MARCH 2000

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MARCH 2000

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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 98-37. (Judge Feldman, January 28, 2000)

Secretary of Labor, MSHA, on behalf of Curtis Stahl v. A & K Earth Movers, Inc., Docket No. WEST 2000-145-DM. (Judge Hodgdon, February 18, 2000)

Review was denied in the following cases during the month of March:

Secretary of Labor, MSHA v. Northwestern Resources Company, Docket No. CENT 99-266. (Interlocutory Review of former Chief Judge Merlin's December 16, 1999 Order accepting the Secretary's Penalty Petition - unpublished)

Secretary of Labor, MSHA on behalf of Gary Dean Munson v. Eastern Associated Coal Corporation, Docket No. WEVA 2000-40-D. (Judge Zielinski, March 10, 2000)

Gary D. Morgan v. Arch of Illinois, Docket No. LAKE 98-17-D. (Judge Weisberger, February 15, 2000)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 3, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	
v.	:	Docket Nos. PENN 94-23 PENN 94-166
CYPRUS EMERALD RESOURCES CORPORATION	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Cyprus Emerald Resources Corporation ("Emerald") challenged the "significant and substantial" ("S&S")[1] designation of a citation alleging a violation of 30 C.F.R. § 50.11(b), which requires an operator to investigate any mine accident. Among other grounds, Emerald argued that because section 50.11(b) is not a mandatory health or safety regulation, it could not be designated S&S, because the Mine Act refers to S&S violations only of mandatory health or safety standards. *See* 30 U.S.C. § 814(d)(1), (e).

Administrative Law Judge William Fauver rejected that argument, stating:

> [T]he citation was issued under § 104(a), not 104(d). An allegation of a "significant and substantial" violation in a § 104(a) citation is an allegation of gravity, not an assertion of jurisdiction to apply the sanctions of § 104(d). Accordingly, I do not reach the issue whether the sanctions of § 104(d) apply to a violation of Part 50.

17 FMSHRC 2086, 2099 (Nov. 1995) (ALJ). The judge found that, with respect to the accident at issue, continuing operations without investigating the accident could contribute significantly and substantially to another accident with a risk of serious injury, and that such an accident had

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

occurred in case. *Id.* Finding that the violation was also due to Emerald's high negligence, and stating that he had taken into account all of the civil penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), the judge assessed a penalty of $3,000. *Id.* at 2099-2100.

On review of the judge's decision, the Commission, at the request of the parties, reached the issue that the judge did not. 20 FMSHRC 790, 801 (Aug. 1998). After affirming the judge's finding of a violation of section 50.11(b), a Commission majority held that violations of non-mandatory health or safety standards could be designated as S&S under sections 104(d) and 104(e) of the Act. *Id.* at 798-809 (Chairman Jordan and Commissioner Beatty), 822 (Commissioner Marks). That Commission majority also affirmed the judge's finding that Emerald's violation of section 50.11(b) was S&S. *Id.* at 810, 822. Commissioners Riley and Verheggen, in dissent, held that under the plain meaning of the Mine Act, only violations of mandatory health and safety standards could be designated as S&S. *Id.* at 826-30.

Emerald subsequently petitioned the United States Court of Appeals for the District of Columbia Circuit for review of this issue. The court held "that a 'significant and substantial' finding is permissible in a citation charging a violation of a mandatory health and safety standard only[.]" *Cyprus Emerald Resources Corp. v. FMSHRC*, 195 F.3d 42, 44 (D.C. Cir. 1999). Accordingly, the court granted Emerald's petition, reversed the Commission's S&S determination, and remanded the case to the Commission for further action. *Id.* at 46.

Pursuant to the court's order, we modify Citation No. 3658696 to delete the S&S designation. We otherwise affirm the citation and remand to the Chief Judge for reassignment and assessment of an appropriate penalty based upon consideration of, and findings regarding, all of the criteria in section 110(i) of the Act.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

We would modify the citation to delete the S&S designation, but would otherwise affirm the citation and the judge's $3000 penalty assessment. While the court held that the violation at issue could not be designated S&S under the terms of the Mine Act, the factual findings that underlay the judge's S&S determination were not disturbed, and were viewed by all Commissioners as sufficient support for the judge's finding on the gravity of the violation. *See* 20 FMSHRC at 810 (opinion of Chairman Jordan and Commissioner Beatty), 822 (concurring opinion of Commissioner Marks), 829-30 (opinion of Commissioners Riley and Verheggen, dissenting on other grounds). Previously, the Commission has held that a penalty need not necessarily be reduced when a special finding is vacated. *See Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 881-82 (June 1996) (vacating judge's S&S determination as beyond his authority, but nevertheless affirming penalty based in part on high gravity finding as supported by substantial evidence); *Austin Powder Co.*, 21 FMSHRC 18, 21 (Jan. 1999) (decision vacating judge's unwarrantable failure determination as beyond his authority does not necessarily require judge to find on remand lower level of negligence or to reduce his earlier penalty assessment). In these circumstances, therefore, there is no need to remand for a reassessment of the penalty, and therefore, we respectfully dissent.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 8, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2000-93-M
	:	A.C. No. 04-05247-05508 A
BAUMAN LANDSCAPE, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 27, 1999, the Commission received from Bauman Landscape 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). The Secretary of Labor does not oppose the motion for relief filed by Bauman Landscape.

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).

In his request, Michael Bauman, an owner of Bauman Landscape, asserts that he did not receive a copy of the original proposed penalty assessment. Mot. Bauman states that he was not aware of the proposed penalties and thus, never had an opportunity to appeal them. *Id.* Bauman claims that the U.S. Postal return receipt was not signed by him. *Id.* He asserts that he already has paid penalties for the same violations giving rise to the subject penalties. *Id.* Bauman requests an opportunity for a hearing to appeal these penalty assessments. *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Harvey Trucking*, 21 FMSHRC 567 (June 1999) (remanding to a judge where the operator did not receive the proposed penalty assessment because delivery was unsuccessful for no known reason); *Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997)

(remanding the matter to a judge where delivery of the proposed assessment was unsuccessful and movant offered no explanation for unsuccessful delivery); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). We have also 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 Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Bauman's position.[1] In the interest of justice, we remand the matter for assignment to a judge to determine whether Bauman 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

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] In view of the fact that the Secretary does not oppose Bauman Landscape's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 8, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 99-111
	:	A.C. No. 46-08330-03511
MOLLOY MINING, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Jordan, Chairman; Marks, Verheggen, and Beatty, 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"). On September 29, 1999, Administrative Law Judge Michael Zielinski issued a Decision Approving Settlement granting a settlement motion filed by the Secretary of Labor which involved civil penalties for six citations issued to Molloy Mining, Inc. ("Molloy Mining"). The Secretary now requests the Commission to modify the judge's decision to correct certain clerical errors.

On April 7, 1999, the Secretary issued six citations — Citation Nos. 7179500 through 7179505 — to Molloy Mining, alleging various violations of mandatory safety standards. S. (Second) Amended Mot. to Approve Settlement at 1 (Jan. 4, 2000). On July 22, 1999, the Secretary filed a Petition for Assessment of Penalties for the six citations and proposed assessments of $259 each, or a total assessment of $1,554. *Id.* at 6. Molloy Mining filed its answer to the Commission on July 29, 1999, denying any violation and contesting the Secretary's proposed penalties. Op. Answer to S. Petition for Assessment of Civil Penalty. On September 24, 1999, the Secretary filed a motion to approve a settlement agreement reached by the parties, in which Molloy Mining agreed to pay a total of $1,066 for the six violations. S. Letter dated Sept. 24, 1999. On September 27, the Secretary filed an amended motion to approve settlement requesting correction of the settlement amount from $1,066 to $1,174. S. Letter dated Sept. 27, 1999. On September 29, the judge issued his decision approving the settlement and directing Molloy Mining to pay $1,174. Unpublished Dec. dated Sept. 29, 1999. On January 4, 2000, the Secretary filed a second amended motion to approve settlement, requesting correction of the settlement amount back to the original total of $1,066. S. Letter dated Jan. 4, 2000. The Secretary explained that the penalties associated with three citations — Citation Nos. 7179503,

7179504, and 7179505 — were incorrectly set forth as $295 each, rather than $259, making the correct total settlement amount $1,066, as originally provided in the Secretary's first motion. *Id.* The judge responded to the Secretary's second amended motion with a letter stating that he no longer had jurisdiction of the case because once he issued his decision on the matter, it became final 40 days after its issuance. Letter from Judge Zielinski dated Jan. 10, 2000.

The judge's jurisdiction over this case terminated when his decision approving settlement was issued on September 29, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Molloy Mining's motion was received by the Commission on January 6, 2000, almost two months after the judge's decision became final. Under these circumstances, we treat Molloy Mining's motion as a late-filed petition for discretionary review requesting amendment of a final Commission decision. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996).

A final Commission judgment or order may be reopened under Fed. R. Civ. P. 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); e.g., *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The Secretary erred in stating the penalty amount for three citations in her motion to approve settlement, mistakenly listing the penalties associated with the citations as $295 each, instead of the correct amount of $259, and setting forth an incorrect total settlement amount of $1,174. The judge's decision approving that settlement agreement incorporates those clerical errors. The Secretary requests that the settlement decision be amended to reflect the correct penalty amount of $259 for each of the three citations and a total settlement of $1,066. Here, the clerical errors incorporated in the judge's decision approving settlement amount to mistake under Rule 60(b).

Accordingly, we reopen the final decision, and grant the Secretary's motion to correct the clerical errors set forth in the judge's decision approving settlement.[1] *See General Chemical Corp.*, 18 FMSHRC at 705 (amending judge's dismissal order where the judge mistakenly left out a citation in the caption and body of his order); *Martin Marietta Aggregates*, 16 FMSHRC 189, 190 (Feb. 1994) (amending judge's decision approving settlement to reflect correct penalty amount agreed to by the parties). On this date, we separately issue an amended decision approving settlement consistent with this order.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] Commissioner Riley concludes that, because the judge committed no error in this matter, this case should be remanded to the judge to allow him to correct the Secretary's clerical error.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 8, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 99-111
	:	A.C. No. 46-08330-03511
MOLLOY MINING, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

AMENDED DECISION APPROVING SETTLEMENT

BY: Jordan, Chairman; Marks, Verheggen, and Beatty, Commissioners

The Secretary of Labor has filed an amended motion to approve settlement in this civil penalty proceeding. The motion is unopposed. The motion having been considered, and good cause appearing:

Wherefore, it is ordered that the Decision Approving Settlement issued September 29, 1999, be amended to reflect that the proposed penalty assessment for each of the six citations, Citation Nos. 7179500 through 7179505, issued to Molloy Mining, Inc., is $259 and that the parties agreed to settle Citation Nos. 7179503, 7179504, and 7179505 for $259 each, for a total payment, by Molloy Mining, Inc., of $1,066.[1]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] In a separate order issued by the Commission on this date, Commissioner Riley concluded that, because the judge committed no error, this case should be remanded to the judge to allow him to correct the Secretary's clerical error.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of LEONARD BERNARDYN	:	
	:	
v.	:	Docket Nos. PENN 99-129-D
	:	PENN 99-158-D
READING ANTHRACITE COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this discrimination proceeding, Administrative Law Judge Avram Weisberger concluded that Reading Anthracite Company ("Reading") did not violate section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1994) ("Mine Act" or "Act"), when it discharged employee Leonard Bernardyn on November 10, 1998. 21 FMSHRC 819, 824 (July 1999) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's determination. For the reasons that follow, we vacate the judge's determination and remand for further analysis.

I.

Factual and Procedural Background

Reading owns and operates Pit 33, a coal mine in Wadesville, Pennsylvania. T. Tr. 10.[1] Bernardyn worked for Reading for nineteen years, including working as a haulage truck driver at the Wadesville mine for approximately four and a half to five years before his discharge. T. Tr. 10-11.

Between 7:00 and 7:10 a.m. on November 10, 1998, Bernardyn began driving his haulage truck — a 190-ton Titan truck — on his usual route between the shovel in the pit and the dump area. T. Tr. 11-12, 15-16, 83. Overall, the road has a grade of approximately 8%, and parts of it are as steep as 10.3%. T. Tr. 82, 107. When Bernardyn began driving, the weather was foggy and misty, and slippery road conditions caused Bernardyn to drive slower than usual. T. Tr. 15-18, 47-48, 114.

When Frank Derrick, the general manager of Reading, observed a Titan truck driving slowly, he called mine superintendent Stanley Wapinski to find out why. T. Tr. 83. Wapinski stopped Bernardyn and asked him why he was driving so slowly, to which Bernardyn responded the roads were getting slippery. T. Tr. 20-21. Wapinski told Bernardyn to drive faster. T. Tr. 20-21, 140-42. Approximately 20 minutes later, Derrick again noticed a Titan truck driving slowly and asked Wapinski whether it was the same truck. T. Tr. 84-85, 143-44. When Wapinski indicated that the truck was the same one and that Bernardyn was the driver, Derrick told him to tell Bernardyn to park the truck. T. Tr. 86. Wapinski approached and talked with Bernardyn at the pit and told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. T. Tr. 24-25, 143-44.

After the second conversation with Wapinski, Bernardyn used the CB radio in his truck to call Thomas Dodds, the United Mine Workers of America ("UMWA") safety committeeman. T. Tr. 29-30, 53. Dodds was driving a truck on the same shift as Bernardyn. T. Tr. 45-46. Bernardyn told Dodds he was being asked to drive at a higher speed than he believed was safe given the poor road conditions. T. Tr. 29-31, 53-54. During his 8-10 minute complaint to Dodds, Bernardyn repeatedly cursed and, referring to Wapinski, said "I'll get the little f----r." 21 FMSHRC at 823; T. Tr. 31-32, 54, 63, 88-91, 134-35; M. Tr. 71. Derrick overheard Bernardyn's complaints and profanity on the CB radio and fired him after he had dumped the load in his

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[1] A hearing on Bernardyn's temporary reinstatement application was held on March 16, 1999. Some witnesses testified at the temporary reinstatement hearing; others testified at the merits hearing on May 18, 1999. Citations to testimony from the temporary reinstatement hearing are referred to as "T. Tr." Citations to testimony from the merits hearing are referred to as "M. Tr." The judge incorporated the transcript and exhibits from the temporary reinstatement hearing into the record of the instant merits proceeding. M. Tr. 9-10.

truck, assertedly for profanity and threatening a supervisor over the CB radio. T. Tr. 87-91, 95-96, 145; M. Tr. 65-66.[2]

On November 12, Bernardyn filed a discrimination complaint with MSHA alleging that he was discharged unlawfully. The Secretary's application for temporary reinstatement was granted, and Bernardyn was ordered temporarily reinstated to his former position on March 22, 1999. 21 FMSHRC 339, 342 (Mar. 1999) (ALJ).

On the merits of the complaint, the judge found that Bernardyn engaged in protected activity when he drove at a speed he felt the road conditions warranted, that Reading's discharge of Bernardyn constituted adverse action, and that, based on the coincidence in time between Derrick's order to Wapinski to stop Bernardyn twice for driving too slowly, and Derrick's discharge of Bernardyn, the Secretary established a prima facie case of discrimination. 21 FMSHRC at 822. However, the judge determined that Reading would have fired Bernardyn in any event for the 8-10 minute cursing episode over the CB radio and his threatening language directed towards Wapinski. *Id.* at 823.[3]

II.

Disposition

The Secretary asserts that the judge failed to evaluate whether Bernardyn's protected activity and his profanity were inextricably intertwined such that the profanity cannot be isolated as an independent and legitimate reason for the discharge. PDR at 8-14.[4] The Secretary also maintains that Bernardyn's impulsive and vague statement to a safety officer does not constitute a threat against his supervisor. *Id.* at 14-17. Finally, the Secretary submits that substantial evidence does not support the judge's finding that Reading's discharge of Bernardyn did not subject him to disparate treatment. *Id.* at 17-19.

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[2] Within 30 minutes after Bernardyn's termination, road conditions worsened, including a layer of ice that had formed on the road. T. Tr. 103-05. After a foreman's truck slid down the haulage road, the road was shut down due to the slippery conditions. T. Tr. 56-57, 103-04.

[3] The judge also "dissolved" his previously issued temporary reinstatement order. 21 FMSHRC at 824. The Commission, finding that the express language of Mine Act section 105(c)(2), 30 U.S.C. § 815(c)(2), requires that a temporary reinstatement order remain in effect until the decision on the merits becomes a final Commission decision pursuant to section 113(d)(1), 30 U.S.C. § 823 (d)(1), vacated the judge's dissolution of the temporary reinstatement order. 21 FMSHRC 947, 949, 951 (Sept. 1999).

[4] Pursuant to Commission Procedural Rule 75(a)(1), 29 C.F.R. § 2700.75(a)(1), the Secretary designated her PDR as her brief.

Reading responds that the judge correctly found that Reading established its affirmative defense, and that Bernardyn's profanity was not inextricably linked to his protected activity. R. Br. in Resp. to PDR at 4-9.[5] Reading further argues that Bernardyn's statements threatened Wapinski. *Id.* at 5. Reading also claims that the judge's finding that it did not subject Bernardyn to disparate treatment is supported by substantial evidence. *Id.* at 9-11.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. 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 for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Reading does not directly dispute that the Secretary proved a prima facie case of discrimination. However, the operator suggests that nothing in the record indicates that Derrick knew that Bernardyn drove slowly because of his concern regarding the road conditions. R. Br. in Resp. to PDR at 7. Insofar as this contention may be seen as calling the prima facie case into question, we address the issue. The judge found that the Secretary made out a prima facie case, but made no explicit finding regarding Derrick's knowledge. 21 FMSHRC at 822. The Commission has stated that "an operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984), *quoted in Wiggins v. Eastern Associated Coal Corp.*, 7 FMSHRC 1766, 1771 (Nov. 1985). Here, Wapinski testified that Bernardyn, in response to Wapinski's inquiry into why he was driving slowly, informed him that the road was slippery. T. Tr. 141-42, 153-54. In any event, Derrick understood that Bernardyn's conversation on the CB was with his safety committeeman, and he admitted he heard Bernardyn say that Wapinski "was forcing him to drive faster and he didn't feel that he should." T. Tr. 88-89. To the extent Reading's argument is viewed as a challenge to the judge's finding of a prima facie case, we conclude the judge's finding is supported by substantial evidence.[6] Accordingly, we affirm that finding.

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[5] Reading designated its brief in response to the PDR as its brief.

[6] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable

Having found that Bernardyn established a prima facie case, the judge nevertheless found that Reading successfully asserted the affirmative defense that it would have fired Bernardyn without regard to his protected activity because he swore over the CB radio and used threatening language towards Wapinski. 21 FMSHRC at 823. As we explain further below, we find the judge's analysis of Reading's affirmative defense problematic in several respects. Furthermore, as discussed *infra*, at section II.B, we find that the judge failed to address the possibly dispositive issue of whether the conduct on which Reading purportedly based its firing of Bernardyn was provoked and therefore protected.[7]

A. Reading's Affirmative Defense

We set forth the general principles for evaluating an operator's affirmative defense within the *Pasula-Robinette* framework in *Bradley v. Belva Coal Co.*:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC 982, 993 (June 1982); *see Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997). In *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984), the general principles of *Bradley* were tailored specifically to situations involving the use of profanity. In *Cooley*, we looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed or used threats. *Id.*; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 532-33 (Apr. 1991) (applying the factors announced in *Cooley*).

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mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[7] We view this case as presenting the issue of provocation. The Secretary's alternative argument that Bernardyn's protected activity and his swearing were inextricably intertwined does not fit the facts of this case, and we therefore decline to apply that mode of analysis in this particular context.

We conclude that the judge failed to adequately analyze the evidence relevant to the *Cooley* factors. First, we note that the record does not contain any evidence of prior difficulties Reading may have had with Bernardyn swearing. *See Cooley*, 6 FMSHRC at 521 (noting lack of evidence that the operator considered complainant to have difficulties involving profanity). Regarding Reading's disciplinary policies, we note that there was a dispute at the hearing as to which disciplinary policy was in effect at the time of Bernardyn's discharge: a 1987 policy which provided that the offending miner would be discharged after "complete exhaustion of disciplinary warnings and suspensions," or a 1998 policy providing that insubordination provided just cause warranting immediate discharge. Gov't Ex. B; R. Ex. 2. We also note that neither of the policies contained any written rule specifically prohibiting cursing. Nor did the 1998 policy define "insubordination."

The Secretary argued below that the 1987 policy was in effect at the time of Bernardyn's discharge. S. Post Hearing Br. at 8. Particularly, she pointed to one of Reading's own exhibits — an August 4, 1998 letter from a Reading attorney to a UMWA attorney which stated: "This letter confirms that the Company will implement the attached Code of Conduct *following the conclusion* of the current negotiations and ratification of the new collective bargaining agreement." *Id.* (citing R. Ex. 2 (emphasis added)). Jay Berger, a UMWA district executive board member who was involved in the 1998 collective bargaining agreement negotiations, testified that the bargaining agreement was not ratified until November 16, 1998 — a date which falls after Bernardyn's discharge — and also testified that the 1987 policy was in effect at the time of Bernardyn's discharge. M. Tr. 43, 45-46.

Reading contended below that the 1998 policy was in effect at the time of Bernardyn's discharge. R. Post Hearing Br. at 6. Berger testified that the disciplinary policy was "separate and apart from the collective bargaining agreement."[8] M. Tr. 56. Derrick testified that the UMWA's chief negotiator said that the disciplinary policy was not a contractual issue, and also stated that, when the UMWA negotiator signed a copy of the August 4, 1998 letter on August 11, 1998, the new disciplinary policy came into effect. M. Tr. 75-77.

The judge did not address this dispute in his decision. Determining which disciplinary policy was in effect on November 10 is a crucial factor to consider in deciding whether Bernardyn's discharge subjected him to disparate treatment and, more broadly, whether Reading established that it would have terminated Bernardyn for his unprotected activity alone. The record suggests that prior cursing incidents at Reading occurred under the 1987 policy. Gov't Ex. C. Thus, if the 1987 policy was in effect at the time of Bernardyn's discharge, the circumstances surrounding Bernardyn's discharge could be compared with prior cursing incidents in determining whether Reading subjected Bernardyn to disparate treatment. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 17 (Jan. 1984) (finding that the operator's treatment of the complainant was consistent with its treatment of other employees disciplined under the

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[8] The operator did not directly address the Secretary's argument that the implementation of the 1998 disciplinary policy was subject to ratification of the bargaining agreement.

same disciplinary policy). If, however, prior to Bernardyn's discharge, insubordination had become grounds for immediate discharge pursuant to the 1998 policy, previous incidents of cursing at Reading become less easy to compare to Bernardyn's case. In sum, the judge should have determined which disciplinary policy was in effect in analyzing the disparate treatment issue.

Regarding the judge's discussion of disparate treatment, we note that the record contains several prior instances of employees being disciplined for cursing at Reading, none of which resulted in discharge. M. Tr. 27-31; Gov't Ex. C at 1-4. The other cursing incidents also involved various failures to obey work orders, including miners who left assigned work areas early, arrived for work late, argued with foremen about job assignments, ignored a supervisor giving work assignments, and refused to perform a job out of classification as ordered. Gov't Ex. C; M. Tr. 29. Thus, Reading had no established practice of disciplining workers for cursing alone and in the absence of accompanying insubordinate acts, or of treating cursing as a form of insubordination. On remand, the judge needs to analyze whether Reading established that it would have discharged Bernardyn for his cursing episode alone even though it had never before levied such a severe penalty on a cursing employee, and had no established policy of discipline for cursing. Although cursing is unprotected activity under the Mine Act, it is not sufficient for an employer to show that a miner deserved to be fired for unprotected conduct; rather, the employer "must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event." *Pasula*, 2 FMSHRC at 2800 (emphasis in original).

While the record contains several prior instances of cursing at Reading, none of which resulted in discharge, Bernardyn's episode of cursing included what the judge characterized as a threat against Wapinski. The Secretary claims here, as she did below, that Bernardyn's words did not constitute a threat against Wapinski. S. Post Hearing Br. at 8; PDR at 14-17. The judge made contradictory findings on this question.[9] On the one hand, he stated that, based on the Secretary's failure to rebut Derrick's testimony regarding the specific words Bernardyn used over the CB, it was "reasonable to draw an inference that he used these words ['I'll get the little fucker'], but did not consider them to constitute a threat." 21 FMSHRC at 823 & n.9.[10] On the

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[9] Our dissenting colleagues conclude that "a reasonable person would not have considered Bernardyn's words to constitute a threat." Slip op. at 15. Commission precedent, however, is clear on this point: it is not within our power to reweigh the evidence in this case or to enter de novo findings of fact based on an independent evaluation of the record — which is precisely what our colleagues do. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993); *see also Wellmore Coal Corp.*, No. 97-1280, 1997 WL 794132, at *3 (4th Cir. 1997) ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted).

[10] We note that Bernardyn testified that when he uttered the purported threat, he was "not trying to describe anybody. I was just blowing some steam off after what I thought [I] was harassed." T. Tr. 32.

other hand, the judge held that Derrick terminated Bernardyn because he "cursed and *threatened* his supervisor." *Id.* at 823 (emphasis added).

On remand, the judge must resolve this inconsistency. Clearly, he concluded that Bernardyn did not intend to threaten Wapinski. *Id.* at 823 n.9. The next question he must analyze is the impact of Bernardyn's words, specifically, how Bernardyn's words could constitute a threat when Wapinski, the person he allegedly threatened, did not hear Bernardyn's supposedly threatening language, and whether Wapinski perceived any threat at all — let alone a threat of physical harm. In this connection, we note that Reading does not dispute that Bernardyn's allegedly threatening language was directed to his safety committeeman over the CB radio, rather than to any
management official. T. Tr. 88-89. The judge must also consider whether the general words Bernardyn used, which named no person in particular, constituted a threat against Wapinski.[11]

B. Provocation

Even if the judge determines that Reading has established the elements of its affirmative defense, the question remains whether that defense must nevertheless fail because Bernardyn's conduct was provoked. Although we have recognized that cursing is opprobrious conduct unprotected by the Mine Act, *Cooley*, 6 FMSHRC at 520-21, and would find threats all the more opprobrious, in many cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"),[12] courts have recognized that an employer cannot provoke an employee

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[11] The dissent implies that anything Bernardyn said over the company radio system is protected because he "invoked the protection of the Mine Act in a classic sense — voicing concern about safety issues to a union official." Slip op. at 12. We believe, however, that safety is not a four letter word nor that miners are so primitive as to be unable to express themselves on important safety issues except through epithets or threats. As even our dissenting colleagues recognize, the Act does not protect a "safety complaint . . . made in . . . a reprehensible manner." *Id.* at 13.

[12] In *Delisio v. Mathies Coal Co.*, we recognized that "cases decided under the NLRA — upon which much of the Mine Act's antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act." 12 FMSHRC 2535, 2542-43 (Dec. 1990).

We also note that the National Labor Relations Board case on which the dissent relies extensively, *Caterpillar, Inc.*, 322 NLRB 674 (1996), was ultimately vacated by the NLRB on March 19, 1998. Unpublished NLRB Order dated March 19, 1998. We question whether a vacated case provides any authority, even persuasive authority, in this or any other legal forum.

into an indiscretion and then rely on that indiscretion as grounds for discipline.[13] In *Trustees of Boston Univ. v. NLRB*, the First Circuit stated, "at least so long as the employee's indiscretions are not major, it is immaterial that the employee's misconduct would constitute a sufficient reason for discharge if the actual reason for discharge is the employee's participation in [protected] activity." 548 F.2d 391, 393 (1st Cir. 1977). That court also indicated that employees are to be given some leeway for impulsive behavior, and that "the leeway is greater when the employee's behavior takes place in response to the employer's wrongful provocation." *Id.* The Fourth Circuit has recognized that "[t]he more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

Whether an employee's indiscrete reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case. Interpreting the NLRA, the Seventh Circuit stated that an "employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

In applying this test, some courts interpreting the anti-discrimination provision of the NLRA have found that an employee's egregious conduct was sufficient to strip the employee of that Act's protection, thereby justifying the employee's discharge. For example, in *NLRB v. Louisiana Mfg. Co.*, the Eighth Circuit denied reinstatement to a complainant who was "openly abusive in his language [towards a supervisor] and obviously insubordinate in his conduct." 374 F.2d 696, 706 (8th Cir. 1967). In *NLRB v. Soft Water Laundry, Inc.*, the Fifth Circuit denied reinstatement to an employee who cursed at a supervisor loudly and in the presence of other employees. 346 F.2d 930, 934-35 (5th Cir. 1965). And in *Timpte, Inc. v. NLRB*, the Tenth Circuit found that the termination of an employee who refused to stop using foul language and disparaging other employees after being warned not to do so was not discriminatory. 590 F.2d 871, 873-74 (10th Cir. 1979).

Other courts, however, have found layoffs, based ostensibly on vulgar employee outbursts to be improper where the employee's conduct was provoked by unjustified employer action. For instance, in *Trustees of Boston University*, the First Circuit upheld an administrative law judge's excusing of an employee's misconduct because it was stimulated by the employer's own wrongful conduct. 548 F.2d at 392-93. In *Coors Container Co. v. NLRB*, the Tenth Circuit held

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[13] Although the issue of provocation is one of first impression before the Commission, in *Moses v. Whitley Dev. Corp.*, we found that the operator failed to establish its affirmative defense in part because "much of the language and improper attitude [which the operator alleged motivated the complainant's discharge] arose in response to [the operator's] unlawful and provocative attempts to determine if [the complainant] had called the inspectors." 4 FMSHRC 1475, 1482 (Aug. 1982).

that the complaining employees' unprotected behavior — cursing at employer-hired security guards who attempted to prevent the employees from engaging in protected activity — was excusable impulsive behavior which did not justify discharge. 628 F.2d 1283, 1285, 1288 (10th Cir. 1980). In *NLRB v. Steinerfilm, Inc.*, the First Circuit upheld a decision of the National Labor Relations Board ("NLRB") excusing a complainant's offensive and abusive language which occurred during a confrontation with a supervisor in reaction to the supervisor's unjustified warning of the complainant. 669 F.2d 845, 852 (1st Cir. 1982). And in *M & B Headwear*, the Fourth Circuit upheld the reinstatement of a complainant who, after her discriminatory layoff, threatened a supervisor and was rude to a vice-president, because "the unjust and discriminatory treatment of [the complainant] gave rise to the antagonistic environment in which these remarks were made." 349 F.2d at 174.[14]

Here, the judge failed to make any findings regarding whether Bernardyn's cursing and alleged threats were provoked by Reading's response to his protected refusal to drive at a higher speed. In this connection, we note that when Bernardyn explained to Wapinski that he was driving slowly because the poor road conditions warranted it, Wapinski responded by telling Bernardyn to "get the thing moving and get going" or "pick it up when and where you can." T. Tr. 20-21, 140-42. Had Bernardyn complied with Wapinski's instruction to drive faster, it would have put him in harm's way. But for Wapinski's reaction to Bernardyn's protected refusal to drive faster, Bernardyn would not have had any reason to make the complaint to Dodds during which he cursed and made the allegedly threatening remark.

The question thus remains for the judge to determine on remand whether Bernardyn's cursing (including the alleged threat) was provoked by Reading's response to his protected refusal to drive faster. The judge must also determine whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the scope of the "leeway" the courts grant employees whose "behavior takes place in response to [an]

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[14] The complainant in *M & B Headwear* was terminated for her organizing activities, and, when her applications for job openings at the company were rejected, she became upset and threatened to harm the supervisor who had conducted surveillance of her organizing activities. 349 F.2d at 171-74. The court held that "when a layoff is discriminatory a rehiring of the injured employee cannot be avoided by reliance on her later unpremeditated and quite understandable outburst of anger that in no way harms or inconveniences the employer." *Id.*

employer's wrongful provocation."[15] *Trustees of Boston Univ.*, 548 F.2d at 393. If Bernardyn's conduct was provoked and excusable, Reading's affirmative defense must fail.

III.

Conclusion

For the foregoing reasons, we *vacate* the judge's dismissal of Bernardyn's discrimination complaint and *remand* this matter for further analysis consistent with this decision.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[15] The dissent first concludes that Bernardyn was provoked, stating "we are hard pressed to identify any other reason why Bernardyn would have cursed." Slip op. at 16. They then conclude that "Bernardyn's actions are excusable and fall within this leeway." *Id.* But as we pointed out above, these *factual* determinations are not ours to make, but rather must be made — as a matter of law — in the first instance by the trier of fact. *Island Creek Coal Co.*, 15 FMSHRC at 347. That this task belongs in the judge's hands is all the more apparent in this case where he has not even reviewed the record and facts under the provocation doctrine we adopt today.

Chairman Jordan and Commissioner Marks, dissenting:

We agree with our colleagues in the majority that the judge's analysis of Bernardyn's discrimination complaint is deficient in several respects. However, because we believe that the record compels the conclusion that Reading Anthracite failed to prove its affirmative defense, we would reverse the judge's decision, and thus respectfully dissent.[1]

The salient factor in this case is that Bernardyn was fired for statements he made during a conversation with his safety committeeman. Because that conversation constituted protected activity (*see Phillips v. IBMA*, 500 F.2d 772, 778 (D.C. Cir. 1974)), and because Bernardyn's comments during that conversation were not so flagrant that they eviscerated the protections of the Mine Act, Reading cannot rely on them to discipline Bernardyn. Consequently, Reading's affirmative defense must fail.

By calling his safety committeeman to complain that he was being forced to drive a truck on slippery roads at an unsafe speed, Bernardyn invoked the protection of the Mine Act in a classic sense -- voicing concern about safety issues to a union official. This was first deemed protected under the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), by the D.C. Circuit in *Phillips*. In that case the Court reversed a decision of the Interior Board of Mine Operations Appeals which had held that a miner had not engaged in protected activity by lodging a safety complaint with his foreman and mine safety committee because the Coal Act only protected complaints made to the Secretary or his authorized representative. The Court recognized that "[o]nly if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced." 500 F. 2d at 778. Subsequently, when Congress was in the process of enacting the Mine Act, the Senate Report cited *Phillips* favorably, stating that the Senate Committee intended "to insure the continuing vitality of the various judicial interpretations of . . . the Coal Act which are consistent with the broad protections of the bill's provisions," and emphasizing that the Act's anti-discrimination provision should be "construed expansively to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

Discharging a miner for peripheral statements made while complaining to a safety committeeman may inhibit the frequency and manner in which miners make safety complaints, resulting in a chilling effect on their ability to point out safety problems. A miner must feel free to communicate about such issues — with a management safety director, a foreman, or a union official — without undue concern about whether the complaint is couched in an acceptable format, and thus should not be fired for the manner in which he states them except in extreme

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[1] We agree with the majority that the judge properly found that Bernardyn had made out a prima facie case of discrimination. Slip op. at 4.

circumstances. These conversations occur within a framework that Congress wished to encourage — the protected activity of making safety complaints — and in making them, a miner enjoys the protection of the Mine Act's shield against retaliatory actions by the operator.

That shield is not absolute, however. A miner may lose the protection of the Mine Act in circumstances where his safety complaint is made in such a reprehensible manner that he no longer deserves the Act's protections because his actions cross a certain line. *See Caterpillar Inc.*, 322 NLRB 674 (1996).[2] The facts in *Caterpillar* are strikingly similar to the instant case. Caterpillar fired its employee because during a grievance meeting, in front of other workers, he said to a supervisor: "'You're a motherfucking liar.' . . . 'You know what you said.' . . . 'If you're man enough to admit it once, you ought to be man enough to admit it now.'" *Id.* at 676. He also gestured at the supervisor with the forefinger of one hand and repeated "'You motherfucker.' . . . 'I'll deal with you on the outside,'" striking the supervisor with his finger in the top part of his body. *Id.* The National Labor Relations Board ("NLRB") nevertheless ruled that his discharge violated the NLRA. *Id.* at 677.[3]

The NLRB acknowledged that "'[t]he Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts.'" *Id.* (quoting *United States Postal Service v. NLRB*, 652 F.2d 409, 411 (5th Cir. 1981)). Recognizing that such protection is not without limits, the NLRB held that when "an employee is discharged for conduct occurring during a grievance meeting, the inquiry must focus on whether the employee's language is '*indefensible* in the context of the grievance involved,'" 322 NLRB at 677 (quoting *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d. 724, 731 (5th Cir. 1970)) (emphasis in original) (citation omitted); *see also NLRB v. Vought Corp.-MLRS Sys. Div.*, 788 F.2d 1378, 1384 (8th Cir. 1986) (when analyzing employer discipline of employees for protected activity where the employee used intemperate language, the standard is whether the employee's improper conduct was so

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[2] While *Caterpillar* was decided under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 et seq., we have often looked for guidance to case law interpreting similar provisions of the NLRA in resolving questions about the proper construction of Mine Act provisions. *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1309 (Dec. 1999); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990). In *Delisio*, the Commission emphasized that it "has recognized . . . that . . . cases decided under the NLRA — upon which much of the Mine Act's antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act." *Id.* at 2542-43.

[3] The NLRB, on the joint motion of the parties, subsequently vacated its decision in *Caterpillar* in order to effectuate a settlement agreement (*see* Unpublished NLRB Order dated Mar. 19, 1998), but the NLRB has nonetheless continued to cite it. *See Central Illinois Public Serv. Co.*, 326 NLRB No. 80, 159 LRRM (BNA) 1217, 1218 n.8 (Aug. 27, 1998); *Shell Electric*, 325 NLRB No. 156, 1998 WL 280365, at *4 (May 29, 1998).

indefensible as to forfeit the protection of the NLRA). We consider this standard to be equally pertinent when we must decide whether a miner's conduct during the course of making a protected safety complaint exceeds the protection of the Mine Act.

There is an unmistakable similarity between the lodging of employee grievances under the NLRA and the filing of safety complaints under the Mine Act. As the Board recognized in *Caterpillar*, "the filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by [the NLRA]." 322 NLRB at 676-77 (citation omitted). Similarly, the reporting of safety complaints is a crucial activity protected by the Mine Act, where candor is essential and disputes may arise.

Our adoption of the approach taken by the Board in *Caterpillar* is consistent with our decision in *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997). In *Knotts*, a miner was discharged after engaging in a conversation with a representative of the mine landowner. The Commission found that this conversation was protected, because it included complaints about unsafe mine equipment. *Id.* at 837. The operator claimed that it would have fired him in any event because he expressed disparaging views about mine management during the conversation, including a statement he allegedly made that the mine manager "sets outside with his feet on the desk and acts like a bigshot coal operator." *Id.* at 839. The Commission found that "a significant portion of the conversation . . . concerned safety issues," (*id.*) and because these protected safety concerns were expressed in the same conversation as the unprotected statements "'[i]t is fair that . . . [the employer] bear the risk that the influence of legal and illegal motives cannot be separated.'" *Id.* at 839, 840 (quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)). Consequently, we held that the operator had failed to meet its affirmative defense.

