down the elevator (Tr. 69).

On cross-examination, Mr. Tysar stated that the elevator window is near the left edge of the door at eye level of a person of average height, and that he had difficulty seeing through the window because it is always dirty and there is an inner screen door in addition to the main door (Tr. 77-78). He further explained the operation of the doors, and stated that the maintenance vehicle that exited the elevator was backed in so that the front of the vehicle came out first when the elevator doors opened (Tr. 79-82).

Mr. Tysar stated that the belt was not running and it was locked out as required when idlers and rollers are to be cleaned (Tr. 82). He confirmed that the two individuals in the maintenance vehicle that came out of the elevator observed him as he was positioning the forklift, and they would pass him on their way back to the elevator (Tr. 85). He stated that there were "quite a few" vehicles in use on the midshift shift, as well as two mechanics and two electricians (Tr. 86). The incident in question occurred at 3:50 a.m., and the shift started at midnight (Tr. 88).

Mr. Tysar could not recall that Mr. Mook offered him any other alternative ways to make the belt cleaning job safe other than looking through the elevator window (Tr. 93). He could not remember whether Mr. Mook ever offered to notify all of the other personnel using vehicles that he was working in the area and stated, "even if he did, that's a moot point because that's still not good enough," and that "people forget" (Tr. 95-96). He believed that "the safest way to do this would have been to disable and not use the elevator or tape it off" (Tr. 96). He further stated as follows at (Tr. 96-97):

Q. So, it's your testimony that there was no other alternative that would have been acceptable to you in any case; is that right?

A. I'm willing to talk with people and compromise. That's what this whole thing is about, especially when my own safety is concerned, that particular - - even if he did or even if he did bring that possible solution up, that would have been unacceptable, yes.

And, at (Tr. 101-102):

Q. Did you suggest anything other than taping off the elevator or de-energizing it, Mr. Tysar?

A. Those are the two things that came to mind and that's normally what would be the best solution to a problem like that.

Q. The question was did you suggest. I take it your answer is "no?"

A. No, because Mr. Mook was fighting me that whole time. He was arguing with me about it.

Mr. Tysar confirmed that the conveyor belt was three and a half to four feet away from the elevator, and if he were standing next to the window looking into the elevator he would have possibly been three to four feet in front of the belt area that Mr. Brown was shoveling (Tr. 105). Mr. Tysar further stated that the belt was three and a half to four feet wide and Mr. Brown was shoveling on the far side of the belt away from the elevator and Mr. Brown would have been six to eight feet behind him (Tr. 106). Mr. Brown would have been anywhere from eight to fifteen feet up in the air, depending on the part of the belt he was working on, and 15 to 20 feet where the window was located.

In response to a question as to whether or not he told Mr. Mook about his concern that Mr. Brown might drop a shovel on his head, or shoveling material down on him, while he was looking through the window, Mr. Tysar responded as follows at (Tr. 108-109):

THE WITNESS: About overhead? Yes, that was brought up; something like that, I guess.

JUDGE KOUTRAS: Specifically, did you tell Mr. Mook - -

THE WITNESS: Not about a shovel, no.

JUDGE KOUTRAS: Or material?

THE WITNESS: Material; things falling from above, yes.

JUDGE KOUTRAS: Could fall on your head?

THE WITNESS: Things falling from above, yes.

JUDGE KOUTRAS: You told Mr. Mook that?

THE WITNESS: I believe - -

JUDGE KOUTRAS: That you were concerned that material would fall on your head while you were standing at the elevator looking through the window?

THE WITNESS: I told Mr. Mook I didn't feel safe doing that; that's what I told him.

JUDGE KOUTRAS: But you didn't give him any specifics. You just used the generic word "safe." You didn't feel you were safe, right?

THE WITNESS: Basically, yes.

JUDGE KOUTRAS: But you didn't tell him why?

THE WITNESS: I don't believe I did.

Mr. Tysar stated that there is less salt buildup higher up the belt line and the "worst of it" was in front of and to the right of the elevator (as one faced it) closer to the belt tail piece which was six to ten feet away (Tr. 113-114). The forklift was four and a half to five feet wide and he did not believe he could have positioned the forklift in such a way as to clean the belt at the tail pulley area without putting it in front of the elevator. He believed that part of the forklift would still be in front of part of the door (Tr. 119).

Mr. Tysar denied that Mr. Mook worked with him to position the forklift so that it was out of the way of the elevator. He confirmed that Mr. Mook showed him how to set the parking brake, and the forklift was 15 or 20 feet away from the elevator at that time and off to the side for a distance of four feet (Tr. 120). He confirmed that the tailpiece was on the left as one exited the elevator, and that the first place a left turn can be made while exiting the elevator was 20 feet from the elevator door (Tr. 122).

Mr. Tysar confirmed that he has never heard Mr. Mook say "to hell with safety" (Tr. 122). He stated that he did not know whether Mr. Mook called Mr. Ryon, and he confirmed that in his deposition he stated that Mr. Mook did in fact call Mr. Ryon but explained that he "was confused to an extent" (Tr. 128). He then confirmed that his notes reflect that "after consulting with Tim Ryon, Mook came back and ordered us to work in this unsafe environment, and we refused on the grounds of our safety" (Tr. 129).

Mr. Tysar stated that Mr. Mook showed him where the job was to be done, and he explained as follows at (Tr. 131):

Q. And he pointed out exactly where he wanted you to shovel and where he wanted you to put the forklift?

A. You use the work "exactly." He basically went up to the second floor with us, showed us the job to be done, told us how he wanted us to do it, what to use. As far as exactly goes, those are specifics. We had a good understanding of what needed to be done and how it had to be done and what we had to use to get it done. That was clear.

Mr. Tysar stated that he raised a safety concern with Mr. Mook about securing the work basket to the forklift, and that Mr. Mook responded to his satisfaction by securing the basket to the forklift, and providing a safety belt and lanyard for Mr. Brown. Mr. Tysar commented that

"if I was going to be in the basket, I wouldn't have any problem with it" and "I would have felt safe" (Tr. 133).

Mr. Tysar stated that Mr. Mook responded to his call to come to the work area in a reasonable amount of time, and "when he got up there, then we had an argument and could not agree on a compromise" (Tr. 137). Mr. Mook then assigned him and Mr. Brown to do some shoveling while he spoke on the telephone "probably with Mr. Ryon" (Tr. 139). After finishing that call, Mr. Mook then stated "I'm giving you a direct order. I want you to do such and such a job," and then "when we refused on the grounds of safety, that's when we were suspended" (Tr. 140).

Mr. Tysar confirmed that he has been warned or written up three times for safety violations, and he explained the circumstances. He filed grievances for two of the violations, and the grievances were denied (Tr. 140-143). Mr. Tysar denied that Mr. Mook had ever previously spoken to him about safety violations or written him up for any violations (Tr. 144).

Mr. Tysar confirmed that when he and Mr. Brown were preparing to do the work and the maintenance vehicle came out of the elevator it was not "a near miss" and they were far enough away. His concern was that a vehicle exiting the elevator in the course of his assigned work would come close to where the forklift would be parked (Tr. 145). The forklift would be positioned away from the elevator, and the conveyor belt would have been between the elevator and the forklift. Assuming that he and Mr. Brown had proceeded to work on the belt, and the vehicle came out of the elevator, Mr. Tysar believed that it would have hit the forklift. He further stated at (Tr. 147-148):

THE WITNESS: Your honor, we're really only talking about that area there, that general area where we were working is only like roughly 20 to 25 feet and directly in front of the elevator doors. There's some space off to the right and off to the left that you're not directly in front of the doors, but most of it is.

JUDGE KOUTRAS: Okay.

THE WITNESS: Just about anywhere you park that thing, if we were positioned directly in front of the elevator door, it would have been a direct hit. If we were off to the right a little bit, we would still have gotten hit.

JUDGE KOUTRAS: Well, my question is in the course of your cleaning the belt, would you have been positioned directly in front of the elevator at any time while you were doing the work?

THE WITNESS: Yes.

Christopher Brown, employed by the respondent as a laborer, confirmed that he and Mr. Tysar were assigned to do the belt cleaning job by Mr. Mook. He believed that Mr. Tysar had a legitimate safety reason for asking Mr. Mook to tape off the elevator, and he would have felt better if the elevator was tagged out (Tr. 154). Mr. Brown could not recall any alternative safety suggestions by Mr. Mook (Tr. 155).

Mr. Brown believed that his one day suspension was unfair, but confirmed that the withdrawal of his complaint "was my own idea," and that mine management never discussed the matter with him or influenced his decision. He also confirmed that respondent's counsel never harassed him, and he simply "couldn't handle" the legal proceeding (Tr. 160-161).