We conclude that the undisputed facts of this case compel the finding that Bernardyn's conduct was not so indefensible as to cause him to fall outside the protective confines of the Act. In fact, Bernardyn's behavior is similar to the behavior the Board considered in *Caterpillar,* and we find it appropriate to adopt its analysis in the instant case:

> [W]e find that [the employee's] statement was a spontaneous and impulsive outburst that was triggered by [the employer's] own inflammatory conduct. There is no evidence that during his 20 years with the Company, [the employee] was a violent or dangerous person. In light of the emotionally charged events that had just occurred, it is apparent to us that [the employee] simply lost his temper (or, as [the supervisor] so aptly put it, "blew up") and made the spontaneous, emotional outburst at issue here. . . .
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> . . . [W]e conclude that [the employee's] conduct during the grievance meeting was not of such a flagrant or serious character as

> to be "indefensible in the context of the grievance involved," thereby depriving him of the protections of the Act and rendering him unfit for further service.

322 NLRB at 677.

In determining that Bernardyn's behavior was not indefensible, we find it noteworthy that, as the majority points out, the record contains several other examples of employees who cursed, but who were not discharged. Slip op. at 7. Unlike Bernardyn, these employees not only cursed directly at their supervisors but also displayed other conduct warranting disciplinary action. *See* Gov't Ex. C. In all four reported incidents, however, the workers received only verbal or written warnings. *Id.* In one case, an employee was given a verbal warning for cursing the plant superintendent in March 1994, and a month later, when he cursed his production foreman, he was only given a written warning.[4] *Id.* at 2-3.

In determining that Bernardyn's conduct was not "indefensible," we have also considered the operator's assertion that Bernardyn was fired for threatening Wapinski. R. Br. in Resp. to PDR at 5, 10. We believe, however, that when the entire context is considered, a reasonable person would not have considered Bernardyn's words to constitute a threat. We are mindful that his comments were extremely general, and were not uttered directly to the alleged "victim."[5] Bernardyn suggested no specific means of hurting Wapinski, but spoke only in a very vague, angry manner to a co-worker, his safety committeeman.[6] He did "fly off the handle," and spoke in a coarse and disparaging manner, but his words reflected his agitation and extreme frustration with Wapinski. In sum, the record compels the conclusion that his actions here cannot be classified as "indefensible."

In *Caterpillar*, the NLRB also reaffirmed the well-established principle, adopted by our colleagues in the majority, that an affirmative defense must fail if the complainant's conduct was

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[4] The April employee warning and disciplinary report reflects that he had received the previous verbal warning in March, and that he had received three other previous warnings (for unspecified actions) since 1989. Gov't Ex. C at 3.

[5] Because he used the only means of communication at hand, the company-provided CB radio in his truck, Bernardyn's complaint to his safety committeeman did wind up being overheard by Wapinski, as well as other drivers.

[6] The judge's finding that Bernardyn himself did not intend his words as a threat is also relevant. *See* 21 FMSHRC 819, 823 & n.9 (July 1999) (ALJ).

provoked by the employer. 322 NLRB at 678; slip op. at 8-9.[7] The majority remands the case for the judge to consider whether Bernardyn's cursing was provoked by his supervisor's response to his protected refusal to drive faster. Slip op. at 10.

Based on this record, we are hard pressed to identify any other reason why Bernardyn would have cursed. In describing his conversation with the safety committeeman, Bernardyn testified that he told him that management had asked him to drive faster, that he thought he should be able to use his own discretion, and that, in terms of the curse words he used, he "was just blowing some steam off after what I thought was harassed [sic]." T. Tr. 30, 32. The operator has offered no other reason for Bernardyn's cursing.

As the majority points out, under a "provocation" doctrine, a determination must also be made as to whether Bernardyn's conduct comes within the scope of the "leeway" granted by courts to employees who were wrongfully provoked. *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977); *see* slip op. at 9. Our review of Bernardyn's actions (*see supra* text accompanying nn. 2-7) and of the relevant case law in the area of "provocation," leads us to the conclusion that, as a matter of law, Bernardyn's actions are excusable and fall within this leeway. Bernardyn's conduct was no more egregious than the actions at issue in *NLRB v. M & B Headwear Co.*, 349 F.2d 170 (4th Cir. 1965) (cited by the majority, slip op. at 10), as well as other cases following the principles articulated in that decision. *See, e.g.*, *Blue Jeans Corp.*, 170 NLRB 1425, 1425 (1968) (employee's statement that she "would kill the S.O.B." who told the company about her union activities, and her actions in threatening the plant manager with scissors in hand, provoked by the employer's discriminatory treatment of her); *Vought Corp.-MLRS Sys. Div.*, 788 F.2d at 1380, 1384 (employee's direct use of abusive, profane, and threatening language toward his supervisor was unreasonably provoked by repeated company violations of his rights under the NLRA).

In deciding to remand this matter, our colleagues cite to cases in which courts have found that the employee's conduct negated the protections of the Act. These cases, however, are readily distinguishable from the matter at hand. In *NLRB v. Louisiana Manufacturing Co.*, the complainant was rude to his supervisor and cursed at him directly. 374 F.2d 696, 705 (8th Cir. 1967). Bernardyn, of course, did not speak directly to his supervisor during the conversation at issue. In *NLRB v. Soft Water Laundry, Inc.*, the court denied reinstatement to an employee who admitted using "extreme profanity" in a conversation with her supervisor. 346 F.2d 930, 934, 936 (5th Cir. 1965). The court found that the employee's language and conduct, carried out in the presence of other employees, constituted insubordination, because it was in direct defiance of superior authority, and amounted to a refusal to follow reasonable instructions. *Id.* at 934. There is no claim by the operator in the instant case that Bernardyn refused to follow orders. Moreover, in neither of these two cases relied on by the majority did the court utilize a "provocation"

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[7] In *Caterpillar*, the Board found that the employee's discharge was illegal because the employer had provoked the alleged insubordination by cursing at him and imposing an unlawful gag order. 322 NLRB at 678-79.

analysis. *See NLRB v. Mueller Brass Co.*, 501 F.2d 680, 686 (5th Cir. 1974) (distinguishing *Soft Water Laundry* and *Louisiana Mfg.*, because "both involved unprovoked outbursts of abusive and threatening language by the discharged employees").

Finally, in *Timpte, Inc. v. NLRB*, 590 F.2d 871, 872 (10th Cir. 1979), the employee was not discharged when he circulated a controversial letter in the plant, but only after he refused to agree that in the future he would not circulate material with vulgar and indecent language. Again, this conduct is a far cry from Bernardyn's.

Even under the traditional disparate treatment analysis discussed by the majority, we believe that reversal, and not remand, is warranted here. Keeping in mind that Reading must prove its affirmative defense by a preponderance of the evidence, (*Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1556 (Sept. 1992)), our review of the record evidence on prior cursing incidents shows that Reading cannot meet its burden of showing that it would have fired Bernardyn based solely on his cursing. The majority remands the case so that the judge may consider whether Reading proved that it would have discharged Bernardyn for his cursing alone, even though Reading had never fired an employee for this behavior in the past. As we have demonstrated above, however, the record compels the conclusion that Bernardyn was the victim of disparate treatment, as other employees who cursed were not fired, and the operator's claim that he was fired for threatening Wapinski is not supported by record evidence.[8]

Our colleagues decline to compare the previous cursing incidents to the one at issue here, because of the possibility that Bernardyn's actions fell under a new 1998 disciplinary policy. Accordingly, they remand to the judge the question of which disciplinary policy was in effect at the time of Bernardyn's termination. Slip op. at 6-7. We believe, however, that under either policy, cursing of the kind that occurred here cannot reasonably be considered an offense warranting immediate dismissal.

For purposes of this case, the only relevant difference between the two policies is that the 1998 policy permits immediate discharge for work refusal and insubordination, while the earlier policy called for progressive discipline when such conduct occurred. Under the 1998 policy, the following misconduct constitutes grounds for immediate dismissal:

(1) Refusal to obey orders, refusal to perform work assignment after instruction, failure to carry out instructions or assignments or act of insubordination.
(2) Stealing.

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[8] It is also significant that supervisors had previously used profanity toward miners. M. Tr. 17-19, 30-31; *see also Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1366 (11th Cir. 1999) (emphasizing prior circuit holding that "evidence demonstrating that the decision-maker engaged in the same policy violation proffered for an employee's termination is 'especially compelling' evidence of pretext") (citation omitted).

(3) Possession or using intoxicants or drugs in the area of work.
(4) Carrying weapons on Company property.
(5) Physical fighting.

R. Ex. 2, at 3. It is apparent that the behaviors described in this list involve actions so serious that they must be stopped immediately, and the perpetrator removed from the mine. It is significant, however, that in Bernardyn's case, he was permitted to continue his behavior, even though management was aware of it and could have stopped it. We find it telling that when Derrick was asked why he didn't get on the CB radio and tell Bernardyn to stop cursing, he replied: "It never dawned on me to do it. . . . [I]t never crossed my mind to pick up the CB and tell him to stop." T. Tr. 116.

Under the 1987 policy, misconduct considered a "serious offense," meriting discharge only after the exhaustion of other disciplinary remedies, included "[r]efusal to obey orders or failure to carry out instructions or assignments. (Insubordinations)." Gov't Ex. B at 2. Reading viewed the 1998 policy as simply moving this provision from the progressive discipline section in the 1987 policy to the immediate discharge section in the 1998 policy. *See* R. Ex. 2 at 1 (letter from Howard A. Rosenthal). The wording under the 1987 policy makes clear that insubordination was defined as work refusal, and that cursing would not fall under this rubric.

Consequently, we believe that remanding the disciplinary policy issue to the judge is unnecessary, because the record supports only one reasonable conclusion: even if the later policy were in effect, under the terms of its provisions, cursing was not cause for immediate dismissal. Bernardyn's termination, therefore, may properly be compared to the discipline previously received by other workers under the 1987 policy, discipline which, as we have stated, was far less severe.

Because we believe that the record in this case compels the conclusion that Reading failed to prove its affirmative defense, we would reverse the judge's finding of no discrimination. *See Donovan v. Stafford Construction Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (although neither the Commission nor the judge had reached the issue of an affirmative defense, the D.C. Circuit recognized that "[s]ince all the evidence bearing upon the issue is contained in the record before us . . . a remand on this issue would serve no purpose. This is particularly so in light of our ultimate holding that only one conclusion would be supportable."); *Brown v. East Miss. Elec. Power Ass'n.*, 989 F.2d 858, 862 (5th Cir. 1993) (evidence permitted only one result — that the employer failed to meet its burden of proving that it would have removed employee if the illegal consideration of race had not played a role); *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 277 (Mar. 1999), *appeal docketed*, No. 99-4278 (6th Cir. Oct. 22, 1999) (remand on constructive discharge claim was unnecessary where the record as a whole admitted to only one conclusion); s*ee also Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998), *aff'g* 19 FMSHRC 48, 52-53 (Jan. 1997); *Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 137 (Feb. 1999).

For the foregoing reasons, we believe that a remand in this case would serve no purpose, and we would therefore reverse the judge's decision and find in favor of Bernardyn.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
v.	:	Docket Nos.	KENT 99-171-R
	:		KENT 99-172-R
EXCEL MINING LLC	:		KENT 99-173-R

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

Pursuant to Commission Procedural Rules 73 and 74, 29 C.F.R. §§ 2700.73[1] and 2700.74,[2] the International Chemical Workers Union Council ("CWU") has filed a motion to

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[1] Commission Procedural Rule 73 provides, in pertinent part, that a motion to intervene shall set forth:

> (a) A legally protectible interest directly relating to the property or events that are the subject of the case on review; (b) A showing that the disposition of the proceeding may impair or impede his ability to protect that interest; (c) The reasons why the movant's interest is not adequately represented by parties already involved in the proceeding; and (d) . . . [an explanation] why the movant's participation as an amicus curiae would be inadequate.

29 C.F.R. § 2700.73.

[2] Commission Procedural Rule 74 provides, in pertinent part:

> (a) After the Commission has directed a case for review, any person may move to participate as amicus curiae. . . . A motion for participation as amicus curiae shall set forth the interest of the

intervene or, in the alternative, to participate as amicus curiae, together with its brief in support of the Secretary of Labor's request to reverse Administrative Law Judge Gary Melick's decision in the above-captioned proceedings. Upon consideration of the motion, we deny the CWU's motion to intervene, grant its motion to participate as amicus curiae, and accept the CWU's amicus brief.

As grounds for its motion, the CWU states that it has been involved in *Asarco, Inc.*, 20 FMSHRC 1001, 1004-08 (Sept. 1998), *pet. for review docketed*, No. 98-4234 (6th Cir. Oct. 16, 1998), at each stage of those proceedings, and that our decision in the instant matter may have an impact upon its chances for success in *Asarco*. Mot. at 2. The CWU explains that its position in the above-captioned matter is not represented by either party. *Id.* The CWU also states that, since it concurrently submitted its brief regarding the proper interpretation of the applicable section of the Mine Act, granting its request to intervene should not unduly delay these proceedings or prejudice any party. *Id.* at 3. Finally, the CWU submits that it did not intervene before the judge because it learned about these proceedings on January 26, 2000, 32 days after the Commission had directed review of this matter. *Id.* at 2.

Excel Mining LLC ("Excel") opposes the CWU's motion. Excel submits that the CWU's motion to intervene was filed out of time, and that the CWU has offered no reason that might constitute "good cause" to excuse the late filing. Opp'n at 1. Excel maintains that the CWU lacks the requisite interest in this matter, and that granting the CWU's motion would prejudice Excel because it would have to refute the CWU's argument, which was not made before the judge. *Id.* at 2-3. Excel also claims that the CWU's motion to participate as amicus curiae should be rejected because the CWU's position does not support one of the parties to the case, because the CWU has no direct interest in this case, and because Excel would be prejudiced in that granting this motion would require an extension of time for Excel and the Secretary of Labor to respond to the CWU's arguments. *Id.* at 3-4.

The procedure for intervention under Commission Procedural Rule 73 requires, inter alia, that the moving party set forth a legally protectible interest directly relating to the case on review, and explain why its participation as an amicus curiae would be inadequate. The issue in the underlying proceeding is whether Section 202(f) of the Mine Act, 20 U.S.C. § 842(f), permits the Department of Labor's Mine Safety and Health Administration to measure silica-bearing dust in coal mines using multiple samples taken over a single shift. 21 FMSHRC 1401 (Dec. 1999) (ALJ). We have held that the legal basis for rejecting the use of single-shift sampling in coal

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> movant and show that the granting of the motion will not unduly delay the proceeding or prejudice any party. . . . (b) The brief of an amicus curiae shall be filed within the initial briefing period (*see* § 2700.75(a)(1)) allotted to the party whose position the amicus curiae supports. . . .

29 C.F.R. § 2700.74.

mines does not apply to metal/non-metal mines. *Asarco, Inc.*, 17 FMSHRC 1, 5 (Jan. 1995). Therefore, under Commission precedent, the holding in the underlying matter here will not have a direct effect on the outcome of the *Asarco* matter currently pending before the Sixth Circuit, which involves single-shift sampling in a metal/non-metal mine. *Asarco*, 20 FMSHRC at 1002. Moreover, the CWU has made no showing that it represents any miners in the coal industry. Thus, the CWU's stated interest in enhancing its chances for success in *Asarco* is insufficiently direct to satisfy the requirements of Rule 73(a). Furthermore, the CWU has made no showing why its participation in this matter as amicus curiae would be inadequate. Accordingly, we deny the CWU's motion to intervene.[3]

The CWU's alternative motion to participate as amicus curiae raises a timeliness issue. We recently amended Rule 74 to clarify that an amicus brief is due "within the *initial* briefing period (*see* § 2700.75(a)(1)) allotted to the party whose position the amicus curiae supports." 29 C.F.R. § 2700.74. Prior to the November 8, 1999 amendment, it was unclear whether the amicus brief could be filed as late as the deadline for filing the reply brief. *See* 29 C.F.R. § 2700.74(b) (1998).

The CWU's amicus brief was not timely filed under Rule 74. Although the CWU's position is not identical to the Secretary's position in this matter, both the Secretary and the CWU seek to overturn the judge's decision. Consequently, we treat the CWU's position as more closely aligned with the Secretary's than with the operator's. Thus, the CWU was required to file its amicus brief within the Secretary's initial briefing period, which ended on January 24, 2000, 30 days after the Commission's direction for review. The CWU did not file its brief until January 27, three days late. In addition, the CWU did not file a motion for extension of time under Commission Procedural Rule 75(c), 29 C.F.R. § 2700.75(c).

Commission Procedural Rule 75(d), governing briefs, states that the Commission "*may* decline to accept a brief that is not timely filed." 29 C.F.R. § 2700.75(d) (emphasis added). We have been liberal in granting amicus status. *See, e.g.*, *Peabody Coal Co.*, 18 FMSHRC 494, 497 (Apr. 1996). We have also frequently granted extensions of time to file briefs. The CWU's failure to timely file its brief, and a motion for extension of time, may be attributable to the recent change in our procedural rules.

Under these circumstances, we grant the CWU's motion to participate as amicus curiae, and accept its late-filed amicus brief.

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[3] Commissioner Marks would grant the CWU's motion to intervene.

Our decision in this matter may affect the manner in which the Secretary will be permitted to sample for respirable dust. To this end, we invite any interested organizations or persons to file motions for leave to participate as amici and amicus briefs in this matter. Any motions and amicus briefs submitted shall be filed no later than 30 days from the date of this order and, pursuant to Commission Procedural Rule 75(c), shall not exceed 25 pages. 29 C.F.R. § 2700.75(c). We hereby toll the time for parties to respond to the CWU's brief pending further Commission order.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 17, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of CURTIS STAHL	: : : : :	
v.	:	Docket No. WEST 2000-145-DM
A&K EARTH MOVERS, INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

INTERIM DECISION AND ORDER

BY THE COMMISSION:

On March 1, 2000, the Commission received from A&K Earth Movers, Inc. ("A&K") a petition for review and request for stay of Administrative Law Judge T. Todd Hodgdon's February 18, 2000, order temporarily reinstating Curtis Stahl, issued pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c). We grant A&K's petition for review and, for the reasons that follow, we affirm the judge's order.

On July 27, 1998, Stahl filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") stating that he had been discharged from A&K on July 15, 1998, and alleging that the discharge was the result of his safety complaints. 22 FMSHRC 233, 233 (Feb. 2000) (ALJ). In his complaint, Stahl stated that, on several occasions during June and July, 1998, he complained to his employer about worn out brakes on a fuel truck. *Id.* at 234-35. Eventually, Stahl red-tagged the truck, taking it out of service. *Id.* at 234. On July 15, he was terminated. *Id.* at 235. When Stahl asked his employer why he was terminated, he was told that he "allowed both generators to run out of fuel last week and we just don't need any more trouble around here." *Id.*

On January 21, 2000, nineteen months after receiving Stahl's complaint, the Secretary applied to have Stahl temporarily reinstated. Appl. for Temp. Reinst. The matter proceeded to hearing before Judge Hodgdon pursuant to A&K's request. Responding to the allegations in Stahl's complaint, A&K presented testimony that Stahl did not communicate any safety complaints to his superiors, that he was terminated for reasons having nothing to do with his alleged protected activity, and that the decision to terminate Stahl was made a week before his first alleged safety complaint. 22 FMSHRC at 235.

The judge found that there was no dispute that Stahl's discharge constituted adverse action, and that employer knowledge of protected activity, hostility or animus towards the protected activity, and coincidence in time are all circumstantial indications of discriminatory intent under Commission case law. *Id.* at 236. In this regard, he noted Stahl's testimony that the company had knowledge of his safety complaints and that only eight days elapsed between those complaints and his termination. *Id.* Declining to resolve credibility disputes, the judge pointed out that, while "A&K's evidence indicates that it may well have a valid defense to Stahl's complaint," the company's evidence did not establish that the claim was frivolous. *Id.* at 237. Accordingly, the judge issued an order directing A&K to temporarily reinstate Stahl. *Id.*

In its petition, A&K claims that the judge erred in finding that the complaint was not frivolously brought because the Secretary failed to present evidence of employer animus towards Stahl's alleged protected activity. PDR at 8-10. A&K also maintains that the Secretary's nineteen-month delay in filing the application for temporary reinstatement prejudices the operator, and that the temporary reinstatement claim should be barred by the equitable doctrine of laches. *Id.* at 10. Finally, A&K requests that the Commission stay the judge's temporary reinstatement order pending the Commission's review of the judge's decision. *Id.* at 10-12.

The Secretary responds that substantial evidence supports the judge's decision ordering Stahl's temporary reinstatement. S. Resp. at 7-15. She also argues that A&K should not be permitted to raise its laches argument before the Commission because it failed to raise it before the judge, that the operator's laches argument is beyond the scope of temporary reinstatement proceedings, and that the operator's laches argument attempts to punish a miner for the Secretary's delay. *Id.* at 16-19. Finally the Secretary submits that the Commission should reject A&K's stay request. *Id.* at 19-24.

Initially, we conclude that A&K's laches argument has not been preserved for review. Below, the operator's attorney twice referenced the Secretary's nineteen-month delay in initiating temporary reinstatement proceedings. Tr. 5, 228. Otherwise, A&K did not discuss the Secretary's delay in initiating temporary reinstatement proceedings, let alone argue that laches barred the instant temporary reinstatement proceedings. Nor has A&K presented in its petition any reason for its failure to present its laches argument before the judge. Accordingly, we decline to reach the argument. 30 U.S.C. § 823(d)(2)(A)(iii) ("Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass.").

Nevertheless, we are troubled by the Secretary's nineteen-month delay in seeking Stahl's temporary reinstatement, and the Secretary's failure to explain this delay. A delay of this magnitude thwarts the entire purpose of the temporary reinstatement provision. To fully discharge our duties under section 105 of the Mine Act, we retain jurisdiction of this case for the limited purpose of obtaining from the Secretary a full and detailed explanation of this delay, including information on when Stahl's complaint first came to the attention of an attorney within the Department of Labor. *Cf. Daanen and Janssen, Inc.*, 19 FMSHRC 665, 666 (Apr. 1997)

(citing Unpublished Order at 2 (Feb. 5, 1997) directing Secretary to provide explanation of what was alleged to be a misrepresentation in a motion for an extension of time). We also note it does not appear that the Secretary has yet filed a discrimination complaint with the Commission. 22 FMSHRC at 233. We urge the Secretary to immediately act on Stahl's complaint if she has not already done so.

Turning to the judge's decision ordering Stahl's reinstatement, we note that "[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 718 (July 1999) and *Secretary of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993), *both quoting Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd,* 920 F.2d 738 (11th Cir. 1990). We apply the substantial evidence test in reviewing the judge's decision.[1] *Secretary of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153 (Feb. 2000).

As stated by the judge, Stahl presented evidence that he engaged in protected activity when he allegedly made several complaints to his superiors about defective brakes on a fuel truck. 22 FMSHRC at 234, 236. It is undisputed that Stahl's discharge constituted adverse action. *Id.* at 236. Nor does A&K dispute that Stahl's termination occurred eight days after his final alleged complaint about the faulty brakes on the fuel truck (*id.* at 234, 236), from which an illegal motive could be inferred. *See Donovan ex rel. Anderson v. Stafford Constr. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) (holding that where two weeks had elapsed between the alleged protected activity and the miner's dismissal, "[t]he fact that the Company's adverse action . . . so closely followed the protected activity is itself evidence of an illicit motive").

In sum, the record contains evidence that A&K was aware of Stahl's safety complaints, and that only eight days elapsed between his last complaint and his discharge. A&K has presented evidence that Stahl made no safety complaints, that it had no knowledge of any safety complaints by Stahl, and that the decision to terminate him was made before the alleged complaints.[2] 22 FMSHRC at 235. However, as the judge correctly pointed out, the judge is not

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

[2] Contrary to A&K's claim that "some evidence of [employer] hostility [towards the protected activity] must be presented in order to support an order for temporary reinstatement," (PDR at 8), we have never held that hostility is a prerequisite to a finding that a complaint is not

obligated to resolve testimonial conflicts in a temporary reinstatement decision. *Id.* at 236. The record evidence on the protected activity, adverse action, and a nexus between the two, constitutes substantial evidence in support of the judge's determination that the complaint was not frivolous.

Accordingly, the judge's order requiring the temporary reinstatement of Stahl is affirmed. We order Stahl's immediate temporary reinstatement, if he has not already been reinstated. We also order the Secretary to file with the Commission within 10 days from the date of this interim decision and order an explanation of the circumstances surrounding the protracted delay in bringing Stahl's temporary reinstatement application.[3]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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frivolous. Rather, such evidence is but one of several circumstantial indicia of discriminatory intent that may be offered to show that a complaint is not frivolous.

[3] We intimate no views as to the ultimate merits of the case. We deny the operator's request for a stay as moot.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 27, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEVA 98-111
CONSOLIDATION COAL COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Marks, and Riley, Commissioners

This is a contest proceeding arising 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 whether the violation, charged in the citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against Consolidation Coal Company ("Consol"), was the result of the operator's unwarrantable failure. Administrative Law Judge Jacqueline Bulluck concluded that it was not (21 FMSHRC 612 (June 1999) (ALJ)), and the Secretary appealed. For the reasons that follow, we reverse the judge's determination and remand the case for assessment of the appropriate penalty.

I.

Factual and Procedural Background

Consol owns and operates Robinson Run No. 95, an underground coal mine in West Virginia. 21 FMSHRC at 613. On January 15, 1998, MSHA inspector Charles Thomas was conducting a Triple-A inspection at the mine. *Id.* While in the 12-D section of the mine to check on safety equipment, Thomas noticed the absence of any centrally located supplementary roof support, including posts, caps, wedges, and a saw. *Id.* As a result, Thomas spoke with Consol day shift foreman Kevin Carter. *Id.* Thomas asked Carter about the location of the supplementary

[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

roof support and number of roof posts. *Id.* at 613-14; Tr. 14. According to Carter, Thomas told him "to count your posts." Tr. 96, 113-14. Carter told Thomas that he would "take care of it." 21 FMSHRC at 614. As Thomas left the mine, accompanied by miner safety representative Dave McCullough, Thomas also spoke with Consol safety director Robert Church and told him that attention was needed to address supplementary roof support in the 12-D section. *Id.*; Tr. 15.

Subsequently, during his shift on January 15, Carter counted the posts and caps along the supply track and found that there were only 11. 21 FMSHRC at 614. Carter then spoke with mine foreman Tom Harrison and requested additional posts and other roof support materials. *Id.* Around 3:30 or 4:00 that afternoon, Harrison ordered the posts from the supply yard, which is located about 10 miles from the 12-D section. *Id.*

MSHA inspector Thomas returned to the mine to continue his Triple-A inspection on January 17 during the midnight shift, 2 days and four shifts after he left the mine on January 15. *Id.* Consol foreman Frank Slovinsky was substituting for the regular foreman of section 12-D. *Id.* Thomas asked Slovinsky where the emergency roof supports were located. *Id.* Slovinsky responded that they should be in the tool car.[2] *Id.*; Tr. 15. When the posts could not be located there, the two searched along the supply track outby four crosscuts of the section. 21 FMSHRC at 614; Tr. 25. They eventually located 11 posts and some cap pieces and wedges, but never found a saw. 21 FMSHRC at 614; Tr. 26.

Inspector Thomas then issued Order No. 4888994 charging Consol with a violation of 30 C.F.R. § 75.214 for failing to maintain a supply of supplementary roof support material at a readily accessible location within four crosscuts of the 12-D section. 21 FMSHRC at 614. Section 75.214 provides:

> **Supplemental support materials, equipment and tools.**
>
> (a) A supply of supplementary roof support materials and the tools and equipment necessary to install the materials shall be available at a readily accessible location on each working section or within four crosscuts of each working section.
>
> (b) The quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered, or in the event of an accident involving a fall.

Consol's roof control plan for the Robinson Run mine further specified that "[t]he quantity of

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[2] It was customary at the Robinson Run mine to maintain supplementary roof support for a working section on a "sled" or tool car at the power center or track entry near the section. 21 FMSHRC at 613 n. 2; Tr. 16-17.

supplementary roof support material required by [section] 75.214(b) shall consist of a minimum of twenty (20) posts of proper length with sufficient cap pieces and wedges." 21 FMSHRC at 615.

The inspector designated the violation as significant and substantial (S&S) and alleged that it was the result of Consol's unwarrantable failure. *Id.*; Ex. P-1. The violation was abated between 3:30 and 5:00 a.m. the following morning when miners were able to locate additional posts along the supply and main tracks, and stored 20 posts, along with wedges, cap pieces, and a saw, in the No. 11 crosscut. 21 FMSHRC at 614.

Consol contested the citation, and a hearing was held before an administrative law judge. The judge held that it was clear that Consol had failed to maintain a supply of 20 posts and related materials at a readily accessible location in the 12-D working section or within four crosscuts. *Id.* at 615. The judge further concluded that the violation was S&S. *Id.* at 616. With regard to unwarrantable failure, the judge noted that Consol was aware of the requirements of the standard and that, on January 15, it had been put on notice that remedial efforts were necessary to achieve compliance. *Id.* at 617. The judge found that, on January 15, foreman Carter and general mine foreman Harrison acted promptly in ordering additional supplies. *Id.* The judge further reasoned that "Consol assumed the risk of being cited by failing to ensure delivery to the section during the supply crew's first available shift, i.e., the day shift of January 16th." *Id.* However, the judge concluded that Consol's lack of follow-up until the midnight shift on January 17 did not constitute intentional misconduct, recklessness, or a serious lack of reasonable care, amounting to more than ordinary negligence and, therefore, was not the result of Consol's unwarrantable failure. *Id.*

II.

Disposition

The Secretary argues the record compels a finding that the violation was due to Consol's unwarrantable failure. S. Br. at 7. She avers that MSHA inspector Thomas notified the day shift foreman, the general foreman, and the safety director at the mine about the problem as well as the need for corrective action, thus Consol was on notice that greater efforts were necessary to address the cited condition, yet no meaningful effort was made to remedy the situation. *Id* at 7-10,12-13. The Secretary also asserts that the cited condition posed a high degree of danger in the event of a roof fall. *Id.* at 13-17. Finally, the Secretary argues that Consol's efforts to correct the violation were ineffective, and the failure of three members of management to follow through with corrective action before a citation issued demonstrated an attitude of indifference toward abatement of the condition and the hazard it created. *Id.* at 10, 17-24.

In response, Consol argues that substantial evidence supports the judge's conclusion that the violation was not the result of its unwarrantable failure. C. Br. at 6-7. Consol further argues that the Secretary is essentially asking the Commission to overturn the judge's credibility resolutions. *Id.* at 8-9. Consol argues that management reacted to the inspector's January 15

comment concerning the supplemental roof post prudently and in a good faith manner. *Id.* at 9-11. Consol further notes that there were other means of roof support available and that the 12-D section where the violation occurred had a history of good roof conditions. *Id.* at 11. The delay in getting the supplemental roof posts, Consol contends, was inadvertent, unintentional, and unavoidable. *Id.* at 13. Finally, Consol argues that there was no prior history of similar violations; rather, Consol made a good faith effort to maintain posts in the 12-D section but they were removed for other purposes. *Id.* at 13-14.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission "has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994) (*citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)).

Not all of the *Mullins* criteria are applicable to the violation at issue. However, a determination of unwarrantable failure is amply supported by the relevant criteria. It is undisputed that, when he was at the mine on January 15, MSHA inspector Thomas informed several Consol officials, including the day shift foreman and safety director, that they needed to check the number of roof posts, caps, and wedges in the 12-D section to comply with the mine roof control plan. However, neither day shift foreman Carter nor safety director Church took action to ensure the violative condition was remedied.

Ideally, Carter should have immediately addressed the violative condition brought to his attention by searching for the required safety equipment and materials. Instead, Carter contacted mine foreman Harrison to have posts ordered from Consol's general supply. Carter's trial testimony explaining his actions is revealing:

> Q. Is there some reason why you just didn't drop everything and go out looking for posts elsewhere?

A. We were in production at that time and it wasn't any emergency situation that presented itself. I did have eleven . . . to use, and we have good top conditions, so I didn't see any reason to stop everything to get nine posts.

Tr. 100.

Harrison, in turn, treated Carter's request for the supplementary roof support as a routine supply request. As Harrison explained in his hearing testimony, Carter "indicated to me that as far as the law is concerned he needed a few more [posts], but that he did have posts on the section, so it didn't [s]eem to be urgent to me." Tr. 136-37. Harrison admitted that he could have had a "special supply crew" assigned to gather the posts but, "[i]t's just not as efficient . . . ." Tr. 137. While obtaining more posts through the normal supply chain should have put them in place on January 16, inexplicably the posts were not delivered. Carter was present on the day shift on January 16 but had no explanation for the delay in the delivery of the posts. Tr. 120-21. More significantly, he took no action on January 16 to inquire about the whereabouts of the posts or to ensure prompt shipment of the posts once it was apparent that they had not been received.

In short, Consol failed to respond effectively to rectify a violative condition of which it was aware. Notwithstanding the passage of four intervening shifts after inspector Thomas' initial admonition, Consol failed to place twenty posts at a central location to serve as supplementary roof support as required. Consol now appears to believe that "good intentions" should be enough to shield the company from an unwarrantable charge. Good intentions, however, and good faith are not the same. Good faith requires vigilance about one's responsibilities, commitment to finding the resources to get the job done, and accountability for failure.

While the record shows Consol officials made some effort to address the violation, clearly their efforts were inadequate and by January 16, it should have been evident that greater efforts were needed to correct the problem. However, no further action was taken because neither Carter, Church, nor Harrison saw any urgent need to eliminate the violative condition for which Consol was later cited.

The inadequacy of Consol's response to finding an insufficient number of posts on January 15 is in stark contrast to its response when it discovered a similar problem on December 15, 1997. On the prior occasion, Carter made an entry into the pre-shift examination log when it was ascertained there were insufficient posts on the working section, and the problem was eliminated by the next shift. Tr. 93-96; R. Ex. 1. In contrast, on January 15, after inspector Thomas alerted Carter to the shortage of posts in the 12-D section, Carter did not enter the shortage in the log so other foremen on subsequent shifts could ensure that remedial action was taken. Thus, on the midnight shift of January 17, foreman Slovinsky was not even aware of the hazard of inadequate supplementary roof support. Understandably, he made no attempt to address or alleviate the violative situation.

We have held that, "[w]here an operator has been placed on notice of [a] . . . problem, the level of priority that the operator places on addressing the problem is a factor properly considered in the unwarrantable failure analysis." *Jim Walter Resources, Inc.*, 19 FMSHRC 480, 487 (Mar. 1997). By January 15, 1998, Consol was specifically alerted to the presence of a violation. Thus, by January 17, when the citation was issued, Consol had clearly been put on notice that greater efforts were needed to comply with the regulation. The Commission has, in a prior case, concluded that the passage of one day, following an MSHA inspector's informing an operator of an accumulation problem, constituted unwarrantable failure because the operator's "allowing the accumulation to continue to exist established its aggravated conduct . . . . " *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1502-03 (Aug. 1990) ("*SOCCO*"). *See also Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1233 (June 1994) (failure to address coal accumulations contained in examination reports for two shifts constituted unwarrantable failure). Here, the violation was in existence for two days after the inspector put the operator on notice that he would be checking on the number and location of posts. We also find relevant Carter's concession that he was aware of the existence of a violative condition at the time the inspector gave him the head's up to check his posts.[3] Carter admitted to Thomas even then that the posts were not centrally located as required, but were scattered along the tracks.[4] Tr. 24, 37; *see* Tr. 100-101.

In sum, once Consol became aware that it was in violation of the regulation and its roof control plan, it was under an obligation to expeditiously remedy the condition that gave rise to the citation. Relegating the request for additional posts to the routine supply system so as not to interfere with production was a conscious decision by mine management. Attaching no special significance to an order for materials necessary to bring the mine into compliance with a mandatory safety standard is an indication that this operator should reexamine its priorities. Failing to follow up the inspector's admonition in such a way as to insure that the request for required roof control supplies did not get lost in the company's own bureaucracy is inexcusable. Finally, nothing in the record suggests that anyone was held accountable for this error. Taken together, the company's actions reflect the kind of indifference to a violation that constitutes an unwarrantable failure to comply with the regulation.

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[3] Although the dissent attempts to distinguish this case from *SOCCO*, in part because there the violative condition had existed before the MSHA inspector alerted the operator (slip op. at 10), Carter's statement makes clear that he, too, had knowledge of a safety problem before being warned by the inspector.

[4] As the Commission has noted in prior cases, a foreman is held to a high standard of care. *LaFarge Construction Materials*, 20 FMSHRC 1140, 1145 (Oct. 1998), *citing Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997).

III.

Conclusion

For the foregoing reasons, we reverse the determination of the judge and conclude that the violation was the result of Consol's unwarrantable failure. We remand the proceeding to the judge for assessment of an appropriate penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

I find that substantial evidence[1] supports the judge's conclusion that the Secretary failed to prove that the violation of 30 C.F.R. § 75.214 was the result of Consol's unwarrantable failure. I would affirm her decision, and therefore I respectfully dissent.

The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). There is no dispute here that the operator was placed on notice by Inspector Thomas during his inspection on January 15, 1997. However, in finding that the Secretary failed to prove the operator's unwarrantable failure, the judge focused on two of the other factors — the length of time the condition existed and the operator's efforts to eliminate the condition — factors which are central to this case. Each of the judge's findings on these factors is supported by the record evidence.

First, with respect to the length of time the violative condition existed, substantial evidence supports the judge's conclusion that the condition had not existed since October of 1997, as the Secretary had alleged.[2] 21 FMSHRC 612, 617 (June 1999) (ALJ). Based on the pre-shift report of December 15, 1997, and the credited testimony of foreman Frank Carter, the judge concluded that supplemental posts had been available on the section prior to January 15, 1997. *Id.* Second, as to the efforts to eliminate the condition, the judge found "that foreman Carter and general mine foreman Harrison acted promptly on January 15th in assessing the deficiency and ordering additional supplies." *Id.* Carter testified that, upon being told by Inspector Thomas to count the posts, he did so, and thereafter called Harrison to order additional posts in accordance with established mine procedure. Tr. 96-97. Harrison testified that, upon receiving Carter's call, he ordered the posts from the supply yard for delivery to the section by the supply crew. Tr. 132-37.

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

[2] According to the citation, "section [12D] has been in coal production since October of 1997 and no supply of supplementary roof support has been stored within four crosscuts of the face." Ex. P-1. Inspector Thomas testified that his decision to cite the operator for unwarrantable failure was based, at least in part, upon the reports of two miners that supplemental posts had never been available in section 12D since work began there in October 1997. Tr. 62-63.

The judge concluded that any lack of additional follow-up until the time of the citation on January 17 did not amount to unwarrantable failure. She reached this conclusion after crediting Carter's testimony that the lack of delivery on January 16 "did not cause him concern, but that no delivery on the next day shift, January 17th, would have merited his attention." 21 FMSHRC at 617.

A judge's credibility findings are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). There is no basis in this case to question the judge's credibility findings. Because the record contains "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion" (*Rochester & Pittsburgh*, 11 FMSHRC at 2163 (quoting *Consolidated Edison*, 305 U.S. at 229)), I would affirm the judge's decision.