On cross-examination, Mr. Brown confirmed that he felt unsafe with the job assignment by Mr. Mook, and told Mr. Mook that "I feel unsafe," but said nothing specific as to why he felt unsafe. Mr. Brown stated that he offered no suggestions or ideas to Mr. Mook to correct the situation, and he could not recall any alternatives offered by Mr. Mook other than taping off or de-energizing the elevator (Tr. 163).

Mr. Brown stated that "I hardly said a word" during the conversation that took place with Mr. Mook, and he could not recall if both he and Mr. Tysar tried to reason with Mr. Mook. He further confirmed that he did not participate in the conversation between Mr. Mook and Mr. Tysar and that "all I said was I thought it was unsafe" (Tr. 166). To the best of his recollection, the vehicle in question backed out of the elevator (Tr. 167), and when asked if he could be wrong, he replied "I could be wrong, but I'm pretty sure it came out backwards" (Tr. 169).

#### Respondent's Testimony and Evidence

James S. Mook, respondent's Surface Shipping Production Foreman, testified that he has worked for the respondent for 19 years, and he described the second floor area around the freight elevator, and explained the diagrams (Exhibit R-2, Tr. 180-185).

Mr. Mook stated that he was informed by the maintenance department that the conveyor belt tailpiece wipers could not be changed out until all of the salt buildup at the tailpiece was cleared out. He determined that the belt tailpiece needed to be cleaned, and he assigned that job task to Mr. Tysar and Mr. Brown on the evening of October 6, 1995. The work was to begin after their lunch hour when he had time to personally take them to the area and show them what needed to be done (Tr. 186). He confirmed that he personally took them to the job area because it was a new job assignment and not a repetitious one (Tr. 187).

Mr. Mook explained what occurred at the time he assigned the job task to Mr. Tysar and Mr. Brown. He stated that he told them that "we had some belt decking to clean out and we needed a lock." The belt electrical breaker was locked out, and Mr. Brown was assigned to do the manual cleaning work from the forklift basket, and Mr. Tysar was assigned to operate the

forklift. He then told them, "we're here, set up and away you go," and since they had no questions, he left the area (Tr. 187-188).

Mr. Mook confirmed that Mr. Tysar raised a question concerning how the basket would be attached to the forklift, and he and Mr. Tysar secured it with a heavy rope and Mr. Tysar "was quite pleased with that arrangement" (Tr. 189). Mr. Mook further explained his work assignment as follows at (Tr. 189-190):

Q. So, you locked out the belt and tied the basket there. Did you show them where you expected them to put the forklift?

A. Yes, I did. It was obvious because I pointed out the tail piece area where all the salt buildup was.

Q. Could you describe - - can you point on the diagram to the best of your recollection where the salt buildup was that they had to knock down?

A. The forklift in the picture is positioned right where the man had to be to be able to reach right and left of that tail pulley because on a tail piece you have strip boards that contain the salt as it enters the belt; that's where the wipers were blown out and that's where the salt was packed up.

As you went uphill, the salt tapered down to nothing. So, the wipers being blown out caused all this spillage right there at the tail piece area. Once we set this man up in this location, he could reach in this tail piece area and uphill and be able to accomplish all the clean up there was.

Q. Did you explain that to Mr. Tysar and Mr. Brown?

A. Not in detail. I told him we were going to clean the tail piece area up, and this is where I told him to set the machine and there were no questions.

Q. So, you told him the tail piece area. Did you tell him the entire belt had to be cleaned?

A. No, I didn't.

Mr. Mook stated that he instructed Mr. Tysar to use a scrap-salt dumpster that was nearby so that most of the salt could be shoveled from the belt decking directly into the dumpster. Mr. Tysar moved the dumpster into place with the forklift and it was placed to the right of the elevator in an inset by a walled partition (Tr. 191).

Mr. Mook stated that he returned to his office, and five to ten minutes later Mr. Tysar called on the intercom and informed him that there was "a near miss accident" and that two men on a maintenance vehicle "came screaming off the elevator" and could have hit him and caused an accident. Mr. Tysar informed him that no one was hurt "because we weren't set up yet" (Tr. 192).

Mr. Mook identified and offered a copy of a letter addressed to Mr. Tysar, dated October 6, 1995, that he was in the process of writing as a disciplinary action because of Mr. Tysar's unsatisfactory work performance (Exhibit R-7). Mr. Mook stated that the letter was never given to Mr. Tysar, or discussed with him because his work suspension that same evening occurred before he could do so. The letter was rejected (Tr. 199-202).

Mr. Mook stated that Mr. Tysar had worked for him for seven weeks prior to the suspension in question, and that he had many discussions and confrontations with him concerning his lack of work, personal safety, and unsafe work (Tr. 203-205).

Mr. Mook stated that after speaking with Mr. Tysar over the intercom, Mr. Tysar and Mr. Brown came to his office within minutes "screaming that they could not do this job at the freight elevator because it was an unsafe act and they started demanding that safety men from the company be brought in" (Tr. 208). Mr. Mook stated that he instructed Mr. Tysar and Mr. Brown to return to the second floor area and not to resume work on the belt, but to shovel salt from the floor into two dumpsters in the corner of the warehouse "until I can get this sorted out." (Tr. 208).

Mr. Mook stated that he then went to the warehouse after requesting the presence of maintenance foreman Brian Bonjack for a second opinion as to whether there were any other safety facets involved with the work assignment that he had made. Mr. Mook then called Mr. Chris Gill, the mine surface superintendent, to make him aware of his problems with Mr. Tysar, and he and Mr. Gill had an ongoing conversation about Mr. Tysar (Tr. 209-211).

Mr. Mook stated that the forklift was parked "off to the side" when he arrived at the job scene, and "it was all set up but not at the job site yet" (Tr. 211). He and Mr. Bonjack discussed the situation, confirmed with Mr. Tysar that the forklift brake had been tested and was working fine, and made sure the basket was secured and that the safety belt and lanyard were in place. The belt line was locked out, and he then ordered Mr. Tysar to move the forklift and park it to the right of the elevator as shown in the large diagram exhibit R-4.

Mr. Mook was of the opinion that the area where all of the belt work was needed to be done could have been reached with a shovel by the person in the basket where the forklift would have been parked to the right of the elevator (Tr. 213). However, this opinion was not acceptable to Mr. Tysar and he was "extremely angry" because he believed that other people could still exit the elevator and was afraid that he could get hit even with the forklift in that location (Tr. 216). Mr. Mook stated that because of the presence of other equipment on the left side of the elevator

as one exits the doors, anyone exiting the elevator on a piece of equipment would have to proceed straight ahead for a distance of 20 feet, and past the parked forklift, before he could make a left turn to reach the other warehouse areas (Tr. 215-216).

Mr. Mook stated that he offered Mr. Tysar the following alternatives other than taping off or locking out the elevator in order to assure him that the job would be safe (Tr. 218-219):

THE WITNESS: I told him to park the machine, set the park brake, take it out of gear, get off, stand three feet, an arm's length away from the machine so he would be at the controls near enough in case Brown needed him, which would put him in a frontal view of that elevator to see anyone getting off of it.

Mr. Mook further stated that he offered to contact everyone that may have been working with vehicles that might come into the work area in question, and he denied telling Mr. Tysar to look through the elevator window (Tr. 217, 225). Mr. Mook pointed out that the dumpster was placed at the intended work location so that the salt could be shoveled in from the belt (Tr. 219). He further explained his suggested safety alternatives at (Tr. 223-224):

A. Two fold. He would be there as the safety man for Mr. Brown, if needed. And he would be needed to move the machine, if nothing else. He was within hand's reach of the control.

And, secondly, to be able to view the elevator because I stated to these gentlemen during the course of these discussions that there was a problem in the block press pump room and I needed to keep the freight elevator running if possible, so that everyone could safely use the elevator and us still get our job done at the same time. So, with Jim Tysar standing in that position, this was the alternative safety suggestion by me, he could be there for Brown as the safety man and also be able to see anyone coming off the elevator.

At that point, I timed the opening on the freight elevator doors - - Brian Bonjack was present during this period, during all of these proceedings - - and it took a full six seconds for the doors to open once the open door button was pushed. So, I explained that to Mr. Tysar that he would have plenty of time to warn off anybody getting off the elevator.

Mr. Mook stated that there were three potential vehicles that could have used the elevator and he offered to warn those operators of the work taking place, but this was unacceptable to Mr. Tysar and "there was only one thought in his mind, and that was the shutting down of the elevator or nothing at all" (229-230).

Mr. Mook denied that there was any "near miss" with respect to the vehicle that drove off of the elevator, and Mr. Tysar and Mr. Brown had not yet arrived at their work area when the

machine drove past them. He stated that he spoke to the vehicle operator who informed him that there was no "near miss" and that the forklift was in the middle of the warehouse and had not moved to the corner by the elevator, and no one was in it (Tr. 235-236).