Regrettably, the majority, in reversing the judge's decision, ignores the judge's factual findings in this case, including her credibility determinations. Worse still, the majority ignores the substantial evidence test altogether, resulting in an opinion that provides, in my view, a classic example of de novo factfinding by an appellate body, contrary to settled principles of law. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) ("It would be inappropriate for the Commission to reweigh the evidence in [any] case or to enter de novo findings based on an independent evaluation of the record."); *Wellmore Coal Corp. v. FMSHRC*, No. 97-1280, 1997 WL 794132 at *3 (4th Cir. Dec. 30, 1997) ("'[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence'") (citations omitted), *cert. denied,* 119 S.Ct. 600 (1998). For example, notwithstanding the judge's contrary findings, the majority concludes that while Consol made some effort to address the violation, "clearly their efforts were inadequate and by January 16, it should have been evident that greater efforts were needed to correct the problem." Slip op. at 5.[3]

Time and again the courts have reminded us that this Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). While it is possible that a reasonable trier of fact could have concluded that Consol's remedial efforts in this case were so inadequate as to constitute "reckless disregard," this judge did not so find. The standard is not whether the judge could have reached a different conclusion under these facts, but whether there is sufficient

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[3] The majority declares, with the benefit of hindsight, that "[i]deally, Carter should have immediately addressed the violative condition brought to his attention by searching for the required safety equipment and materials." Slip op. at 4. I agree. It does not follow, however, that the actions taken by Consol, insufficient as they may have been, amounted to a less than good faith effort, as the majority appears to suggest. *Id.* at 5 ("Consol now appears to believe that 'good intentions' should be enough to shield the company from an unwarrantable charge. Good intentions, however, and good faith are not the same.").

evidence in the record to support the judge's conclusion. *See Wellmore*, 1997 WL 794132 at *3 ("the Commission's review [is] statutorily limited to whether the ALJ's findings of fact [are] supported by substantial evidence. The 'possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.'") (citation omitted).

If the majority believes the judge erred by failing to properly analyze the adequacy of Consol's remedial efforts, their only recourse under well settled Commission precedent would be to remand this case to the judge rather than substitute their own judgement for that of the judge. Notably, in another case where the adequacy of an operator's abatement efforts were questioned in similar circumstances, this Commission remanded the case to the judge. *See Windsor Coal Co.*, 21 FMSHRC 997, 1006 (Sept. 1999).[4]

The majority also finds the operator's conduct unwarrantable because the violative condition was not eliminated four shifts after it was placed on notice, citing as authority *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1502-03 (Aug. 1990) ("*SOCCO*"). My colleagues' reliance on *SOCCO* is misplaced. First, unlike this case, there was evidence in *SOCCO* that the violative condition, an accumulation of coal in a tailgate entry, had existed for some time prior to the operator being warned by an MSHA inspector. *Id.* More importantly, in *SOCCO*, the Commission was not reversing the judge's finding of unwarrantable failure, but *affirming* his finding on substantial evidence grounds. Those grounds included the operator's failure to take meaningful action to eliminate the accumulation after being notified one day earlier, as well as, among other things, the judge's credibility findings against the operator. *Id.*

It is one thing to find that the failure to remedy a violation after the passage of one day may support a finding of unwarrantable failure. But it is another thing altogether to find, as my colleagues do, that the passage of four shifts compels a finding of unwarrantable failure and reversal of the judge. Once again, my colleagues substitute their judgement for the judge's in this case, finding de novo that Consol's actions, or lack thereof, over four shifts constituted aggravated conduct. It is not our role, however, to reweigh the evidence or to enter findings based on an independent evaluation of the record. *Island Creek*, 15 FMSHRC at 347. Furthermore, as we have recently recognized, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent . . . [a] finding from being supported by substantial evidence." *Secretary of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 958 n.6 (Sept. 1999) (citing *Secretary of Labor ex rel. Walmsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113 (4th Cir. 1996)).

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[4] In *Windsor*, I concluded that remand was unnecessary since it was obvious that the operator's "efforts were not 'adequate' — had they been, there would have been no violation. The question is rather whether [the operator's] efforts were *so* inadequate that the company's conduct rose to a reckless, aggravated level of negligence. The judge concluded they were not, and substantial evidence supports this conclusion." 21 FMSHRC at 1012 (Comm'r Verheggen, dissenting). The same holds true in this case.

For the foregoing reasons, I would affirm the judge's finding that Consol's violation was not unwarrantable. Accordingly, I respectfully dissent.

Theodore F. Verheggen, Commissioner

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March 27, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
v.	:	Docket Nos.	WEVA 93-77-R
	:	through	WEVA 93-80-R
CONSOLIDATION COAL COMPANY	:		WEVA 93-146-B
	:		WEVA 93-146-C

BEFORE: Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Marks, Riley, and Verheggen, Commissioners

This consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the "Act" or "Mine Act"), raises the issue of whether Consolidation Coal Company ("Consol") violated four mandatory safety standards as alleged in one citation and three orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a methane explosion which occurred on March 19, 1992, at Consol's Blacksville No. 1 Mine in northern West Virginia, resulting in the deaths of four miners and injuries to two others. Commission Administrative Law Judge Gary Melick vacated the citation and upheld the orders. 20 FMSHRC 1336 (Dec. 1998) (ALJ). We granted cross petitions for discretionary review filed by the Secretary of Labor and Consol. The Secretary petitioned for review of the judge's decision vacating the citation and vacating MSHA's allegations of unwarrantable failure on two of the orders. Consol petitioned for review of the judge's decision upholding the orders and his finding of unwarrantable failure with respect to one of the orders. For the reasons that follow, we affirm in part, reverse in part, vacate in part, and remand.

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[1] Chairman Jordan and Commissioner Beatty recused themselves in this matter and took no part in its consideration. 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.

I.

Factual and Procedural Background

Consol's Blacksville No. 1 Mine liberated over 1 million cubic feet of methane during a 24-hour period and, therefore, was liberating "excessive quantities of methane," as specified in section 103(i) of the Mine Act, 30 U.S.C. § 813(i), which provides for spot inspections by MSHA in that circumstance. 20 FMSHRC at 1337. Donzel Ammons was a Consol vice-president who was in charge of several mines, including Blacksville No. 1. *Id.* Among those working under Ammons were Daniel Quesenberry, Ammons' assistant; Robert Levo, superintendent of Blacksville No. 1; and Jack Lowe, foreman of Blacksville No. 1. *Id.*

Consol ceased production at the mine in June 1991 and by 1992 began closing down the mine. *Id.* The primary activities during January to March 1992 were mine maintenance, withdrawal of supplies and equipment, and removal of above-ground stockpiles of coal. *Id.* By letter dated February 3, 1992, Consol's regional manager for safety, Charles Bane, notified MSHA that Consol was in the process of withdrawing production equipment from the mine. *Id.*; Resp't Ex. 3. The letter further stated that Consol would shut down all fans and simultaneously cap all shafts when the underground areas had been vacated. 20 FMSHRC at 1337; Resp't Ex. 3.

Later in February, Consol decided to install an 800-foot dewatering pipe in the production shaft to prevent water from accumulating in the mine and seeping into adjacent Consol mines. 20 FMSHRC at 1337.[2] Consol's regional engineering office, headed by Van Pitman, was responsible for installing the dewatering pipe. *Id.* Pitman directed Ed Moore, supervisor of environmental quality control, to arrange for the installation. *Id.* Moore, in turn, retained an independent contractor, M. A. Heston, Inc., to do the work. *Id.* Heston had worked for Consol on many other jobs. *Id.* at 1339.

In order to install the dewatering pipe, it was necessary to build a work platform over the production shaft. *Id.* at 1338. Ammons assigned that project to his assistant, Quesenberry, who contracted with Forest Construction to construct a platform, sufficiently open to facilitate the work, but which later could be sealed to form a permanent cap over the shaft. *Id.*[3]

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[2] The production shaft was one of the mine's six shafts and had been used to transport coal out of the mine with a skip hoist. 20 FMSHRC at 1337; Resp't Ex. 14. According to the approved ventilation plan, the shaft had been intaking 187,000 cubic feet of air per minute ("cfm"). 20 FMSHRC at 1337.

[3] We will hereinafter refer to this platform as a "cap" because this is the term used by the parties and judge throughout these proceedings. We note, however, that the platform was not a cap because it was not used to seal the production shaft. *Cf.* 30 C.F.R. § 75.1711-1 ("Caps consisting of a 6-inch thick concrete cap or other equivalent means may be used for sealing."). Instead, Consol intended initially to use the so-called "cap" as a work platform to install the

Officials from Consol, Forest Construction, and M. A. Heston conferred on methods to construct a cap over the shaft that would allow work to be performed on the dewatering pipe and also would support the weight of the pipe. 20 FMSHRC at 1339. Initially, Consol's regional engineering office had recommended the use of only a partial or "half" cap, so as to allow ventilation to enter the shaft, with a fireproof partition as a means to prevent sparks from entering the shaft. *Id.*; Tr. 117, 154, 501, 951-53.

Ammons told Quesenberry that he wanted threaded pipe to be used for the dewatering project, so that pipe segments would not have to be welded together over the production shaft. 20 FMSHRC at 1340. Ammons was concerned with igniting grease in the production shaft, although he was also aware of the potential for methane occurring in the shaft. *Id.* In a meeting with Consol's regional engineering department, Quesenberry relayed the request for threaded pipe and left the meeting with the understanding that it would be used. *Id.* Subsequently, when the pipe was delivered to the mine, Quesenberry learned for the first time that engineering department personnel had decided to use non-threaded pipe that would have to be welded. *Id.* Ammons then telephoned Pittman, who explained that threaded pipe would not hold the weight of the casing. *Id.* Without consulting with the engineering office, Ammons decided to construct a "full" cap over the shaft, to ensure that sparks from welding would not enter the shaft. *Id.* at 1339; Tr. 694-95, 809-11.

The plan for construction of the cap over the shaft was based on a standard design used previously by Consol (though not as a platform for installing dewatering pipe). *See* 20 FMSHRC at 1339, 1340; Tr. 1698; Gov't Ex. 24. The base of the cap was to be constructed of 1/4-inch steel plate welded to 6-inch I-beams across the shaft opening. 20 FMSHRC at 1339. A 6-inch concrete deck would then be poured over the top of the steel plate. *Id.* at 1339, 1340. The plan included a 22-inch square opening in the center of the cap to allow entry of the 16-inch dewatering pipe, with additional I-beam support to bear the weight of the pipe. *Id.* at 1339. At least until the shaft was permanently capped, air would still be able to enter the shaft around the dewatering pipe. *Id.* For ventilation, Ammons added two smaller steel pipes to the plan, each 6 inches in diameter, penetrating through the cap, welded to the steel plate below and extending 3 feet above the concrete deck where they would be capped by a valve connected to additional lengths of PVC pipe. *Id.* The 6-inch pipes were incorporated into the plan, at least in part, to provide the ventilation necessary to dilute methane in the shaft. *Id.* at 1342.

Ammons' decision to add the additional pipes for ventilation of the shaft was based on his background and experience. *Id.* at 1339. It was standard procedure to cap a production shaft in this manner when sealing a mine, and Ammons determined that the pipes would provide

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dewatering pipe into the production shaft through the large opening provided for that purpose. The platform would have become a cap only after completion of the dewatering pipe installation when Consol intended to seal the shaft. Tr. 605-06, 1602, 1610, 1703.

adequate ventilation.[4] *Id.* He did not consult with any of Consol's engineers or conduct any simulations or tests to determine if the pipes would provide adequate ventilation while the work of installing the dewatering pipe was completed. *Id.* He was unfamiliar with the methane liberation rate at the mine, the volume of air movement the two 6-inch pipes were capable of providing, or the velocity of the airflow. *Id.* He assumed that the air intake through one of the ventilation pipes would have been sufficient to ventilate the production shaft. *Id.* However, he had never been involved in a project similar to this where welded pipe segments (for the dewatering pipe) were installed through a modified cap. *Id.*

Since Consol's regional safety office generally communicated with MSHA on ventilation plans, John Yerkovich, Consol's regional safety inspector (and Charles Bane's assistant), verbally informed Terry Palmer, an MSHA safety inspector specializing in ventilation, of Consol's plans to undertake what they characterized as capping the production shaft before capping the other shafts and vacating the mine. *Id.* at 1337, 1338.[5] Following that conversation, by letter dated March 3, 1992, Yerkovich wrote to MSHA concerning the project. *Id.*; *see* Gov't Ex. 27. The letter did not indicate, however, that a dewatering pipe would be installed through the cap and into the shaft. 20 FMSHRC at 1338; Gov't Ex. 27. Palmer drafted a response to the letter, dated March 16, for the signature of MSHA district manager Ronald Keaton. 20 FMSHRC at 1338; *see* Gov't Ex. 29. Palmer recommended to Keaton that MSHA seek additional information from Consol because it was unclear why Consol was deviating from its original plan of capping all the shafts in the mine at one time. 20 FMSHRC at 1338. Palmer believed that since the production shaft was intaking 187,800 cfm of air, capping the shaft required agency approval under MSHA regulations because it involved a change in the ventilation plan. *Id.*; Gov't Ex. 26. The plan stated that "all changes or revisions to the ventilation plan" must be approved before being implemented. Gov't Ex. 26. Palmer's letter was not mailed to Consol until after the March 19 explosion. 20 FMSHRC at 1338.

Construction of the production shaft cap took place during the week of March 9, 1992, with the concrete deck being poured on Friday, March 13. *Id.* at 1340; Tr. 254-60.[6] Once the

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[4] *See also* 30 C.F.R. § 75.1711-1 ("Caps shall be equipped with a vent pipe at least 2 inches in diameter extending for a distance of at least 15 feet above the surface of the shaft.").

[5] At trial, Yerkovich testified that Raymond Strahin, another MSHA ventilation specialist who worked with Palmer, told him that written notification of this change would be sufficient (Tr. 1254-57), which Strahin denied. 20 FMSHRC at 1338; Tr. 1866. Palmer testified that he told Yerkovich that capping the production shaft would result in a change in the ventilation plan that would have to be approved by MSHA's district manager. 20 FMSHRC at 1338; Tr. 1106.

[6] MSHA inspector Dale Dinning, along with inspector trainee William Sperry, were at the mine on March 13 on a section 103(i) spot inspection, and observed the pouring of concrete over the steel plate. Tr. 1339-40, 1342-49, 1509-10, 1513. The two inspectors were at the mine next on March 19, the day of the explosion, for a regular inspection. Tr. 1341-42, 1351-52.

concrete was in place, airflow decreased from around 187,000 cfm to around 7,350 cfm. 20 FMSHRC at 1341. On March 13, Consol stopped its morning shift of underground personnel from entering the mine while portions of the cap were put in place. *Id.* at 1340. After Consol personnel evaluated the effects of the ventilation change, they determined that the mine was safe to enter, and the miners continued the removal of underground equipment. *Id.* at 1340-41. In evaluating the effect of the cap, Consol utilized the same procedures as a preshift examination that took approximately 30 minutes to complete. *Id.* at 1341. Consol also checked charts for the fans on the surface. *Id.* The charts reflected readings of water gauges near the fans that measured pressure differences. Tr. 635-37, 932-33. However, the charts on the fans would not show the impact of capping on airflow within the shaft itself. 20 FMSHRC at 1341. Around 11:00 a.m. on March 13, mine foreman Jack Lowe traveled underground to the bottom of the production shaft to release smoke from a smoke tube and ascertained that there was a drift of airflow down the shaft. *Id.* He did not, however, measure the velocity of the airflow. *Id.* Nor was the impact of the cap on airflow in the production shaft evaluated. *Id.*

On Monday, March 16, Heston employees arrived at the Blacksville Mine to organize materials and begin preparations for fabricating the dewatering pipe. *Id.* Consol environmental engineer Rodney Baird and Consol environmental technician Russell DeBlossio were assigned to oversee installation of the dewatering pipe, although each assisted in the manual labor of installing the pipe. *Id.* Baird was certified to make methane examinations and had a working methane detector in his vehicle at the mine. *Id.* Neither Baird nor DeBlossio had any experience in underground ventilation. *Id.*

On Wednesday, March 18, Heston employees began installing the 16-inch dewatering pipe into the production shaft. Tr. 262-63. The dewatering pipe was constructed by welding each 20-foot long section to the one below it. Tr. 175. The first section of pipe was plugged to prevent welding sparks from entering the shaft through the pipe. 20 FMSHRC at 1342. As each new length of pipe was lifted in place, the 22-inch opening in the cap through which the lengthening column of pipe extended down into the shaft was sealed with Thermoglass cloth and two steel plates cut to fit around the pipe. *Id.* The pipe sections were then welded together several feet above the 22-inch opening by miners standing on the cap. *Id.*; Gov't Ex. 15. With the plugged 16-inch pipe in place and steel plates and Thermoglass cloth surrounding the pipe, airflow into the production shaft was again reduced, from 7,350 to 790 cfm. 20 FMSHRC at 1341, 1342.

Consol environmental engineer Baird and Heston employees found that the 6-inch ventilation pipe closest to the 22-inch opening interfered with installation of the dewatering pipe. *Id.* at 1342. Blacksville Superintendent Robert Levo received a request from the production shaft site for a saw to cut off the PVC pipe extension of one of the 6-inch ventilation pipes. *Id.* A ball of burlap or Thermoglass cloth was put inside the shortened pipe, and a second piece of the material was wired over the top. *Id.* The elimination of one of the two 6-inch pipes as a source of ventilation further reduced airflow to 400 cfm. *Id.* at 1341, 1342. Levo visited the job site after the pipe was plugged. *Id.* at 1342. He could not recall whether he told Baird the

importance of leaving the pipe open, but assumed Baird knew enough to reopen the pipe. *Id.* Ed Moore, in charge of environmental quality control in Consol's regional engineering office and Baird's boss, was also aware that one of the ventilation pipes had been cut and covered or plugged. *Id.* at 1337, 1342.

Throughout the first day of installation, one welder was used, and approximately 12 sections of dewatering pipe were installed. *Id.* at 1342-43. Installation resumed at 7:30 a.m. the following day, Thursday, March 19, with Baird and DeBlossio again assisting. *Id.* On this occasion, Heston utilized two welders instead of one, reducing by half the time it took to weld sections of pipe together. *Id.* at 1343. At approximately 10:18 a.m., a methane explosion occurred in the production shaft that completely destroyed the cap. *Id.* Consol engineer Baird and three Heston employees were killed in the explosion; two other Heston employees were injured. *Id.* In addition, underground stoppings, cribs, and overcasts within 100 feet of the production shaft were damaged. *Id.*

Following an investigation,[7] MSHA issued the following citation and three orders:

Citation No. 3109521 charged Consol with a violation of 30 C.F.R. § 75.301 (1991) for failing to maintain the volume and velocity of air sufficient to render harmless explosive gasses in the production shaft. 20 FMSHRC at 1343. MSHA determined that the violation was significant and substantial ("S&S")[8] and was the result of the operator's unwarrantable failure (*see infra* n.11). *Id.*

Order No. 3109522 charged Consol with a violation of 30 C.F.R. § 77.1112(b) (1991) by failing to make required methane examinations at the capped production shaft where welding was being performed. 20 FMSHRC at 1345. MSHA designated the violation as S&S and alleged that it was the result of the operator's unwarrantable failure. *Id.* at 1347.

Order No. 3109523 charged Consol with a violation of 30 C.F.R. § 75.316 (1991) by making a major change in the approved ventilation plan without MSHA approval when it capped the production shaft. 20 FMSHRC at 1348. MSHA determined that the violation was S&S and the result of the operator's unwarrantable failure. *Id.* at 1351.

Order No. 3109524 charged Consol with a violation of 30 C.F.R. § 75.322 (1991) by making changes in its ventilation which affected the split of air ventilating the production shaft where miners were allowed to work before effects of the changes were evaluated. 20 FMSHRC

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[7] For a description of the post-accident investigation, see *Consolidation Coal Co.*, 20 FMSHRC 315, 316-17 (Apr. 1998).

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

at 1351. MSHA designated the violation as S&S and alleged that it was the result of the operator's unwarrantable failure. *Id.* at 1353.

As a result of the violations, MSHA proposed civil penalties of $200,000. *Id.* at 1337.

Following an 8-day hearing, the judge issued his decision in which he dismissed the citation and found violations with regard to the three orders. *Id.* at 1344, 1346-47, 1349-50, 1353. With regard to special findings, the judge found that the violations charged in all three orders to be S&S. *Id.* at 1347, 1350-51, 1353. He also found that the violation charged in Order No. 3109523 was the result of Consol's unwarrantable failure, but concluded that the violations alleged in the other two orders were not unwarrantable. *Id.* at 1348, 1351, 1353-54. The judge reduced MSHA's proposed penalties to $70,000. *Id.* at 1354.

The Secretary and Consol filed cross appeals with the Commission, both of which were granted.

II.

Disposition

A. Citation No. 3109521

The citation alleges that, in violation of 30 C.F.R. § 75.301 (1991),[9] Consol allowed methane to accumulate in the production shaft, an active working of the mine, and that the methane was ignited on March 19 when Heston employees were welding during the installation of the 16-inch pipe. 20 FMSHRC at 1343-44; Gov't Ex. 1. The term "active workings" was defined at 30 C.F.R. § 75.2(g)(4) (1991) as "any place in a coal mine where miners are normally

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[9] The cited regulation, 30 C.F.R. § 75.301 (1991), provided in relevant part:

> All active workings shall be ventilated by a current of air containing not less than 19.5 volume per centum of oxygen, not more than 0.5 volume per centum of carbon dioxide, and no harmful quantities of other noxious or poisonous gases; and the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive fumes. . . .

The language of the regulation tracked section 303(b) of the Mine Act, 30 U.S.C. § 863(b). The regulation was revised and recodified in 1996 at 30 C.F.R. § 75.321(a).

required to work or travel."[10] The citation was designated S&S and the result of the operator's unwarrantable failure.[11]

The judge found no evidence that any person worked or traveled in the production shaft after it was capped on March 13, 1992. 20 FMSHRC at 1344. The judge analyzed the language of the regulation and found that it was clear. *Id.* The judge reasoned that "active workings" included "any place *in* a coal mine" but not the areas above and below the cap. *See id.* (emphasis added). Moreover, the judge also found that, even if the language of the regulation was not plain, the Secretary's interpretation was unreasonable. *Id.*

The Secretary argues that her interpretation of the standard is entitled to deference. S. Br. at 16-17. More particularly, the Secretary asserts that the definition of "active workings" is "any place," and the dictionary definition of "place" includes physical surroundings or environment, which is broad enough to encompass the area above the cap. *Id.* at 18-20. The Secretary argues that it would defeat the purpose of the regulation to require that a miner has to be "in" the production shaft before the regulation would apply, particularly given the facts of this proceeding where miners were on top of the cap inserting pipe into the shaft. *Id.* at 21-25. Finally, the Secretary argues that the occurrence of preshift examinations at the bottom of the shaft was sufficient to support a determination that the shaft was an active working. *Id.* at 25-26.

In response, Consol asserts the language of the standard and the definition of "active workings" are clear and the Secretary is not entitled to deference in interpreting them. C. Revised Resp. Br. at 2-4, 9. Rather, Consol argues that "active workings" should be given its ordinary meaning and considered in light of other terms in the Mine Act and its legislative history. *Id.* at 5-7. Further, Consol contends that Congress, when it enacted the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"), distinguished abandoned areas from active workings, with ventilation requirements only applying to the latter. *Id.* at 7-8. Consol finally argues that the Secretary misconstrued Commission case law regarding active workings. *Id.* at 10-12.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal* Co., 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43;

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[10] The regulatory definition of "active workings" is taken from the Mine Act, 30 U.S.C. § 878(g)(4). The present definition in the regulations is identical in language to that in effect at the time of the alleged violation. *See* 30 C.F.R. § 75.2 (1999).

[11] Although the judge did not acknowledge in his decision that the citation charged Consol with unwarrantable failure in committing the violation (20 FMSHRC at 1343), the citation clearly alleged it, and the Secretary raised the judge's failure to so find in her petition for review. S. PDR at 22.

accord Local Union 1261, UMWA v. FMSHRC, 917 F.2d 42, 44 (D.C. Cir. 1990). In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the particular statutory language at issue, and the language and design of the statute as a whole, to determine whether Congress had an intention on the specific question at issue. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989).

We agree with the judge that the language of § 75.301 and the definition of "active workings" are clear. However, we disagree with his application of the statutory and regulatory provisions to the facts of this case. We conclude that substantial evidence[12] does not support his finding that no persons worked or traveled in the production shaft.

The judge found "[t]here is no evidence in this case that any person worked or traveled or normally worked or traveled in the production shaft after the shaft was capped on Friday, March 13, 1992." 20 FMSHRC at 1344. This finding is erroneous. To the contrary, the record clearly indicates that the shaft continued to be an active working after being capped, because miners continued to work or travel there during installation of the dewatering pipe. Specifically, miners continued to conduct methane and air flow tests at the bottom of the shaft on a daily basis, including on the morning of the explosion. Tr. 1450-53, 1478-81, 1494-95. Those tests are sufficient in and of themselves to establish that the entire shaft remained an active working up to the time of the explosion.

Furthermore, as we explained above (*see supra* note 3), the so called "cap" Consol constructed over the production shaft was designed to be used initially as a work platform, not to seal the shaft as a cap would normally be used. *See* 30 C.F.R. § 75.1711-1. As even the judge recognized, construction of the modified cap actually facilitated work in the shaft, i.e., installation of the dewatering pipe through the 22-inch opening in the cap. 20 FMSHRC at 1349.[13]

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[12] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). 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. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

[13] We fail to understand why the Secretary adopted, without question, Consol's characterization of the work site from which the dewatering pipe was being installed as a "cap."

Consol argues that finding the production shaft an active working is contrary to Commission case law. Consol states that in *Southern Ohio Coal Co.*, 12 FMSHRC 1498 (Aug. 1990) ("*SOCCO*"), *aff'd mem.*, 940 F.2d 653 (4th Cir. 1991), the finding that a portion of a tailgate entry was an "active working[] was not premised upon the conduct of regular examinations," but rather was "based upon the fact that . . . an escapeway was involved." C. Revised Resp. Br. at 11. This is an incorrect reading of *SOCCO*. The Commission's decision was actually based upon the fact that the tailgate entry "had to be maintained and *inspected*" — necessitating travel through the entry — because it was an escapeway. 12 FMSHRC at 1502 (emphasis added); *see also id.* at 1501 (numerous references to the need for the tailgate entry to be "maintained and examined" at least "[o]nce a week"). *SOCCO* thus, in fact, actually supports our holding that the production shaft was an active working. Here, miners were traveling to the bottom of the shaft to take methane checks *on a daily basis*.[14] *See also Old Ben Coal Co.*, 3 FMSHRC 608, 609 (Mar. 1981) (without deciding whether the "function" alone of an area of a mine qualifies it as an active working, an area where no miners worked was found to be an active working where it was inspected once a week, rock dusted, and designated as an escapeway).

Although four other cases Consol cites were decided by our judges, and thus have no precedential value (29 C.F.R. § 2700.72), we note that in all four cases, our judges found that bleeder entries were not active workings under regulations then in force providing, inter alia, that bleeder systems "shall not include active workings." 30 C.F.R. § 75.316-2(e)(2) (1991); *see Old Ben Coal Co.*, 13 FMSHRC 1930, 1948 (Dec. 1991) (ALJ); *Rushton Mining Co.*, 11 FMSHRC 1506, 1507 (Aug. 1989) (ALJ); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 1318, 1322 (July 1989) (ALJ); *United States Steel Corp.*, 6 FMSHRC 291, 307 (Feb. 1984) (ALJ). Section 75.316-2(e)(2) was eventually replaced by more specific regulations covering bleeder entries when MSHA revised its ventilation regulations in 1996. *See* 61 Fed. Reg. 9764 (1996); *see, e.g.*, 30 C.F.R. §§ 75.321(a)(2) (air quality requirements for bleeder entries); 75.364(a)(2) (weekly examination requirements for bleeder entries). The four cases Consol cites are thus irrelevant to the instant proceedings.[15]

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[14] Consol also attempts to distinguish a case in which former Chief Administrative Law Judge Paul Merlin held that a tailgate entry where miners were working to abate a "long-standing water problem" was an active working. *Consolidation Coal Co.*, 14 FMSHRC 590, 595-96 (Apr. 1992) (ALJ). Consol states that in that case, "miners normally and routinely worked in the tailgate entry at issue." C. Revised Resp. Br. at 11. Here, miners normally and routinely traveled to the production shaft to check for methane.

[15] Consol also cites *National Mining Association v. MSHA*, 116 F.3d 520 (D.C. Cir. 1997), with no explanation as to its relevance aside from a reference appearing in that case to two of the ALJ cases we have already discussed. In that decision, which was not a Mine Act proceeding under Commission jurisdiction, the National Mining Association petitioned directly to the court for review of several of MSHA's ventilation regulations that were finalized in 1996 — including 30 C.F.R. § 75.321(a)(2), which the court upheld. *Id.* at 525-28.

In light of the conclusion that the production shaft was an active working, largely undisputed evidence establishes that ventilation in the production shaft was insufficient to dilute and render harmless methane in the shaft. In this regard, both the Secretary's expert, John Urosek, and Consol's expert, Donald Mitchell, concluded that airflow in the production shaft had been reduced to no more than 400 cfm, and also agreed that the airflow was insufficient to render harmless methane being liberated into the shaft. 20 FMSHRC at 1343. Thus, the record evidence leads to only one conclusion — that Consol violated section 75.301. *See Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998) (remand unnecessary where record as whole admits only one conclusion on issue).

We reverse the judge's determination that section 75.301 was not violated and remand the citation to the judge for consideration of the S&S and unwarrantable failure determinations[16] and imposition of the appropriate penalty.

B. Order No. 3109522

The order alleges that Consol failed to conduct methane tests at the production shaft where Heston was performing welding operations in violation of 30 C.F.R. § 77.1112(b).[17] 20 FMSHRC at 1345; Gov't Ex. 2 at 1. The order further alleges that the cap on the production shaft severely restricted ventilation into the shaft and that the mine had a known history of methane liberation. 20 FMSHRC at 1345; Gov't Ex. 2 at 2. In addition, MSHA determined that the violation was S&S and resulted from the operator's unwarrantable failure. 20 FMSHRC at 1345; Gov't Ex. 2 at 1. The judge concluded that the standard required methane examinations be made in areas within a range of likely ignition from welding, including the area beneath the cap. 20 FMSHRC at 1346. The judge further concluded that the violation was S&S but not a result of the operator's unwarrantable failure. *Id.* at 1347-48.

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[16] Because the judge dismissed the underlying violation, he did not reach the S&S or unwarrantable failure designation of the citation.

[17] The cited regulation, 30 C.F.R.§ 77.1112(b), provides:

> Before welding, cutting, or soldering is performed in areas likely to contain methane, an examination for methane shall be made by a qualified person with a device approved by the Secretary for detecting methane. Examinations for methane shall be made immediately before and periodically during welding, cutting, or soldering and such work shall not be permitted to commence or continue in air which contains 1.0 volume per centum or more of methane.

Unlike the preceding standard involving "active workings," which is defined in the Mine Act and regulations, "areas" is not defined.

Consol argues the judge ignored the "regulation's clear terms." C. Br. at 17. Consol contends that the area likely to contain methane must be the same area where welding was performed. *Id.* at 17-18. Further, Consol argues that the regulation must give fair warning of what conduct is prohibited before sanctions can be imposed. *Id.* at 18-19. Consol asserts that the Secretary bore the burden of proving that she had an approved device for taking methane examinations and that the judge erred when he placed the burden on Consol to prove the non-existence of such a device. *Id.* at 19-21. Consol concludes by arguing that the S&S determination and the $10,000 penalty should be vacated. *Id.* at 19. Finally, Consol asserts that substantial evidence supports the judge's determination that the violation was not the result of Consol's unwarrantable failure. C. Revised Resp. Br. at 14-28.

The Secretary responds that her interpretation of the standard is reasonable, furthers the purposes of the Mine Act, and is owed deference. S. Resp. Br. at 5-8. In essence, the Secretary argues that the standard should be interpreted to guard against the risk that was present in the instant proceeding. *Id.* at 8. The Secretary asserts that Consol's efforts to ventilate the shaft and to prevent sparks and molten metal from entering the shaft indicate that Consol was concerned with the buildup of methane in the shaft and the hazard of ignition. *Id.* at 9-10. The Secretary contends that the regulation provided fair notice of the conduct required; indeed, the Secretary argues that Consol had actual notice of the requirements of the regulation. *Id.* at 11-14. The Secretary urges rejection of Consol's impossibility or infeasibility of performance with the regulation argument, on the ground that the regulation does not permit such a defense. *Id.* at 15-18. Finally, the Secretary argues that substantial evidence does not support the judge's conclusion that the violation was not the result of Consol's unwarrantable failure. S. Br. at 26-41.

1. Violation

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

Here, as a threshold matter, we find clear and unambiguous the requirement of section 77.1112(b) that "[b]efore welding . . . is performed in areas likely to contain methane, an examination for methane shall be made." 30 C.F.R. § 77.1112(b). To prove a violation of this regulation, the Secretary must show (1) that a particular area was "likely to contain methane," (2) that welding was performed in that area, and (3) that no examination of the area was made. Clearly, the area directly beneath the cap was an area "likely to contain methane." *Id.* The mine liberated a high level of methane. 20 FMSHRC at 1337. Construction of the cap over the production shaft significantly reduced air flow into the shaft. *Id.* at 1341. Moreover, when one

of the 6-inch ventilation pipes was plugged, reducing air flow to a mere 400 cfm, there was, as the judge found based on expert testimony, "a potential for explosive concentrations of methane to accumulate beneath the cap." *Id.* at 1346 (citations omitted). The fact that an explosion occurred is proof enough that ventilation of the area beneath the cap was inadequate to dilute, render harmless, and carry away methane being liberated in the shaft. *See id.* ("[t]he methane explosion itself is *prima facie* proof" that methane was likely to accumulate beneath the cap).[18]

The question remains, though, whether the area beneath the cap can be said to have been within the relevant area in which welding was performed. The judge concluded that "the area beneath the cap . . . was within the area or zone affected by [the] welding." *Id.* We find that substantial evidence supports this conclusion. First, we note that the operator took precautions to guard against welding sparks and molten metal from going into the production shaft (*id.* at 1342), evincing Consol's concern that the welding posed some risk of causing an ignition in the shaft. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984) ("the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence"). But more importantly, we note that the I-beam supporting the dewatering pipe extended across the production shaft (Gov't Ex. 15, Drawing 12), and also connected the area above the cap to the atmosphere of the production shaft (Gov't Ex. 15, Drawing 1). Experts for Consol agreed with the Secretary's position that the most likely cause of the methane explosion was the improper grounding of the second welding machine to the I-beam (20 FMSHRC at 1346), which probably caused arcing to occur between the pipe being welded and the I-beam. Tr. 455-57; 2156-58; 2182-83, 2355-56). Given this direct electrical link between the work area above the production shaft and the atmosphere of the shaft below the cap,[19] we find that Consol was clearly and unambiguously required under section 77.1112(b) to perform methane examinations in the area immediately below the cap.

Consol's argument that, to prove a violation of section 77.1112(b), the Secretary "must establish that 'a device approved by the Secretary for detecting methane' was in existence . . . and that the operator failed to utilize that device" (C. Br. at 19) puts the cart before the horse. Given the very high likelihood of methane being present under the cap, a fact Consol fully appreciated, it was up to the company to design the cap in such a way as to allow the required methane examinations to be performed. Indeed, the judge found that Consol could have incorporated sampling pipes into the cap (20 FMSHRC at 1347), and substantial evidence supports the judge. In any event, the appropriate response to the lack of a device that could

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[18] Ammons, Bane, Moore, Pittman, and DeBlossio all testified regarding the potential for methane in the shaft absent adequate ventilation. Tr. 435, 494, 686-87, 821, 956-57, 1723-24. Moreover, Consol's expert Mitchell stated that, even with both air pipes open, there would have been some areas beneath the cap with explosive concentrations of methane, and that it was reasonable to expect methane accumulations. Tr. 2277, 2328.

[19] Consol's argument that the cap separated the production shaft from the welding (C. Br. at 17-18) is simply without merit.

accurately measure methane levels beneath the cap would have been to suspend welding over the production shaft rather than blindly proceed and risk the disastrous consequences that, in fact, occurred.

In light of the above, we affirm the judge's determination of violation and S&S designation.[20]

2. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. *See Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. But all of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated.

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[20] Consol did not separately challenge the judge's S&S determination, but requested the Commission reverse the judge's determination if it agreed to reverse the underlying violation. *See* C. Br. at 21. Also, in light of our agreement with Consol that this violation can be decided on the basis of the clear language of the regulation, there is no notice issue present. Further, even if the language of the regulation were ambiguous, Consol cannot raise a notice issue because the company failed to raise it before the judge. 30 U.S.C. § 823(d)(2)(A)(iii); *see* C. Post-Hearing Br. at 54-61; C. Resp. to S. Post-Hearing Br. at 11-14.

The judge concluded that, while Consol was negligent in failing to measure for methane below the cap, that negligence did not rise to the level of unwarrantable failure. 20 FMSHRC at 1348. The judge relied on four considerations: Consol could have reasonably perceived that methane would not accumulate above the cap so that not testing would not be violative; Consol could have perceived that the welding was to be performed in a discrete area above the cap that separated the welding from the methane; methane examinations were in fact performed at the bottom of the shaft; and the most likely ignition source, an electrical arc from an improperly grounded welding machine, was not an obvious source of ignition. *Id.*

The judge, however, failed to fully consider all the facts and circumstances relevant to an unwarrantable failure determination. As the judge noted, the Blacksville No. 1 Mine was a "gassy" mine — one that emitted large quantities of methane. *Id.* Consol witnesses testified extensively regarding the gassy nature of the mine and how methane, which is lighter than air, could migrate into the shaft and accumulate under the cap. Tr. at 555, 562, 580-81, 616, 624, 686, 691, 958, 1202, 1243-46, 1288, 1693. The judge also found that "Consol officials admitted that they knew methane could be liberated into the production shaft." 20 FMSHRC at 1348. Further, Consol officials were well aware of the hazards associated with methane accumulations and welding. Tr. 481-85, 1309, 1436. Consol assistant vice-president Quesenberry even testified that he understood the need to test for methane underneath the cap. Tr. 624-25. Nevertheless, Consol decided to install dewatering pipe that required welding just above the shaft. By proceeding to cover the shaft, causing inadequate ventilation, and to weld in the presence of accumulating methane of which they were or should have been aware, Consol ignored obvious danger that was apparent to a number of its managers.