Mr. Mook stated that he and maintenance foreman Bonjack discussed the job "from beginning to end and made sure that there were no unsafe items left," and concluded that "we were well off to the side and no one could get hurt exiting the elevator" (Tr. 237). He then called superintendent Gill who informed him that "since there are no more safety items to be addressed, that this is now an act of insubordination," and Mr. Brown and Mr. Tysar were suspended and escorted off the property (Tr. 237-238). Mr. Mook stated that during his discussions with Mr. Brown and Mr. Tysar, Mr. Brown was "very quiet," and simply accompanied Mr. Tysar (Tr. 240).

During cross-examination, and in response to a bench question, Mr. Mook agreed that assuming the forklift moved along the beltline, if it was in front of the elevator doors when they opened, this would be an unsafe location (Tr. 248). However, Mr. Mook believed that the forklift would never be positioned in front of the elevator doors because the salt buildup was only at the tail piece, and the main reason for the work was to clean that area so that the wipers could be repaired (Tr. 248).

Brian T. Bonjack, respondent's Surface Maintenance General Foreman, testified that he was summoned by Mr. Mook to the scene of the incident on October 6, 1995, involving Mr. Tysar and Mr. Brown. Mr. Mook requested his presence because he wanted a second opinion about a safety matter on the second floor of the warehouse. He stated that there were discussions going on about the relevant safety of the job assignment made by Mr. Mook, and Mr. Mook wanted his opinion regarding the conditions that Mr. Tysar and Mr. Brown had been asked to work in (Tr. 256-258).

Mr. Bonjack stated that Mr. Tysar and Mr. Brown were assigned to clean the belt tailpiece, and he explained further as follows at (Tr. 258-259):

Q. Okay, if I may, if you can look at Exhibit R-4, and if you would, Mr. Bonjack, show me on Exhibit R-4 what area of the belt Mr. Tysar and Mr. Brown had been assigned to, please?

A. The tail piece is this area at the end of the conveyor, this being the tail roller which is shown at this point right here. And the chalking on this is generally directly going upstream from that, which would be in this particular area.

Q. If we're facing the elevator, is it your testimony that most of the area Mr. Tysar and Mr. Brown had been assigned to clean was to the right of the elevator?

A. That's correct.

Q. Did they have to clean any of the area over here by the elevator?

A. I didn't observe any significant salt buildup in that area. There was a large accumulation in the tail piece area because there was a leaky tail piece wiper, which is what perpetrated this whole cleanup operation.

Based on his understanding that the work that Mr. Tysar and Mr. Brown were assigned to do was confined to the tailpiece area, Mr. Bonjack was of the opinion that they would not be in the pathway of any vehicles coming out of the elevator, (Tr. 259-261). He believed the forklift would not have been located directly in front of the elevator door in order to complete the cleanup job because the cleanup area was significantly offset from the elevator (Tr. 259-262).

Mr. Bonjack stated that although the cleaning of the belt was not part of his department, and he does not assign workers to do the cleaning, he believed that it is a routine assignment and the tail pieces are routinely the worst areas to clean up. He did not know if the belt in question had previously been taped off while it was cleaned (Tr. 262-263).

Mr. Bonjack stated that Mr. Mook suggested to Mr. Tysar that he position the forklift a safe distance from the elevator opening and stand next to it to assist Mr. Brown if necessary and to verbally warn anyone coming off the elevator that they were working in the area. He stated that the area was quiet and that the elevator doors can be heard when they are opening. He further stated that Mr. Mook offered to apprise or warn other plant personnel about the cleanup activity taking place and to use caution if they were in the area. However, Mr. Tysar would only be satisfied if the elevator was rendered inoperable (Tr. 263-266).

Mr. Bonjack was of the opinion that Mr. Tysar and Mr. Brown were not exposed to any imminent danger from vehicles passing by the area where they were working (Tr. 266). He stated that the mechanical work that was to be done required the elevator to be serviceable in order to bring in parts. He believed the options given to Mr. Tysar and Mr. Brown were clearly explained to them and that the response by Mr. Tysar and Mr. Brown "was an overreaction to a situation that didn't merit that type of reaction" (Tr. 268).

On cross-examination, Mr. Bonjack stated that he was not specifically summoned to the scene by Mr. Mook to be a witness but to "verify what his findings were and to see if I could see anything additional that maybe he had not seen" (Tr. 269). He confirmed that for the most part, he simply observed the verbal exchange between Mr. Mook and Mr. Tysar, and that his conversation about the safety issues was with Mr. Mook and not with Mr. Tysar and Mr. Brown (Tr. 271-273).

Mr. Bonjack stated that he was not aware that Mr. Mook's work assignment included the entire belt. He believed that the opening of the elevator doors could be heard above the noise of

the forklift motor (Tr. 277-278, 280). He agreed that someone up on a forklift cleaning the belt directly in front of the elevator would be at risk if a piece of equipment came off the elevator (Tr. 283).

In response to further questions, Mr. Bonjack stated that he was not present when Mr. Mook gave Mr. Brown and Mr. Tysar their work assignment. However, in the course of his conversation with Mr. Mook after arriving at the scene, it was his understanding that Mr. Brown and Mr. Tysar were to clean the belt tail piece (Tr. 285). He stated that the salt buildup at the belt area closer to the top "tapers off dramatically once you get away from the tail piece." In his opinion, it was not necessary to clean the belt area away from the tail piece because the entire purpose of the cleanup assignment was to ready the area for the mechanics to change the worn tail piece wipers. He stated "whether he wanted the rest of the belt cleaned or not, I wasn't a party to that and I certainly didn't see large accumulations of salt elsewhere. The tail piece was the area of concern" (Tr. 286). He conceded that assuming Mr. Brown and Mr. Tysar understood that they were to clean the entire belt, the forklift would at one point during the cleaning process be directly in front of the elevator (Tr. 288).

Russell T. Ryon, respondent's Human Resources Manager, explained how company overtime is calculated, and stated that Mr. Tysar would not have been eligible for overtime because he was suspended, and the suspension was over a weekend. He stated that he would have to review the personnel records to determine whether Mr. Tysar would have qualified for overtime had he not been suspended (Tr. 289-293).

Mr. Tysar testified in rebuttal that he and Mr. Brown were ordered to clean the entire belt line and not just the tail piece, and he stated as follows at (Tr. 306-307):

We were told to shovel the decking on that particular belt, not the tail piece, the whole belt. We weren't even told where to start. We were just told to do the decking. That's what we were told.

With respect to any safety alternative offered by Mr. Mook, Mr. Tysar stated as follows at (Tr. 307):

\* \* \* \* he told me to go look in the window of the elevator after I hoisted Chris Brown up in the air and set the parking brake. That's it.

I don't remember anything about him telling me to put my arm out and stand an arm's length away from a forklift. He stated to me to go up to the door, and look through the window, and when the elevator comes up, to tell whoever comes out of the elevator to be careful or to stop or whatever.

Mr. Tysar denied that Mr. Mook told him he was prepared to ask the other employees and mechanics to be aware when they got off the elevator (Tr. 308).

Christopher Brown was recalled by the Court and stated that Mr. Mook instructed him and Mr. Tysar to clean off the decking, and when asked if he mentioned anything about the tail piece, Mr. Brown responded "well, that's part of it" and "he didn't tell us where to start" (Tr. 310). He could not recall that Mr. Mook indicated which part of the belt was "worse" or "best," and he believed that he and Mr. Tysar were expected to shovel off the decking of the entire belt.

In response to a question as to where he would have started the belt cleaning, Mr. Brown responded "I have no idea." When asked where he would have started if the elevator opening incident had not occurred, he responded "I don't know" (Tr. 311). When asked if he would have started at the far end or at the worst end, he responded "wherever, we really weren't in position" (Tr. 311). He explained that the belt decking is the area between the rollers and the belt frame, and it was his understanding that he and Mr. Tysar were to clean the entire length of the belt and the tail piece (Tr. 313-314).

### Findings and Conclusions

#### Fact of Violation

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidated Coal Company, 2 FMSHRC 2768 (1980), rev'd on other grounds sub nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Company, 3 FMSHRC 803 (1981); Secretary on behalf of Jenkins v. Hecla-Day Mines Corporation, 6 FMSHRC 1842 (1994); Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-2511 (November 1981), rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Company, 4 FMSHRC 1935 (1982). The ultimate burden of persuasion does not shift from the complainant. Robinette supra. See also Boich v. FMSHRC, 719 F.2d 194 (6<sup>th</sup> Cir. 1983); and Donovan v. Stafford Construction Company, 732 F.2d 954 (6<sup>th</sup> Cir. 1983) (specifically-approving the Commission's Pasula-Robinette test). See also NLRB v. Transportation Management Corporation, 462 U.S. 393, 76 L.ed.2d 667 (1983), where the Supreme Court approved the NLRB's virtually identical analysis for discrimination cases arising under the National Labor Relations Act.

### Mr. Tysar's Protected Activity

I conclude and find that Mr. Tysar had a right to complain to Mr. Mook about his concern that proceeding with the belt cleaning job assignment might place him at risk and expose him to a possible hazard if he and Mr. Brown were working with the forklift in front of the elevator doors and another vehicle exited the elevator. His complaint is a protected activity which may not be the motivation by mine management for any adverse personnel action against him. Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), Rev'd on other grounds, sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Secretary of Labor ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). Safety complaints to mine management or to a foreman constitutes protected activity, Baker v. Interior Board of Mine Operations Appeals, 595 F.2d 746 (D.C. Cir. 1978); Chacon, supra. However, the miner's safety complaint must be made with reasonable promptness and in good faith, and be communicated to mine management, MSHA ex rel. Michael J. Dunmire and James Estle v. Northern Coal Company, 4 FMSHRC 126 (February 1982); Miller v. FMSHRC, 687 F.2d 194, 195-96 (7<sup>th</sup> Cir. 1982); Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

I further conclude and find that Mr. Tysar timely communicated his safety concern to Mr. Mook about the possibility that another vehicle might exit the elevator and place him at risk when he contacted him over the intercom and then went to his office with Mr. Brown to further express their safety concerns about their belt cleaning assignment. The timeliness of the complaint met the requirements enunciated by the Commission in Secretary on behalf of Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 126 (February 1982); Secretary ex rel. John Cooley v. Ottowas Silica Company, 6 FMSHRC 516 (March 1984); Gilbert v. Sandy Fork Mining Company, supra; Sammons v. Mine Services Co., 6 FMSHRC 1391 (June 1984).

In the course of the hearing, Mr. Tysar, for the first time, alleged that Mr. Brown could have dropped a shovel on him if he were standing under the belt looking through the elevator window. I take note of the fact that Mr. Tysar never mentioned such a concern in his complaint statement to MSHA's special investigator on December 11, 1995. When asked in the course of the hearing whether he ever informed Mr. Mook about any safety concern that Mr. Brown might drop a shovel on him while cleaning the belt, Mr. Tysar "guessed that something like that was brought up." However, when pressed for more specifics, Mr. Tysar admitted that he did not mention any shovel to Mr. Mook. During his testimony, Mr. Mook made no mention of any shovel complaint by Mr. Tysar. Further, I find nothing in Mr. Brown's deposition and hearing testimony reflecting any safety concern that he could drop a shovel on Mr. Tysar while cleaning the belt.

I find no credible evidence that Mr. Tysar ever communicated a safety concern to Mr. Mook concerning the possibility that Mr. Brown might drop a shovel on him if he and Mr. Brown were positioned in front of the elevator cleaning the belt.

In the course of the hearing, Mr. Tysar expressed a further concern about the possibility of Mr. Brown shoveling salt materials on him if he were to stand in front of the elevator looking through the window. Although Mr. Tysar suggested the possibility of such an event in his prior statement to the MSHA investigator, his October 6, 1995, company grievance does not include safety concerns for falling shovels or materials. Further, when asked in the course of the hearing if he informed Mr. Mook about any concern for falling materials, Mr. Tysar responded "Yes," but then explained that he simply told Mr. Mook that he "didn't feel safe" looking in the elevator window and did not believe that he gave Mr. Mook any reasons for his concern (Tr. 108-109).

I find Mr. Tysar's testimony regarding his concern for falling materials to be contradictory. However, in the course of the hearing Mr. Mook testified that Mr. Tysar and Mr. Brown "blew this out of proportion" in referring to "shoveling salt down directly in front of this elevator where people coming or they themselves would be in danger" (Tr. 227). He then confirmed that falling salt "was their concern, so I was trying to address it" (Tr. 228). Under the circumstances, and notwithstanding Mr. Tysar's contradictory testimony, I conclude and find that Mr. Mook must have been aware of Mr. Tysar's concern since he acknowledged as much. Accordingly, I find that Mr. Tysar timely communicated his falling materials concern to Mr. Mook.

#### Mr. Tysar's Work Refusal

When a miner has expressed a reasonable, good faith fear of a safety or health hazard, and has communicated this to mine management, such as a foreman, management has a duty and obligation to address the perceived hazard or safety concern in a manner sufficient to reasonably quell his fears, or to correct or eliminate the hazard. Secretary v. River Hurrigan Coal Co., 5 FMSHRC 1529, 1534 (September 1983); Gilbert v. Sandy Fork Mining Company, 12 FMSHRC 177 (February 1990), on remand from Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), rev'g Gilbert v. Sandy Fork Mining Co., 9 FMSHRC 1327 (1987).

The focus in work refusal cases is the complaining miner's belief that a hazard exists, and the critical issue is whether or not that belief is held in good faith and is a reasonable one. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983); Miller v. FMSHRC, 687 F.2d 1984 (7<sup>th</sup> Cir. 1982). In analyzing whether a miner's belief is reasonable, the hazardous condition must be viewed from the miner's perspective at the time of the work refusal, and the miner need not objectively prove that an actual hazard existed. Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993, 997-98 (June 1983); Secretary ex rel. Pratt v. River Hurricane Coal Co., 5 FMSHRC 1529, 1533-34 (September 1983); Haro v. Magma Cooper Co., 4 FMSHRC 1935, 1944 (November 1982); Robinette, supra, 3 FMSHRC at 810. Secretary on behalf of Hogan and Ventura v. Emerald Mines Corp., 8 FMSHRC 1066 (July 1986). The Commission has also explained that "good faith" belief simply means honest belief that a hazard exists." Robinette, supra at 810,

As recently reiterated by the Commission in Billy R. McClanahan v. Wellmore Coal Corporation, 19 FMSHRC 55, 67 (January 1997), once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears should have been reasonably quelled" Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir. 1989); Thurman v. Queen Anne Coal Co., 10 FMSHRC 131-135 (February 1988), Aff'd, 866 F.2d 431 (6<sup>th</sup> Cir. 1989); Secretary of Labor on behalf of Bush v. Union Carbide Corp., 5 FMSHRC 993, 997 (June 1983). A miner's continuing refusal to work may become unreasonable after an operator has taken reasonable steps to dissipate his fears or ensure the safety of the challenged task or condition, Bush, at 5 FMSHRC 998-99.

The respondent concedes that Mr. Tysar engaged in a protected activity by raising the issue of a potential danger to him and Mr. Brown if they were to proceed with their assigned job task. Indeed, foremen Mook and Bonjack both agreed that assuming the forklift moved along the beltline, if it was positioned in front of the elevator doors when they opened, it would be in an unsafe location. However, the respondent believes that the disputed issue is whether, in light of the circumstances, Mr. Tysar's belief that a hazard existed was reasonable, whether the hazard was beyond one inherent in the mining industry, and whether it was adequately addressed by Mr. Mook.

The critical disputed issue with respect to whether or not Mr. Tysar's work refusal was made in good faith and based on an honest and reasonable concern that he would be exposed to a potential hazard if he were to commence cleaning the belt while the elevator was still in operation is whether his assigned work task by foreman Mook included the cleaning of the entire beltline or was limited to the cleaning of the tailpiece.

The respondent does not dispute the fact that Mr. Tysar would have a legitimate safety concern if he and Mr. Brown were assigned to clean the entire beltline and needed to position the forklift in front of the elevator to do the job (Tr. 317-318). Mr. Mook and Mr. Bonjack agreed that if the forklift were to move along the beltline and was positioned in front of the elevator doors when the doors opened, Mr. Brown and Mr. Tysar would be in an unsafe location (Tr. 248-283).

I conclude and find that if in fact Mr. Tysar and Mr. Brown were assigned and expected to clean the entire beltline while the elevator remained in operation, they would at some point in time be positioned with the forklift in front of the elevator doors, and would be at risk if a vehicle unexpectedly exited the elevator while they were in front of it. Under this scenario, I would conclude that Mr. Tysar's concern for his safety would not be unreasonable. However, if Mr. Tysar's work assignment was confined to the belt tail piece area, I would find it reasonable to conclude that the cleaning of the belt in that location would not present a hazard to Mr. Tysar and Mr. Brown if the elevator were to continue in operation, and that Mr. Tysar's concern would not be reasonable.

Mr. Brown testified at his October 22, 1996, deposition that Mr. Mook assigned him to clean the belt decking "right above the elevator" for a distance of "about 30 feet" (Tr. 5-6). He confirmed that the elevator was 10 feet wide, and when asked about the remaining 20 feet of the beltline, he stated that "we would doing this one section" directly above the elevator (Tr. 6). He could not remember how Mr. Tysar described the area where they were supposed to be working in to Mr. Mook during their discussion (Tr. 19). When asked to describe his understanding of their exact work area on the evening in question, Mr. Brown stated as follows at (Tr. 20-22).