However, corporate balkanization at Consol apparently led to a situation where officials in one division did not know what those in another division were doing. Thus, Blacksville Mine vice-president Ammons was not consulted on the decision by Consol's regional engineering department to switch from threaded pipe to welded pipe. 20 FMSHRC at 1340. Ammons, without consulting anyone in Consol's environmental quality control department or its regional safety office, determined to utilize two six-inch ventilation pipes to ventilate the production shaft, even though he did not know the methane liberation rate or how much air would come in through the ventilation pipes. *Id.* at 1339. When Consol regional safety inspector Yerkovich notified MSHA of the proposal to cap the production shaft, he did not notify MSHA of when the proposed capping was to occur or that welded dewatering pipe would be installed in the shaft. *Id.* at 1338. Nor did Yerkovich alert anyone in the Consol hierarchy that MSHA had not responded to his notification of the early capping. Accordingly, Consol proceeded to construct the cap without hearing back from MSHA. *Id.* Finally, Consol regional engineering employees DeBlossio and Baird, who were assigned to the project, had no experience in underground mine ventilation. *Id.* at 1341. Indeed, DeBlossio was not even aware that the Blacksville Mine liberated large quantities of methane. *Id.*

The confusion resulting from this inadequate communication and coordination was itself a contributing cause of the explosion. There was a serious lapse of judgment among Consol

personnel in not ordering or ensuring that methane checks were made underneath the production shaft cap. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998) (a foreman's failure to search for undetonated explosives when such explosives had been uncovered in the past evinced a reckless disregard for the hazards associated with misfires), *aff'd in pertinent part*, 170 F.3d 148 (2nd Cir. 1999).

The factors on which the judge relied in finding no unwarrantable failure are at odds with findings that he made in regard to the underlying violation or are contrary to the Commission's unwarrantable failure test. The first factor that the judge considered — the failure to measure methane accumulations above the cap — is not relevant because the underlying violation concerns the failure to measure methane *below* the cap. Similarly, the fact that welding was occurring above the cap is not dispositive, since the heart of the alleged violation deals with the effects the welding had on the atmosphere in the production shaft via the electrical connection between the welding area and that atmosphere. Further, Consol's assertedly reasonable and good faith belief that testing for methane at the bottom of the shaft was adequate to comply with the standard was undercut by its own witness, Quesenberry, who acknowledged the need to test for methane under the cap, as well as at the bottom of the shaft. Tr. 624-25. Finally, arcing associated with electrically energized equipment is, as the Secretary points out (S. Br. 31-32), a well-recognized ignition source for methane in mines. *See, e.g.*, *Eastover Mining Co.*, 4 FMSHRC 123, 123 (Feb. 1982) (recognizing that electrical arcing presents a potential ignition source).

In light of the foregoing discussion, we vacate the judge's unwarrantable failure determination and remand the matter to him for reconsideration in light of the facts and circumstances outlined above.

C. Order No. 3109523

This order charged Consol with an S&S and unwarrantable violation of 30 C.F.R. § 75.316 (1991)[21] on the ground that, because major ventilation changes resulted from capping the production shaft, Consol was obligated to revise its mine ventilation plan to reflect those changes and obtain the prior approval of the MSHA District Manager. 20 FMSHRC at 1348; Gov't Ex. 3 at 1. The judge rejected Consol's contention that such approval was not required in this instance. 20 FMSHRC at 1349. While the judge recognized that, prior to March 1992, section 75.316 approval for capping a mine shaft was not required in MSHA District 3 when the capping occurred during mine sealing, he found this case clearly distinguishable because the

[21] At that time, section 75.316 tracked section 303(o) of the Act, 30 U.S.C. § 863(o), and provided in relevant part: "[a] ventilation system and methane and dust control plan and revisions thereof suitable to the conditions of the mining system of the coal mine and approved by the Secretary shall be adopted by the operator . . . ." Similar requirements can now be found in 30 C.F.R. § 75.370 (1999).

Blacksville No. 1 production shaft was not sealed, but rather remained partially open to allow for the ongoing work of fabricating the dewatering pipe and for continued intake ventilation. *Id.*

The judge also found that an agent of Consol, Yerkovich, was specifically informed by ventilation specialist Palmer that revision of the ventilation plan to reflect capping the production shaft would require MSHA approval, thereby placing Consol on notice of its obligations in this instance. *Id.* at 1349-50. The judge refused to credit Yerkovich's denials that he was told prior approval for capping the production shaft was required. *Id.* at 1350. The judge found the violation to be S&S and of high gravity. He also found that Yerkovich was directly and specifically told of the necessity of obtaining MSHA approval for the capping job, and that Consol deliberately disregarded that directive. Finally, the judge determined that Consol's violation of section 75.316 resulted from its unwarrantable failure. *Id.* at 1350-51.

1. Violation

Consol argues the judge erred in discrediting Yerkovich's trial testimony that MSHA ventilation specialist Strahin told him approval was not necessary. C. Br. at 22-23. According to Consol, that testimony, contrary to the judge's finding, is not inconsistent with Yerkovich's earlier deposition testimony, given his explanation that he did not have the opportunity at the deposition to testify regarding his conversation with Strahin. *Id.* at 23. Consol also contends that substantial evidence does not support the judge's conclusion regarding differences in previous Consol capping projects, because Consol witnesses testified that, prior to the mine explosion, approval was not required for capping projects in which neither the mine nor the shaft at issue was sealed completely. *Id.* at 23-24.

The Secretary maintains the judge correctly analyzed testimony in finding that Yerkovich was informed by Palmer that approval of the capping project was necessary. S. Resp. Br. at 23-24. The Secretary also argues that to the extent there may have been prior occasions in which Consol, without receiving MSHA approval, partially sealed shafts in District 3 while miners remained underground, there is no evidence that MSHA's ventilation specialists in that district were aware of such projects, much less acquiesced to them. *Id.* at 24 n.16.

There is no dispute that the changes in ventilation resulting from the dewatering project were such that, according to the terms of section 75.316, Consol was obligated to revise its ventilation plan to show those changes and get MSHA's approval before undertaking the project.[22] As the judge noted, "when the extant ventilation plan was approved, the accompanying

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[22] We note that both of Consol's arguments in support of its contention that the judge's finding of violation should be reversed — that Yerkovich was told by Strahin that approval was not necessary in this instance and that approval had not previously been required in District 3 for Consol capping projects — are essentially estoppel arguments. In general, the Commission does not recognize estoppel as a valid defense to a citation or order. *See King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). While Consol cites no reason why we should depart from

letter sent to Consol stated that '[y]ou are reminded that all changes or [revisions] to the ventilation plan must be submitted and approved before they are implemented.'" 20 FMSHRC at 1349 (quoting Gov't Ex. 26 at 1). In addition, consistent with that directive, the March 3, 1992, letter from Consol informing the MSHA District Manager of the capping project described it as a "proposed air change" at Blacksville No. 1. Gov't Ex. 27.

Moreover, the judge, in concluding that Consol was specifically made aware of the need for MSHA approval in this instance, credited the testimony of Palmer and Strahin over Yerkovich's conflicting testimony. *See* 20 FMSHRC at 1349-50. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

In this instance there is sufficient evidence to support the judge's credibility determinations. Both Palmer and Strahin were clear in their testimony that, with respect to the production shaft project, neither had acquiesced to anything less than the prior approval required by section 75.316. Tr. 1106 (Palmer), 1865-66 (Strahin). In addition, while being deposed, Yerkovich agreed with the statement that Palmer *and Strahin* "indicated to you in no uncertain terms that *they* thought that you needed prior approval." Gov't Ex. 51 at 83 (deposition excerpts) (emphasis added). In these circumstances, the judge, who had the opportunity to view all three witnesses while each gave his trial testimony, clearly was justified in refusing to credit Yerkovich's claim at trial that Strahin had told him that prior approval was not necessary. Tr. 1256-57, 1294-95.[23] Substantial evidence therefore supports the judge's conclusion that Consol was informed by a representative of MSHA that approval was necessary before the project could proceed.

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that practice here, we nevertheless address its arguments.

[23] Consol gives no citation to the record in support of its claim that Yerkovich explained at trial that he did not have an opportunity at his deposition to elaborate regarding the conversation he had with Strahin. *See* C. Br. at 23. Yerkovich did testify at trial that, in general, given the way some of the deposition questions were phrased, his answers were not entirely complete. However, he did not indicate that this testimony specifically applied to the subject of what he was told regarding the need for approval under section 75.316, even when he was given an opportunity to do so. Tr. 1304-06.

As for Consol's claim that the judge erred in distinguishing previous Consol capping projects in MSHA District 3, we do not agree. The testimony cited by Consol (C. Br. at 24; C. Reply Br. at 10-11) fails to establish that MSHA knew of a previous instance in which Consol had capped a shaft and conducted welding over a hole in the cap while there were men underground in that portion of the mine.

The judge's determination that Consol violated section 75.316 is affirmed.

2. Unwarrantable Failure

Consol contends that, in finding the violation unwarrantable, the judge failed to consider or discuss extensive evidence establishing that, based on Consol's prior dealings with MSHA and the presence of two MSHA inspectors at the mine while the production shaft was being capped and the dewatering pipe installed, Consol's personnel had a reasonable, good faith belief that approval from MSHA for ventilation changes resulting from the capping project were not required in this instance. C. Br. at 24-30. The Secretary answers that because the violation occurred despite Palmer's warning to Yerkovich regarding the need for prior approval, Consol's decision to move ahead without that approval constitutes aggravated conduct. S. Resp. Br. at 25-27. The Secretary also maintains that the mere contemporaneous presence at the mine of two inspectors is insufficient to excuse Consol's failure to comply with section 75.316, given that neither inspector was a ventilation specialist responsible for approving changes to ventilation plans. *Id.* at 28-29.

It was not error for the judge to refuse to accord Consol shelter from the unwarrantable failure charge on the basis of evidence of its good faith and reasonableness.[24] Consol bases the reasonableness of its belief that approval was not required here on prior MSHA treatment of Consol District 3 capping projects, as well as circumstances surrounding this project and Consol's notification to MSHA. Regardless of whether the evidence Consol cites establishes the reasonableness of its belief in the inapplicability of section 75.316 to a project *such as this*, the fact remains that Yerkovich was told by an MSHA representative that prior approval was necessary *in this instance*. Moreover, Yerkovich did not remain silent about this conversation but reported it to his superiors at Consol. *See* 20 FMSHRC at 1350-51.

In light of this evidence, we agree with the judge that Consol's failure to obtain MSHA approval, despite being put on notice that approval was required in this instance, demonstrates that Consol's conduct was aggravated and therefore unwarrantable. *See Rochester & Pittsburgh*, 13 FMSHRC at 194 (intentional misconduct, whether by commission or omission, is aggravated conduct). Consequently, we affirm the judge's unwarrantability determination.

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[24] In general, the Commission will not find a violation unwarrantable where it is shown to have resulted from the operator's mistaken but good faith, reasonable belief that it was in compliance with applicable law. *See Florence Mining Co.*, 11 FMSHRC 747, 753-54 (May 1989).

D. Order No. 3109524

This order charged that Consol, during the capping of the production shaft and installation of the dewatering pipe, violated 30 C.F.R. § 75.322 (1991),[25] and that the violation was S&S and due to the Consol's unwarrantable failure. 20 FMSHRC at 1351; Gov't Ex. 4. The Secretary alleged two separate grounds of violation. Specifically, she alleged that, on March 13, while Consol had properly withdrawn its personnel from the mine to evaluate changes in ventilation caused by construction of the cap, the operator violated the regulation by permitting miners to return underground without evaluating ventilation changes within the production shaft. 20 FMSHRC at 1351; Gov't Ex. 4 at 1.

The order alleged that a second material change to the split of air ventilating the production shaft occurred the following week, when the plugged dewatering pipe was inserted into the 22-inch hole in the cap and the remaining portion of that hole was covered. 20 FMSHRC at 1351; Gov't Ex. 4 at 2. According to the order, when the subsequent closing of one of the two intake ventilation pipes in the cap is also taken into account, ventilation in the shaft was reduced from approximately 7,500 cfm to around 400 cfm. 20 FMSHRC at 1351; Gov't Ex. 4 at 2. Miners remained working both underground and above during the change in ventilation, and the split of air ventilating the production shaft was not evaluated following the change. 20 FMSHRC at 1351; Gov't Ex. 4 at 2.

The judge rejected Consol's argument that section 75.322 did not apply. Relying on the testimony of Ammons, the judge found the production shaft intake could be properly characterized as a "split of air." 20 FMSHRC at 1352 n.2. Focusing solely on the reduction in airflow in the covered production shaft from 7,500 cfm to 400 cfm caused by insertion of the dewatering pipe and closing one of the ventilation pipes, the judge found that reduction materially affected the split of air ventilating the production shaft. *Id.* at 1352-53. Because it was undisputed that the reduction of airflow within the production shaft affected the safety of

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[25] At the time of the explosion, section 75.322 tracked section 303(u) of the Mine Act, 30 U.S.C. § 863(u), and provided that:

> Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when then the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

The regulation was revised and recodified in 1996 at 30 C.F.R. § 75.324.

persons in the mine (*id.* at 1352), the judge concluded that Consol was required to follow the procedures set forth in section 75.322, and violated the standard when it failed to do so. *Id.* at 1353.

While the judge found the section 75.322 violation to be S&S and of high gravity, he concluded it was not shown to be the result of Consol's unwarrantable failure. 20 FMSHRC at 1353-54. The judge based his unwarrantability determination solely on his finding that, without the testimony of the four dead miners, the Secretary could not show whether Consol officials failed to notify those working on the project of the importance of keeping the two ventilation pipes open for intake air, or whether the dead miners were otherwise aware of that importance of doing so. *Id.* at 1354.

1. Whether the Production Shaft Intake Is a Split of Air Under Section 75.322

We note at the outset that the judge did not address the change in ventilation of the production shaft on March 13 caused by closing of the shaft. This does not affect our consideration, however, as Consol's appeal of the finding of violation is based on an issue which applies to all changes in ventilation the Secretary alleges in the order occurred without compliance with section 75.322.

Specifically, Consol urges reversal of the finding of a violation on the ground that the judge's conclusion that the intake air in the production shaft was a "split of air" under section 75.322 is factually and legally erroneous, and unsupported by substantial evidence. C. Br. at 31-33. According to Consol, the judge ignored evidence establishing that the production shaft intake air did not contribute to the main air current ventilating the underground workings of the mine. *Id.* at 31-32; C. Reply Br. at 13-14. In response, the Secretary maintains that there is overwhelming support in the record, in the form of admissions by Consol officials, for the judge's conclusion that the production shaft intake constituted a "split of air" under section 75.322. S. Resp. Br. at 30-33.

Section 75.322 applies to changes materially effecting *any* split of a mine's main air current. While the term "split" is undefined in the regulations, the standard's use of the term is consistent with the industry usage. The *Dictionary of Mining, Mineral, and Related Terms* defines "air split" as "[t]he division of the main current of air into two or more parts." American Geological Institute, *Dictionary of Mining, Minerals and Related Terms* 12 (2d ed. 1997).

We note that Consol's claim that the production shaft was not a "split of air" is contrary to the testimony of some of its highest officials. According to Ammons, air from the production shaft was going to the mine's active workings, and both Ammons and Quesenberry conceded that the production shaft intake qualified as a split of the main air current. Tr. 648, 669, 749.

Moreover, Consol's claim that section 75.322 was inapplicable to the capping project is contradicted by its own actions. The record reflects that Consol treated the March 13 covering of the shaft as a change in ventilation subject to section 75.322, and attempted to comply with at least some of the regulation's requirements. 20 FMSHRC at 1340-41; Tr. 736-37, 1634. Indeed, Yerkovich cited Consol's compliance with the regulation that day as a reason why MSHA prior approval of the capping was not required under section 75.316. Tr. 1298-1300.

In addition, the production shaft was one of only five primary entry points for intake air in the mine. Gov't Ex. 13 (Blacksville No. 1 Mine Post-Accident Mine Ventilation System Investigation) at 5-6; Gov't Ex. 26 (data included in last ventilation plan). Five surface-mounted exhaust fans drew air into the production shaft and four additional shafts elsewhere in the mine that were all intake entries or had intake compartments. Gov't Ex. 13 at 5-6. Before the production shaft was covered, air flowed through the shaft at nearly 200,000 cfm. *Id.* at 27, 28; Gov't Ex. 26. This was a greater rate than two of the other intake shafts and constituted approximately 17% of the total amount of air entering the mine. Gov't Ex. 13 at 28. At that time, no more than 34% of the intake air flowed through any one shaft. *Id.* Furthermore, the production shaft and the nearby service shaft, also known as the portal shaft, were situated and designed so that any reduction in air flow in the production shaft was compensated by an increase in air flow through the service shaft. Tr. 648-49, 735-36, 1654, 1689; Gov't Ex. 13 at 18-23.

Consol's recitation of evidence that ventilation changes that occurred once the production shaft was covered did not materially affect ventilation in the mine misses the point. C. Br. at 32-33. By its terms, section 75.322 was not triggered by only those ventilation changes that would "materially affect" mine-wide ventilation or the ventilation of active workings, but rather was triggered by any ventilation change that would "materially affect" any split of a mine's main air current.[26] Moreover, by twice providing that the actions it required operators to take were limited in geographic scope to those "areas" affected by the change in ventilation, the regulation clearly connotes that the ventilation changes to which it refers include those changes that have less than mine-wide effects. Consequently, we reject Consol's invitation to overturn the judge's finding that the air ventilating the production shaft was an air split to which section 75.322 applied.[27]

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[26] To the extent that Consol's appeal can be read as an attack on the judge's determination that the ventilation changes that occurred while the dewatering pipe was being installed "materially affect[ed]" the production shaft air split, we reject any such argument, as that determination is supported by substantial evidence. The judge correctly calculated and took into account that a reduction in air from 7,350 cfm to 400 cfm is a decrease of over 94%. 20 FMSHRC at 1353. Moreover, as the judge acknowledged (*id.*), Consol's expert Mitchell conceded that such a reduction would result in a material affect on ventilation. Tr. 2306-09.

[27] We note that Consol had the opportunity to present expert testimony that section 75.322 was not at all applicable in this instance, but did not do so. Its expert, Mitchell, who was the assistant chairman of the Mine Enforcement and Safety Administration committee that wrote

In light of the record evidence and the plain meaning of the term "split of air," substantial evidence supports the judge's conclusions that the production shaft intake was a split of air to which the requirements of section 75.322 applied, and that the changes in ventilation that occurred during installation of the dewatering pipe materially affected that split of air. We therefore affirm the judge's finding that Consol violated section 75.322.

2. Unwarrantable Failure

The Secretary urges reversal of the judge's negative unwarrantability finding on the ground that the judge failed to consider an extensive body of evidence which demonstrates that Consol's failure to ascertain the effect on ventilation of the production shaft of the activities that surrounded capping the shaft constituted an unwarrantable failure to comply with the standard. S. Br. at 42-49. The Secretary also contends that the judge erred in failing to take into account the reason why the four dead miners were unavailable to testify, and that he should have shifted to Consol the burden of showing what the miners knew regarding the need to keep the ventilation pipes in the cap open. *Id.* at 49-55.

Consol maintains that, assuming *arguendo* that it violated section 75.322, the judge's negative unwarrantability determination is supported by substantial evidence. C. Revised Resp. Br. at 29. Consol further contends that any violation of section 75.322 cannot be deemed unwarrantable because it reasonably relied on guidance provided by MSHA that any ventilation change under 9,000 cfm is not subject to the requirements of the regulation. *Id.* at 29-31.

While we are refusing Consol's request to overturn the judge's finding of a section 75.322 violation, that does not end the question of the extent of the violation. This is a relevant issue because of the judge's conclusion that the violation *he found* was not unwarrantable. However, as mentioned, the judge did not completely address the question of the extent of the violation posed by the order. The judge failed to address whether section 75.322 was violated in connection with the March 13 completion of construction of the cap over the production shaft. Below, the parties disputed whether Consol's actions that day in evaluating the change of air flow within the production shaft — an area "affected" by the change in ventilation and therefore subject to evaluation — were sufficient to comply with section 75.322's requirement that the safety of the effects of the change be ascertained. *See* S. Post-Hearing Br. at 62-63; C. Post-Hearing Br. at 52-53. The judge never resolved this dispute, and thus never addressed

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the Part 75 regulations following the passage of the 1969 Coal Act, testified at length regarding whether the post-capping changes to the ventilation in the production shaft "materially affect[ed]" the shaft's ventilation as section 75.322 uses that term. However, he never disputed that the regulation applied to the shaft intake as a main air current or air split. Tr. 2247-60.

whether Consol violated section 75.322 on March 13 and, if so, whether the violation that day was unwarrantable.[28]

In light of his failure to completely address the extent to which Consol violated section 75.322, the judge's negative unwarrantability finding is fundamentally inadequate. Consequently, we vacate that finding and remand for a more complete consideration of the evidence and issues raised by the allegation of unwarrantability in connection with the order alleging a section 75.322 violation. *See Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (remand for judge to adequately address evidentiary record). On remand, the judge should resolve whether section 75.322 was first violated on March 13.

As for the issue the judge found dispositive on the question of unwarrantability — the closing of one of the ventilation pipes — on remand it would only be necessary for the judge to reach the issue of whether the ventilation pipe closing resulted in an unwarrantable violation of section 75.322 if the record evidence does not establish that an unwarrantable violation of the regulation occurred before that point.[29] Moreover, unlike the judge, we do not consider the testimony of the dead miners a necessary prerequisite to finding Consol's actions unwarrantable, for, as the judge found, there is evidence in the record that superintendent Levo not only facilitated the cutting of one of the ventilation pipes, but also at one point witnessed that it had been closed. 20 FMSHRC at 1342.

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[28] The judge's failure to resolve the issue may be the result of believing that the Secretary was alleging that the March 13 and 17 air changes had to be considered cumulatively. *See* 20 FMSHRC at 1353. However, it is undisputed that the capping of the shaft by itself resulted in a material effect on the air in the production shaft, and the citation plainly alleges that on March 13 "Consol did not evaluate the change to the air split ventilating the Production shaft itself before allowing miners to return to work." Gov't Ex. 4 at 1.

[29] We note that much of the reduction in ventilation that occurred during installation of the dewatering pipe was due not to the closing of a ventilation pipe, but to the insertion of the dewatering pipe into the cap. The Secretary's expert Urosek estimated that, at certain times during the installation process, there would have been less than 800 cfm of air ventilating the shaft even if both ventilation pipes were open, because the dewatering pipe, the plates that fit around it, and the Thermoglass cloth would almost entirely seal off the 22-inch diameter hole providing most of the ventilation to the shaft. Tr. 2071-72; Gov't Ex. 13 at 21-23. Consol did not dispute this figure, which represents a decrease of over 89% from the amount of air that was entering the shaft immediately before installation of the dewatering pipe began. Unlike with the closing of the ventilation pipe, there is no dispute that Consol should have been aware of the reduction in airflow resulting from installation of the dewatering pipe, as it knew the dewatering pipe was being installed through the cap and that the Thermoglass cloth was being used to prevent sparks from falling into the shaft. Tr. 699-700 (testimony of Ammons).

In determining unwarrantability on remand, the judge should address all of the factors the Commission considers relevant to the question of unwarrantability, as discussed at page 14, *supra*. There may be a number of such factors present here with respect to the section 75.322 violation, including the extensiveness of the violative condition (once the judge has completely addressed the allegations in the order) and the degree of danger posed by the violation.[30] We also again note the relevancy of Consol supervisory personnel participating in various aspects of the project but not communicating with each other.

As part of his unwarrantable failure analysis, the judge should also consider whether a defense was established by Consol. Consol claims that it did not comply with section 75.322 because it was relying on the 9,000 cfm figure then contained in MSHA's *Program Policy Manual* ("*PPM*") as the minimum air reduction necessary to trigger application of section 75.322. *See* 20 FMSHRC at 1353; Resp't Ex. 52. The judge considered Consol's claim in concluding that there was a violation (20 FMSHRC at 1353),[31] but made no finding regarding the good faith and reasonableness of the claim in light of the facts. Such a finding is necessary in the context of an unwarrantable failure charge. *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1628 (Aug. 1994) ("reasonableness" of belief determined by surrounding circumstances).

E. Penalties

The Secretary seeks review of the two $10,000 penalties the judge assessed in connection with each of the two orders he found not to be unwarrantable, a reduction from the $50,000 the Secretary sought for each violation. S. Br. at 55-61. Because we have vacated and remanded those negative unwarrantability determinations, the penalties assessed for the two orders are also vacated and remanded. On remand, once the judge has decided whether the violations were unwarrantable, we direct him to reassess the penalties consistent with findings made on each of the six statutory penalty criteria set forth in section 110(i) of the Mine Act. We also direct the

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[30] While no miners were near the bottom of the production shaft when the explosion occurred, the equipment that remained at or near that area was severely damaged. Tr. 2056-57, 2115-16. It was stipulated that "[o]vercast, cribs, stoppings, and the rotary dump in the underground areas [of the mine] within 100 feet of the shaft were . . . damaged by the force of the explosion." Jt. Ex. 1 at 3 (Jt. Stip. 14); *see also* Gov't Exs. 20-21 (post-explosion underground maps). Consol also acknowledged that it knew that a fire in the production shaft caused by the welding above it would put the miners who were underground at risk. Tr. 1648 (testimony of Charles Bane).

[31] Below, Consol claimed that the *PPM* was dispositive on the issue of whether, under section 75.322, a ventilation change of less than 9,000 could be considered to "materially affect" a main air current or air split. C. Post-Hearing Br. at 48-51. The *PPM*, however, while it can provide guidance on an issue, has been found by the Commission to lack legal effect and thus cannot be used against the Secretary as grounds to estop a finding of violation. *See King Knob*, 3 FMSHRC at 1419-22.

judge to consider our previous holdings that a judge's assessment of a penalty may not "substantially diverge" from the penalty proposed by the Secretary without sufficient explanation. *See Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983); *see also Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994). The judge's initial decision lacked any such explanation.

III.

Conclusion

For the foregoing reasons, we: (1) reverse the judge's determination that section 75.301 was not violated, and remand for a determination of whether that violation was S&S and due to Consol's unwarrantable failure, and a penalty assessment; (2) affirm the judge's determination that Consol violated section 77.1112(b), and vacate and remand his determination that the violation was not unwarrantable and his penalty assessment for further consideration consistent with this opinion; (3) affirm the judge's determination that Consol violated section 75.316 and that the violation was unwarrantable; and (4) affirm the judge's determination that Consol violated section 75.322, and vacate and remand his determination that the violation was not unwarrantable and his penalty assessment for further consideration consistent with this opinion.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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March 28, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. EAJ 96-3
CONTRACTORS SAND AND GRAVEL, INC.	: :	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

In this proceeding under the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (1996) ("EAJA"), Contractors Sand and Gravel, Inc. ("Contractors"), sought recovery of attorney's fees and expenses following the decision in *Contractors Sand and Gravel, Inc.*, 18 FMSHRC 384 (Mar. 1996) (ALJ), in which Contractors prevailed over the Mine Safety and Health Administration ("MSHA") in a proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Administrative Law Judge August Cetti ordered the Secretary to pay attorney's fees and expenses because her position in the merits proceeding was not substantially justified. *Contractors Sand and Gravel, Inc.*, 18 FMSHRC 1820 (Oct. 1996) (ALJ). The Secretary filed a petition for review with the Commission. Following the direction for review, Contractors challenged the Commission's jurisdiction to review the judge's award. On review, the Commission ruled against Contractors on the issue of jurisdiction, and a majority further concluded that the Secretary's position in the underlying Mine Act adjudication was substantially justified, thereby reversing the judge. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967-76 (Sept. 1998) (Chairman Jordan and Commissioners Marks and Beatty). The dissenting Commissioners held that the Secretary's position was not substantially justified. *Id.*at 978-85 (Commissioners Riley and Verheggen).

Contractors subsequently petitioned for review of the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The court affirmed the Commission's disposition of the jurisdictional issue. *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1339-40 (D.C. Cir. 2000). The court agreed with the dissenting Commissioners that the Secretary's position before the administrative law judge in the Mine Act proceeding lacked substantial justification because the Secretary's interpretation and application of the regulation at issue had no reasonable basis in law or fact. *Id.* at 1340-42. The court ordered that the award of fees and expenses granted by the administrative law judge be restored, and remanded the case to the Commission for further proceedings to determine the amount of an award to compensate Contractors for pursuing review before the court. *Id.* at 1343.

Subsequently, the Secretary and Contractors each filed with the court a motion for clarification. The Secretary requested that the court clarify its decision to permit the Commission to consider on remand several issues that it did not reach because it reversed the judge. Those issues included whether the judge properly awarded Contractors attorney's fees at an hourly rate that was higher than the maximum rate specified in EAJA, and properly ordered interest on the award that accrued as a result of Contractors' failure to pay its bills for attorney's fees on time. Contractors requested that the court clarify that on remand the Commission should award, in addition to fees and expenses accrued in pursuing court review, those attorney's fees and expenses that were incurred in defending the administrative law judge's decision before the Commission.

The court issued an order in which it granted Contractors' motion and denied the Secretary's. *Contractor's Sand and Gravel, Inc. v. FMSHRC*, No. 98-1480, slip op. at 1 (D.C. Cir. Mar. 3, 2000). With regard to the Secretary, the court stated that the issues she raised in her motion "were not raised before the court at any time" and therefore the motion could not be granted. *Id.* With regard to Contractors' motion, the court stated that it was not the court's intent "to foreclose such fees and expenses otherwise awardable." *Id.* (citation omitted).

Pursuant to the court's orders, we reinstate the judge's original EAJA award and remand the case to the judge for further proceedings on attorney's fees and expenses incurred in defending the judge's decision before the Commission and those incurred in seeking review of the Commission's decision before the court.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., 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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March 7, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-314-M
Petitioner	:	A.C. No. 24-01889-05515
v.	:	
	:	Montgomery Crusher
MONTGOMERY CONSTRUCTION,	:	
Respondent	:	

DECISION

Appearances: Gary L. Grimes, Conference and Litigation Representative, U. S. Department of Labor, Denver, Colorado, on behalf of Petitioner;
Larry J. Bowser, Office Manager, Montgomery Construction, Hilger, Montana, on behalf of Respondent.

Before Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Montgomery Construction pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and proposes a civil penalty of $55.00. A hearing was held in Lewistown, Montana on February 8, 2000. For the reasons set forth below, I affirm the citation and assess a penalty of $25.00.

The Evidence

Montgomery Construction operates a crusher in Hilger, Montana. Three employees normally work at the site. Richard Bowser, the crusher superintendent, controls the crusher and the other two individuals operate loaders feeding the crusher and doing stockpiling. On March 3, 1999, David Huston, an inspector employed by the Department of Labor's Mine Safety and Health Administration (MSHA), conducted an inspection of Montgomery's crusher. He was accompanied by Richard Bowser. Both individuals observed a Terex 70C, front end loader in operation with a non-functional back-up alarm. Inspector Huston issued Citation No. 7903260, charging Montgomery with a violation of 30 C.F.R. § 56.14132(a), a mandatory health and safety standard applicable to surface metal and non-metal mines. Inspector Huston did not observe any other infractions.

Section 56.14132 provides, in pertinent part:

§ 56.14132 Horns and backup alarms

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

The citation issued by Inspector Huston stated:

> The backup alarm installed on the Terex 70C, 5 yard front end loader in operation at the mine site was not maintained in a functional condition. The backup alarm did not give any sound as the front end loader is put into reverse motion. The operator of the front end loader did have an obstructed view to the rear from the cab location of the loader. The warning system shall be maintained to warn of the reverse motion of the mobile equipment. No foot or other mobile equipment was observed in the vicinity where the loader was being operated. The chance of an incident resulting in injury to an employee was unlikely.

In assessing the gravity of the violation, inspector Huston concluded that it was not significant and substantial and that it presented an unlikely probability of a fatal injury affecting one person. He rated the operator's negligence as "moderate" because he determined that the operator of the equipment should have noticed that the backup alarm was non-functional and taken steps to have it repaired prior to the inspection. Richard Bowser testified that he conducts daily pre-shift inspections of the crusher and mobile equipment and that he did so on March 3, 1999. When he inspects the mobile equipment he performs a visual inspection, starts the engine and checks the operation of the backup alarm by putting the transmission into reverse. The backup alarm sounds when the reverse gear is engaged, regardless of whether the equipment is actually moving backward. He testified that he inspected the Terex 70C loader on the morning of March 3, 1999, that the backup alarm was functioning at the time, and that records of his inspections, which he discussed with inspector Huston, did not note an inoperable backup alarm. Huston testified that he did not recall having the discussion, although he did review pertinent records prior to commencing a physical inspection of the premises. Richard Bower also confirmed that the backup alarm was not functioning at the time of the inspection, which commenced around 2:00 p.m. Upon examination, it was found that a wire leading from the cab of the loader to the backup alarm had become disconnected. The wire was re-connected and secured and the violation was terminated shortly after the citation was issued.

Findings of Fact and Conclusions of Law

The relevant facts are largely undisputed. I credit Mr. Bowser's testimony and find that he inspected the loader that morning and that the backup alarm was working at that time. The parties agree that the backup alarm was not functional at the time of the inspection, which was based upon observations of the loader being operated in reverse. There was testimony by

Richard Bowser that it is difficult for the operator of the loader to hear the backup alarm when the loader's engine is running at or above half-throttle. However, the alarm sounds as soon as the reverse gear is engaged, an action that would normally be taken a low engine speeds.

The testimony and exhibits introduced by Respondent establish that it is cognizant of safety issues and has attempted to achieve and maintain compliance with applicable health and safety standards. Exhibit R-1 includes a letter dated October 15, 1999, from MSHA congratulating Montgomery Construction for receiving "the Joseph A. Holmes Safety Association, Certificate of Honor, for 50,425 manhours without incurring a lost time injury." Respondent's primary objection to the citation and proposed penalty goes more to the procedures followed by MSHA and the philosophy behind the basic enforcement scheme of the Act. Respondent complains that it is subject to varying interpretations of the standards by different inspectors and objects to the civil penalty enforcement mechanism, questioning whether MSHA benefits from civil penalty collections. It also complains about the burden imposed by the inspection process and responded to the proposed assessment by indicating that it would pay the proposed assessment in this case when it's "invoice" in the amount of $24,906.08, for "down time created by MSHA inspections" was paid. It has sought legislative action from it's representative in the United States Senate, proposing that a "partnering" relationship be established, similar to that used in federally funded highway projects, in lieu of the civil penalty mechanism.

These issues are, of course, beyond the jurisdiction of the Commission and the undersigned Administrative Law Judge, as Respondent understands. Nevertheless, it has raised them in this proceeding, in an attempt to further it's efforts to change the Act's enforcement scheme. The only issues properly before me are whether Respondent committed the violation as alleged and, if so, the appropriate civil penalty to be imposed.

I find that Respondent violated 30 C.F.R. § 56.14132(a) on March 3, 1999. The front end loader was being operated with a non-functional backup alarm. While the alarm may be difficult for the operator to hear when the engine is being operated at half throttle or more, a properly operating alarm will sound when the vehicle's transmission is placed into reverse. Shifting is not typically done at high engine speeds and the operator should have been aware that the alarm was not functioning and taken steps to have it repaired. There is no evidence that the crusher superintendent, or any other supervisory employee of Montgomery, was negligent or otherwise at fault. However, it is well settled that under the Act mine operators are subject to a strict liability standard, i.e. an operator is liable for a civil penalty, even though it's supervisory employees are without fault with respect to a violation of a mandatory health and safety standard. *Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir 1989)(*aff'g* 8 FMSHRC 1632) and cases cited therein. The degree of fault of the operator is, however, taken into account in determining the amount of any civil penalty to be imposed. *Id.*

Civil Penalty Assessment

The Secretary has proposed a penalty of $55.00 for the violation at issue. However, it is

the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six criteria itemized in § 110(i) of the Act. 29 C.F.R. § 2700.30; *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 482-83 (April 1966).

Montgomery Construction's crusher operation is a small business entity. It has been cited for eight violations of mandatory health and safety standards in the twenty-four months preceding the violation at issue here. It has attempted, in good faith, to comply with mandatory health and safety standards and it's efforts have been very effective in avoiding lost-time injuries. I find that inspector Huston correctly assessed the gravity of the violation and that, while any potential injury would have been very serious, the probability of injury was unlikely because of the absence of pedestrian and vehicular traffic in the area where the loader operated. The parties have stipulated that Montgomery demonstrated good faith in rapidly abating the violation. Montgomery does not contend that the civil penalty proposed here would threaten it's ability to remain in business. I do not agree with inspector Huston's assessment of negligence. I find that Montgomery Construction was not negligent with respect to this violation.

Upon consideration of these penalty criteria, I find that a penalty of $25.00 is appropriate for the violation.

ORDER

Citation No. 7903260 is **AFFIRMED**. Montgomery Construction is **ORDERED** to pay a civil penalty of $25.00, within 30 days of the date of this decision.

Michael E. Zielinski
Administrative Law Judge

Distribution:

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

March 10, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-88-D
on behalf of Raymond Ramon,	:	MSHA Case No. PIKE CD-99-04
Complainant	:	
v.	:	Mine No. 10
	:	Mine ID No. 15-17977
EAGLE COAL COMPANY, INC.,	:	
Respondent	:	

ORDER OF TEMPORARY REINSTATEMENT

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Complainant;
Michael J. Schmitt, Esq., Wells, Porter, Schmitt & Jones, Paintsville, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," and Commission Rule 45, 29 C.F.R. § 2700.45, upon the application of the Secretary of Labor to temporarily reinstate Raymond Roman to his former position with the Eagle Coal Company Inc., (Eagle). The Secretary alleges in her application that Mr. Roman had been employed by Eagle as a continuous miner operator and that on or about August 7, 1999, he was constructively discharged because representatives of Eagle believed he had been cooperating with the Secretary's investigation under Section 110(c) of the Act. The Secretary seeks to have Roman temporarily reinstated to the position he held immediately before his constructive discharge or to a similar position at the same rate of pay and with the same or equivalent duties.

Section 105(c)(1) of the Act prohibits discrimination against miners for exercising any protected right under the Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as result of their participation." S. Rep. No. 181, 9th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 9th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought. *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty . . . to resolve . . . conflict[s] in testimony at this preliminary stage of proceedings." *Secretary of Labor on behalf of Albu v. Chicopee Coal Co., Inc.*, 21 FMSHRC 717, 719 (July 1999). At a temporary reinstatement hearing the judge must determine "whether the evidence mustered" by the miner to date establishes that his complaint is nonfrivolous," not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d at 747.

The "not frivolously brought" standard contained in section 105(c)(2) of the Act has been equated with a "reasonable cause to believe standard." See *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial" and "not clearly without merit." *Jim Walter Resources,* 920 F.2d at 747. The legislative history of the Mine Act defines the "not frivolously brought standard" as whether a miner's complaint "appears to have merit." S. Rep. No. 181, 9th Cong., 1st Sess. 36-37 (1977), *reprinted* in Senate Subcommittee on Labor, Committee o Human Resources, 9th Cong., 2nd Sess. *Legislative History of the Federal Mine Safety and Health Act of 1977 at 624-25 (1978).*

At hearings held March 6, 2000, Mr. Roman testified that he first began working in coal mines in 1993. He last worked at the Eagle No. 10 Mine on August 7, 1999, as a continuous miner operator. Over the previous two years there had been what Roman characterized as excessive dust at the face - - so much so that he was unable to see. As a result, Roman and, at other times, two other miners complained to Foreman Tony Armstrong and asked that a curtain be hung to remedy the problem. According to Roman the curtain was never hung and the operator in fact never complied with the requirements to hang curtains.

Roman also maintains that after he acknowledged to Eagle officials that he had met with an investigator for the Mine Safety and Health Administration (MSHA) he was harassed. He was purportedly told by Armstrong not to tell the truth to the MSHA investigator about the company's failure to use dust pumps. Armstrong purportedly reminded Roman two or three times a week that he did not want to go to jail, presumably for dust sampling violations.