Q. Again, can you describe for me exactly the work area? Was it only the area immediately over the elevator?

A. Um-hum, yes.

Q. So you didn't have to clean any of the decking to the right of the elevator?

A. Yes. We had to do a section.

Q. I'm still a little confused about the section that you all had to clean off. Was it actually 30 feet of the belt that you had to clean off?

A. No. It was right where the tail piece was.

Q. And you're saying that that is directly over the elevator?

A. No. That is to the right, but it goes up, that we had to shovel.

Q. It's to the right and it goes up, so it's to the right of the elevator and it goes up?

A. Right.

Q. So in addition to the area directly over the elevator, you had to clean to the right and up?

A. Right.

\* \* \* \*

Q. But if it was to the right of the elevator, how was cleaning that section unsafe?

A. Well, we had to move up. We'd have to - - he'd have to move his forklift and then get in position to shovel the - - keep on moving up shoveling.

be done until the salt accumulations at the tail piece were cleaned up. Indeed, Mr. Tysar confirmed that the "worst" salt buildup was at the tail piece, and that had the work begun, Mr. Brown would have cleaned up the salt accumulations and shoveled them into the dumpster that was placed at the tail piece for this purpose (Tr. 56). Mr. Mook testified credibly that Mr. Tysar used the forklift to move the dumpster into place in an inset next to a wall partition so that the salt materials shoveled by Mr. Brown could fall directly into the dumpster (Tr. 191). All of this credible and un rebutted testimony by Mr. Mook lends credence to his contention that the belt cleaning assignment was limited to only the tail piece area and not the entire belt line.

In the course of his deposition, Mr. Brown stated that a foreman whose name he could not recall told him "a long time ago" that there was a "rule" that required a forklift operator to remain in the driver's seat if there was someone in the man basket (Tr. 25-27). He suggested that this rule would not allow Mr. Tysar to stand next to the forklift while he was in the basket. Upon review of the respondent's April 1, 1995, mine safety rules and policies, Mr. Brown could not find any such rule related to forklifts (Tr. 34-36). Mr. Brown did not pursue this "rule" further at the hearing, and there is no credible evidence that he or Mr. Tysar ever raised it with Mr. Mook. The only safety issue Mr. Tysar raised with respect to the forklift was the securing of the man basket, and Mr. Tysar conceded that Mr. Mook addressed his concern to his satisfaction (Tr. 133-134).

Mr. Tysar stated that even if the assigned work area was confined to the belt tail piece, there was "a very good probability" that the forklift could have been bumped by a vehicle exiting the elevator because part of the forklift would still be in front of part of the elevator doors (Tr. 119). I find this difficult to believe, particularly since Mr. Tysar himself described the width of the forklift at 4 ½ to 5 feet, and stated that the belt tail piece was 6 to 10 feet away from the elevator door (Tr. 113-114). He further stated that had he proceeded with the assigned work, "the forklift would have been positioned away from the elevator. The conveyor belt would have been in between the elevator and the forklift" (Tr. 145). Under these circumstances, and given the fact that the dumpster was located directly under the belt so that Mr. Brown could shovel in the salt materials, I find it highly unlikely that any of the materials would fall on Mr. Tysar.

Mr. Tysar further confirmed that any vehicle exiting the elevator would have to travel straight out of the elevator for at least 20 feet before it could turn left because of the presence of other equipment in the tail piece area. Under the circumstances, I find it highly unlikely that a vehicle exiting the elevator would abruptly turn sharply to the left immediately upon exiting the elevator rather than proceeding straight ahead for 20 feet where it could freely turn left without encountering any equipment obstacles, including the forklift that I find was positioned in front of the tail piece and clear of the elevator doors. Further, if the vehicle was backing out of the elevator, as Mr. Brown testified it did on the day in question, I find it unlikely that it would back out at a high rate of speed and then turn around and proceed toward the tail piece area.

After careful review and consideration of all of the testimony and evidence in this case, I credit the testimony of Mr. Mook and Mr. Bonjack and find that Mr. Mook assigned Mr. Tysar

and Mr. Brown to clean the belt tail piece area and not the entire belt. I find the testimony of Mr. Tysar and Mr. Brown regarding their work assignment to be contradictory and less than credible.

In view of my finding that Mr. Tysar's work assignment was confined to the tail piece area, and based on my foregoing findings and conclusions, I conclude and find that Mr. Tysar would not have been exposed to a hazard had he proceeded to clean the tail piece area, and that even viewed from his own perspective, I cannot conclude that his work refusal was reasonable and made in good faith. Further, even if I were to find that Mr. Tysar's work refusal was reasonable, in view of my findings and conclusions which follow below, I have concluded that Mr. Mook timely addressed Mr. Tysar's safety concerns with reasonable offers of safety alternatives, and that Mr. Tysar's rejections of these offers was unreasonable.

#### Foreman Mook's Response to Mr. Tysar's Safety Concerns

The evidence establishes that Mr. Tysar's confrontation with Mr. Mook took place while Mr. Tysar and Mr. Brown were preparing to position the forklift in order to commence the belt cleaning, and before any cleaning had actually been done. Mr. Tysar candidly admitted that he viewed his encounter with Mr. Mook as a "power struggle" and he believed that Mr. Mook acted less than diplomatically in responding to his concern. Having viewed Mr. Tysar in the course of the hearing, he impressed me as an articulate, but rather argumentative and strong willed individual, who at times displayed his anger and frustration in a less than diplomatic manner. Indeed, at one point in the course of the hearing I observed that Mr. Mook was so provoked by Mr. Tysar's suggestions that he had little or no concern for safety that he needed to be restrained by his counsel, and the Court ordered a brief "break" to "cool off" the parties and admonish them to maintain the proper decorum.

I find Mr. Tysar's unsupported assertion that Mr. Mook had little regard for safety to be less than credible. Mr. Tysar himself confirmed that Mr. Mook responded to his call to come to the work area in a reasonable amount of time, and assigned him and Mr. Brown to do other work while he considered the matter further (Tr. 137-138). Mr. Tysar further confirmed that Mr. Mook locked out the belt, and immediately responded to his safety concern regarding the securing of the "man basket" to the front of the forklift, and provided a safety belt and lanyard for Mr. Brown's use while cleaning the belt from inside the basket that was equipped with protective railings and a locked gate (Tr. 133).

Mr. Mook testified credibly that he thoroughly considered all of the safety aspects of his belt cleaning assignment in consultation with foreman Bonjack, and rejected as unreasonable Mr. Tysar's request to take the elevator out of service before he was expected to proceed with the belt cleaning job. Mr. Mook further testified credibly that he offered two alternative safety suggestions to Mr. Tysar namely, an offer that he (Mook) inform and alert other employees who might use the elevator that Mr. Tysar and Mr. Brown were working in the area, or that Mr. Tysar station himself next to the forklift and near the controls, with the brake engaged, so that he could

have a clear view of the elevator in order to readily alert anyone exiting the elevator that he and Mr. Brown were working in the area.

Mr. Brown testified at his deposition that Mr. Mook did not suggest any safety alternatives and never suggested that Mr. Tysar serve as "a lookout" or put the forklift in gear or in park (Tr. 9, 11, 12). However, in the course of the hearing that followed a little over a month later, Mr. Brown was less than certain that Mr. Mook never offered any alternatives to shutting down the elevator and stated that he had no recollection of any alternatives offered by Mr. Mook (Tr. 163). Mr. Brown's conflicting testimony was contradicted by Mr. Tysar who testified that Mr. Mook told him to set the forklift brake and stand by the elevator door where he could observe the arrival of the elevator by looking through the window.

Mr. Tysar initially claimed that he had no idea what Mr. Mook expected of him by looking through the elevator window (Tr. 58). However, he later testified that Mr. Mook suggested that he look through the elevator window in order to warn anyone on the elevator to be careful or to stop (Tr. 307). I find Mr. Tysar's testimony concerning Mr. Mook's alternative safety suggestion to be less than credible. Mr. Tysar claimed that he had no idea what Mr. Mook had in mind when he told him to look through the elevator window, yet he confirmed that Mr. Mook expected him to warn anyone on the elevator that he and Mr. Brown were working in the area.

I further find Mr. Tysar's testimony that he could not remember Mr. Mook offering to inform other employees that he and Mr. Brown were cleaning the belt (Tr. 95), to be contrary to his later denials that any such offer was ever made (Tr. 308).

I have considered the question of why Mr. Mook would find it necessary to offer alternative safety precautions if in fact his work assignment was limited to the tail piece area, and I find his explanation that he did so to assure Mr. Tysar that the cleaning job would be safe to be credible.

Foreman Bonjack corroborated Mr. Mook's testimony that he offered the two safety alternatives to Mr. Tysar in response to Mr. Tysar's concern that he and Mr. Brown might be at risk if a vehicle exited the elevator with the forklift positioned in front of it, but that Mr. Tysar rejected Mr. Mook's offer and insisted that the elevator be shut down. Having viewed Mr. Bonjack's demeanor in the course of the hearing, I find his testimony to be credible.

Although Mr. Tysar indicated that he was "willing to talk with people and compromise," he confirmed that he made no suggestions to Mr. Mook short of insisting that the elevator be taken out of service, and he remained steadfast in his insistence that the only safe method of cleaning the belt that he would accept was to shut down the elevator and tape it off so that it could not be used while the belt was being cleaned. Indeed, Mr. Tysar admitted that any alternatives suggested by Mr. Mook, short of taking the elevator out of service, would have been unacceptable to him and rejected out of hand.

I find Mr. Tysar's summary refusal to seriously consider Mr. Mook's alternative safety suggestions to be unreasonable and a less than good faith effort to at least attempt to resolve the dispute to their mutual satisfaction. I further discredit Mr. Tysar's assertion that Mr. Monk simply told him to go look through the elevator window, and credit Mr. Mook's testimony that he did more than that in suggesting alternative ways to address Mr. Tysar's safety concerns.

I conclude and find that foreman Mook addressed Mr. Tysar's safety concern in a reasonable way by offering the two alternatives previously discussed, and that Mr. Tysar's rejection of those suggestions and insistence that the elevator be shut down was unreasonable. Under the circumstances, I conclude and find that Mr. Tysar's work refusal was unprotected and that his suspension was not discriminatory and did not amount to a violation of section 105(c) of the Act.

### **ORDER**

In view of the foregoing findings and conclusions, and after careful consideration of all of the credible evidence and testimony adduced in this case, I conclude and find that the complainant has failed to establish a violation of section 105(c) of the Act. Accordingly, the complaint IS DISMISSED, and the complainant's claims for relief ARE DENIED.

  
George A. Koutras  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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MAR 3 1 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 96-221
Petitioner	:	A. C. No. 36-02398-03756
v.	:	
	:	Docket No. PENN 96-248
LION MINING COMPANY,	:	A. C. No. 36-02398-03759
Respondent	:	
	:	Grove No. 1 Mine

**DECISION**

Appearances: Andrea J. Appel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;  
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for the Respondent.

Before: Judge Feldman

These consolidated civil penalty proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). These matters were called for hearing on January 15, 1997, in Somerset, Pennsylvania.

The petition in Docket No. PENN 96-248 sought to impose a total civil penalty of \$1,128.00 for two alleged violations of mandatory safety standards in Part 75 of the regulations. At the hearing, the parties advised they had reached settlement in PENN 96-248. The record was left open to enable the parties to file a motion for approval of their agreement. The motion was filed on January 29, 1997. The respondent has agreed to pay a reduced civil penalty of \$733.00 in satisfaction of 104(d) Order No. 4387378 and 104(a) Citation No. 4387380. The reduction in penalty is based on reduction in the gravity and degree of the respondent's negligence with respect to the cited violations, although the 104(d) Order remains unmodified. I have considered the representations submitted in support of their agreement, and I conclude the proffered settlement in Docket No. PENN 96-248 is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). Thus, the motion for approval of settlement in Docket No. PENN 96-248 shall be granted.

The petition in Docket No. PENN 96-221 seeks to impose total civil penalties of \$1,795.00 for five alleged violations of mandatory safety standards in Part 75 of the regulations, 30 C.F.R. Part 75. This docket concerns four 104(a) citations and a 104(d) order. At the hearing, the parties moved to settle the four 104(a) citations. The settlement terms included reducing the proposed civil penalty for the four 104(a) citations from \$595.00 to \$471.00. The reduction in penalty is based on the deletion of the significant and substantial designation for Citation Nos. 4387717 and 4387660. The parties' settlement with respect to these four citations shall be approved.

The parties failed to reach an agreement with respect to the remaining \$1,200.00 civil penalty in Docket No. PENN 96-221 proposed by the Secretary for 104(d) Order No. 4387711. Thus, the evidentiary hearing was limited to the propriety of Order No. 4387711. The parties' post-hearing Proposed Findings of Fact and Conclusions of Law regarding this Order are of record.

Order No. 4387711 presents the issue of whether depositing piles of gob, taken by scoop from the face, in unused crosscuts off a return entry, a common and permissible industry practice, constitutes a violation of the mandatory safety provisions of section 75.400, 30 C.F.R. § 75.400. This mandatory standard states:

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

While, as alleged by the Secretary, the cited, stored deposits may not have been adequately rock-dusted in accordance with the provisions of section 75.403, 30 C.F. R. § 75.403, the issue in this case is whether the cited gob material was a prohibited accumulation under section 75.400. As discussed below, the respondent's permissible storage of the cited piles of gob, euphemistically characterized as by the Secretary as "accumulations," is in glaring contradiction to the provisions of section 75.400 that prohibit accumulations in active workings. Consequently, Order No. 4387711 shall be vacated.

#### Statement of the Case

The pertinent facts in this matter are not in dispute and can be briefly stated. Mine Safety and Health Administration (MSHA) Inspector Rudy Kotor inspected the respondent's Grove No. 1 Mine on April 10, 1996. Kotor was accompanied by Mine Superintendent Russell Lambert and Shift Foreman Kevin Sleasman. The three men traversed the 1<sup>st</sup> Left (017) Section Immediate Return in the L2 return entry. The Immediate Return is examined weekly, requiring an employee to travel the entire length of the return entry. At the time of the inspection, the floor of the L2 entry was white with rock dust.

It was the respondent's practice to deposit fallen rock and other gob material removed from the face in unused crosscuts off the return entry, moving in an inby direction as the section developed. Kotor testified that gob material deposited in crosscuts is a valid procedure that is not prohibited by MSHA. (Tr. 154). Kotor observed a pile of accumulations, consisting of coal dust, coal dirt and rock in each of nine crosscuts off the L2 entry. Specifically, Kotor observed piles of gob in the third, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and thirteenth crosscuts. There were footprints, presumably left by the weekly mine examiner, and scoop tire tracks on the rock dusted floor in proximity to the nine gob piles observed by Kotor. Based on his observations, which included observations of dry gob piles, black in color, Kotor concluded that, with the exception of a small portion of the gob pile in the thirteenth crosscut, none of the gob piles had been rock dusted.

The respondent admits that there was some coal dust content in the gob material that was scooped up with the fallen rock at the face. However, the respondent asserts that Kotor's observations with respect to the degree of combustible material was misleading because the roof rock is blackish-grey in color. (Tr. 156).

Kotor took spot samples, consisting of several shovels of material from various places from each of the gob piles in the third, fifth, sixth, eighth, ninth and thirteenth crosscuts. The samples from each gob pile were sifted through a 20-mesh wire screen. The sifted samples were then placed in different tagged plastic bags. The plastic bags containing the samples were placed in the trunk of Kotor's car on April 10, 1996, where they remained for approximately nine months until January 6, 1997, when, in preparation for this January 15, 1997, hearing, Kotor sent them to the Department of Labor's laboratory for combustible content analysis. (See Gov. Ex. 5, p.2). Kotor testified that he had forgotten that the samples were in his automobile trunk.

Kotor issued 104(d) Order No. 4387711 on April 10, 1996, citing a significant and substantial (S&S) violation of section 75.400. At the hearing, the Secretary moved to modify Order No. 4387711 by deleting the S&S designation. (Tr. 22). Order No. 4387711 was abated by Kotor on April 12, 1996. In abating the Order, Kotor noted:

A heavy application of rock dust was applied to all (9) gob piles<sup>1</sup> to maintain the accumulations to a (sic) incombustible content along the first left (017) Section Immediate Return air course. (Emphasis added). (Gov. Ex. 2, p.2).

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<sup>1</sup> Kotor repeatedly refers to the cited accumulations as "gob piles." (See, e.g., Gov. Ex 2, Gov. Ex. 3 pp. 14(a), (b), (c), 15, 18, 19, 20; Tr. 37, 40, 48, 49, ).

The belated laboratory results revealed incombustible content in the seven samples varying from 14.9 per cent to 25.9 per cent. Section 75.403, not cited by Kotor, requires incombustible content of materials in return aircourses to be no less than 80 per cent.<sup>2</sup>

### Findings of Fact and Conclusions

At the outset, it is important to focus on the two materials extracted or dislodged in underground coal mining -- coal and everything else (gob). Whether accumulations are primarily gob, or, prohibited combustible accumulations under Section 75.400, must be decided on a case-by-case basis. For only combustible accumulations of coal that are by-products of the coal extraction process, such as accumulations of coal dust and float coal dust, are prohibited by section 75.400. These by-products, when "permitted to accumulate" over a period of time, in mine areas such as the floor and ribs, without "being cleaned up" constitute a violation of Section 75.400. Similarly, coal dust accumulations and loose coal spillage on equipment, such as a continuous miner, or around beltlines and rollers, that remain unaddressed, constitute section 75.400 violations. Such combustible accumulations of coal dust and loose coal are violative accumulations under section 75.400 regardless of whether they are permitted to remain at their original location, or whether they are transported for storage by scoop into crosscuts off of a return entry.