Roman claims he was also harassed by management because, when the continuous miner was down for repairs, he was required to perform such undesirable tasks as shoveling the belt and picking up garbage. Before his complaint about excessive dust and before the operator learned of his meeting with the MSHA investigator he claims he was permitted to assist in repairing the continuous miner rather than shovel the belt or pick up garbage.

Finally, on August 7, 1999, Roman observed, after the "breaker" kept "knocking out," that there was a wire on the cat head presumably illegally and unsafely jumping the circuit breaker. Testifying that he was tired of the unsafe conditions and presumably believing, based on

past experience, that it would be futile to complain, he decided to quit. As he left the mine he told only the outside man, Earl Cook, that he was quitting.

A miner's work refusal is protected by the Act under conditions he reasonably and in good faith believes to be hazardous. See *Miller v. FMSHRC*, 687 F2d 194, 195-96 (7th Cir. 1982). While the miner must ordinarily communicate his reasons for a work refusal to the operator, that is not critical when such notice would be futile. *Secretary v. Northern Coal Co.* 4 FMSHRC 126, 133 (1982). A constructive discharge is protected under the Act if conditions faced by the miner are so intolerable that a reasonable person would feel compelled to resign. *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988). Recognizing that it is not the judge's duty to resolve the conflicts in testimony at this preliminary stage of proceedings and noting that the Secretary's theories of liability herein are "not clearly without merit," I find, based on the evidence presented, that the Secretary's application for temporary reinstatement is not frivolously brought.

ORDER

Eagle Coal Company, Inc., is hereby ordered to immediately reinstate Raymond Roman to the position of continuous miner operator or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him before his departure from Eagle Coal Company, Inc., on August 7, 1999.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 3, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-8-M
Petitioner	:	A. C. No. 44-06803-05508
v.	:	
	:	Adco Land Corp No. 1
VIRGINIA SLATE COMPANY,	:	
Respondent	:	

DECISION

Appearances: M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for the Secretary;
V. Cassel Adamson, Jr., Esq., Adamson and Adamson, Richmond, Virginia, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") alleging that Virginia Slate Company ("Virginia") violated various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing in this matter was held in Buckingham, Virginia.

Briefs were due to be filed three weeks after receipt of the transcript. The transcript was filed on November 16, 1999. On December 6, 1999 the Secretary filed a motion for extension of time to file its brief. The motion was not opposed. On October 21, 1999 an order was entered allowing the parties until February 15, 2000 to file their briefs. On February 15, 2000 the Secretary filed a Post-Hearing Brief. On February 28, 2000 Respondent filed a Brief and Argument.

Findings of Fact and Discussion

I. Order No. 7711660

A. The Secretary's Evidence

On June 2, 1998, Rickey Joe Horn, an MSHA inspector, inspected Virginia's open pit slate operation. In the course of his examination, he observed that the tail pulley for the No. 1

conveyor belt, located on the crusher, which was not in operation,[1] was not guarded. According to Horn, he asked Roy Terry, the foreman, why the guard was off, and the latter informed him that the guard was off because the crusher motor was being worked on. Horn testified that he also spoke to two crusher operators who informed him that the crusher had been worked on for the past 2 weeks, but that it had been run during this time in the condition observed by him (Horn) and that Terry had told him that the mine had been in production for the past week. In this connection, Leroy Williams, who was a crusher operator in 1998, stated that a stock pile at the site on the day of the inspection contained the quantity of material produced in "a full days run." (Tr. 201).

According to Horn, the pulley was only 2 feet above the ground, and because it was unguarded, there was nothing to prevent a person from walking into it. He described the ground around the pulley as being rocky, and consisting of loose material. According to Horn, if a person would trip on this material and fall into the pulley, a fatality would probably result. According to Horn, V. Cassel Adamson, Jr., Virginia's President, told him he did not know how long the guard had been off.

Horn issued an order alleging a violation of 30 C.F.R. § 56.1417(a), and opined that the violation was significant and substantial inasmuch as two employees work all day in the area of the tail pulley, and that it was reasonably likely that an injury that would be at least permanently disabling, would have resulted upon inadvertent contact with the pulley. He also opined that the violation was as the result of Virginia's unwarrantable failure.

Williams indicated that the cited tail pulley did not have any guard "at the time leading up to when the inspection took place" (Tr. I, 148). He testified that the crusher had guards on it when it was in operation, but the guards were removed a few weeks prior to the inspection. He indicated that when crusher was being repaired, the motor was test-fired, but he did not recall if the guards were in place. Later on in his testimony, he indicated that when the "engine" was tested, the guards were in place.

B. Discussion

1. Violation of 30 C.F.R. § 56.14107(a)

Section 56.14107(a) as pertinent, provides as follow: "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly wheels, couplings, shafts, fans blades, and similar moving parts that can cause injury."

According to Horn's testimony the tail pulley at issue when observed by him on June 2,

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[1]/ If the hopper is not in operation, the conveyor belt can be placed in operation as it has a separate power source.

did not have any guard. This testimony was not impeached, nor was it contradicted by Virginia's only witness, the V. Cassel Adamson, Jr., its President. Nor did Virginia contradict or impeach Horn's testimony that the tail pulley was located approximately 2 feet above the ground. Accordingly, I accept Horn's testimony that on June 2, the tail pulley was not guarded to prevent persons from contacting it. I also find, based upon Horn's uncontradicted testimony that contact with the moving tail pulley can cause an injury. It appears to be Virginia's argument, in essence, that it was not in violation on June 2, as the tail pulley was not in operation. However, the plain meaning of the wording of section 56.14107(a), supra, does not provide for any exception to the requirements set forth therein if the moving part to be guarded is not in operation. Further, Horn's and Williams' testimony establishes that the tail pulley, which is powered by an electric motor, was capable of being operated at a time when the crusher was inoperable. For all these reasons, I find that Virginia did violate section 56.14107(a), 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 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

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

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

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

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

As set forth above, the evidence establishes the first two elements set forth in *Mathies*, supra, i.e., that Virginia violated a mandatory safety standard, and that the violative condition contributed to the hazard of a miner becoming injured upon coming in contact with a moving tail pulley. In analyzing the third element of *Mathies*, supra, i.e., whether there was a reasonable likelihood of an injury producing event, i.e., contact with a moving tail pulley, the continuation of normal mining operations must be taken into an account. In essence, according to Adamson, Jr., in normal operations the tail pulley at issue is guarded, and the guard had been removed because the crusher was inoperable, and was being worked on. I reject this testimony as being too speculative to predicate a finding that, with continued normal mining operations, there would not have been a reasonable likelihood of contact with the tail pulley, as it would have been guarded. Further, taking into account the nature of the ground conditions in the area of the tail pulley, consisting of rocky loose material which would have created a stumbling or tripping hazard, the location of the tail pulley approximately 2 feet above the ground, and the fact, as testified to by Horn, that two crusher operators work in the area, I find that the third element of *Mathies*, supra, has been met. In addition, Virginia did not impeach or contradict Horn's testimony, that should a miner have contacted the unguarded tail pulley, it was reasonably likely that a permanently disabling injury would have resulted. I thus find that it has been established that the violation was significant and substantial.

3. Unwarrantable Failure

According to Horn, in essence, Terry and the two crusher operators has told him that the crusher had been operated for the past 2 weeks in an unguarded condition. The Secretary did not call Terry to testify, nor did the Secretary indicate why Terry was not called . Hence, an inference might be drawn that Terry's testimony would not have been helpful to the Secretary's case. Moreover, the only crusher operator to testify, Leroy Williams, indicated that there was no guard at the tail pulley "at the time leading up to the inspection"(Tr. Vol I, 148), but he did not testify that it had been run without a guard. There is no evidence that a guard was not in place prior to the time the crusher, and the operation of the entire plant, including the belts at issue, had been shut down approximately 2 weeks prior to June 2. According to Horn's testimony, a stock pile that was in existence June 2, consisted of a quantity of material produced in one full day of operation. It appears to be the Secretary position that the stock pile evidences the fact that the plant was in operation, and the tail pulley at issue was in operation during the 2 weeks period when it was not guarded. I find this argument to be speculative, and not supported by the record. I take cognizance of Horn's testimony that James Carter, a crusher operator, had told him that he (Carter) was told by the foreman to operate the crusher without the guards being in place. However, not much weight was accorded this hearsay testimony, as Horn did not indicate where or when this conversation took place. Nor was it corroborated by Williams, the other crusher operator, who did testify. In contrast, I observed Adamson's demeanor and found his testimony credible that, from May 10, 1998, through June 1, 1998, the plant was not in operation, was not

producing any material and that no belts were in operation, because the conveyor was being worked on. I also find his testimony credible that only late in the afternoon on June 1, did the plant operate, in order to test the crusher, and only six buckets of material were processed. Also, I accept his uncontradicted testimony that Virginia had decided to make sure that all guards be in place prior to the startup of the normal operations, but before this task could be performed, Horn arrived at the site to commence his inspection.

Within the above context, I find that Virginia's actions regarding the violative conditions did not reach the level of aggravated conduct, and hence did not constitute an unwarrantable failure. (c.f., *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

4. Penalty

Inasmuch as the violative condition could have resulted in a permanently disabling injury or fatality, I find that the level of gravity of the violation was relatively high. For the reasons set forth above, (I.(B.)(3.)), I conclude that the level of Virginia's negligence to have been moderate. The violative condition was abated in a timely fashion. There is no evidence in the record that imposition of a penalty would have any adverse affect on Virginia's ability to remain in operation. Also there is no evidence in the record that any penalty herein should be mitigated by the size of Virginia's operation. Taking all these factors into account, as set forth in section 110(i) of the Act, as well as Virginia's history of violations, I find that a penalty of $300.00 is appropriate.

II. Order No. 7711661

In his inspection of June 2, Horn observed that there was no protective device for the V-belt drive, and the pulleys for the feeder. The drive motor was located approximately 3 feet above ground level. Horn issued an order under section 56.14107(a), supra. Virginia did not contradict or impeach Horn's testimony regarding the conditions observed by him, but adduced Adamson's testimony to the effect that normally the belt drive at issue was located above the reach of miners working in the area. I thus find, based upon the Horn's testimony that on June 2, as observed by him, the V-belt drive at issue was not guarded and was within approximately 3 feet above the ground. For the reasons as set forth above, (I.(B.)(2.)), I find that this condition presented a hazard to miners of contacting moving machinery. I thus find that Virginia did violate section 56.14107(a), supra. Also, for the reasons set forth above, (I.(B.)(2.), I.(B.)(3.)), I find that the violation was significant and substantial, but not the result of Virginia's unwarrantable failure. For essentially for the same reasons set forth above, (I.(B.)(4)) I find that a penalty of $300.00 is appropriate.

III. Citation No. 7711663

On June 2, Horn observed that the tail pulley for the No. 2 belt, which was located about

2 ½ feet above the ground level, was not guarded. Virginia did not impeach Horn's testimony regarding his observations, nor did it adduce evidence to contradict or rebut his observations. Virginia's evidence relating to the existence of the violative condition consisted of Adamson's testimony that the areas at issue had usually been bolted by perforated steel material considered to be an area guard. Since Virginia did not rebut or impeach or contradict Horn's testimony regarding the conditions observed by him on June 2, I find, that Virginia did violate section 56.14107(a), supra.

I accept Horn's testimony, that the violation was not significant and substantial inasmuch as a injury of a reasonably serious nature was not reasonably likely to have occurred. Essentially for the reasons set forth above (I.(B.)(3.)), and based upon Adamson's testimony that I found credible that the guard at issue had been removed to clean the area, I find that the violation was not the result of Virginia's unwarrantable failure (c.f. *Emery*, supra). I find that although a reasonably serious injury was not reasonably likely to have occurred, should an injury have occurred as a result of the violation, it could have been of a serious nature. Thus, I find that the gravity of the violation was relatively high. Considering the additional factors set forth in section 110(i) of the Act, as set forth above, (I.(B.)(4.)), I find that a penalty of $300.00 is appropriate.

IV. Citation No. 7711665

On June 2, 1998, the motor, which ran the crusher, was operated by separate clutch and throttle hand levers. There were no guard rails or catwalks provided to access these levers. The means of accessing these levers, was by walking on an I-beam, approximately 6 inches wide, and located approximately 6 feet above the ground. According to the uncontradicted testimony of Horn, a person walking on the I-beam while operating the motor, could loose his balance and suffer an injury. Horn cited Virginia under 30 C.F.R. § 56.11001 which provides that "[s]afe means of access shall be provided and maintained to all working places."

Virginia did not impeach or contradict Horn's testimony, and I accept it. Accordingly, I find that on June 2, there was no safe means of access provided to a working place, i.e., the location of the levers to operate the crusher. Accordingly, I find that Virginia violated section 56.11001, supra.

According to Williams, he had to access the levers by walking on the I-beam twice a day. Considering this testimony, as well as the width of the I-beam, and its location above a rocky surface, I find, that within this context it has been established that the violation was significant and substantial (See *Mathies*, supra).

According to Horn, it was "plainly visible"(Tr. Vol I, 82) that there were no railings or catwalks providing access to the control levers. However, the only evidence the Secretary adduced regarding the length of time that the violative condition had existed, consisted of Williams' testimony. Williams indicated that when he first started to work at the plant, he asked the foreman, Roy Terry, why there was no hand rail on the crusher, and Terry said that he did not

know. Not much weight was accorded this hearsay testimony, as it was not corroborated. Also, the Secretary did not indicate why it had not called Terry to testify.

Williams testified that the means of access to the controls as depicted in government exhibit 20, had been in that condition for 2 months or less prior to the date of the inspection (Tr. Vol. I, 175). However, he also indicated that he thought the access platform was taken down a week or so prior to the inspection, but that he could not remember, and was not sure (Tr. Vol. I, 178). He indicated that the plant was in operation just part of the week prior to June 2 (Tr. Vol. I, 180). I find Williams' testimony unclear, and can not predicate any findings on his testimony regarding the length of time the crusher had operated without safe access.

On the other hand, I observed that the demeanor of Adamson, and found his testimony to be credible that the crusher was not in operation in the period from May 10 through June 1, and that after the new motor in the crusher was tested for 10 minutes on June 1, it was then shut down and instructions were given not to run it again until either the controls were shifted to the side of the crusher that had a catwalk, or additional catwalks were installed. Within this framework, I find that it has not been established that Virginia's actions herein amounted to aggravated conduct, and thus do not constitute an unwarrantable failure (see *Emery*).

I find that the level of gravity of the violation was relatively high, inasmuch as a serious injury could have resulted. For the reasons set forth above, I find that the level of Virginia's negligence to have been no more than moderate. My analysis of the remaining factors set forth in Section 110(i) of the Act is set forth above (I.(B.)(4.)). I find a penalty of $300.00 appropriate for this violation.

V. Order No. 7711666

Horn testified that a berm was missing for 20 feet along the west side of an elevated roadway leading to the dump. He indicated that there was a 15 to 20 foot drop-off. He issued an order alleging a violation of 30 C.F.R. § 56.9300 which provides as follows: "[b]erms or guard rails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons and equipment." Virginia did not impeach, contradict, or rebut Horn's testimony, and accordingly I accept it. Based upon Horn's testimony, I find that, on June 2, 1998, a berm was missing for approximately 20 feet on the bank of the roadway where there existed a drop off of approximately 15 to 20 feet would have endangered persons in a vehicle using the roadway. Accordingly, I find that Virginia did violate section 56.9300(a), supra.

According to Horn, the violation was significant and substantial, because trucks do use the roadway, and if such a vehicle would overturn, fatal injuries could result. The Secretary has not adduced any evidence regarding the slope, physical condition of the surface of the roadway, the width of the roadway, how often it was traversed, whether the roadway was used for two way traffic, and the condition of the trucks traveling the roadway. Within this context, I find that it

has not been established that an injury producing effect was reasonably likely to have occurred. I thus find that it has not been established that the violation was significant and substantial (see, Mathies, supra).

According to Horn, Adamson III, told him that he was responsible for checking the area at issue, that Virginia had started using a front-end loader the week prior to June 2, and that he did not realize that the drop off was that high. Horn concluded that the violation was as the result of Virginia's unwarrantable failure, since Virginia knew of the violative condition, and did nothing about it. Williams testified that since February 1998, a front-end loader has been used to load the hopper. On the other hand, Adamson testified that from March 1997 when operations commenced, until June 1, 1998, he only saw the excavator feeding the crusher. He indicated that normally the excavator was used to load the hopper, but that on June 1, the front-end loader was used the load the hopper for about 10 minutes.

I find the Secretary's evidence inadequate to specifically establish how long a period of time prior to June 2, the area in question has been used as roadway. More importantly, the Secretary failed to establish for how long a period prior to June 2, there was no berm along the bank for approximately 20 feet. Within this context, I find that it has not been established that Virginia's actions amount to aggravated conduct. Thus I find that it has not been established that the violation was the result of Virginia's unwarrantable failure (see, *Emery*, supra).

I find that should a vehicle have gone off the road due to the lack of a berm a reasonably serious injury could have resulted. Accordingly, I find that the gravity of the violation was relatively high. For the reasons set forth above, I find that it has not be established that Virginia's negligence was more than moderate. I find that the violation was abated in a timely fashion. Additionally, taking into account the remaining factors set forth in section 110(i) of the Act, as discussed above (I.(B.)(4.)). I find that a penalty of $200.00 is appropriate.

VI. Order 7711667

According to Horn, there were no bumper blocks or any other impeding devices to prevent a front-end loader loading the hopper from running into the hopper, hitting a rock, or overturning. He issued a section 104(d)(1) order alleging a violation of 30 C.F.R. § 56.9301 which provides that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning."

Virginia did not impeach or contradict Horn's testimony that there were no bumper blocks or any impeding devices at the hopper dumper location. Nor did it impeach or rebut Horn's testimony that there was a danger of overturning. Accordingly, I find that it has been established that Virginia did violate section 56.9301, supra.

According to Horn, the violation was significant and substantial because it was reasonably likely that if the front-end loader continued to use the dumping point, the vehicle

would overturn, hit rocks, or run into the side of the hopper. However, he did not explain the bases for his conclusion. Nor does the record contain any facts to support such a conclusion. Accordingly, I find that it has not been established that the violation was significant and substantial.

The evidence adduced by both Parties regarding the issue of unwarrantable failure was essentially the same as that adduced regarding Order No. 771166. Hence, for the reasons set forth above (V., *infra*), I find that the violation herein was not the result of Virginia's unwarrantable failure.

Essentially, for the reasons set forth above (V., *infra*), I find that a penalty of $200.00 is appropriate.

VII. Order 7711668

According to Horn, on June 2, he asked the operator of the Case 584 fork lift to test the manual horn and the automatic reverse horn, and they did not work. He issued an order alleging a violation of 30 C.F.R. § 14132(a) which provides as follows: "[m]anually-operated horns or other audible devices provided on self-propelled mobile equipment as a safety feature shall be maintained in a functional condition."

Virginia did not impeach Horn's testimony. Adamson testified that the cited vehicle, at the time of the inspection, was not provided with any manual horn. However, he did not present any evidence to contradict Horn's testimony that the automatic reverse horn was not operable. Hence, based upon Horn's testimony, I find that Virginia did violate section 56.14132(a), supra.

Adamson testified that the operator of the fork lift sits high above the ground, has all around visibility, and can see behind him by using a rear mirror. Virginia did not impeach or rebut Horn's testimony that the fork lift was being operated inside a building where there is foot traffic. Within the framework of this evidence, I find it has been established that the violation was significant and substantial (see Mathies, supra).

Adamson testified that the fork lift had not been cited in the two previous inspections, and that he was not aware that the horn was not operational. However, on the other hand, Horn testified that he spoke to the operator of the fork lift who told him that the horn and backup alarm had not worked for several weeks. There is no evidence that the fork lift operator had communicated the existence of this defect to any Virginia's managers. Thus, there is no evidence that Virginia's conduct reached the level of aggravated conduct (see, E*mery*, supra). Within the context, I find that it has not been established that the violation was the result of Virginia's unwarrantable failure.

I find that the level of gravity of this violation was relatively high, inasmuch as a serious injury could have resulted should a person not have been warned of the fork lift backing up, and

thus could have sustained a serious injury. For the reasons set forth above, I find that it has not been established that the level of Virginia's negligence was more than moderate. Taking all the remaining factors of section 110(i) of the Act into account, I conclude that a penalty of $300.00 is appropriate.

VIII. Order 7711669

Horn testified that the left section of the two-piece seatbelt in a R-22 Euclid haul truck was missing. Virginia did not impeach Horn's testimony. Horn issued an order alleging a violation of 30 C.F.R. § 56.14131(a).[2]

Adamson testified that when he drove the truck in early May 1998, both halves of the seatbelt were in place. However, Virginia did not adduce any evidence to contradict Horn regarding his observation on June 2. Accordingly, I find that Virginia did violate section 56.14131(a), supra.

Horn testified that truck was driven on a elevated roadway to and from the pit. He opined that an accident would have been reasonably likely to have occurred, should the truck have lost its brakes, or hit something, and that a fatality would have resulted. Accordingly Horn concluded that the violation was significant and substantial. Virginia did not impeach this testimony nor did it offer any evidence to rebut it. Hence, within this frame work I find that the violation was significant and substantial (see, *Mathies*, supra.

According to Horn, Terry had told him that after the truck was delivered 3 weeks prior to June 2, he did not check it for safety defects. Also, Horn testified that Adamson III had told him that he drove it prior to its being put in service. Roy Lee Green, a former truck driver for Virginia, testified that he had driven the truck almost every day prior to the inspection, and that it had just one side of a seatbelt. On cross-examination, he stated that he had driven the truck for 3 weeks without a seatbelt. He indicated that he reported the lack of a full seatbelt to Terry who told him that "he would get it straight. But . . . he didn't do nothing about it" (sic) (Tr. Vol II, 224).

Adamson testified that when he drove the truck in early May 1998, when he had purchased it, both halves of the seatbelt were in place. He also testified that he had told Terry to check it out before it was put in service, that a couple of days later, he asked Green, who was driving it, how it was and he said it was okay, that his (Adamson's) son drove it and said it was okay, and that the preshift reports of the truck indicated that it was satisfactory. I accept Adamson's testimony that he neither knew nor reasonably should have known that the left side of the seatbelt was missing on June 2, and prior thereto. However, Virginia did not rebut or

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[2]/ Section 56.14131(a) provides that "[seatbelts shall be provided and worn in haulage trucks."

impeach Horn's testimony that Terry had told him that he did not check it. Nor did Virginia impeach or rebut Green's testimony that he had reported the lack of a complete seatbelt to Terry, but that the latter did not do anything about it. Within the context, I find that Virginia's actions constituted aggravated conduct, and hence I find that the violation resulted from its unwarrantable failure (see *Emery*, supra).

I accept Horn testimony, inasmuch as it was not impeached or rebutted, that if the truck would have rolled over, the operator would have been thrown out of the cab, due to the lack of seatbelt. Accordingly, I find that the gravity of the violation was relatively high. Also, for the reasons set forth above, I find that the level of Virginia's negligence was relatively high. Considering also the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $600.00 is appropriate.

IX. Order No. 7711674

According to Horn, on June 2, he observed two compressed gas cylinders that were standing unsecured in a scale house. He indicated that although they were capped, they could fall over and injure someone. He issued an order alleging a violation of 30 C.F.R. § 56.16005 which requires that compressed gas cylinders be secured in a safe manner.

Virginia did not rebut or impeach Horn's testimony, and accordingly, I accept it. I thus find that Virginia did violate section 56.16005, supra.

According to Horn, Adamson III told him that he had placed the cylinders inside the scale house, and that he knew that instead they should have been placed in a storage area, and that he knew he was at fault. Also, according to Horn's testimony, Virginia had been cited in the past for this same type of violation. Virginia did not rebut or impeach this testimony, and I accept it. Within this framework, I find that the violation was as the result of Virginia's aggravated conduct and thus constituted an unwarrantable failure (see *Emery*, supra).

I find that the gravity of this violation was only moderate, inasmuch as Horn testified that should the cylinders fall over as a consequence of not having been secured, and it could cause an injury that would that would result in restricted duty. For the reasons set forth above, I find that the level of Virginia's negligence to have been relatively high. Considering the remaining factors set forth in section 110(i), supra, I find that a penalty of $300.00 is appropriate.

X. Citation No. 7711685

According to Horn, on June 10, 1998, he provided the driver of the R-22 Euclid haul truck with a calibrated noise dosimeter, and the driver kept it on for 8 hours. Horn testified that the dosimeter indicated, after proper conversion from percentage to decibel, a decibel reading in excess of 90. Horn issued a citation alleging a violation of 30 C.F.R. § 56.05050, which, in essence, provides that exposure for 8 hours to more than 90 decibels is not permissible. Virginia

did not rebut or impeach Horn's testimony, and accordingly, I accept it. I find on the basis of this testimony that Virginia did violate section 56.05050, supra.

According to Horn, continued exposure of the truck driver to this level of noise over a long period of time would cause the employee to start to loose his hearing, and that this injury is permanently disabling. Virginia did not rebut or impeach this testimony, and accordingly, I accept. Within this framework I find that the violation was significant and substantial (see, *Mathies*, supra.

I find that there is not any evidence that Virginia's negligence was more than moderate. Since the violation could have resulted a miner losing his sense of hearing, I find that the level of gravity was relatively high. Considering the remaining factors in section 110(i) of the Act, I find that a penalty of $300.00 is applicable.

XI. Order No. 7711680

Horn testified that in his inspection, he had noted various safety defects that should have been observed in an examination, and corrected. He noted that it was obvious that guards, a berm, and a stopping block were missing. He concluded that proper examinations were not being performed, and issued an order alleging a violation of 30 C.F.R. § 56.18002(a) which, as pertinent, requires that each shift the operator shall examine each working place ". . . for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate actions to correct such conditions."

Inasmuch as I previously found that these violative conditions did exist (I.(B.)(1.), II, III, V, VI, *infra*), I conclude that Virginia did violate section 56.18002, supra. Further, since the failure to conduct proper examinations resulted in not correcting violative conditions that were found to be significant and substantial (I.(B.)(2.), II, *infra*), I find that the violation herein was significant and substantial.

According to Horn, Adamson III told him that ". . . examinations had not been conducted in a while, and that they just let it slide" (Tr. Vol. III, 20-21). Inasmuch as Virginia did not impeach, rebut, or contradict this testimony, I accept it and find that within this framework, Virginia's conduct amounted to an unwarrantable failure (see *Emery*, supra).

Since the violation herein was significant and substantial, I find that the level gravity was relatively high. Also, as discussed above, I find that the level of negligence was relatively high. Taking into the account the remaining factors set forth in section 110(i) of the Act, supra, as discussed above, I conclude that a penalty of $600.00 is appropriate.

XII. Order No. 7711681

Horn testified that because he had observed several safety defects on mobile equipment, in his inspection on June 2, he concluded that if a preshift examination had been done properly, the defects would not have existed. He issued an order alleging a violation 30 C.F.R. § 56.14100 which requires, in essence, the inspection of mobile equipment prior to its being placed in operation on a shift. As discussed above (VII, VIII, *infra*), the record establishes the existence of the following safety defects on mobile equipment: inoperable horns and lack of seatbelts. Due to the existence of safety violations on various mobile equipment, I conclude that it was more probable than not that a proper preshift examination had not been performed. I thus find that Virginia did violate section 56.14100, supra. Essentially for the reasons stated above (VII, VIII, *infra*), inasmuch as the various safety defects were found to be significant and substantial, I conclude that the violation herein of the failure to inspect, was also significant and substantial.

The record does not contain sufficient facts to predicate a finding that Virginia's conduct rose to the level of aggravated conduct. Horn referred to the fact that Terry and Adamson III were aware of the standard at issue, and had ignored the various defects cited. Since the gravamen of the violation relates to the performance and thoroughness of the inspection, evidence of the failure to correct violative conditions is not relevant regarding the issue of negligence relating to a proper preshift examination. Within this context, I find that it has not been established that Virginia's actions constituted an unwarrantable failure.

I find that the gravity of this violation was high, but that the level of negligence was no more than moderate. Taking into the account the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $300.00 is appropriate.

XIII. Order No. 7711683

According to Horn, on June 4, 1998, a 1978 Ford welding truck was being operated on the subject site by an employee of the mine. Horn indicated that the manually operated horn on this truck was not operable. He issued an order alleging a violation of section 56.14132(a), supra.

According to Adamson, the pickup truck was owned by Terry who used it to commute to the work site. Adamson stated that the truck contained a tool box, torches, and gauges that belonged to him (Terry). Adamson stated that the welder was usually transported with a fork lift, and that the only time it was in Terry's truck was when, on a couple of occasions, Terry borrowed it. Adamson testified that the truck was not considered Virginia's quarry equipment, and was never intended to transport quarry equipment around the site, and that specifically it was never intended for Terry to put the welder or company tools in the truck, or for him to use his truck for other than personal transportation.

However, Adamson indicated that he did not know which set of tools or gauges in the

truck were his or Terry's. Also, Virginia did not impeach or rebut Horn's testimony that on June 4, the truck was being operated by an employee of Virginia. Nor did Virginia impeach or contradict Horn's testimony regarding the inoperable condition of horn. Accordingly, I find that it has been established that Virginia did violate section 56.14132(a), supra.

I find that Horn's opinion reasonable that Terry, as foreman, should have known that his truck was being used on the site. However, although on June 2, Virginia had been cited for a violation of the section 56.14132(a), supra, a different piece of equipment was cited. There is no evidence as to how long a period the horn had been inoperable, and for how long a period Virginia knew or should reasonable have known that it was inoperable. Within this context, I find that it has not been established that Virginia's action herein constituted aggravated conduct, and thus the violation was not as a result of its unwarrantable failure.

There is insufficient evidence in the record regarding the path of travel normally taken by the truck, the traffic pattern in the area, any pedestrian traffic in the area, and the nature of the roadway over which it travels. I thus find that it has not been established that the gravity of the violation was more than low. For the reasons set forth above, I find that Virginia's negligence was no more than moderate. Considering the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $200.00 is appropriate.

XIV. Order No. 7711684

Horn testified that he asked the operator of the 1978 Ford truck to back up a slight incline, and set the parking brake, but that the vehicle rolled. Virginia did not impeach or rebut Horn's testimony. I thus find that it has been established, as alleged by Horn, in the order that he issued, that Virginia did violate section 56.14101(a)(2), *supra*, which, as pertinent, provides that mobile equipment shall be provided with a service brake system ". . . capable of . . . . holding the equipment with its typical load on the maximum grade it travels."

There is no evidence as to how long a period prior to June 4, the parking brake had been defective. Within this context, and for the reasons stated above, *infra*, I find that it has not been established that Virginia's conduct herein amounted to an unwarrantable failure (see *Emery*, supra).

According to the uncontradicted and unimpeached testimony of Horn, as a consequence of the violative condition, the truck could hit a person or roll over a cliff causing an injury resulting in loss of work days or restricted duty. I find that the gravity of this violation was moderate. For the reasons set forth above, I find that it has not been established that Virginia's negligence was more than moderate. Considering the remaining factors set forth in section 110(i) of the Act, I find that a penalty of $200.00 is appropriate.

ORDER

It is **ORDERED** that: (1) The following orders are to be reduced to section 104(a) citations that are significant and substantial: 7711660, 7711661, 7711665, 7711668, and 7711681; (2) the following orders reduced to section 104(a) citations that are not significant and substantial; 7711663, 7711666, 7711667, 7711683, and 7711684; and (3) Respondent shall pay a total penalty of $4,400.00 within 30 days of the date of this Decision.

Avram Weisberger
Administrative Law Judge

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

March 10, 2000

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON,	:	Docket No. WEVA 2000-40-D
Complainant	:	MORG-CD-2000-01
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.,	:	Mine ID 46-01456
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, Arlington, Virginia, for Applicant;
Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., Morgantown, West Virginia, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Gary Munson pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Eastern Associated Coal Corporation (EACC) to reinstate Munson as an employee pending completion of a formal investigation and final decision on the merits of a discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA). A hearing on the application was held in Morgantown, West Virginia on March 7, 2000. For the reasons set forth below, I grant the application and order Mr. Munson's temporary reinstatement.

Summary of the Evidence

Mr. Munson had been employed by EACC for 28 years. For the past three years he held the position of control room operator and at the time of his discharge he was working the afternoon shift. By all accounts, Munson was a good worker and there were no complaints about his work performance. Throughout his tenure with EACC, Munson was active in bringing complaints to management about safety and general labor concerns. There is no dispute that he frequently raised safety concerns at, or in conjunction with, weekly safety meetings held by his immediate supervisors, foremen Stanley Eddy and Donald Livengood.[1] Munson testified that when his safety concerns were not addressed in a timely fashion, he would call the Secretary's Mine Safety and Health Administration (MSHA) on a confidential complaint line, the "code-a-phone". He testified that he frequently told management that he had phoned complaints to MSHA and would continue to do so when his complaints were not addressed. Munson and a fellow miner, Roger Hornick, also testified that Munson raised safety concerns with Frank Peduti, EACC's manager of preparation and electrical engineering. Mr. Peduti occasionally called meetings to discuss certain issues. Munson and Hornick testified that Peduti indicated that he did not like "code-a-phone" complaints and preferred that such matters be handled in house. Peduti denied animosity toward safety complaints because it was management's obligation to address such concerns and EACC wanted to do so beyond the letter of the law. EACC's management witnesses denied knowledge of Munson's "code-a-phone" complaints and noted that he had never raised safety concerns through the formal grievance process. Munson testified that, until recently, he had been unaware that he could file a grievance on a safety complaint.

Munson was aware that he could file grievances related to labor issues and EACC records showed that, for calendar years 1998 and 1999, he had filed 22 grievances over various labor matters, substantially more than any other miner at the preparation plant. Munson testified that his foremen had expressed concerns about his grievances and safety complaints, stating that they could result in the plant being shut down. Munson also testified that he was authorized to accompany MSHA and state mine inspectors when a member of the safety committee was not available and that he had done so on approximately 12-15 occasions in the past 10 years. Because the inspections started on the day shift, his involvement generally lasted only an hour or two, during which he pointed out safety problems that may have lead to citations being issued. EACC introduced records showing that Munson was recorded as accompanying an inspector only one time since December 1, 1994.

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[1] As control room operator, Munson was required to start work 15 minutes earlier than other shift workers and was frequently unable to attend the safety meetings held at the beginning of the shift. The foreman would generally speak individually with Munson after the meeting, giving him a synopsis of the meeting and an opportunity to provide input.

The developments that lead to Munson's discharge commenced on Thursday, November 18, 1999, when he told his foreman, Stanley Eddy, that he was going to purchase a "four wheeler" the following day and that he might be late for work. He was told to come in if he was going to be 30-60 minutes late. A miner could report tardy by up to 60 minutes without significant repercussions. Munson encountered delays in purchasing and registering the vehicle and did not report to work on November 19, 1999. He was not scheduled to work that Saturday or Sunday and had applied for vacation days[2] for Monday through Wednesday, November 22-24, 1999. The mine was to be closed for the Thanksgiving holiday period on November 25 and 26, 1999. In accordance with required procedure, his application had been submitted prior to January 1999 and decisions were made at that time based upon the number and seniority of persons applying for vacation on a particular day. His request for vacation was approved for November 22 and 24, but was denied for the 23rd, and he was given a form noting the decisions made on his vacation requests. Munson, like many of the employees at EACC, was an avid deer hunter and had taken off that first week of the firearm deer season, referred to as "gun week", for several years. He inadvertently had referred to his 1998 vacation leave schedule, mistakenly thought that he had also been granted a vacation day on November 23, 1999, and did not come in to work. On the 18th, Stanley Eddy had inquired who was going to be working the following short Thanksgiving week, and Munson indicated that he had scheduled days off. The fact that his vacation request for the 23rd had been denied was not raised at that time. On or around November 24, his foreman called him and asked that he sign up to work the holiday on Friday, November 26, 1999. Despite the opportunity for triple pay, he declined, but did agree to work the following day, Saturday, and otherwise worked his normal schedule the following week. Neither Stanley Eddy, nor any other management employee said anything about his absences until the following Friday. At the beginning of his shift on December 6, 1999, he was called to a meeting and served with a letter advising him that he was being terminated for missing two consecutive work days without a viable excuse.

The formal policies for addressing absenteeism at EACC are found in the National Bituminous Coal Wage Agreement of 1993. Article XXII, Section (i) "Attendance Control" provides in pertinent part:

> (4) Absences of Two Consecutive Days
> When any Employee absents himself from his work for a period of two (2) consecutive days without the consent of the Employer, other than because of proven sickness, he may be discharged. * * *

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[2] With his seniority level, he was entitled to specified numbers of "graduated" and "floating" days off. In addition, he was entitled to 5 "personal days" off, which he did not need management's permission to take. It appears that as of November 19, 1999, Munson had at least one personal day remaining.

Robert Areford, EACC's manager for employee relations at the time, testified in response to a question about the significance of the word "may", that termination was "not automatic." The term "two (2) consecutive days" has apparently been interpreted to mean two consecutive scheduled work days. Such that, in Munson's case, even though there were intervening weekend days and one scheduled vacation day, the 19th and 23rd were considered consecutive days.[3]

Subsection (2) describes a procedure to address employees who accumulate single days of unexcused absences. An employee who accumulates six single days of unexcused absences in a 180-day period or three single days of unexcused absences within a 30-day period is designated an "irregular worker" and is subject to "progressive steps of discipline". If an "irregular worker" has an unexcused absence within 180 days of his last unexcused absence he may be given a written warning, if another unexcused absence occurs within 180 days of the warning, he may be suspended for 2 working days and if another unexcused absence occurs within 180 days of the suspension, he may be suspended with intent to discharge.

In addition to these formal policies, EACC also applied an informal, discretionary procedure referred to as "last chance agreements". Under this procedure, an employee who was subject to discharge would be given a "last chance" to retain his job, by entering into an agreement to maintain required attendance and possibly take other actions to address the cause of his absenteeism. Failure to comply with the agreement would result in discharge. EACC's officials testified that "last chance agreements" were employed when there were "extenuating circumstances" surrounding the absences. Examples of extenuating circumstances offered by Respondent were situations where an employee had misunderstood what vacation day requests had been disapproved because he was "probably illiterate"; an employee misunderstood the consequences of consecutive absences because he was "considered developmentally slow"; an employee had a substance abuse problem related to the death of his wife and needed only a short period of employment to qualify for retirement; and, an employee misunderstood the pre-scheduling policy, had vacation days available to take and needed only one more year to qualify for retirement." EACC officials testified that they had grown increasingly dissatisfied with such agreements because they often failed to correct the attendance problem. Those officials presently with the authority to enter into last chance agreements, have not done so, but stated that such an agreement would be available in a particular case, depending upon the circumstances.

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[3] Stanley Eddy, Munson's foreman, testified that he was unaware of that interpretation and initially did not consider the absences to have been on consecutive work days, a view that also may have been held by Munson's other foreman, Donald Livengood. When Munson attempted to raise that issue at a subsequent meeting, it was dispensed with summarily by both management and union representatives. The issue of whether the considerably more harsh rule applicable to consecutive days rather than the single day rule applied in such circumstances had apparently been arbitrated in the past. Whether that decision was subject to further review is unknown. There was no explanation of why unexcused absences that occurred several days apart were more serious or disruptive because there were vacation, as opposed to work, days intervening.