Gob is defined as material "store[d] underground, as along one side of a working place, the rock and refuse encountered in mining." Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, 1968, p. 497. Although gob may contain particles of coal, accumulations of gob material are not prohibited. While the mandatory standard in section 75.403 may require gob, depending on its combustible content, to be rock dusted, gob, by its nature, is not amenable to clean-up and removal.

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<sup>2</sup> Section 75.403 provides:

#### **Maintenance of incombustible content of rock dust**

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall not be less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dust shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 85 per centum, respectively, of incombustibles are required.

There was no evidence of methane in the cited 1<sup>st</sup> Left (017) Section Immediate Return. (Tr. 124, 198-9; Gov. Ex 3, Kotor's notes at p.4).

In the instant case, by his own admission, Kotor observed gob piles that, consistent with industry practice, were stored in crosscuts. Kotor conceded that the roof, floor and ribs in the immediate area in the L2 entry were rock dusted. Although Kotor opined that the gob piles consisted of "over half" combustible coal material, he also stated the piles contained "some rock," including "large pieces of rock." (Tr. 64-67).

I am unpersuaded by the Secretary's apparent reliance on the inert laboratory analysis to support her assertion that the cited "extensive accumulations" were coal dust accumulations contemplated by section 75.400. With regard to extensiveness -- there is nothing unusual about extensive gob piles that contain large pieces of rock. Although I am cognizant of the laboratory results that suggest an incombustible content of approximately 20 per cent, the validity of these samples in this case must be placed in context. This procedure is intended to achieve a representative sample of the percentage of rock dust in a given accumulation of coal dust and float coal dust. This procedure is not designed to obtain a representative sample from a gob pile. For when one sifts coal dust and rock through a 20-mesh screen, a resultant sample containing primarily coal dust is not surprising. Consequently, these sample results do not establish that the cited "accumulations" were 80 per cent coal. Thus, I remain unconvinced that Kotor's samples accurately reflect the percentage of combustible material in these gob piles. In any event, while these gob piles may have required additional rock dusting, notwithstanding the chain of custody problem and the validity of the rock pile sampling method, the respondent was not charged with a rock dusting violation. Finally, in discussing the evidentiary value of these sample results, I would be remiss if I did not note that the laboratory analysis, that occurred only one week before this hearing, was untimely in that it interfered with the respondent's ability to prepare for this case. See Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 22, 1993).

At the hearing, the Secretary was requested to cite case law to support her position that section 75.400 is applicable to gob piles. In her post-hearing brief, the Secretary relies on the Commission decision in Mid-Continent Resources, Inc., 16 FMSHRC 1226 (June 1994) for the proposition that section 75.400 applies to "relocated" accumulations. However, the Secretary's reliance on Mid-Continent begs the question. "Relocated" accumulations constitute a violation of section 75.400 only if they are prohibited accumulations. In Mid-Continent, the cited accumulations had been transported to a crosscut off an intake roadway. The subject of the section 75.400 violation in Mid-Continent "was mostly full of material consisting of timbers, lump coal, very dry coal dust, float coal dust and coal fines." *Id.* at 1228. The accumulations were extensive and combustible, and they were noted in various pre-shift examination reports. *Id.* at 1229, 1233.

The Secretary also relies on the Commission's holding in Doss Fork Coal Company, 18 FMSHRC 122 (February 1996). In Doss Fork, the operator had been issued citations on several previous occasions for storing "dirty coal," consisting of mud, rocks and coal, in crosscuts. Consequently, in Doss Fork, the Commission concluded the operator was on notice and affirmed the ALJ decision that the cited "dirty coal" condition constituted a violation of section 75.400.

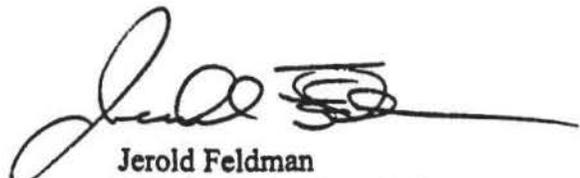
This case concerns gob piles that were stored in crosscuts. Unlike Doss Fork, where the operator had a history of citations for the same condition, Kotor's testimony reflects the cited gob piles were stored in accordance with industry practice. Moreover, unlike the cited condition in Mid-Continent that dealt with extensive, combustible accumulations, the alleged section 75.400 violation in this case is characterized as non-significant and substantial. Significantly, both Mid-Continent and Doss Fork dealt with prohibited accumulations that were required to be removed. In fact, in Mid-Continent, the operator's defense was that "it was impossible to remove the [cited] accumulations from the mine via the conveyor belts due to unexpected mechanical problems . . ." 16 FMSHRC at 1233. In the instant case, the Secretary does argue that the gob piles should have been removed from the mine.

In short, regulations must be interpreted to harmonize with their intended purpose. Emery Mining Corp. v. Sec'y of Labor, 744 F.2d 1411, 1414 (10<sup>th</sup> Cir. 1984). Section 75.400 requires the clean-up of the cited combustible accumulations. The notion that gob in an underground mine should be cleaned up and not be permitted to accumulate is, indeed, strange. Rather, the mandatory standard in section 75.403 concerning rock dusting is the appropriate standard to address the potential hazards associated with combustible material in gob. In this regard, Kotor admitted that he normally does not take samples to support a section 75.400 violation. (Tr. 156).

The Secretary's interpretation of section 75.400, as it applies to the facts of this case, is not entitled to deference as the meaning of the "clean-up requirements" is neither doubtful nor ambiguous. Pfizer Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984). Here the cited accumulations constituted gob that was permissibly stored in crosscuts. Thus, in the final analysis, the Secretary's interpretation of section 75.400 "is at odds with the plain meaning of the standard." Sunny Ridge Mining Company et al., 18 FMSHRC 254, 258 (February 1997). Since storage is permitted, clean-up and removal cannot be required under section 75.400. Accordingly, Order No. 4387711 is hereby vacated.

#### ORDER

Accordingly, **IT IS ORDERED** that, consistent with the parties' settlement agreements, the respondent shall pay civil penalties of \$733.00, in Docket No. PENN 96-248, and \$471.00 in Docket No. PENN 96-221. **IT IS FURTHER ORDERED** that Order No. 4387711 issued in Docket No. PENN 96-221 **IS VACATED**. Consequently, the respondent shall pay a total civil penalty of \$1,204.00 in these matters. Payment is due within 30 days of the date of this decision. Upon timely receipt of payment, these proceedings **ARE DISMISSED**.

  
Jerold Feldman  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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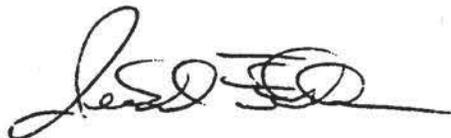
April 2, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 96-221
Petitioner	:	A. C. No. 36-02398-03756
v.	:	
	:	Docket No. PENN 96-248
LION MINING COMPANY,	:	A. C. No. 36-02398-03759
Respondent	:	
	:	Grove No. 1 Mine

**ORDER CORRECTING DECISION**

Before: Judge Feldman

The decision in these proceedings was issued on March 31, 1997. The last sentence in the first paragraph on the last page of the decision omitted the word "not." The sentence is hereby corrected to read as follows: In the instant case, the Secretary does not argue that the gob piles should have been removed from the mine.



Jerold Feldman  
Administrative Law Judge



ADMINISTRATIVE LAW JUDGE ORDERS



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

March 20, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 97-52  
Petitioner : A.C. No. 46-06448-03534  
v. :  
: Rocklick Preparation Plant  
EASTERN ASSOCIATED COAL CORP., :  
Respondent :

## ORDER DENYING MOTION TO ENFORCE SETTLEMENT AGREEMENT, MOTION TO DISMISS AND MOTION FOR CONTINUANCE

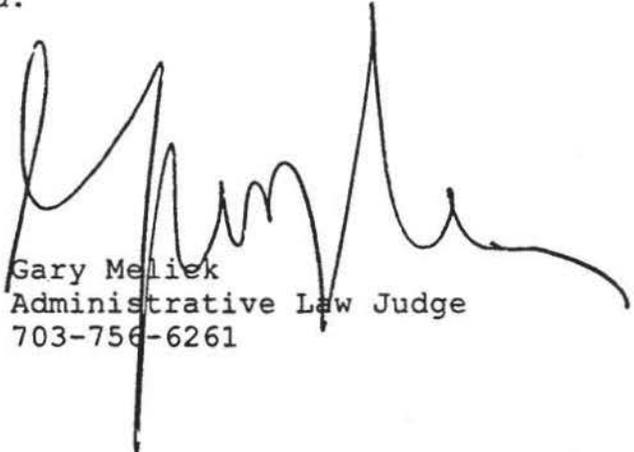
In its Motion to Enforce Settlement Agreement, Respondent maintains that, during the course of settlement negotiations, a Conference and Litigation Representative (CLR) for the Department of Labor, had agreed at a February 20, 1997, meeting, to vacate Citation No. 4400179. It is represented by Respondent that the CLR thereafter advised its representative on February 26, 1997, that he would, in fact, not vacate the citation and advised such representative that the Department of Labor's Mine Safety and Health Administration (MSHA) intended to litigate the citation before an administrative law judge. Respondent seeks in the instant motion to "enforce" what it maintains is a "binding agreement" between the parties to vacate Citation No. 4400179.