EACC records indicated that approximately 38 last chance agreements had been entered into between December 14, 1980 through February 4, 1999. A summary of the agreements indicated that the underlying reason for the disciplinary action was generally absenteeism. On seven occasions the absenteeism was related to a substance abuse problem. Sixteen of the agreements involved unexcused absences on two consecutive days and the discipline imposed in conjunction with the last chance agreement ranged from a 1-day suspension to an 18-day suspension. In some instances, it appears that employees were allowed to substitute vacation or personal days in lieu of actual suspension.

After Munson was given the notice letter, a second meeting was held to address his challenge to the termination. The meeting is referred to as a "24-48 hour meeting" and representatives of the union and management discussed the reason for the proposed action and Munson's explanation for his absences. As noted previously, the question of whether the two consecutive day provision applied was raised but summarily dismissed. Munson testified that he offered to substitute vacation days for his unexcused absences and requested and expected to receive a last chance agreement. His requests were rejected and he was discharged. Munson testified that Robert Areford stated that there were no more last chance agreements and that they were going to make an example of him. Areford denied making any statement about making an example of Munson. The union representatives stated that the decision would be arbitrated, the standard practice. However, when EACC attempted to schedule the arbitration proceeding the next day, it was advised that the union had withdrawn the arbitration request. Frank Peduti testified that the virtual lack of defense of Munson by the union representatives struck him as "odd" and that he found the union's withdrawal of the arbitration request "a shocker."

Following the conclusion of the 24-48 hour meeting, several attempts were made to try and "work something out" for Munson, in order to avoid the proposed discharge. The union's District President contacted Mr. Hibbs 3-5 times. Complainant introduced a statement by the District President wherein he related that Hibbs had told him that "Munson's case was not about absenteeism [] there was no way they would settle the case [-] Munson was well-known to call the code-a-phone [and that] Munson was not well liked by himself and others." Stanley Eddy talked to Mr. Peduti in an effort to obtain a second chance for Munson. He was informed, however, that last chance agreements were no longer available. Mr. Hibbs testified that he never made a decision regarding a last chance agreement for Munson because it was never proposed. He also stated that if it was up to him, there would be no more last chance agreements because they didn't work. Throughout the discharge process, specifically the meetings of December 6 and 9, 1999, neither Munson, who testified that he was somewhat in shock, nor anyone on Munson's behalf, raised a claim of discrimination or otherwise complained that his discharge was motivated by his making of safety complaints. Roger Hornick testified that Stanley Eddy and Donald Livengood told him that it was Munson's grievances and safety complaints that got him "in trouble" and that he was "done" even before he was completely discharged.

Following his discharge, Munson prevailed in an administrative claim for unemployment compensation benefits. The administrative law judge who decided the claim held that EACC had failed to prove that Munson had been discharged for an act of misconduct.

Munson filed a complaint of discrimination with MSHA on January 4, 2000, alleging that he was discharged and was subject to disparate treatment when he was not given a last chance agreement because he had made numerous safety complaints to his immediate supervisors and had informed management that he had made code-a-phone complaints to MSHA when his safety complaints were not satisfactorily addressed.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987) *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Secretary on behalf of Bussanich v. Centralia Mining Company,* 22 FMSHRC ___ (February 22, 2000) at p. 5.

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (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. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

There is some dispute as to the extent of the protected activity engaged in by Complainant. However, there is little question that he engaged in such activity and that his activity was known to managers at EACC. A complaint made to an operator or it's agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act. There is also no dispute that he was subjected to adverse action, in that he was discharged on December 6, 1999. Complainant has also offered evidence that EACC's managers were hostile to his complaints and that that hostility lead to rejection of his offers of compromise and discharge. The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

While Munson claims that he made complaints within the "several months" prior to his discharge, and introduced limited evidence that EACC managers were aware of and motivated by knowledge of his code-a-phone complaints, he does not present a classic case of an operator's immediate adverse reaction to a specific safety complaint. He relies on evidence of statements made indicating unlawful motivation by EACC's managers and disparate treatment. In essence, he contends that EACC was intent on discharging him at the first opportunity -- that opportunity arose when he mistakenly took the 23rd of November off after having missed work on the 19th — and that in the absence of unlawful motivation, he would have been allowed to substitute vacation or personal days for his absences, and/or that he would have been given a last chance agreement rather than being discharged.

There is clearly enough evidence to demonstrate that his claim of discrimination is not frivolous. He was uniformly acknowledged to be a good worker who had no performance or significant attendance problems. Last chance agreements had been entered into with at least 16 other employees who had unexcused absences for 2 or more consecutively scheduled work days. Other employees likely with more serious absenteeism records[4] had also been offered last chance agreements. EACC's explanation of the status of "last chance agreements" is somewhat inconsistent, as is its explanation of whether or not a last chance agreement was considered for Munson. When Stanley Eddy attempted to intervene and obtain a "second chance" for Munson, he was told by Mr. Peduti that last chance agreements were no longer available. Mr. Hibbs testified that, they were available on a case-by-case basis, though if it was up to him, they would not be. Mr. Areford, likewise testified that he would "never say never" to the availability of last chance agreements. Mr. Hibbs, who would have had the initial authority to approve a last chance agreement for Munson, testified that he never made such a decision because he was never asked to. He acknowledged, however, that the union's District President had contacted him several times in an attempt to secure some relief for Munson. Munson, of course, testified that he specifically requested a last chance agreement at the meetings held in conjunction with his discharge. As Richard Eddy's statement notes, it appeared that Munson met all of the criteria for such an agreement, because he had a good work record, little absenteeism and had made a mistake, i.e. he compared favorably to those employees who had been afforded last chance agreements in the past.

On the other hand, EACC has presented credible evidence that it's view toward last chance agreements was changing for legitimate business related reasons and that Mr. Hibbs, who took over as operations manager in August of 1999, had a decidedly more negative view towards such agreements than his predecessor. Whether EACC's failure to offer Munson a last chance agreement was motivated, in part by animosity toward his protected activity and, if so, whether EACC would have taken the same action in the absence of unlawful motivation pose more difficult questions than whether Munson's complaint is frivolous. These questions cannot, and should not, be answered at this stage of the proceedings. The investigation of Munson's complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.* 920 F.2d at 744. Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Id.* 920 F.2d at 748 n.11.

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[4] The wage agreement provisions described above provide that to reach the discharge point for non-consecutive days of unexcused absences, the employee would have had to have been designated as a "irregular worker" and then missed three additional work days without a viable excuse.

I find that Munson's complaint is not entirely without merit and conclude that his discrimination complaint has not been frivolously brought.

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Eastern Associated Coal Corporation is **ORDERED TO REINSTATE** Mr. Munson to the position that he held immediately prior to December 6, 1999, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.[5]

Michael E. Zielinski
Administrative Law Judge

Distribution:

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Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., 5000 Hampton Center, Suite 4, Morgantown, WV 26505 (Certified Mail and facsimile transmittal)

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[5] There was evidence submitted at the hearing that EACC had restructured it's workforce since the time Munson was discharged. If EACC contends that Munson would no longer have held his former position had he remained employed, it should attempt to reach agreement with Munson on the position to which he will be reinstated. If the parties are unable to reach agreement EACC may file an appropriate motion seeking relief from this Order.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
March 15, 2000

JIM WALTER RESOURCES, INCORPORATED,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. SE 99-6-R
v.	:	Citation No. 7665505; 9/23/98
	:	
SECRETARY OF LABOR,	:	Docket No. SE 99-7-R
MINE SAFETY AND HEALTH	:	Citation No. 7665506; 9/23/98
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 99-8-R
	:	Citation No. 7665507; 9/23/98
	:	
	:	Docket No. SE 99-9-R
	:	Citation No. 7665508; 9/23/98
	:	
	:	Docket No. SE 99-10-R
	:	Citation No. 7665512; 9/24/98
	:	
	:	Central Supply Shop
	:	Mine ID 01-02515
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 99-66
Petitioner	:	A.C. No. 01-02515-03521
v.	:	
	:	Central Shop
JIM WALTER RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

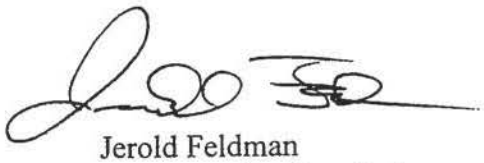
DECISION APPROVING SETTLEMENT ON REMAND

Before: Judge Feldman

On January 31, 2000, the Commission remanded these matters for assessment of the appropriate civil penalties after the Commission determined the Central Supply Shop operated by Jim Walter Resources, Inc. (JWR) is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U. S.C. § 801 et seq. (1994) (the Mine Act). 22 FMSHRC 21 (January 2000). Specifically, the Commission concluded JWR's Central Supply Shop is a "coal or other mine" as contemplated by section 3(h)(1) of the Mine Act, 30 U. S.C. § 802(h)(1).

In response to the Commission's decision, on February 28, 2000, the Secretary filed a Motion to Approve Settlement wherein JWR agreed to pay the $55.00 civil penalty initially proposed by the Secretary for each of the three non-significant and substantial (non-S&S) citations pertaining to JWR's Central Supply Shop.[1] I have considered the representations 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 Jim Walter Resources, Inc., pay a civil penalty of $165.00 in satisfaction of the three citations in issue within 45 days of this order, and, upon receipt of timely payment, the contest proceedings in Docket Nos. SE 99-8-R, SE 99-9-R and SE 99-10- R, and the civil penalty proceeding in Docket No. SE 99-66, **ARE DISMISSED**.[2]



Jerold Feldman
Administrative Law Judge

Distribution:

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/mh

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[1] The citations are Citation Nos. 7665507, 7665508 and 7665512.

[2] The Secretary initially proposed a total civil penalty of $440.00 for eight citations in Docket No. SE 99-66. The initial decision in Docket No. SE 99-66 imposed a civil penalty of $275.00 for five citations related to JWR's Central Machine Shop. 21 FMSHRC 495 (May 1999) (ALJ) (corrected by Order issued June 7, 1999). The $275.00 civil penalty for these five citations, that included the two citations contested in Docket Nos. SE 99-6-R and SE 99-7-R, has been paid. The additional $165.00 civil penalty JWR now has agreed to pay for the remaining three citations in Docket No. SE 99-66 will result in payment of the total $440.00 civil penalty initially proposed by the Secretary.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 17, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-248-D
on behalf of GRANT NOE, Jr.	:	BARB CD 99-07
Complainant	:	
v.	:	
	:	
J & C MINING, L.L.C. AND	:	
MANALAPAN MINING CO., INC.,	:	No. 1 Mine
Respondents	:	Mine ID No. 15-17707

DECISION

Appearances: Brian W. Dougherty, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Complainant;
Susan Lawson, Esq., Lawson & Lawson, Harlan, Kentucky, and
Richard D. Cohelia, Evarts, Kentucky, on behalf of the Respondents.

Before: Judge Melick

This case is before me upon the Complaint by the Secretary of Labor, on behalf of Grant Noe, pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act." These proceedings have been bifurcated and therefore have been limited at this stage to the issue of liability. The Secretary alleges in her complaint that J & C Mining Company , LLC (J & C) violated Section 105(c)(1) of the Act on March 2, 1999, when Noe was purportedly the subject of a constructive discharge after he had engaged in protected activities on December 16, 1998 and on January 19, 1999, and engaged in a protected work refusal on March 2, 1999. (Secretary's Reply Brief page 5)[1]. She seeks as restitution only

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[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and

damages for the alleged constructive discharge on March 2, 1999. Manalapan Mining Company Inc., (Manalapan) has been joined as a successor-in-interest to J & C.

Background

J & C operated the No. 1 Mine from 1997 to May 1, 1999, when it was acquired by Manalapan. During relevant times, J & C operated two production shifts and one maintenance shift each day for five days a week. It employed 13 to 14 miners on each of the first and second production shifts and six miners on the third shift. J & C also frequently operated overtime shifts on Saturdays for coal production or dead work. Four to six miners were typically assigned for such deadwork and the full crew was typically assigned for overtime production.

J & C operated a bridge hauling system which dumped onto a belt. The mine had as many as four underground beltheads and four bridges operating at one time. The production shifts had four bridge operators and two beltmen. There was a constant problem with rocks clogging and stopping the belt. It was therefore important to have a beltman assigned at the beltheads to prevent rocks from causing belt shutdowns.

In early 1999, J & C was retreat mining in the main section. As it progressed toward the surface, three of the beltheads were eliminated. Early in March 1999, they were ready to move to the new panel. It took three shifts to move the belthead. Once the mining equipment was moved to the new panel after March 8, 1999, two of the four bridges were temporarily removed until the advance mining moved deep enough to return them to production. With the removal of the two bridges, two additional qualified men (the two bridge operators) were then available to operate several different types of equipment, perform dead work and watch the belts until their bridges were placed back into production.

Noe had been working as a beltman on the first shift from September 1997 to March 2, 1999. His main duties were to remain at the beltheads and remove rock from the belt. On March 1, 1999, Mine Foreman Jesse Saylor met with Noe in the mine office and stated that he needed someone to work the third shift for two or three weeks because third shift miner, Roger Ramey had been injured. There is no dispute that Ramey had in fact been injured and was unable to work. Noe responded that he did not want to work on the third shift. In this regard he explained at hearing that he did not want to leave his family alone and that third shift foreman Jerry Polly was hard to work for, was an unsafe foreman and that he did not want to work for him.

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potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

Saylor ended the conversation by instructing Noe to report the next day at his regular first shift assignment.

Noe reported for work on the first shift the next day as directed. At the end of the shift Saylor again called Noe into the mine office. Also present in the office at that time was second shift foreman George Saylor and section foreman Carl Runyon. Jesse Saylor again asked Noe to transfer to the third shift. Noe refused, and Jesse Saylor then offered him a $.50-cent per-hour raise to work the third shift. According to Noe he refused, explaining that if he went to the third shift and "got hurt again they would not pay me [compensation]." Jesse Saylor then informed Noe that the third shift assignment was all that J & C Mining had to offer him and gave Noe the option of working the third shift or quitting. Noe informed Saylor that he could not quit but that he would not work the third shift. Saylor stated that "it was either third shift or go home." Noe asked Saylor whether that meant he was fired. Saylor confirmed that Noe was fired. Noe then turned in his equipment and uniforms as requested by Saylor.

According to George Saylor, Jesse Saylor asked Noe at this meeting to help him out for a couple of weeks. Noe responded "I'm not going on no God damn third shift" and when Jesse Saylor told Noe "that's all I got, it's either that or go home," Noe "exploded."

The Secretary argues that when Noe was fired by Jesse Saylor at the March 2, 1999, meeting, he was constructively discharged. She maintains that his refusal to transfer to the third shift was based on a reasonable and good faith belief that to do so would have been hazardous.[2] *See Miller v. FMSHRC*, 687 F.2d 194, 195-96 (7th Cir. 1982). It is now the well established law that a constructive discharge is protected if conditions faced by the miner (in this case by Noe's transfer to the third shift) are so intolerable that a reasonable person would feel compelled to resign. *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988).

Constructive discharge cases have been analyzed by the Commission by first determining whether the miner engaged in a protected work refusal, and then determining whether the conditions faced by the miner constituted intolerable conditions. *Secretary on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 268 at 272-81 (March 1999); *Secretary on behalf of Nantz v. Nally & Hamilton Entreprises Inc.*, 16 FMSHRC 2208 at 2210-13 (November 1994). The Act grants miners the right to complain of a safety or health danger or violation , but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. In order to be protected, work refusals must be based upon the

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[2] While the Secretary argues in her post hearing briefs that Noe quit on March 2, 1998, also because of prior adverse actions based on earlier protected activities, the record does not support her argument. At hearings, Noe clearly articulated the reasons he quit and did not mention in this regard any of these alleged prior adverse actions as having any part in this decision. Under these circumstances the Secretary cannot properly assert that any of the prior alleged adverse actions played any role in Noe's decision to quit. Accordingly the Secretary's argument in this regard is rejected.

miner's "good faith, reasonable belief in a hazardous condition." *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982).

The issue then is whether Noe, in refusing to transfer to the third shift, held a good faith and reasonable belief that it would have been hazardous and then whether conditions on the third shift were so intolerable that a reasonable person would have felt compelled to resign. Noe testified that he explained to Jesse Saylor at their meeting on March 1, 1999, his reasons for refusing the transfer. This testimony is set forth in the following colloquy at hearing:

Q. What did you tell Jessie Saylor at that time with regard to the third shift transfer?

A. I told him I didn't want to go on third shift because I didn't want to leave my family alone.[3] You know, I was scared of where I lived at. And Jerry Polly is hard to work with. Because to me, I thought he was an unsafe worker and I didn't want to work with him.

Q. And why did you consider him to be unsafe to work for?

A. Well, the time I was there I know of at least six people that had been in hurt and one died. They saved him two or three time before they got him out of the mine. That scared me.

Q. Who do you know that was hurt on third shift? What are their names?

A. Glen Brock was.

Q. And he's the one who died three times?

A. That's why they say, sir.

Q. And who else do you know that was hurt?

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[3] It was proffered at hearing that Noe suffers from a condition known as "obsessive compulsive disorder" and that this condition was related to his concerns about leaving his family at night. (Tr. 189).

A. Roger Ramey was hurt twice.

Q. Okay. Who else?

A. Cole Colinger (phonetic) was hurt. And I think there's another one, but I can't remember his name. I'm pretty sure.

(Tr. 111-112)

When asked to explain these injuries and foreman Polly's involvement if any, Noe testified as follows:

JUDGE MELICK: And what kind of injuries did each receive?

BY ATTORNEY DOUGHERTY: Let's start with the first one. Who was the first one. Who was the first one?

A. Glen Brock, he was electrocuted.

JUDGE MELICK: He was electrocuted?

A. Yes, sir.

JUDGE MELICK: And what did Mr. Polly have to do with that electrocution?

A. Well, he was the foreman, you know, so he was there.

JUDGE MELICK: Well, do you know if he had anything to do with the injuries?

A. No, sir I don't.

JUDGE MELICK: Who was the second one?

A. Roger Ramey.

JUDGE MELICK: Ramey?

A. Yes, sir.

JUDGE MELICK: What kind of injuries did Mr. Ramey receive?

A. First time, I believe, he cut his little finger off.

JUDGE MELICK: And what did Mr. Polly have to do with that injury, if anything?

A. He was just there, also.
JUDGE MELICK: He happened to be there?

A. Yes sir.

JUDGE MELICK: And what was the third injury?

A. Cole Colinger. He was cut - - - his arm with a piece of rock, and they thought he was going to lose his arm for a while, but he didn't.

JUDGE MELICK: All right. And what did Mr. Polly have to do with him being cut by a rock, if anything?

A. He as roof bolter man. He should have made it safer. He should have had a jack there for him to see it.

JUDGE MELICK: Mr. Polly was a roof bolter?

A. No, he was a box cutter. The other fellow was a roof bolter man.

JUDGE MELICK: All right. Are there any other injuries working for Mr. Polly?

A. No, just those three, but two of them were hurt twice.

JUDGE MELICK: Two of them were hurt twice?

A. Yes, sir. Roger Ramey and Glen Brock.

JUDGE MELICK: Do you know if any other injuries were the result of working for Mr. Polly?

A. No.

(Tr. 113-116).

At the second meeting with Foreman Jesse Saylor on March 2, 1999, Noe provided a third reason for not wanting to transfer to the third shift. This was explained in the following colloquy:

Q. And what did you [mean] by that with regard to your compensation and going to third shift?

A. Well, [if] I went on third shift and got hurt again, they would not pay me. They didn't pay me that first time.

Q. So you were concerned that there was a likelihood you may be injured on third shift and that if you were, that compensation would be denied again?

A. Yes, sir.

(Tr. 120).

Noe testified that after stating his reasons for not wanting to go to the third shift the following conversation transpired:

A. He said, you have no choice but to quit. And I told him, Jessie, I can't quit. I said, I can't quit. He said that's all I got for you. I said, well I'm not going to. He said, that's all I got. I looked at him, I said, I'm fired now? He said, yes. I asked him, I said do you want my rescuer? He said, I'll take your rescuer and uniforms. I set my rescuer - - - laid them both beside him. I said, you f'ed me, Jessie? He said no.

(Tr. 120-121).

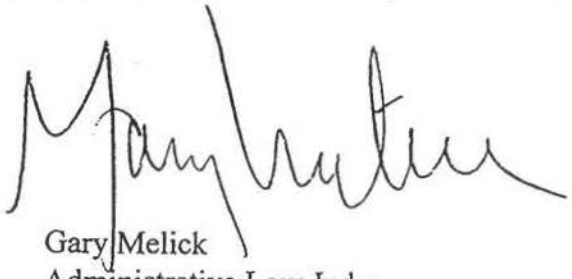
Within this framework of evidence I find that Noe had neither a good faith nor reasonable belief that it would have been hazardous to transfer to the third shift. The first and apparently most important reason he cited for not wanting to transfer, i.e., that he did not want to leave his family alone because he lived in an unsafe area, is unrelated to any mining hazard. His desire not to work with Foreman Polly because Polly was "hard to work with," is likewise not a reason related to any mining hazard.

Finally, Noe's vague claim that third shift Foreman Polly was an unsafe worker (and that Noe would therefore more likely be injured on the third shift) has no credible record support. While Noe speculates that Polly was unsafe because three miners had been injured while working on his shift he concedes that Polly had not caused any of the injuries (Tr. 165-166). Indeed, the Complainant has failed to provide any specific evidence that Polly had anything to do with any of those injuries or that in fact there were more injuries on his shift than on other shifts. The very fact that Noe has asserted these facially unsupported claims in itself demonstrates the lack of a good faith reasonable belief.

Under the circumstances I do not find that the Secretary has sustained her burden of proving that Noe entertained either a reasonable or a good faith belief that a transfer to the third shift would have been hazardous or that the conditions on the third shift were so intolerable that a reasonable person would have felt compelled to resign. The facts do not support a constructive discharge.

ORDER

Discrimination Proceeding Docket No. KENT 99-248-D is hereby dismissed.



Gary Melick
Administrative Law Judge

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 20, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-152-M
Petitioner	:	A.C. No. 35-00023-05520
	:	
	:	Docket No. WEST 99-269-M
v.	:	A.C. No. 35-00023-05522
	:	
	:	Docket No. WEST 99-345-M
MOLALLA REDI-MIX AND	:	A.C. No. 35-00023-05523
ROCK PRODUCTS, INC.,	:	
Respondent	:	Docket No. WEST 99-390-M
	:	A.C. No. 35-00023-05524
	:	
	:	Molalla Redi-Mix

DECISION

Appearances: Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, and Paul A. Belanger, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner;
Douglas Jorgensen, President, MRM, Inc., Molalla, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Molalla Redi-Mix and Rock Products, Inc., ("Molalla"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Portland, Oregon, on February 23, 2000. The stay previously entered in WEST 99-152-M, WEST 99-269-M, and WEST 99-345-M was lifted at that time.

At the start of the hearing, counsel for the Secretary request time for the parties to meet privately because it appeared that they were close to settling all issues. At 9:35 a.m. the hearing reconvened at which time the parties announced that they had indeed settled all issues.

The settlement was read into the record and was confirmed in a joint motion to approve settlement. The terms of the settlement are as follows:

Citation/Order No.	30 C.F.R. §	Penalty
WEST 99-152-M		
4375514	56.14101(a)	$2,275.00
WEST 99-269-M		
7973084	56.14107(a)	595.00
WEST 99-345-M		
4375503	56.4203	1,365.00
4375512	56.14131(a)	1,365.00
4375517	56.14130(a)	3,640.00
4375520	56.18002(a)	VACATE
7973082	56.12028 & 104(b) of Act	6,335.00
WEST 99-390-M		
7973085	56.14107(a)	360.00
7973087	56.14132(a)	595.00
4375233	56.12001	235.00
4375234	56.12001	235.00
	TOTAL	$17,000.00

I have considered the representations and documentation submitted at the hearing and in the joint motion. I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(i) of the Act. The parties agree that Molalla may pay the total penalty in eight payments over a period of two years and that in doing so the penalty will not impair its ability to continue in business.

Accordingly, the motion to approve settlement is **GRANTED**; Citation No. 4375520 is **VACATED**; and Molalla Redi-Mix and Rock Products, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $17,000 as follows: $2,125 shall be paid on or before July 1, 2000, and seven additional payments of $2,125 each shall be paid on or before the first day of each successive calendar quarter starting on October 1, 2000, until the entire $17,000 is paid.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 24, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 97-95
Petitioner	:	A.C. No. 46-01286-03985
v.	:	
	:	Windsor Mine
WINDSOR COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

This civil penalty proceeding is before me based upon a decision by the Commission in this matter, 21 FMSHRC 997 (September 19, 1999), which vacated the decision of Judge George A. Koutras[1] (19 FMSHRC 1694 (October 27, 1997)) that the violation by Windsor Coal Company (Windsor) of 30 C.F.R. § 75.400 was not the result of its unwarrantable failure, and remanded this proceeding for further consideration.[2] Subsequent to the issuance of the Commission's decision, the undersigned conferred with counsel for both parties in a telephone conference call and suggested that the parties attempt to negotiate to settle the issues raised by the Commission's remand. The parties subsequently indicated that they were unable to reach a settlement, and counsel were allowed until January 28, 2000 to file briefs. Pursuant to the parties' request the time to file briefs was extended, and the parties filed their briefs on March 6, 2000.

In its remand, the Commission, directed a reconsideration of the issue of unwarrantable failure. Compliance with the Commission's decision requires analysis of the circumstantial evidence regarding the duration of the cited conditions, along with an analysis of the evidence of record regarding notice of the need for greater compliance efforts, efforts to eliminate the violative conditions, and the danger and obviousness of the cited accumulations. (21 FMSHRC *supra*, at 1004, 1006-1007).

1. Duration

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[1]Judge Koutras is presently retired.

[2]This case was subsequently assigned to me by former Chief Judge Paul Merlin.

On September 19, 1996, MSHA inspector Lyle Tipton inspected the No. 10 belt. The Commission, 21 FMSHRC *supra* at 998, set forth Tipton's observations of the violative conditions, and the description of the violative conditions as set forth in his order as follows:

> Tipton observed an `accumulation of combustible material consisting of float coal dust, ... loose coal spillage, spillage of fine dry loose coal and coal dust in contact with the conveyor belt and bottom roller structure[.]' *Id.* at 1697. Tipton's order states that `the total distance of this 6,000 foot entry containing float coal dust was 3,600 feet' and that spillage of `coal and fine dry loose coal was present under the majority of the bottom belt and in contact with the bottom rollers.' *Id.* The order indicated that Inspector Tipton observed accumulations of float coal dust from the belt drive (227 crosscut) to the 260 crosscut; accumulations of loose coal beneath the majority of the bottom belt and in contact with the bottom rollers; spillage in contact with rollers and visual signs that a roller had heated up at the 254 stopping; an 80-foot long, 1-foot wide, and 1-foot deep spillage at the 248 stopping; a 50-foot long, 1-foot wide, and 1-foot deep spillage at the 268 stopping; a 20-foot long, 3-foot wide, and 2-foot deep spillage at the 275 stopping; and a 10-foot long, 3-foot wide, and 2-foot deep spillage at the 276 stopping. Ex. P-3 at 2. He concluded that the cited conditions `for the most part were being carried as reported in the mine record books and would have taken days to accumulate to the degree described in this action.' 19 FMSHRC at 1698.

Generally, the testimony of miners Cox and Welch corroborated Tipton's opinion that the accumulations developed over a period of several shifts. On the other hand, Porter indicated that in his preshift examination of September 18, he had not observed any hazardous conditions, and that specifically the conditions noted in Tipton's order were not present in his preshift examination made on September 18. Also, there is no specific reference in Windsor's pre-shift and on-shift reports prior to September 19, relating to the violative conditions described in Tipton's order at the following stoppings: 248, 254, 268 and 275.

However, most importantly, as noted by the Commission, (21 FMSHRC *supra* at 1001) the September 19 preshift report showed that the area between crosscuts 227 and 253 needed cleaning. Also, on September 19, the midnight pre-shift report listed accumulations on both sides of stopping 276, but the midnight on-shift report showed that only the right side of the belt was cleaned i.e., "the left side of stopping 276 still needed cleaning by the time the day preshift report was written" (21 FMSHRC *supra* at 1002) I thus find that the preponderance of the evidence establishes that float cut accumulations from crosscut 227 to 260, and accumulations along the left side of the belt at the 276 stopping had existed for at least one shift prior to Tipton's inspection.

2. Notice of the Need for Greater Compliance Efforts.

Windsor, in asserting that it lacked notice of a greater need for compliance, argues that annotations in the pre-shift book reflecting that coal had accumulated and some of the

accumulations remained for several shifts without abatement, does not demonstrate that Windsor was on notice. In this connection, Windsor argues that none of the specific conditions set forth by the Commission 21 FMSHRC *supra* at 1004, were cited by Tipton, and that many of the conditions that were recorded do not amount to violative conditions. Also, Windsor argues that its two-year history of Section 75.400 violations fails to show that it was on notice of a greater need for compliance. In this connection, Windsor refers to the record as establishing that only two-violations, both issued in 1995, were viewed by the Secretary to be the result of indifference or serious lack of reasonable care, that these violations were spread out over 14 miles of belt haulage, that in the three month period preceding the issuance of the order at issue Windsor had received only three section 75.400 violations, and that during the inspection at issue, the 14 mile haulage was inspected, and only one violation was issued.

However, the record establishes that float coal dust existed along 3,600 feet of the 6,000 foot belt in question. Further, 15 to 20 miners worked over a two-shift period to correct the violative accumulations. Hence, I find that, when cited by Tipton, the accumulations were extensive. Considering the extent of the accumulations as well as the history of 98 section 75.400 citations in a two-year period which the Commission considered to be a "high number of violations during this time period" (21 FMSHRC *supra* at 1004, I conclude that, within the framework of evidence in this case, Windsor was on notice that greater efforts were necessary for compliance with Section 75.400, *supra*.

3. Efforts to Eliminate the Violative Conditions.

The Secretary argues, in essence, that Windsor's efforts to correct the violative conditions were incomplete and ineffective. In this connection the Secretary argues that not withstanding Windsor's efforts to clean up the violative conditions, it took nearly 30 employees working over a period of two shifts to abate the violation. On the other hand, I am cognizant of the Commission's findings, that prior to the order's issuance, "....the record contains evidence of Windsor's abatement efforts on the number 10 belt and elsewhere in the mine... ." 21 FMSHRC *supra* at 1005). Further, on the September 18, afternoon shift six miners were assigned to work on the No. 10 belt. The on-shift report indicated that these miners "corrected" conditions at the head to drive, 269 to 272, 238 to 271. The on-shift report for the midnight shift September 19, 1996 indicated that the following areas were cleaned: 282 to 260, 278 and 276. The work assignment record for September 19, 1996 indicates the completion of the following: "cleaning and dusting 265 to 260 crosscut, cleaning 272 to 278, changing 23 rollers, changing bad stands 262 to 263".

4. Danger and obviousness.

Judge Koutras, in addition to finding the existence of a section 75.400 violation, also found that the violation was significant and substantial. He specifically found that "...the presence of float coal dust on a running belt with potential ignitions sources such as hot defective rollers, rollers turning in loose dry coal accumulations, and a belt dragging and/or in contact with loose dry accumulations and/or spillage presented serious potential fire and explosive hazards"

(19 FMSHRC at *supra* 1715). No appeal was taken regarding Judge Koutras' finding of significant and substantial. Accordingly his conclusion in this regard as well as the underlying facts he cited in support of his conclusion becomes the law of the case. However, there is no evidence in the record that Windsor either knew or reasonably should have known of the specific defective hot rollers, and rollers turning in loose dry coal accumulations cited by the inspector.

Within the framework of the above discussed factors, I find that it has been established that the violation herein was as a result of more than ordinary negligence, reached the level of aggravated conduct, and hence constituted an unwarrantable failure (See: *Emery Mining Corporation* 9 FMSHRC 1997 (Dec 1997)).

5. Penalty

Judge Koutras, in his decision, 19 FMSHRC *supra* at 1728 made findings, pursuant to section 110(i) of the Act, regarding the size of Windsor's business and the effect of a penalty on its ability to continue in business, its history of its prior violations, good faith abatement, and gravity. None of these findings have been appealed, and they become the law of the case. Regarding negligence, as discussed above (*infra 4*), I find that the level of negligence was more than ordinary and reached the level of aggravated conduct.

Taking into account all the above factors, I find that a penalty of $2,500.00 is appropriate.

ORDER

It is **ORDERED** that within 30 days of this decision, Windosr shall pay a total civil penalty of $2,500.

Avram Weisberger
Administrative Law Judge

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March 27, 2000

SECRETARY OF LABOR, MSHA on behalf of MARK L. POLLOCK, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 99-169-DM
v.	:	
	:	Barney's Canyon Mine
KENNECOTT BARNEY'S CANYON MINING COMPANY, Respondent	:	MSHA Id. No. 42-02040
SECRETARY OF LABOR, MSHA on behalf of TONY M. LOPEZ, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 99-170-DM
v.	:	
	:	Barney's Canyon Mine
KENNECOTT BARNEY'S CANYON MINING COMPANY, Respondent	:	MSHA Id. No. 42-02040

DECISION

Appearances: Mark W. Nelson, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainants;
Laura E. Beverage, Esq., and Karen L. Johnston, Esq., Jackson & Kelly, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on complaints of discrimination brought by the Secretary of Labor on behalf of Mark L. Pollock and Tony M. Lopez against Kennecott Barney's Canyon Mining Company ("Kennecott") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). A hearing in the cases was held in Salt Lake City, Utah. The parties presented testimony and documentary evidence and filed post-hearing briefs.

Mr. Pollock filed three complaints of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") and Mr. Lopez filed one complaint. MSHA investigated the complaints, determined that Kennecott violated the provisions of section 105(c)(1) as alleged in each complaint, and filed these discrimination cases.

I. FINDINGS OF FACT

Barney's Canyon Mine is a surface gold mine in Salt Lake County, Utah. Several unions represent the employees at the mine under one collective bargaining agreement. Messrs. Pollock and Lopez acted as miners' representatives under the Mine Act at the Barney's Canyon Mine. Mr. Lopez has been a miners' representative since 1990, but his role as a miners' representative diminished over time. He was chairman of the local steelworkers union and was on the grievance committee. Mr. Pollock began representing miners in about 1995 and he was quite active in that role at the time of the events in this case. Between May 20 and June 14, 1998, five hazard complaints were filed with MSHA by miners at the Barney's Canyon Mine. Mr. Pollock was directly responsible for filing two of the complaints while Mr. Lopez filed one of the complaints.

At all pertinent times, Mr. Pollock was an ore-control technician on the day shift . He was required to perform various duties that sequentially take place at the mine. As an ore-control technician, Pollock marked the exact locations on benches for the drilling crew to drill holes that would subsequently be filled with explosives. This task is referred to as "marking pattern." After the holes are drilled, he tags and collects samples of cuttings that are placed in bags by the drilling crew. He delivers the bags to the assay laboratory at the mine. Next, he "flags the holes," using numbered flags that correspond with the bags of drill cuttings. The assay lab identifies the samples as ore or waste and plots this information on a computer map. The mine's surveyor performs a survey of the area using a GPS pack and the computer map. With the assistance of an ore technician or another person, he marks the areas containing ore with green lath so that the mining crew knows which areas contain gold ore and which areas are waste. Painted stakes and lath are used to mark the outside boundary of the ore-containing material. Because of the nature of his work, Pollock travels around the mine in a company pickup and frequently works independently. At all relevant times, Kennecott was mining in an area of the mine known as the Melco pit, which is about a 20- to 30-minute round trip drive from the assay lab. Mr. Lopez was an ore technician until 1996. In the summer of 1996, he became a driller on the swing shift.

A. Mr. Lopez's Discrimination Complaint

On July 10, 1998, Mr. Lopez was assigned to operate Drill No. 102 (the "drill"). During his preshift inspection, he noted that the side window on the drill was broken. He previously reported that this window was broken during the week of June 29, 1998. Mr. Lopez's supervisor, Gil Valdez, told Lopez that the window would be fixed. When Lopez pointed out the broken window to Valdez on July 10, Valdez told Lopez to get to work. Valdez also told Lopez that he

would be sent home if he did not operate the drill. Lopez believed that the condition of the glass was caused by the hydraulic hoses of the drill banging against the window and that he was worried the he could get glass in his eyes. The window apparently had been replaced the week before but the hydraulic lines broke it again. Mr. Lopez contacted Kennecott safety representatives Brian Regan and Steve Lackey. After examining the window, Mr. Regan concluded that no safety hazard was created by the condition of the glass. Regan noted that the safety glass was cracked, not broken, and asked Lopez if he could finish his shift and the drill would be fixed in accordance with the mine's preventive maintenance program.

Lopez also contacted Ray Gottling, Operations Manager. When Gottling arrived at the drill, he determined that no safety hazard existed. Nevertheless, he shut down the drill because Lopez seemed so upset about it. Mr. Gottling testified that he was not aware that Mr. Lopez was concerned about hydraulic hoses hitting the window. (Tr. 1340). Lopez also complained about hydraulic fluid on the walking surfaces of the truck. After the drill was shut down, Valdez ordered him to clean the walking surfaces of the truck with a steam cleaner. Lopez testified that Valdez told him that he "wasn't through" with him and that he would "get even." (Tr. 392). Mr. Lopez asked another employee to telephone MSHA to complain about the hazardous condition. An MSHA inspector subsequently inspected the drill, but he did not issue any citations. The window had been replaced by the time he arrived.

The next day, Mr. Pollock and Tom Withers, an equipment operator, were doing reclamation work. Mr. Valdez drove up and asked Mr. Pollock why he is always getting him in trouble with Mr. Gottling.[1] (Tr. 69). Pollock testified that he told Valdez that if he did things safely, he would not be in trouble so much. Mr. Withers then asked Valdez how he likes Lopez and Pollock getting him in trouble by going over his head. Valdez responded, "I'll get even." (Tr. 69, 275.) Both Pollock and Withers believed that Valdez's threat was serious.

A few days later, Mr. Lopez went on a previously scheduled vacation. When he returned, Lopez was charged with a failure to meet Kennecott's mandatory drilling quota. Following a disciplinary hearing, a disciplinary letter was placed in his file for this offense. (Ex. R-1). On September 13, 1998, Mr. Lopez filed his discrimination complaint with MSHA. He alleges that this discipline was taken against him in retaliation for his safety complaint.

The disciplinary letter was signed by Valdez and states that Lopez failed to meet the company's drilling standards during March, May, and June 1998. *Id.* It further states that if Lopez failed to meet these standards in any month before March 1999, another disciplinary hearing would be held. Lopez contends that he should not have been disciplined at all or that, at most, he should have received an oral warning. (Tr. 463). He believes that if he had not made the safety complaint described above, he would have received an oral warning. By filing this

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[1] For example, during the Week of July 7, Pollock reported to Gottling that Valdez's crew was drilling on a catch bench. The catch bench was not supposed to be drilled or blasted. Valdez was the drilling supervisor and he admitted to Gottling that it was a mistake.

action, Lopez is seeking to have the letter removed from his personnel file along with records of all other disciplinary actions taken against him by Mr. Valdez.