The validity of a settlement or release agreement is, in the first instance, governed by the applicable contract law and that law is ordinarily the law of the place where it is made--in this case it is alleged to be the State of West Virginia. *Williston on Contracts*, Third Edition § 1792. *U.S. v. J.C. Bradford and Co.*, 616 F.2d 167, 169 (5th Cir. 1980); *Village of Kaktovika v. Watt*, 689 F.2d 222, 230 (D.C. Cir. 1982). In certain cases involving litigants under a nationwide federal program however, federal law may control. *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); *Mid South Towing v. Harwin, Inc.*, 733 F.2d 386, 389 (5th Cir. 1984), *Fulgance v. J. Ray McDermott & Co.*, 662 F.2d 1207, 1209 (5th Cir. 1981), *Tarmann v. International Salt Co.*, 12 FMSHRC 1291 (June 1990). Since there is no conflict in the basic principles of contract law here at issue there is no need to decide in this preliminary analysis which law is applicable.

Since the Secretary has the unilateral authority to vacate citations without any settlement motion or agreement, the question arises as to whether there was, in this case, any legal consideration to support the alleged promise by the CLR to vacate the instant citation. Consideration has been defined as some right, interest, profit or benefit occurring to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by another. *Cook v. Heck's Inc.*, 176 W.Va. 368, 342 S.E.2d 453 (1986); *Adkins v. Inco. Alloys Int'l Inc.*, 187 W.Va. 219, 417 S.E.2d 910 (1992).

Respondent does not allege what, if any, consideration existed. It is, of course, a fundamental principle of the law of contracts that every promise or agreement, in order to be enforceable, must have a consideration to support it. 4B M.J., Contracts, § 31. *Hamilton v. Harper*, 185 W.Va. 51, 404 S.E.2d 540 (1991). Since a settlement agreement is a contract, consideration is a prerequisite to enforceability of such an agreement. *Hamilton v. Harper*, *supra*.

Thus even assuming, *arguendo*, that Respondent's allegations herein are true, there is insufficient basis for granting the motions to enforce settlement agreement and to dismiss. No binding "settlement agreement" could have existed as alleged by Respondent and no further legal analysis is necessary to deny its Motion to Enforce Settlement Agreement and Motion to Dismiss. The Motions are accordingly denied. The Respondent's Motion for Postponement is also denied.



Gary Meliek  
Administrative Law Judge  
703-756-6261

Distribution:

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SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
on behalf of DAVID FAGAN,  
Complainant  
v.

: DISCRIMINATION PROCEEDING  
:  
: Docket No. KENT 95-615-D  
: MSHA Case No. BARB CD 95-14  
:  
: Huff Creek Mine

MOUNTAIN TOP TRUCKING CO., INC.,  
ELMO MAYES; WILLIAM DAVID RILEY  
ANTHONY CURTIS MAYES; and MAYES  
TRUCKING COMPANY, INC.,  
Respondents

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**ORDER REQUESTING COMMENTS ON THE  
CALCULATION PERIOD FOR DAMAGES.**

A related temporary reinstatement hearing in these matters was conducted on August 23 and August 24, 1995. At the reinstatement hearing, counsel for the Secretary moved to withdraw the temporary reinstatement application filed on behalf of Walter Jackson. Consequently, Jackson's temporary reinstatement application was dismissed in the temporary reinstatement decision released on October 5, 1995. 17 FMSHRC 1695. The temporary reinstatement decision ordered the immediate reinstatement of Lonnie Bowling and David Fagan to their former positions as coal haulage truck drivers. *Id.* at 1709.

A decision on liability in these discrimination cases was released on January 23, 1997. 19 FMSHRC 166. That decision determined that Jackson's February 17, 1995, discharge was in violation of the anti-discrimination provisions of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Consequently, it was determined that Jackson was entitled to relief as of February 18, 1995.

The liability decision provided an opportunity for the parties to propose the appropriate relief to be awarded to Jackson. Jackson was requested to explain why he withdrew his application for temporary reinstatement in his proposal for relief. *Id.* at 205.

On March 6, 1997, Jackson replied that he withdrew his request for temporary reinstatement on August 23, 1995, because he "had obtained full-time employment with Cumberland Mine Service as of August 1, 1995. Jackson indicated he was employed at Cumberland Mine Service from August 1, 1995, through October 10, 1995, when he was laid-off. Jackson also worked for Garland Company, Inc. for two weeks in January 1996. Jackson indicated his total gross wages earned at these two jobs was \$3,758.00.

Jackson asserts the respondents are liable for back pay plus interest, minus Jackson's gross earnings of \$3,758.00, for the 70 week period from February 18, 1995, until June 21, 1996, when the respondents reportedly stopped hauling coal for Lone Mountain Processing.

On the other hand, the respondents argue Jackson is only entitled to relief from February 18, 1995, until he withdrew his application for temporary reinstatement on August 23, 1995, less pertinent wages from other employment.

The case law concerning a complainant's obligation to mitigate back-pay awards by seeking other employment is clear. Thus, back-pay awards must be reduced in situations "where a miner fails to mitigate damages, for example, by failing to remain in the labor market or to search diligently for other work." Metric Constructors, Inc., 6 FMSHRC 226, 231-32 (February 29, 1984) (citing Dunmire and Estle, 4 FMSHRC at 144), aff'd 766 F.2d 469 (11<sup>th</sup> Cir. 1985).

Thus, this case involves the frequently raised issue of whether an unemployed complainant, who is seeking back-pay damages, has actively sought other work. In addition, however, this case presents the novel question of what obligation, if any, an unemployed discriminatee has to reapply for temporary reinstatement, after he had previously withdrawn his initial reinstatement application because he secured other employment.

In view of the above, in order to determine the appropriate period for calculating the relief that should be awarded, Jackson should provide the following information:

- (1) On what date did Jackson first advise counsel for the Secretary that he wished to withdraw his temporary reinstatement application?<sup>1</sup>
- (2) What was Jackson's reason for withdrawing his temporary reinstatement application?
- (3) Jackson was laid-off from his job at Cumberland Mine Service on October 10, 1995. When did Jackson first advise counsel for the Secretary that he was laid-off from his job at Cumberland Mine Service?

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<sup>1</sup> Tony Oppegard filed a Notice of Appearance on behalf of Jackson on December 27, 1995. Some of the questions posed refer to the Secretary's counsel because the questions involve events that may have occurred before Mr. Oppegard was retained. Of course, Mr. Oppegard is also invited to respond to this order on behalf of Jackson.

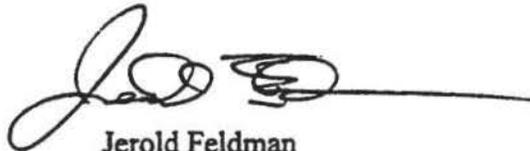
(4) At approximately the same time Jackson was laid-off from Cumberland Mine Service, Jackson, through Counsel for the Secretary, was served with the October 5, 1995, temporary reinstatement decision that dismissed his application for temporary reinstatement, and ordered the reinstatement of two of Jackson's former colleagues. Did Jackson request the Secretary to reopen his application for temporary reinstatement? If yes, was it reopened? If not, why not?

(5) The respondents have alleged that Jackson may have been a party in a pertinent disability proceeding. Has Jackson been a party in any legal action or claim involving allegations of physical or mental impairment? If yes, identify and describe the legal action or claim, provide the dates of such actions or claims, and provide the status or outcome.

(6) Jackson should state what he did to look for work from October 11, 1995 through June 21, 1996.

(7) Jackson should address whether or not he was required to seek temporary reinstatement in order to mitigate back-pay damages, citing pertinent statutory provisions, legislative history, or case law to support his position.

**IT IS ORDERED** that Jackson's response shall be filed within 21 days of the date of this Order. **IT IS ALSO ORDERED** that the respondents shall have ten (10) days thereafter to reply. **IT IS FURTHER ORDERED** that Jackson shall have ten (10) days to respond to the respondents' reply.



Jerold Feldman  
Administrative Law Judge

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