B. Mr. Pollock's First Discrimination Complaint

On July 14, 1998, Mr. Pollock filed a safety complaint with MSHA because of his belief that the drill still presented a safety hazard. (Tr. 63; Ex. C-5). He was especially concerned that the Murphy switch on the drill was broken with the result that the drill operator would not know if the compressor engine "was going to explode." (Tr. 64). The Murphy switch apparently indicates the temperature of the compressor oil. The complaint also states that the window was broken again. When MSHA investigated this complaint, it determined that the conditions did not present a hazard. MSHA determined that the defective Murphy switch merely posed a risk to the equipment, but that no miners would be injured if the compressor engine overheated.

On July 15, Gerald Slothower, the engineer and short-range planner, approached Pollock to tell him that "people in admin were a little upset with [Pollock] for calling MSHA." (Tr. 80). Mr. Slothower indicated that he believed that Pollock's concerns were not unreasonable. Slothower was Pollock's supervisor.

Mr. Pollock talked to Laurie Priano, Human Resources Manager, about this alleged harassment, but she did not believe that he was being harassed. Pollock filed his first discrimination complaint with MSHA on August 31, 1998 (MSHA No. RM MD 98-14). The complaint alleges that as a result of the five complaints filed with MSHA, including the complaints about the drill, he was continually harassed by mine management, especially Messrs. Valdez and J. Ed. Switzer, the chief mining engineer.

C. Mr. Pollock's Second Discrimination Complaint

In November 1998, Pollock assisted another Kennecott employee file a complaint with MSHA. (Ex C-14). On Sunday, December 6, 1998, Pollock entered a break room to eat his lunch. The television used for training videos was on and was tuned to an NFL football game. Pollock did not turn off the television and watched the game as he was eating. Mr. Gottling walked through the room when Pollock was present but Gottling did not say anything.

On December 7, 1998, Pollock was called to a disciplinary hearing for violating Kennecott's general code of conduct because he was watching television. At the conclusion of the hearing, Pollock was advised that he would be given a written warning for the misuse of company property. (Ex. C-18).

On December 8, 1998, Mine Superintendent Leonard Wolff told Pollock to report to the administration building. MSHA arrived at the mine to begin a regular inspection and Pollock was one of the miners' representatives. Wolff told Pollock that he was to accompany the inspectors during that portion of the inspection involving the surface mine areas. After the

opening conference, Mr. Slothower asked Pollock to come into his office. Slothower handed Pollock the written warning. Pollock asked why he was being disciplined for such a minor offense. Slothower said that he was being issued a written warning because of "his abrasive attitude toward management personnel." (Tr. 102). Pollock testified that he was amazed by Slothower's statement. He responded by saying: "Well, if I have such an abrasive attitude, it's going to be a tough [MSHA] inspection for me to be around management personnel for the next two or three days." *Id.* Pollock testified that this was meant as a smart aleck comment that he would have a tough time being constantly around management employees during the inspection. Slothower interpreted the conversation differently and believed that Pollock was attempting to intimidate him into reducing the discipline for the television incident.

Mr. Slothower also asked Pollock if he was responsible for the MSHA inspection. Pollock replied that he did not call MSHA and that it was a regular MSHA inspection. Mr. Pollock left the building and while traveling around the mine that afternoon, he advised various people to get the mine in shape for the inspection. For example, Curtis Sanchez was an acting supervisor that week and was worried about the MSHA inspection. (Tr. 289). Pollock told him to make sure that equipment operators do thorough preshift examinations and to check the portable toilets to make sure they are upright and clean. Pollock also examined a highwall with another supervisor.

On December 9, Pollock arrived at the mine to accompany the MSHA inspection team as a walk-around representative. Slothower approached Pollock and told him that he was being suspended for making threats against Kennecott during his conversation with him the previous day. Pollock was escorted from the mine property and was unable to act as a miners' representative during the inspection. Another miners' representative accompanied the inspectors and no citations were issued during the inspection.

One of the reasons that Kennecott's managers decided to suspend Pollock was because they believed that he was going to try to create violative conditions that would be cited by MSHA. They based that belief on Pollock's statement to Slothower that it was going to be a "tough inspection" with him around. Thus, Kennecott believed that he might engage in deliberate sabotage. As discussed above, Pollock did not try to create violations after his conversation with Slothower on December 8 but worked to try to eliminate potential violations.

A disciplinary hearing was held on December 12. Pollock contends that he was not permitted to call all of the witnesses that he wanted to call. A meeting was held on December 13 where Pollock was advised that Kennecott was dropping the charge that he threatened to create violations of safety standards. He was charged with insubordination for making threats to management. His suspension was reduced to one day. (Tr. 115). He was also required to write a letter of apology to Mr. Slothower. (Tr. 118; Ex. C-23). A written warning was placed in Pollock's file describing the reasons for Kennecott's disciplinary action. (Ex. C-25). Pollock filed grievances for the written warnings and his suspension.

On December 21, 1998, Mr. Pollock filed his second discrimination complaint with MSHA (MSHA No. RM MD 99-02). This complaint alleges that the disciplinary actions that were taken against him between December 6 and 13 were a direct result of his protected safety activities. In the complaint he stated that management "will stop at nothing to harass and discriminate against miners' representatives [whom] they view as a threat." (Ex. C-15).

D. Mr. Pollock's Third Discrimination Complaint

On April 20, 1999, Robert Jones, the surveyor, asked Pollock to help him flag and stake ore in the Melco pit. Pollock told Jones that Jones was required to ask someone from the overtime board to help him. The job of assisting Jones flag and stake ore would have taken about 20-30 minutes. Jones complained to Slothower who then ordered Pollock to report to the pit at 11:00 a.m. Pollock reported to the area but remained in his pickup. April 20 was a rainy day and Pollock passed by the building containing his locker where he stored his rain gear several times that morning. He did not stop to put his rain gear in his truck.

When Jones arrived at the pit, he parked his truck within 150 feet of Pollock's truck. Jones tried to contact Pollock by radio but Pollock did not respond. Jones got out of his truck and began working. He painted the lathing needed to stake ore. Pollock did not attempt to assist him. Cory Withers, the drill and blast supervisor, [2] drove by and asked Jones for his assistance. Jones left for a few minutes to assist Withers. When he returned to the pit, he again radioed Pollock but got no response. Jones then walked over to Pollock's truck and knocked on his window. Jones was wearing his rain gear and had his GPS pack on his back. When Pollock opened his window, Jones told him he was ready. As Jones walked toward the area to be surveyed, he turned back and saw Pollock driving away. Unknown to Jones, Pollock called Slothower to ask if he could get his rain gear. It would have taken Pollock about 30 minutes to get his rain gear and return to the pit.

Pollock never helped Jones stake the ore. By the time Pollock got back to the pit with his rain gear, the GPS system was no longer functioning. Slothower ordered Pollock to mark pattern instead. Jones staked the ore himself later that afternoon when the GPS system was working. Pollock was scheduled to be at a grievance hearing at 1 p.m. that afternoon and did not assist Jones. Thus, Pollock sat in his truck at the pit from about 10:55 am to about 11:30 a.m. without providing any assistance to Jones. Soon after Jones knocked on Pollock's truck window, Pollock left the area to get his rain gear. Pollock did not mark any pattern that afternoon until after the hearing.[3]

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[2] Cory Withers, who is not related to Tom Withers, replaced Mr. Valdez in this position. Mr. Valdez died in an auto accident in January 1999.

[3] The testimony of Pollock and Jones differed somewhat concerning the events that morning. I credit the testimony of Jones in all respects. Jones was one of the Secretary's most credible witnesses.

Kennecott management was upset at Pollock's conduct and conducted an investigation. At about 11:30 a.m. on April 21, a disciplinary hearing was held concerning this matter. Pollock was charged with the failure to perform a reasonable job assignment and with insubordination.[4] At the conclusion of the hearing, Pollock was sent home and paid for the rest of his shift. Pollock wanted to call a number of witnesses to the hearing, but this request was denied. These witnesses were to be called in response to the radio charge which was dropped.

There was a considerable delay before Pollock was notified of the nature of his discipline. Kennecott management received permission for an extension of time from a union representative. Pollock was informed by this representative that the company was thinking about terminating him from his employment.

On May 3, Pollock was presented with a "Last Chance Agreement." Under this agreement, Pollock would remain an employee but he would, in essence, be on probation. (Ex. G-29). He would also be required to withdraw all pending complaints that he filed under section 105(c) of the Mine Act. In exchange for this agreement, Pollock's suspension would be reduced to three days. Pollock refused to sign the agreement and there were extensive negotiations between the company, union officials, and Pollock. (Exs. G-30-31).

When these negotiations broke down, Kennecott reduced Pollock's termination to an eight-day suspension with a final warning that future violations of the mine's general code of conduct will result in termination from employment. (Ex. 32). The warning was issued because of Pollock's "argumentative and combative behavior and failure to complete ... work assignments." *Id.* Pollock was instructed to return to work on May 9. In the meantime, Pollock filed his third complaint of discrimination with MSHA on May 4, 1999 (MSHA No. RM MD 99-09). (Ex. G-26). In the complaint, Pollock alleges that Kennecott terminated him for not signing the last chance agreement. Pollock remains employed by Kennecott.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

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[4] Pollock was also charged with failure to respond to radio calls, but that charge was dropped.

A miner alleging discrimination under the Mine Act 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 of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The mine 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 the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

There is no dispute that Messrs. Lopez and Pollock engaged in protected activity. The issue is whether the adverse actions taken were motivated by that protected activity. In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). Some of the circumstantial indicia of discriminatory intent include (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action.

A. Mr. Lopez's Discrimination Complaint

Valdez gave Lopez a disciplinary letter for failure to meet Kennecott's mandatory drilling quota during March, May, and June 1998. The Secretary contends that this letter was issued in violation of the company's progressive discipline policy. She argues that, at most, Lopez should have received a verbal warning for this violation. She notes that when other employees failed to meet the performance standards, no discipline was given. The Secretary also points to the threats made by Valdez to establish a discriminatory motive. She argues that when Lopez attempted to discuss Valdez's threats with Ms. Priano, he was rebuffed and, thus, had no choice but to file his discrimination complaint. Lopez was concerned that if he raised other safety issues, he would face even stronger discipline.

Kennecott contends that its managers recognized that Lopez had the right to shut down the drill and, at the conclusion of its investigation, it allowed Lopez to do so despite the fact that no safety hazard was actually present. Lopez contacted MSHA after the drill had been shut down. Kennecott questions the accuracy of Lopez's description of Valdez's comments to him. Lopez did not tell Kennecott managers and safety representatives that he had been threatened by

Valdez. Ms. Priano testified that she did not hear of these alleged threats from Lopez, but learned about them during the course of a grievance hearing involving Mr. Pollock.

Kennecott argues that Lopez did not suffer any adverse action as a result of Valdez's alleged threats. First, the Secretary failed to establish that the threats were actually made or that he reported the threats to anyone in management. In his statement to MSHA, Valdez denied making any threats to Lopez. (Ex. R-23). Valdez also stated that he was joking around when he told Pollock and Withers that he would "get even." *Id.* Even if the threats were made, Kennecott maintains that an unrealized threat cannot constitute adverse action under the Mine Action.

Kennecott contends that the Secretary did not establish a nexus between the protected activity and any adverse action. The company has an excellent record with respect to safety issues and it does not take adverse action against employees who raise safety issues. Lopez's discipline was motivated solely by his failure to meet the company's drilling standards. The standards, which set forth how many holes each driller must complete on a monthly average, were provided to drillers in February 1998. (Ex. R-28). Lopez failed to meet the standard for three out of four months. In essence, Lopez was placed on probation because of his failure to meet the standards.

Kennecott argues that the Secretary also failed to establish disparate treatment. The Secretary did not establish that Lopez was treated more harshly than those similarly situated. Kennecott states that the Secretary did not identify any similarly situated employee who was treated better than Lopez. Lopez was the only employee who missed the standards for three months and, as a consequence, he was issued the warning letter.

I find that the Secretary established that adverse action was taken against Lopez. I credit the testimony of Lopez and Tom Withers that Valdez made threats against Lopez. Although Valdez could not testify to counter Lopez's testimony, I note that Lopez's testimony is consistent with the testimony of Pollock and Tom Withers on this issue. The fact that Lopez did not immediately report these threats is not surprising because Valdez was his immediate supervisor. He wanted the window on the drill fixed. Raising issues about threats would not have helped resolve the safety issue. If Valdez denied making the threats to upper management, it would put Lopez in a very difficult position.

I reject Kennecott's argument that since the threat was never carried out, it cannot constitute adverse action. First, as discussed below, I find that the threat was carried out. In addition, even if it were not, such threats on the part of a front line supervisor would have a chilling effect on the right of miners to raise safety issues. No miner is going to raise a safety issue if his supervisor tells him or other employees that he will "get even."

I find that the Secretary established that Lopez's discipline was motivated, at least in part, by his protected activity. As stated above, direct evidence of motivation is rarely encountered. In this case, however, I find that there is a direct link between the protected activity and the

adverse action. Mr. Valdez expressed his hostility to the protected activity and he is the person who issued the disciplinary letter. He had knowledge of the protected activity; he displayed hostility towards the protected activity; and the adverse action was taken in a matter of days after the protected activity occurred.

Valdez based the discipline on Lopez's failure to meet the production standards for drillers. The letter he issued stated that if Lopez failed to meet any of the required drilling standards for a nine-month period he could be discharged. (Ex. R-1). This was the first time that Lopez failed to meet production standards at the mine. (Tr. 1438). He felt that if he made any mistake, even a minor one, he would face discharge. Although Valdez had warned the drilling crew that some crew members were not meeting the drilling quotas, Mr. Lopez had not received a verbal warning specifically directed at his performance. (Tr. 1444). Mr. Lopez met all of the company's other requirements during these months.

Kennecott articulated a legitimate business justification for disciplining Lopez. He did not drill a sufficient number of holes during three months. The memo from Gil Valdez, dated February 24, 1998, that set forth the new drilling standards, provided that "should a driller fail to make the standard three (3) times in any rolling 12-month period, the driller will be considered for disqualification." (Ex. R-28). The Secretary argues that the discipline was too harsh to be solely motivated by the company's stated justification and that Lopez's protected activity played a part.

I agree with the Secretary that Lopez's protected activities were considered when it was determined that a written warning would be issued. Mixed motive cases are difficult to resolve because "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." *Chacon*, 3 FMSHRC 2516. In this case, the issue is whether Kennecott would have issued the warning letter for his unprotected activities alone. I find that Kennecott would not have issued the letter had Lopez not engaged in protected activity. I reach this conclusion based on Valdez's hostility to the protected activity and the coincidence in time. Although I cannot speculate what discipline he would have received if he had not engaged in protected activity, I find that Mr. Valdez was motivated, in part, by the protected activity when he issued the disciplinary letter. This violation was serious and Kennecott's negligence was moderate. A penalty of $1,000 is appropriate.

B. Mr. Pollock's First Discrimination Complaint

Mr. Pollock engaged in protected activity by filing safety complaints with MSHA. He did not receive any discipline for the protected activity set forth in his first complaint of discrimination. In the Secretary's complaint of discrimination filed with the Commission, the Secretary alleges that Pollock "was and continues to be threatened, harassed, and intimidated" by Kennecott for exercising his rights under the Mine Act. The Secretary seeks an order directing Kennecott to "cease and desist from threatening, harassing, or intimidating Mr. Pollock" for his protected activity.

The alleged threats and intimidation came from Mr. Valdez and Mr. Switzer. Valdez's threats are discussed above in conjunction with Mr. Lopez's discrimination complaint. For the same reasons discussed above, I find that Mr. Valdez made threats against Mr. Pollock as a result of Pollock's protected activity.

The alleged harassment by Mr. Switzer is described by the Secretary as "yelling at Pollock over benign work performance issues." (S. Br. 7). As proof of discriminatory animus, Pollock states that Switzer asked Slothower in July 1998 whether Pollock had enough work "to keep [him] busy to keep him from calling MSHA all the time." (Tr. 81). Pollock believes that Mr. Switzer continually harassed him after he made complaints to MSHA.

One of the incidents relied upon by the Secretary occurred in August 1998, when Switzer was filling in as Pollock's supervisor in place of Slothower. Pollock testified that Switzer wanted Pollock to mark more pattern than Slothower usually required. When Pollock questioned the need to mark more pattern, Switzer yelled at him for arguing with him about it. (Tr. 84-85). Switzer testified that he asked Pollock three times to mark pattern in a certain area and he refused to do it. (Tr. 1010-11). At a subsequent meeting during which the duties of ore technicians were discussed, Switzer explained to Pollock that he needed to mark as much pattern as possible so that Kennecott can get the results back from the assay lab as quickly as possible after the holes are drilled. (Tr. 1015). He explained that marking more holes gives the drilling crew flexibility as to where they can drill on a particular shift. At this meeting, Pollock complained about his job duties, argued with management about these duties, and argued about the need to mark additional pattern. (Tr. 1016).

Another incident relied upon by Pollock concerned overtime pay. Mr. Jones was authorized to work overtime in August 1998 doing some reclamation work. When Pollock found out about this he complained to Switzer about this overtime and asked why he could not work overtime. (Tr. 1021). Switzer responded in a heated manner that he determined who works overtime not Pollock. Switzer canceled Jones's overtime.

I find that the Secretary did not establish any connection between Switzer's alleged "harassment" of Pollock and Pollock's discrimination complaints. First, both Slothower and Switzer denied that Switzer made the statement to keep Pollock busy to keep him from filing complaints. I credit their testimony in this regard. Second, Switzer's relationship with Pollock was always strained especially after Pollock was suspended by Switzer in 1996. Pollock refused to pick up and deliver sample bags to the assay lab in July 1996 because he believed that some of the bags were heavier than normal. (Tr. 1000-02). When Pollock was told that someone else would pick them up, Pollock refused to tag the samples. Switzer met with Pollock later that day to discuss the matter. Pollock came into Switzer's office "very agitated," he was "yelling and screaming," and he was very "irate." Pollock received a three-day suspension which was upheld by the labor arbitrator. (Ex. R-21).

The conflict between these two men in August 1998 also concerned whether Pollock refused to complete a work assignment and this conflict does not demonstrate animus towards protected activity. Switzer was Slothower's supervisor and Switzer believed that the ore technicians were not marking sufficient pattern. He resented Pollock's argumentative attitude about the issue. He believed that Pollock was refusing to carry out a reasonable job assignment.

I find that the evidence of record establishes that Switzer believed that Pollock exhibited disregard for management directives and that he displayed an aggressive attitude when given job assignments that he did not like or disagreed with. I find that any hostility Switzer exhibited towards Pollock was a result of the unprotected activity discussed above and that Pollock's protected activity played no part in Switzer's relationship with or attitude towards Pollock. Even assuming that Switzer was also motivated, in part, by Pollock's protected activity when he allegedly harassed Pollock, I find that Switzer would have treated Pollock in the same manner for the unprotected activity alone.

As a consequence, only the threats made by Mr. Valdez support Mr. Pollock's first discrimination complaint. I reject the other allegations contained in Pollock's first complaint of discrimination filed with MSHA. This violation was moderately serious and Kennecott's negligence was moderate. A penalty of $500 is appropriate.

C. Mr. Pollock's Second Discrimination Complaint

The Secretary contends that "Kennecott's removal of Pollock from the mine on December 9, 1998, was a direct result of Kennecott's concern about Pollock fulfilling his role as a pro-active miners' representative during the course of the inspection." (S. Br. 11). Kennecott contends that, because Pollock denied watching television during his lunch break on December 6 at the disciplinary hearing on December 7, he was issued a written warning for the offense. Kennecott states that if Pollock had admitted watching television he would have received an oral warning. It maintains that when Pollock was given the written warning on December 8, Pollock was angry and tried to get it reduced. Kennecott contends that when Slothower refused to reduce the offense to an oral warning, "Pollock warned Slothower that the company would pay for the issuance of the discipline in the course of the inspection." (K. Br. 28). Kennecott argues that Slothower reasonably perceived Pollock's statements as a threat against the company, no matter what Pollock's exact words were during this conversation. Kennecott believes that this perceived threat is sufficient to support a charge of insubordination and a two-day suspension. Pollock's "expression of disrespect and disobedience toward authority" supports the charge of insubordination even assuming that Pollock did not intend his statement to Slothower to be a threat. (K. Br. 31).

The first issue is whether Pollock's discipline was motivated in any part by his protected activity. The events at the disciplinary hearing on December 7 are disputed by the parties. Pollock testified that he did not deny watching television on December 6. (Tr. 96). Mr. Jones also testified that Pollock did not deny watching television during the disciplinary hearing. (Tr.

318). Mr. Slothower and Melissa Miller, a human resources employee, testified that Pollock denied watching television on December 6 during the disciplinary hearing. (Tr. 985, 1180-81). Slothower testified that he issued the written warning because Pollock "lied" during the disciplinary hearing when he stated that he was not watching television. (Tr. 1181). Pollock stated that he would have accepted an oral warning. (Tr. 179).

There is no dispute that, during the disciplinary hearing, Pollock argued that watching the company television did not violate the general code of conduct. I find that during the course of this discussion Pollock failed to take responsibility for his actions but that he did not affirmatively deny that the television was on or that he looked at the television. His point may well have been that simply being in a room with a television on does not violate the code of conduct unless the employee turned it on. In his complaint filed with MSHA, Pollock merely mentions the television incident. At the hearing in this case, Pollock testified that he did not know what motivated the company to issue the warning letter. (Tr. 178).

I credit the testimony of Mr. Slothower that he would have given Pollock an oral warning if Pollock had accepted responsibility for his actions. Whether or not Pollock actually lied at the disciplinary hearing, Slothower reasonably believed that Pollock failed to admit that he violated the general code of conduct.[5] I find that Slothower issued the written warning for that reason alone and that he was not motivated, in any part, by Pollock's protected activity.

Pollock's second discrimination complaint principally focuses on the events of December 8-12, 1998. As stated above, the Secretary alleges that Pollock was removed from mine property because Kennecott was concerned that Pollock would exercise his statutory rights during the MSHA inspection. I find that Slothower was intimidated by Pollock's statement to him in his office on December 8. I note that Slothower, who is a geologist, is not a tough manager. He goes out of his way to avoid conflict with the employees he supervises. (Tr. 1174-75). Until December 8, his relationship with Pollock was "amicable." *Id.* Whatever words were actually used, Slothower felt that Pollock was using his position as a miners' representative to intimidate him to reduce his discipline for watching television. (Tr. 1190). Kennecott argues that Pollock's misuse of his position as a miners' representative is not protected under the Mine Act. I agree. If a miner, including a miners' representative, threatens to create a hostile environment during an MSHA inspection in order to reduce the severity of disciplinary action taken against him, such threats are not protected by the Mine Act. In this case, Slothower did not believe that Pollock would create a hazard that would threaten the safety of miners or that he would damage company property, but he feared that Pollock would create a hostile environment that would create friction between the company and MSHA. Slothower believed that Pollock might "go out and try to cause the company to get an undeserved citation." (Tr. 1189-90). This belief was shared by Wolff and Priano. (Tr. 677, 764-65).

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[5] At the hearing in this case, Pollock admitted that watching the company television was a violation of Kennecott's general code of conduct. (Tr. 179).

Pollock had a reputation as a rather hard-nosed advocate for safety at the mine. Kennecott takes mine safety and health issues seriously and Barney's Canyon Mine received MSHA's Sentinels of Safety Award in 1998. MSHA Inspector Okuniewicz testified that this mine has an excellent history of previous violations compared with other mines of its size. (Tr. 529-30). The mine had not interfered with Pollock's right to act as a walk-around representative, but a number of disputes have arisen over the years in which Pollock disagreed with the company on safety issues. It is quite clear that Pollock is an "in-your-face" type of person who does not back down when he believes that a safety hazard is present. He is also a strong advocate for the union. I find that most of the hostility that developed between the company and Pollock is a result of his union activities and the perception that he is frequently disrespectful and disobedient to Kennecott's managers. The record shows that he frequently argues with supervisors about work assignments. Slothower, on the other hand, is a rather quiet and unassuming individual.

Was Slothower's decision to suspend Pollock motivated in any part by his protected activity? The Secretary argues that the "timing of the discipline in relation to Pollock's involvement with MSHA activities at the mine, coupled with Kennecott's knowledge of Pollock's involvement with MSHA, is more than sufficient to establish the requisite motivational nexus between Pollock's protected activity and the adverse action taken against him." (S. Br. 12). Slothower knew that Pollock was an MSHA advocate and that, even if he did not create violations, he would aggressively assist MSHA inspectors in finding violations. His right to do so is protected under the Mine Act. A miners' representative has the right to point out violations to an MSHA inspector.

It is important to recognize that until Pollock made the comment to Slothower that it was going to be a "tough inspection," Pollock was scheduled to be the miners' representative during the inspection. Kennecott had made arrangements for Pollock to attend the opening MSHA conference and to accompany the MSHA inspectors during the inspection. Because of his work schedule that week, Pollock was going to be paid at his overtime rate during the MSHA inspection. Thus, until the "tough inspection" conversation, there was no indication of any animus against Pollock's full participation in the inspection as a walk-around representative, despite his reputation as a strong safety advocate.

Pollock was suspended in December 1998, because Kennecott perceived that he threatened Slothower. Although Slothower knew of Pollock's past protected activity, there is no evidence that he was hostile to this activity. Indeed, Slothower told Pollock in July that he understood his concerns about the drill. As stated above, Pollock was scheduled to be a walk-around representative during the inspection. Slothower felt that Pollock was attempting to intimidate him to reduce the written warning to an oral warning.

The fact that a miner frequently makes safety complaints does not immunize him from discipline for threatening management. *See e.g. Sapunarich v. Lehigh Portland Cement Co.*, 11 FMSHRC 81, 88 (January 1989)(ALJ). In reviewing a claim that a whistle-blower had been discriminated against for raising safety issues at a nuclear power plant, the Seventh Circuit noted

that "an employee's insubordination toward supervisors and coworkers, even when engaged in protected activity, is justification for termination." *Kahn v. U.S. Secretary of Labor*, 64 F. 3d 271, 279 (1995)(citations omitted). The court went on to state that the rights afforded employees under the Energy Reorganization Act "are a shield against employer retaliation not a sword with which one may threaten ... supervisors." *Id.* The Mine Act affords miners broader protection than a whistle-blower statute. In addition, one must take into consideration the fact that, in the mining industry, harsh words are often spoken between supervisors and employees. Although Slothower enjoyed a reasonably good relationship with Pollock, Slothower genuinely felt threatened by Pollock's "tough inspection" statement. Slothower's decision to discipline Pollock was based solely on Pollock's statement to him on December 8.

I also find that Pollock was not provoked into making the statement. The "tough inspection" statement was made in the context of an informal conversation in Slothower's office. Slothower told Pollock that he would get along with managers better if he were less abrasive. (Tr. 1185). At the hearing, Pollock testified that he was "amazed" by Slothower's comment. (Tr. 102). I find this response by Pollock to be rather disingenuous. As stated above, Pollock was known as an in-your-face type of person and he had quite a few disagreements with managers at the mine about work-related issues. Pollock knew about the written warning and he did not raise safety issues at the meeting. Thus, I find that nothing in the informal conversation that occurred that morning reasonably provoked Pollock's response.

The Secretary argues that other evidence demonstrates Kennecott's hostility to Pollock's protected activity. For example, Slothower asked Pollock if a call from him precipitated the MSHA inspection. The Secretary also relies on testimony from Mr. Wolff that, although a miners' representative has the right to act as "a second set of eyes for the inspector," he takes a dim view of it. (Tr. 680-82). I find that Wolff merely stated the obvious. Every mine manager would prefer miners to point out safety violations to management or the company's safety department first rather than to MSHA so that the company can be given the opportunity to correct the problem. Wolff recognized that Pollock had the right to show violations to an inspector. His statement that he prefers to correct safety hazards in house does not indicate specific animus towards Pollock's protected activity. The Secretary also criticizes the fact that there was a delay between the conversation between Pollock and Slothower and the decision to suspend Pollock. Slothower testified that he does not like to discipline employees so he usually thinks about it first and seeks advice from upper management. (Tr. 1188-89). The ultimate decision to discipline Pollock was Slothower's and he based his decision on the factors discussed above. (Tr. 1192).

I find that Kennecott had a legitimate business justification for disciplining Pollock. I do not have the authority to determine whether the terms of his discipline were fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). I conclude that Mr. Pollock's suspension in December 1998 was not motivated in any part by his protected activity.

D. Mr. Pollock's Third Discrimination Complaint

When Pollock would not help Jones stake and flag ore on the morning of April 20, 1999, Slothower walked up to Pollock's truck and told Pollock to report to the Melco Pit at 11 a.m. to assist Jones. Pollock told Slothower that Jones should get help from the overtime board. In response, Slothower told Pollock not to dictate policy and that Jones did not need to go to the overtime board. (Tr. 218). Pollock told Slothower that he was going to file a grievance over this issue because Jones was never required to help the ore technicians. (Tr. 219). Pollock construes Slothower's order to help Jones stake the ore to be harassment and favoritism because Jones is never required to help him. *Id.* Pollock admits, however, that assisting the surveyor is part of the job responsibility of an ore technician. (Tr. 221). Such assistance may include staking and flagging ore. (Ex. R-5). Pollock provided such assistance in the past.

Kennecott argues that Pollock's response to Slothower's reasonable job assignment "encapsulates the real issue: Pollock does not want to do anything that he perceives to be more than his fair share, even when it is included in his job responsibilities and is a direct order from his supervisor." (K. Br. 37). Kennecott contends that Pollock's conduct between 11:00 and 1:00 a.m. demonstrates his continuing resistance to carry out this job assignment despite a direct order from Slothower. It maintains that Pollock sat in his truck for about 30 minutes while Jones worked at preparing the stakes without making any effort to assist Jones. When Jones walked over to his truck to specifically request his assistance, Pollock abruptly left the area without notifying Jones. Kennecott argues that Pollock knew that Jones could finish the job in the time it took him to drive to his locker to get his rain gear and return to the pit. It maintains that Pollock deliberately disregarded Slothower's order to assist Jones. If Pollock had helped Jones, the job could have been completed by noon. Kennecott states that it disciplined Pollock for his refusal to complete a reasonable job assignment.

The Secretary argues that "the undisputed facts establish that none of [the] purported reasons for discipline occurred." (S. Br. 15). She points to testimony from Jones that Pollock was not insubordinate to him. (Tr. 323). Jones also testified that this was the first time that Pollock was assigned to assist him and he did not do so. (Tr. 335). She also relies on the testimony of Slothower that, had the GPS system not failed, Jones and Pollock would have had time to finish the survey after Pollock retrieved his rain gear. (Tr. 1289-90). The Secretary argues that the reasons offered by Kennecott for Pollock's discipline are "contrived and inconsistent." (S. Br. 16).

The Secretary submits that Pollock was disciplined because of his protected activities including the fact that he filed two complaints of discrimination with MSHA. She believes that the last chance agreement confirms the relationship between Pollock's protected activities and the adverse action taken against him. She maintains that Pollock was treated far more harshly than other employees who violated company rules and that the last chance agreement was unlike anything anyone had seen before. She concluded that the discipline given Pollock far exceeds the discipline received by other employees for significantly more serious infractions.

The issues surrounding this discrimination complaint are factual in nature. The Secretary relies heavily on a disparate treatment theory. The other ore control technician, Carl Bluth, had a significant absentee problem and he frequently failed to fill out laboratory sample sheets as required. The Secretary points to the fact that Bluth only received oral warnings for failing to perform this important part of his job duties. In addition, Bluth was put on probation in December 1998 for excessive absences, yet when he violated the terms of his probation in August he was given a second chance. Kennecott contends that both Pollock and Bluth have failed to fill out laboratory sample sheets and that Pollock was treated no more harshly than Bluth. Moreover, Slothower testified that Bluth's alleged infraction was never brought to his attention. (Tr. 1268, 1477). In addition, Kennecott argues that this issue is not relevant because the incidents upon which the Secretary relies occurred after Pollock returned from his April 1999 suspension. (Ex. G-45).

Except as discussed below, I find that Kennecott rebutted the Secretary's *prima facie* case by showing that the adverse action was not motivated in any part by Pollock's protected activity. The dispute between Slothower and Pollock concerned his work assignment on April 20, 1999. I credit Slothower's testimony and find that he reasonably believed that Pollock was deliberately refusing to carry out a work assignment. Pollock refused to help Jones until he was directly ordered to do so by Slothower. He argued with Slothower about the job assignment. When Pollock went to the pit, he sat in his truck while Jones began working. Pollock drove away in his truck shortly after Jones knocked on Pollock's truck window. Thus, it was reasonable for Slothower to conclude that Pollock was deliberately defying his order to help Jones. The fact that Jones did not regard this as "insubordination" or that Pollock helped Jones in the past is irrelevant. Pollock did not want to help Jones; he argued with Slothower about it; and he managed to avoid helping him. The entire project could have been completed in less than 45 minutes. No protected activity was involved. Nothing in the record indicates that any part of Slothower's decision to discipline Pollock was based on his prior protected activity.

Pollock had a history of arguing about job assignments with supervisors. As discussed earlier in this decision, he argued with Switzer about how much pattern should be marked, and he refused to tag and deliver sample bags to the lab if they were not filled correctly. The record documents other incidents in which Pollock argued with managers about overtime, working hours, and work assignments. It is significant that Pollock regarded Slothower's order that he help Jones as harassment and favoritism because Jones was never required to help him. The Mine Act does not protect an hourly employee who continually questions or argues with supervisors about job assignments, working hours, and the manner in which the mine is being managed. Such disputes are not protected under the Mine Act unless they involve safety issues.

The Secretary's reliance on disparate treatment is misplaced. There are no other employees whose conduct is comparable to Pollock's. None of the other employees that the Secretary points to for comparison had a history of arguing with managers about job assignments. Mr. Bluth, for example, had an absentee problem. He was placed on probation and then given a second chance. Pollock, on the other hand, was given an award by Kennecott in July 1999 for

seven years of perfect attendance. (Ex. G-28). Both Bluth and Pollock failed to completely fill out the laboratory sample sheets some of the time, but there is no showing that Pollock was treated more harshly. The Secretary argues that Bluth was not as good an ore technician as Pollock. Even if I assume that to be true, I do not have jurisdiction to be Solomon in this case to determine who deserves to be disciplined and what discipline should be meted out.

The Secretary also relies on the terms of the last chance agreement to establish her case. (Ex. G-29). I agree that the last chance agreement is the most troubling aspect of this case. I credit the testimony of the Secretary's witnesses, including union officials, that this agreement was unlike anything they had seen at the Barney's Canyon Mine. Paragraph D of that agreement is of particular concern in the context of this Mine Act proceeding. In that paragraph, Pollock was required, as a condition of keeping his job, to admit that the discrimination complaints he filed with MSHA were "without foundation or merit and were filed only in an attempt to shield myself from discipline for my misconduct." *Id.* As stated above, Pollock refused to sign the agreement. He was allowed to return to work, was given an eight-day suspension, and was told that future violations of the mine's general code of conduct would result in his termination.

I find that the last chance agreement violated section 105(c) of the Mine Act. An operator cannot demand that a miner waive his Mine Act rights as a precondition to continued employment. Such a provision puts a miner in an untenable position at odds with the protections set forth in the Mine Act. He must either face termination or give up his rights. The agreement was not reached following negotiations between the parties but was compelled by Kennecott. A mine operator cannot include in its disciplinary program a provision that a miner must waive his section 105(c) rights as a precondition to employment or reduced discipline. Requiring Pollock to sign Paragraph D was an obvious and egregious violation of section 105(c). Even though Pollock did not sign the last chance agreement, other miners at Barney's Canyon may well be reluctant to raise safety issues or file safety complaints with MSHA. It had a chilling effect on miners' rights.

The discipline that Pollock was ultimately given did not include any references to his Mine Act rights. Because I find that Slothower did not discipline Pollock for his protected activity, the issue is whether the last chance agreement is evidence of a discriminatory motive. Slothower wanted to terminate Pollock but was not involved in drafting the last-chance agreement. (Tr. 1224). Mr. Pollock was under probation as a result of his previous discipline for insubordination in December 1998. After negotiations between Kennecott and the union broke down over the last-chance agreement, Kennecott gave Pollock a final warning and suspended him for nine days. I find that Kennecott's attempt to impose Paragraph D of the last-chance agreement does not indicate that Slothower or Kennecott was motivated by his protected activity when it was decided that he should be disciplined for insubordination.

I disagree with the Secretary's characterization of Kennecott's rationale for disciplining Pollock as contrived and inconsistent. Slothower was responsible for supervising Pollock. He believed that Pollock was becoming increasingly defiant of management direction. He knew of

many instances where Pollock refused to follow his orders and company policy. It was this history that lead Slothower to conclude that discipline was necessary following the events of April 20, 1999. I find that Kennecott established that this discipline was not motivated by his protected activity.

Kennecott violated section 105(c) when it required Pollock to sign the last-chance agreement. This violation was very serious and Kennecott's negligence was high. A penalty of $10,000 for this violation is appropriate.

E. Consideration of Mr. Pollock's Cases as a Whole

Because Mr. Pollock engaged in protected activity over an extended period of time as a miners' representative, it is important to look at his case as a whole and not simply analyze each complaint of discrimination in isolation. The Secretary is alleging that Kennecott engaged in a course of conduct to discourage Pollock from being a zealous safety advocate. She contends that Kennecott's discipline of Pollock would tend to have a chilling effect on other miners' expressing safety concerns. Some of the evidence of record supports the Secretary's position. Mr. Jones, for example, testified that any individual who raises safety concerns "will have a difficult relationship with this particular administration." (Tr. 335). He also stated that "if you're as involved as [Pollock] is in safety issues out there, that you're going to have a hard time with the Company." (Tr. 325). I credit Mr. Jones's testimony in this regard and find that the company was becoming increasingly impatient with Pollock's aggressive safety advocacy.

I find that the Kennecott's relationship with Pollock was influenced at least in part by Pollock's safety advocacy. It is difficult to separate Kennecott's animosity towards his unprotected activities from its dislike of his zeal for safety issues. It is particularly difficult to analyze this issue because, in each instance, Kennecott had reasons for disciplining Pollock.

As a consequence, I will assume that the Secretary established that the decision to discipline Pollock in December 1998 and April/May 1999 was motivated in some part by his protected activities. The issue is whether Kennecott affirmatively proved that it considered Pollock's unprotected activity when disciplining him and would have disciplined him for that conduct alone. In *Bradley v. Belva Coal Co.*, the Commission set out the framework for analyzing this affirmative defense, as follows:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only

> to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC 982, 993 (June 1982).

As stated above, there are no other employees at the Barney's Canyon Mine who can be compared with Pollock. As stated by Kennecott, "insubordination is not a common problem and discharge and suspensions for such behavior are limited." (K. Br. 49). The employees that the Secretary offers for comparison were not charged with failure to follow the orders of a supervisor or insubordination. Pollock has been involved in a number of such disputes, as discussed in this decision. Pollock is a careful and diligent ore technician. He has been granted a great deal of independence by Kennecott in the performance of his job duties. Kennecott's complaint is that when he is directed to perform any task that is outside his daily routine he argues with his supervisors about it. Pollock was given a number of warnings about his combative attitude and refusal to perform work assignments. Both Switzer and Slothower expressed concern about it to Pollock. Finally, Kennecott's General Code of Conduct requires employees to perform work assignments and comply with instructions from supervisors.

Based on the record, I find that Kennecott established that it would have disciplined Pollock for his unprotected activity alone and that the reasons given by Kennecott were not pretext. Based on credible evidence that Kennecott is not always receptive to safety complaints from miners, I include an order that Kennecott cease and desist from taking any adverse action against miners who exercise their rights under section 105(c) of the Mine Act. This order is entered as part of the remediation for the Lopez's complaint and Pollock's first and third complaints.

The Commission's recent decision in *Secretary of Labor o/b/o Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC _____, (March 16, 2000), discusses issues that are relevant here. In that case, a miner raised safety issues and, in the process, used profanity and made what might be construed as threats. The Commission held that a miner should be given leeway for impulsive behavior when raising safety issues or refusing to perform a task that he believes is unsafe. As the Commission stated, "[w]hether an employee's indiscrete reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case." *Id.* at Slip. Op. 9. Subject to limits, I believe that if a miner is engaged in protective activity, he should not be stripped of his rights under the Mine Act simply because, in raising the safety issues, he spontaneously and impulsively says impertinent things to his supervisor.[6]

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[6] As the dissent states in *Bernardyn*: "A miner must feel free to communicate about [safety] issues — with a management safety director, a foreman, or a union official — without undue concern about whether the complaint is couched in an acceptable format, and thus should not be fired for the manner in which he states them except in extreme circumstances." Slip. Op 12-13.

Pollock was often emotional when he raised safety issues. He states that he became agitated only if he felt that supervisors were not responding in an appropriate fashion. Thus, from his point of view, he became aggressive when he was provoked by management. The events giving rise to his December and April/May discipline, however, did not involve safety disputes. In each instance, the dispute concerned work rules and job assignments. Although aggressive behavior while discussing safety disputes may be protected by the Mine Act, such behavior is not protected if the discussions concern activities that are not protected. Otherwise, a mine operator would have a difficult time disciplining a miner who is actively involved in safety issues for insubordination or other unprotected conduct. I find that the conduct that gave rise to Pollock's discipline was not protected in this manner.

The record in this case consists of about 1,480 transcript pages and over 75 exhibits. As a consequence, I could not discuss all of the evidence in this decision. Any evidence that is inconsistent with my findings and conclusions is hereby rejected.

III. CIVIL PENALTY CRITERIA

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The Barney's Canyon Mine is a relatively large operation with 388,262 man hours worked during 1998. The total number of man hours worked at all operations is 5,594,546 in 1998. In the two years prior to May 1, 1999, the mine was issued 24 citations and orders and paid $1,634 in civil penalties. The penalties assessed in this decision will not have an adverse effect on Kennecott's ability to continue in business. It has not been shown that Kennecott failed to demonstrate good faith with respect to the charges brought by the Secretary in these cases. Based on this criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

For the reasons set forth above, I hold that Kennecott discriminated against Tony Lopez when he was issued a disciplinary letter on July 23, 1998, by Gill Valdez. Kennecott is **ORDERED** to remove the letter from his personnel file and this letter shall not be considered as part of his disciplinary history by Kennecott. All other allegations contained in this complaint and any other relief requested by the Secretary and Mr. Lopez are **DENIED**. Kennecott is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of $1,000 for this violation of section 105(c) within 40 days of the date of this decision.

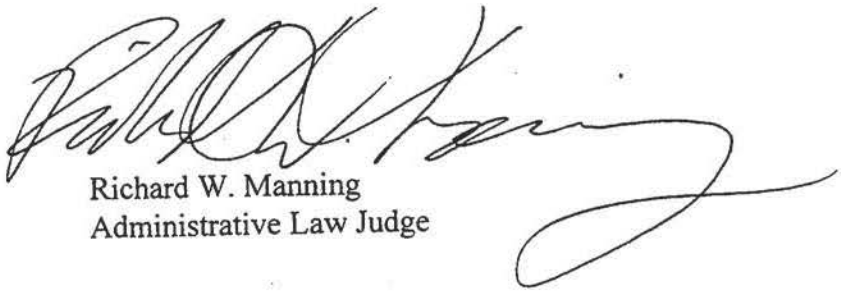
For the reasons set forth above, I hold that Kennecott discriminated against Mark Pollock when Mr. Valdez made threats against him in July 1998. Kennecott is **ORDERED** to cease and desist from making threats against Mr. Pollock or otherwise discriminating against Mr. Pollock for activities that are protected under section 105(c) of the Mine Act, including telephoning MSHA with safety complaints. All other allegations related to Mr. Pollock's first complaint of discrimination (No. RM MD 98-14) and any other relief requested by the Secretary and

Mr. Pollock are **DENIED**. Kennecott is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of $500 for this violation of section 105(c) within 40 days of the date of this decision.

For the reasons ser forth above, I hold that Kennecott did not discriminate against Mark Pollock when it disciplined him in December 1999. Accordingly, the Secretary's complaint of discrimination filed with respect to this discipline (RM MD 99-02) is **DISMISSED**.

For the reasons set forth above, I hold that Kennecott discriminated against Mark Pollock when it required him to sign the last chance agreement as a result of events that took place on April 20, 1999, because Paragraph D of that agreement violated the Mine Act. Kennecott is **ORDERED** to cease and desist from including such language in any future last chance agreements it may execute with respect to any employee at its mine. All other allegations related to Mr. Pollock's third complaint of discrimination (RM MD 99-09) and any other relief requested by the Secretary and Mr. Pollock are **DENIED**. Kennecott is **ORDERED TO PAY** the Secretary of Labor a civil penalty in the amount of $10,000 for this violation of section 105(c) within 40 days of the date of this decision.

For the reasons set forth above, Kennecott is **ORDERED** to cease and desist from taking adverse actions against any miner who exercises his or her rights under section 105(c) of the Mine Act. This decision is my final decision and order in these cases.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 30, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 99-193 A. C. No. 15-16958-03510 HD2
v.	:	
DOTSON TRUCKING COMPANY INCORPORATED, Respondent	:	Long Fork Preparation Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 99-201 A. C. No. 15-16958-03517
v	:	
MCCOY ELKHORN COAL CORP., Respondent	:	Long Fork Preparation Plant

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Lexington, Kentucky, on behalf of Dotson Trucking Incorporated;
Melanie J. Kilpatrick, Esq., and Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of McCoy Elkhorn Coal Corporation.

Before: Judge Melick

These consolidated cases are before me upon petitions for Civil Penalty filed by the Secretary of Labor against Dotson Trucking Company, Inc., (Dotson) and McCoy Elkhorn Coal Corporation (McCoy) pursuant to Section 105(d) of the Federal Mine and Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging violations of mandatory standards and seeking civil penalties of $60,000.00 and $25,000.00, respectively, for those violations. The general issue before me is whether the violations were committed as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Background

On Tuesday, September 1, 1998, at approximately 2:45 p.m., truck driver Charlie Hall was injured when he failed to negotiate a curve while descending the refuse haul road at the subject mine. Hall died of his injuries on September 13, 1998. McCoy operates the cited coal preparation plant and Dotson provides trucking services hauling refuse from the plant by road up a hill to the refuse dumping area. At the top of the hill an employee of Sky Hawk Construction operated a bulldozer to spread the refuse material. After Dotson's haulage trucks dumped their refuse they traveled unloaded down the hill to the preparation plant to be reloaded.

On September 1, 1998, Dotson was using four trucks to haul refuse. One of these trucks, the Cline Number 77, was being driven by Charlie Hall. Hall was traveling unloaded down the refuse haul road on a 15% grade, apparently lost control of his truck, failed to make the turn at the Number 1 curve and passed through the berm into the side of a hill. When Hall's truck struck the hillside, he was projected through the windshield and landed in a ditch.

On September 1, 1998, Buster Stewart, an experienced coal mine inspector and accident investigator for the Mine Safety and Health Administration (MSHA) and Robert H. Bellamy, an MSHA mining engineer, proceeded to the mine to investigate. The investigation continued on September 2, 1998, and on September 3, 1998, when Dennis Ferlich and Terry Marshall from MSHA's Approval and Certification Center arrived. Ferlich is a mechanical engineer who focused his investigation on the braking system and related components of the cited truck.

The Alleged Violations

Citation Number 3816166, issued to Dotson, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1605(b) and charges as follows:

> The Cline refuse truck #77 was not provided with adequate brakes. The truck was examined by MSHA Technical Support personnel and defects to the braking system were documented which include that the front brakes were not operational.

The cited standard 30 C.F.R. § 77.1605(b) provides as relevant hereto that "[m]obile equipment shall be equipped with adequate brakes."

Citation Number 7350320 was issued to McCoy and also alleges a "significant and substantial" violation of the standard at 77.1605(b). It charges as follows:

> The 50-Ton Cline Refuse Truck, Co., No. 77, was not provided with adequate service brakes that would stop the truck in an emergency situation on the roadway it was traveling. On September 1, 1998, the truck was returning empty to the refuse bin when it failed to negotiate the No. 1 curve. The truck traveled through the berm and impacted the hillside. The evaluation of the testing performed by

MSHA Technical Support during the fatal accident investigation concluded the brakes were inadequate at the time of the accident. The truck has been out of service since the accident.

Citation Number 7351484, issued to Dotson and as subsequently modified, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 77.1607(c) and charges as follows:

> Equipment operating speeds are not consistent with the conditions of the roadway, grade, and type of equipment being used. On September 1, 1998, a powered haulage accident occurred resulting in fatal injuries to Charlie R. Hall, truck driver. The accident occurred when the #77 Cline refuse truck failed to negotiate the #1 curve. The truck traveled through the berm and over the out slope of the road and in to the hillside. The gravel on the road was firmly embedded and worn slick. The grade of the road in the area was approximately 15%. Extra water had been added to the refuse and allowed to leak from the truck beds for dust control purposes which added to the condition. The road is maintained by Dotson Trucking, Inc.

The cited standard, 30 C.F.R. § 77.1607(c), provides as follows:

> Equipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used.

Citation Number 7351483, issued to McCoy and as subsequently modified, also alleges a "significant and substantial" violation of 30 C.F.R. § 77.1607(c) and charges as follows:

> Equipment operating speeds are not consistent with the conditions of the roadway, grade, and type of equipment being used. On September 1, 1998, a powered haulage accident occurred resulting in fatal injuries to Charlie R. Hall, truck driver. The accident occurred when the #77 Cline refuse truck failed to negotiate the #1 curve. The truck traveled through the berm and over the out slope of the road and in to the hillside. The gravel on the road was firmly embedded and worn slick. The grade of the road in the area was approximately 15%. Extra water had been added to the refuse and allowed to leak from the truck beds for dust control purposes which added to the condition. The on-shift examinations are conducted by McCoy Elkhorn personnel.

Evaluation of the Evidence

Both MSHA investigators, Stewart and Bellamy, opined that truck driver Charlie Hall had been traveling at excessive speed in the presence of adverse road conditions. They concluded that the haul road where the accident occurred was slick from the deposition of water

and from gravel worn to a smooth surface. They also considered the skid marks at the Number 1 curve; the fact that the same truck had been driving this haul road for four hours before the accident on September 1, 1998, without incident; and reports from interviews that the victim, Charlie Hall, was known to drive fast down the haul road.

Mechanical engineer Dennis Ferlich's opinions are not disputed. Ferlich found that three of the six brakes on the cited truck were completely inoperative and that the remaining three brakes had a reduced functional capacity. He opined that the cited Cline Number 77 truck had only about 50% of its normal braking capacity and therefore the brakes were not adequate. Ferlich further opined that it was much more likely that the accident would not have happened if the truck had had full braking capacity. Ferlich also opined that, based upon his own examination of the brakes and the testimony of William New, Dotson's chief mechanic, Dotson did not in fact have a preventive maintenance program. In this regard he noted the failure of Dotson to have replaced the worn brake drums.

William New was the chief mechanic at Dotson and had worked for Dotson his entire mining career of 16 years. New was also supervisor for Dotson's two other mechanics and its truck drivers. According to New, Hall had worked for Dotson for three to four years before the accident on September 1, 1998. New was aware even before the accident that Hall had a reputation among the truck drivers for driving "too fast" down the haul road. He defined "too fast" as "coming off the hill" in fourth gear. New had himself seen Hall driving too fast on two occasions, one of which was only two to three weeks before the accident. He asked Hall to slow down "because it was too dangerous to come off that fast."

New also testified that there were no established disciplinary procedures at Dotson for violating company rules. When asked if he had ever disciplined Hall for driving too fast, he responded only that "I had spoke [*sic*] to him about driving too fast." New agreed with the Secretary's experts that "by all of the signs at the accident scene" Hall had been "definitely going fast."

Tommy Bevins, vice-president, secretary of Dotson and one of Dotson's owners, testified about Dotson's lack of disciplinary procedures in the following colloquy:

> Q. The 15 or 22 employees that you had in 1998, what were your disciplinary procedures or operation there, for example for driving too fast?
>
> A. Well, if it was a constant thing I would probably have fired them. But as far as-I'm just a small operator, I don't have a lot of extra people, and I couldn't afford to furnish . . . . So I couldn't have six or eight drivers to fill in if I disciplined one or laid him off. So what I tried to do was really stay on them, caution them about safety factors of it.

(Tr. 12/14/99 at 61, 76-77).

Bevins also testified that Dotson did not examine the drums or brake shoes on its equipment unless there was a problem. He later testified, regarding Dotson's method of

inspecting the brakes on its equipment, as follows:

> We do it the same way MSHA does, you know, if they stop then we assume they are all right. You know, like I say, if we see a problem we fix it, but if they stop we assume they are all right.

(Tr. 11/16/99 at 281-282). (Tr. 12/14/99 at 109).

Todd Lowe was employed on September 1, 1998, as a bulldozer operator for Sky Hawk Construction, a company also owned by Tommy Bevins. In order to get to and from his work site on the top of the hill he would ride with one of the truck drivers. He had been a passenger with Charlie Hall on two or three of these occasions and would not ride with him again. He was afraid to ride with Hall because "he came off the hill too fast."

Based on the undisputed evidence alone it is clear that all of the violations have been proven as charged. Citation No. 7351484 against Dotson and Citation No. 7351483 against McCoy both allege violations of the standard at 30 C.F.R. § 77.1607(c) and charge that the haulage truck driven by Charlie Hall was not operated at a speed prudent and consistent with conditions of the roadway, grades and related conditions and with the type of equipment being used. There is no dispute that the haulage road at the No. 1 curve was slick from water and with gravel which had been worn smooth. The area descended steeply at a grade of 15%. Skid marks also indicated that the truck was proceeding at a high rate of speed when it entered the No. 1 curve. There is, in addition, undisputed evidence that this truck driver had a practice of driving with excessive speed down the haul road.

The violations were clearly also of high gravity and "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

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

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

There is no dispute that haul truck driver Charlie Hall died as a result of the injuries he sustained when his truck proceeded through the berm, struck a hillside and he was thrown through the window of his truck. There likewise can be no dispute that the accident was caused by imprudent driving considering the road conditions including the grade and slickness of the road. Under these circumstances the violations were clearly "significant and substantial."

McCoy nevertheless claims that it is not liable for the violation charged in Citation No. 7351483, because neither its employees, its equipment nor its activities caused or contributed to the violation. The Commission and various courts have long recognized, however, that, under the Act's scheme of strict liability, an operator, although without fault itself may be held liable for the acts of its independent contractor. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Company v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981). In instances of multiple operators, the Secretary has "wide enforcement discretion" and may proceed against the operator, independent contractor, or both. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (February 1997), *Aff'd per curiam*, No. 97-1392 (4th Cir. January 8, 1998); *Consolidation Coal Company*, 11 FMSHRC 1439, 1443 (August 1989). The Commission has determined that "its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion." *W-P Coal Company*, 16 FMSHRC 1407, 1411 (July 1994). A litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on an improper understanding of the law. *Mingo Logan*, 19 FMSHRC at 249-50 n.5.

The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary's discretion, including the operator's day-to-day involvement in the mine's operations, whether the operator is in the best position to effect safety and whether the enforcement action is consistent with the purpose and policies of the Act. *Secretary v. Extra Energy Inc.*, 20 FMSHRC 1 (January 1998).

In this case I find that McCoy had substantial involvement in the day-to-day operations at the mine in that it operated the preparation plant at which the waste material hauled by Dotson's trucks originated, it directed Dotson's trucks to the place to dump the waste material and it retained overall directorial authority over the haul trucks. In addition, McCoy took no measures to ensure that the Dotson's haul truck drivers were driving at a reasonable and prudent speed considering the conditions of the haul road.

As the Secretary observes in her brief it is clear that McCoy's employees were also exposed to the hazards presented by the reckless driving of Charlie Hall. Indeed, Gary Thacker, who was at the time of the accident McCoy's plant superintendent, testified that he and other employees of McCoy's traveled the haulage road in order to carry out the required on-shift

examination for McCoy as well as for other purposes. Thacker also testified that on occasion William Spears, McCoy's safety director traveled this road to perform his own inspections. Thacker testified that while traveling on the haul road he remained in contact with the Dotson truck drivers by radio since they were traveling the same road at the same time. Clearly Dotson's trucks therefore posed a hazard to McCoy's employees. It is consistent with the purposes of the Act that McCoy should therefore have an active role in assuming that its employees are protected by ensuring that its contractor had competent and safe drivers on its mine property.

Based on the credible and unchallenged testimony of the Secretary's expert mechanical engineer Dennis Ferlich, it is also clear that the violations charged in Citation No. 7350320 against McCoy and Citation No. 3816166 against Dotson have also been proven as charged. 30 C.F.R. § 77.1605(b) requires that mobile equipment be equipped with adequate brakes. Ferlich's credible and undisputed testimony that the subject Cline No. 77 truck had only three operative brakes out of six and that its braking capacity had been reduced by 50% is clearly sufficient to sustain the violations. The violations were also of high gravity and "significant and substantial." In this regard Ferlich opined that if the subject 50-ton haul truck had been equipped with a fully functioning brake system then the deceased could have stopped the truck before he struck the hillside. It may reasonably be inferred in this case therefore that the inadequate brakes were a causative factor in the death of Charlie Hall.

McCoy nevertheless argues again that it should not be held liable because the Secretary abused her discretion in issuing the citation. McCoy maintains that its employees did not work with or alongside Dotson Trucking employees and the alleged violations were abated by the employees by Dotson. Applying the principles of law previously stated it is noted that Dotson's trucks represented a hazard to McCoy's employees who were required to travel the same haul road on which Dotson's haul trucks were operating. As previously noted McCoy was also responsible for the overall day-to-day mining activities at this operation and provided overall direction to Dotson's employees including the location to dump and designated the haul roads to be utilized. In addition, McCoy took no measures to ensure that the brakes on the haulage trucks were safe either by inspecting them itself or by requiring Dotson to do so. As a result, the obvious defects in the braking system were not discovered. Through its failure to inspect or ensure that the haul trucks were inspected, McCoy contributed to the braking violation and to the continued existence of the violation. See *Extra Energy*, 20 FMSHRC at 6. Under the circumstances I cannot find that the Secretary abused her discretion in citing McCoy for the violation herein.

Negligence Regarding Violations of 30 C.F.R. § 1607(c)

(a) Dotson's Negligence.

It is established that haul truck driver Charlie Hall was traveling at excessive speed for the conditions present at the time of his accident and that it may reasonably be inferred therefrom that Hall was highly negligent. The issue is whether the negligence of a rank and file truck driver may be imputed to Dotson for purposes of assessing a civil penalty. In *Southern Ohio Coal Co*,

4 FMSHRC 1459 (August 1982) 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 must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miners' violative conduct." The Commission also stated in that case that the fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being negligent. "In this type of case, we look to such considerations as the foreseeability of the miners' conduct, the risks involved, and the operator's supervising, training and disciplining of its employees to prevent violations of the standard in issue." *A. H. Smith Stone Co.*, 5 FMSHRC 13, 15 (January 1983).

In the instant case it is undisputed that haul truck driver Charlie Hall was traveling at excessive speed for the conditions present on the date of his accident. It is also undisputed that Hall's supervisor, William New, had knowledge of Hall's propensity for driving at excessive speed down the haul road. New was aware not only of Hall's reputation for excessive speed but also had personally observed this behavior only two or three weeks before the accident at issue. Hall was "talked to" but no disciplinary action was taken. Tommy Bevins, one of the co-owners of Dotson confirmed that he could not, or would not, institute any disciplinary procedures because of a labor shortage. Under the circumstances, it may reasonably be inferred that because of Hall's continued unpunished behavior in driving down the haulage road at excessive speed that the accident on September 1, 1998, was a foreseeable result of a lack of discipline and/or training. Dotson is accordingly responsible for Hall's negligence in driving at an excessive speed down the haul road on September 1, 1998.

(b) McCoy's Negligence.

While the Secretary has alleged in the citation at bar that McCoy was chargeable with "moderate" negligence she fails to cite in her post-hearing brief any evidence to support such a finding. Indeed, McCoy notes in its post-hearing brief that Dotson performed all maintenance on the road, that McCoy did not directly supervise Dotson's truckers, that McCoy had no information that Hall had a reputation for driving at excessive speed or that he in fact had been observed driving the road at excessive speed. These facts are indeed undisputed and, under the circumstances, I cannot find McCoy chargeable with negligence for this violation.

Negligence Regarding Violations of 30 C.F.R. 77.1605(b)

(a) Dotson's Negligence

The Secretary's expert, mechanical engineer Dennis Ferlich, credibly testified without contradiction that the brakes on the cited truck were seriously defective. The truck had only three of its six brakes operative and its braking capacity was reduced by 50%. Dotson mechanic-in-charge William New testified that they perform their own service and maintenance such as adjusting brakes and installing brake drums and brake shoes on the trucks. According to Tommy Bevins, one of Dotson's owners, the brakes are not routinely inspected and if the trucks "stop"

they are assumed to be all right. Dotson therefore by its own admission failed to comply with the standard at 30 C.F.R. § 77.1606.[1] By its failure to have conducted legally mandated inspections on its haulage truck brakes, Dotson was clearly negligent. *See Jim Walter Resources Inc.*, 19 FMSHRC 1646, 1649 (October 1997).

(b) McCoy's Negligence

The Secretary argues in this regard that McCoy had a duty to inspect the maintenance records of Dotson to ensure that the subject Cline #77 Truck as well as other Dotson equipment being used on its mine property was being maintained in a safe operating condition. *See Secretary v. Extra Energy Inc.*, 20 FMSHRC 1 (January 1998). There is no evidence that McCoy inspected or ensured that the Dotson trucks were inspected and, accordingly, within the framework of the *Extra Energy* decision, McCoy was negligent in this regard.

Civil Penalty

In assessing civil penalties in these cases I have also considered that Dotson is a small operator with a modest history of violations and that McCoy is a large operator with a significant history of violations. The instant violations were abated appropriately and there is no evidence that the assessed penalties would affect the ability of either to continue in business. The negligence and gravity criteria have already been discussed with respect to each violation.

ORDER

Citations No. 3816166 and 7351484 are affirmed as "significant and substantial" citations and Dotson Trucking Company, Inc., is directed to pay civil penalties of $35,000.00 and $25,000.00 respectively for the violations charged therein within 40 days of the date of this decision. Citations No. 7361483 and 7350320 are affirmed as "significant and substantial" citations and McCoy Elkhorn Coal Corporation is directed to pay civil penalties of $200.00 and $2,000.00 respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

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[1] The standard at 30 C.F.R. § 77.1606 provides that "mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation."

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

March 30, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-80-M
Petitioner	:	A. C. No. 21-02975-05510
v.	:	
	:	Docket No. LAKE 98-99-M
TOW BROTHERS CONSTRUCTION,	:	A. C. No. 21-02975-05511
INCORPORATED,	:	
Respondent	:	Cedar Rapids Crusher #F25918

DECISION

Appearances: Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner;
Arvid Wendland, Esq., Wendland and Timmerman, Blue Earth, Minnesota, for the Respondent.

Before: Judge Feldman

Before me are petitions for assessment seeking to impose a total civil penalty of $52,500 filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary) against the respondent, Tow Brothers Construction, Inc. (Tow Brothers). This matter concerns a serious accident that occurred on November 11, 1996, involving Tow Brothers foreman Wayne Walter. The accident occurred when Walter's right hand and forearm were caught in an unguarded trap feed conveyor head pulley as Walter was performing maintenance activities. Tow Brothers is a closely held family corporation with brothers James and Robert Tow each holding 50 per cent of the outstanding shares of the corporation.

These matters were called for hearing on February 9, 2000, in Fairmont, Minnesota. After several conferences with the parties' counsel, during which time I explained the application of the penalty criterion in section 110(i) of the Mine Act with respect to the effect on the operator's ability to continue in business, the parties reached settlement.[1] Specifically, I noted

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[1] The statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), provides, in pertinent part, in assessing civil 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

the capitalization structure of closely held corporations is intended to limit liability. Consequently, although the corporations small size, and the financial information and documentation submitted by Tow Brothers, were appropriate considerations, the corporation's purported inability to pay, alone, did not relieve Tow Brothers of its liability under the Mine Act.

The parties' settlement terms were set forth and approved on the record. The settlement terms included Tow Brothers' agreement to pay a reduced civil penalty from $52,500 to $22,500. Pursuant to my direction at trial, the Secretary has filed a written summary of the parties' settlement agreement. As part of their settlement, the parties have stipulated:

(a) The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.

(b) Tow Brothers is a corporation.

(c) Tow Brothers' operations affect interstate commerce.

(d) At all times relevant to the instant proceedings, Tow Brothers operated the Cedar Rapids Crusher #F25918.

(e) The Cedar Rapids Crusher #F25918 extracted sand and gravel.

(f) The Cedar Rapids Crusher #F25918 worked less than 10,000 hours in the period November 12, 1995, through November 11, 1996.

(h) Tow Brothers committed one (1) violation of a health and safety regulation in the 24 month period ending on December 31, 1996.

(i) Tow Brothers has agreed to pay the reduced civil penalty according to the payment plan detailed below.

The settlement terms as they apply to Docket Number LAKE 98-80-M are:

Citation	Date Issued	30 C.F.R.	Assessment	Settlement
4421526	11/13/96	56.14107(a)	$18,000	$ 7,700
4421527	11/13/96	56.14203	$20,000	$ 8,500
4421528	11/13/96	56.11001	$10,000	$ 4,500
		TOTAL	$48,000	$20,700

(1) The serious gravity associated with these citations remains unchanged.

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after notification of a violation.

(2) The degree of negligence specified in the citations is unchanged.

(3) Tow Brothers demonstrated its good faith by abating the citations within the time allowed by the MSHA inspector.

(4) The reduced penalty assessment is appropriate based on Tow Brothers' small size and financial limitations.

The settlement terms as they apply to Docket Number LAKE 98-99-M are:

Citation	Date Issued	30 C.F.R.	Assessment	Settlement
4421529	11/13/96	56.14107(a)	$1,500	$ 600
4421530	11/13/96	56.14107(a)	$1,500	$ 600
4421531	11/13/96	56.14107(a)	$1,500	$ 600
		TOTAL	$4,500	$1,800

(1) The gravity of the cited violations is unchanged.

(2) The degree of negligence specified in the citations is unchanged.

(3) Tow Brothers demonstrated its good faith by abating the citations within the time allowed by the MSHA inspector.

(4) The reduced penalty assessment is appropriate based on Tow Brothers' small size and financial limitations.

The parties have agreed to the following schedule of payments: Tow Brothers will pay $6,500 on March 15, 2000. [2] The remainder of the installments will be paid in eight (8) quarterly payments of $2,000 each, payable on or before the following dates: June 15, 2000, September 15, 2000, December 15, 2000, March 15, 2001, June 15, 2001, September 15, 2001, December 15, 2001, with the last payment made on or before March 15, 2002. If payments are not made in accordance with this payment schedule, the remaining balance of the $22,500 civil penalty shall due and payable immediately.

Payments shall be made to the Mine Safety and Health Administration, ATTN: Dorothy Johnson, 4015 Wilson Blvd., Room 926, Arlington, VA 22203.

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[2] As of March 24, 2000, the first installment of $6,500 had not yet been received by MSHA's Office of Assessments. I assume payment has been delayed pending the issuance of this decision formalizing the parties' agreement. **If payment of the first $6,500 installment is not received within 21 days of the date of this decision, the Secretary may file a motion for a default judgment that seeks to impose the $52,500 civil penalty initially proposed in these matters.**

ORDER

As noted on the record at trial, I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the parties' motion for approval of settlement **IS GRANTED,** and, **IT IS ORDERED** that Tow Brothers Construction, Inc., pay a $22,500 civil penalty in accordance with the above payment schedule and, upon receipt of timely payment of the entire $22,500 penalty, these cases **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 31, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-148
Petitioner	:	A. C. No. 46-01433-04274
v.	:	
	:	Loveridge No. 22
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary) against the respondent, Consolidation Coal Company (Consol). The petition sought to impose a total civil penalty of $54,000 for six 104(d)(2) Orders.

This matter was heard on November 16 and November 17, 1999, in Morgantown, West Virginia, at which time the respondent stipulated that it is a mine operator subject to the jurisdiction of the Act. At the hearing the parties proposed a settlement of three of the orders in issue that resulted in vacating one order and modifying one order to a 104(a) citation. The parties' settlement motion was granted on the record and the terms of their agreement are discussed below.

I. Findings of Fact

The three contested 104(d) orders in this matter are: Order No. 4889944 issued for alleged combustible coal dust accumulations in the 9 South Mains section, also called the Leo section, of Consol's Loveridge No. 22 Mine during the day shift on May 20, 1998, in violation of the mandatory safety standard in 30 C.F.R. § 75.400; Order No. 4889945 issued for Consol's

alleged failure to maintain incombustible content of at least 65 per cent of the combined coal dust, rock dust and other dust in the 9 South section in violation of 30 C.F.R. § 75.403; and Order No. 4889946 issued for Consol's alleged failure to perform an adequate preshift examination in violation of 30 C.F.R. § 75.360(a)(1) because the cited accumulations were not noted in the preshift examination book. All of the cited conditions were designated as significant and substantial (S&S) and attributed to Consol's unwarrantable failure.

Generally speaking, the normal mining cycle involves extracting coal by driving entries forward with a continuous miner one entry at a time. The entry is then roof bolted. Once the newly driven entry is under supported roof, loose coal is then swept from the mine floor with scoops that travel across the section to shuttle cars or the section dumping point. At that point, rock dust is applied to the entries. In order to determine whether the Secretary has satisfied her burden of proof with respect to each of the elements of the 104(d) orders in issue, it is necessary to first consider the activities occurring in the Leo section at the time of the subject May 20, 1998, inspection.

The 9 South section has three working shifts: the day shift (8:00 a.m. to 4:00 p.m.); the afternoon shift (4:00 p.m. to 12:00 a.m.); and the midnight shift (12:00 a.m. to 8:00 a.m.). The 9 South section was idle on the midnight shift of May 20, 1998, just before the subject inspection on the following day shift of May 20. However, miners were present in the section on that midnight shift to grade the track heading. The 9 South section mined only 47 feet during the afternoon shift on May 19, 1998. Only 38 feet was mined during the preceding day shift on May 19, 1998.

On May 20, 1998, coal production in the Leo section had been suspended for several shifts in order to complete several construction projects including trenching, installation of overcasts, grading of the mine floor for what was to become a new belt entry, and cutting or "bumping" the corners of coal pillars to widen new haulage roadways for use. These construction projects were in preparation for the start-up of the new 1D section, a section that branched off from the 9 South entries at 90 degrees. Resumption of production mining in the Leo section was not scheduled to begin until completion of the construction activities and rock dusting of the section. At the time of the inspection, the 9 South section equipment had been moved outby the area of construction activity. In addition to the mining equipment used in the 9 South section, the mining equipment to be used in the new 1D section was being stored in the 9 South section inby the tailpiece. This equipment included three continuous miners with 1000 feet of trailing cable and two sets of mining equipment, a loading machine with 800 to 900 feet of trailing cable, shuttle cars and a roof drill. The equipment's trailing cables were placed along the ribs to keep the cables clear of the haulage roads. Rib sloughage is common in the Loveridge Mine and some of the cables had sloughage on them. Although rib sloughage is common, MSHA does not require the sloughage to be cleaned because cleaning may destabilize the rib. Consequently, the issuing inspector in this case did not include rib sloughage in his measurements of the depth of the cited accumulations. (Tr. 65, 67).

The installation of overcasts and the construction of trenching required extensive cutting into mine roof material that mainly consists of dark gray rock with little or no coal. Overcasts are designed to allow two air currents to cross in situations where converging mine sections are driven in different directions. To install overcasts for the new ventilation controls, the roof area removed by Consol to create the overcast was approximately 10 feet above the roof line (10 feet deep) in an area 16 feet wide by 60 feet long.

Trenching is the method used to create the necessary clearance (or height) from the mine floor to the roof to install the belt drive and belt take-up unit for the new 1D section. To cut the trench for clearance of the belt drive, the area of rock removed from the roof was 15 feet above the roof line (15 feet deep) in an area 16 feet wide by 220 feet long.

To cut the overcasts and trench Consol used the common industry method of allowing the rock cut from the roof to remain on the mine floor in order to create a "ramp" that was used by the continuous miner for elevation to access deeper into the mine roof, and, later, was used by the roof bolting machine to install permanent roof support. Cutting the trenches and overcasts generated large quantities of dark gray rock dust. This rock dust was ventilated inby the construction work area, away from mine personnel. The dark color of the rock dust ruined the appearance of the section in that it covered previous inert rock dusting.

In January 1998, jurisdiction over Consol's Loveridge Mine was transferred from MSHA's Fairmont, West Virginia field office to MSHA's Bridgeport, West Virginia field office. Shortly thereafter, personnel from MSHA's Bridgeport office, including MSHA Inspector Kenneth W. Tenney, inspected the Loveridge mine to evaluate mine conditions. As a result of the Bridgeport field office's initial inspection, Consol officials were informed that Consol's cleanup and rock dusting efforts were "borderline" and that they must be improved. (Tr. 300-01). Therefore Consol was told that the Bridgeport office would "place emphasis" on such things as cleanup and rock dusting. (Tr. 133).

At approximately 10:00 a.m. on May 20, 1998, Tenney arrived at the 9 South Mains section of the Loveridge No. 22 Mine for the purpose of continuing an ongoing triple A inspection that had begun in April 1998. At that time, no mining was occurring, the section having been idle since the previous midnight shift. However, Tenney testified that crew members on the section had been instructed to adjust the ventilation system in order to begin the cleanup of material removed from the roof during the cutting of the overcast.

Tenney was accompanied by Danny Kuhn, Consol's safety escort, and Mike Renick, a UMWA union escort. Tenney was familiar with the 9 South section because he had been at the Loveridge Mine every week since January 1998, when the previous triple A quarterly inspection had begun. Tenney testified that mining in 9 South mains was "periodic" and that the tailpiece, or "dumping point" had not advanced and that it had remained in the "same place for an "extended period of time . . . for up to a week or maybe even longer. " (Tr. 45-6). Tenney explained advancement was "very slow" because Consol was cutting overcasts and went days

without actually cutting the face. (*Id.*) The overcasts were necessary before mining of the 1D panel could begin. The haul roads were used to transport overcast and trench debris to the tailpiece for removal to the surface.

Upon arriving on the 9 South section, Tenney observed excessive spillage and rib sloughage. Tenney testified haulage equipment had run over the spillage and pulverized it into dust. The shuttle cars are equipped with drags that spread the spillage over the entries as they go back and forth through the entries. The drags smooth the roadway by filling potholes in the roadway with loose material. (Tr. 61).

Specifically, Tenney observed the conditions in the number 3 through number 7 entry from the first crosscut inby the section tailpiece to the last open crosscut at the number 8 block, an area of approximately 600 feet in length. Tenney initially estimated the section had areas of "six, eight, ten, twelve inches, it depended on where you measured it at." (Tr. 47). However, when asked to quantify the areas of 8 to 10 inch accumulations, Tenney explained:

> Q: Was it mostly eight inches throughout this area? Was it eight inches in only a few places? . . . And the question is how extensive . . . an area?
>
> A: If you're asking me to characterize the whole thing, I would say that 99 percent of it had more than one inch. And from all the holes that was . . . the drags [on the shuttle cars] had drug it around could have six, eight, 12 inches, I didn't measure all the depths . . .
>
> Q: So if there was a [pot]hole it could accumulate six to eight inches or more in the hole?
>
> A: Right.
>
> Q: But where the mine floor was essentially level without potholes it was in the area of one to two inches; is that what you're saying?
>
> A: Yes sir, that would be a good surmise.

(Tr.389-92).

As a result of his observations, Tenney issued Order No. 4889944 citing an S&S violation of the mandatory standard in section 75.400. The specific areas of excessive accumulations cited in Order No. 4889944 were (1) coal spillage that was 20 inches deep, 8 inches wide and 12 feet long from a bulldozed corner in the number 7 crosscut between the number 6 and number 7 entries; (2) coal accumulations 10 inches deep in the center of the mine floor in the number 5 crosscut between the number 2 and number 3 entries; and (3) ground up coal from sloughage that was run over by mobile equipment 10-14 inches deep and 36 inches wide running along the full

length of the number 4 crosscut between the number 3 and number 4 entries. The Order also cited coal wind rowed along the sides of the entries up to 12 inches deep. In summary, the Order noted, "section shows signs of general lack of clean up and house keeping. Conditions are obvious to even the most casual observer."

Section 75.400 provides:

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

Consol's production reports reflect in the two days preceding the inspection, beginning 12:01 a.m. on May 18, 1998, through 12:01 a.m. on May 20, 1998, 1,128 tons were mined and transferred by shuttle cars in the 9 South section. (Tr. 141-42). Tenney opined that it was inconceivable that mining this relatively small amount of coal could have resulted in the extensive accumulations and spillage that he had observed. (*Id.*) Tenney speculated, based on the extent of the accumulations and spillage, and the small amount of coal mined in the preceding shifts, that the cited accumulations had existed for approximately 12 shifts. (Tr. 381-82, 385-88). In this regard Tenney testified:

> Sir, I believe that the accumulations are from two things. Number one, part of it was from the fact that the ribs had sloughed and shuttle cars had run over it repeatedly. And number two, that the time frame that they were using the travelway, that it had not been cleaned up for an extended period of time. And that it was from the spoonful or shovelful of the coal, each facet of the shuttle car and day after day being drug around by the bar on it [the drags]. (Tr. 387-88).

Tenney noted that the No. 1, No. 2 and No. 3 entries in the 9 South Leo section had been recently cleaned and rock dusted. At the time of Tenney's inspection, the Number 1, 2 and 3 entries were not being used as haul roads to remove the overcast and trench material that had been removed from the mine roof.

Tenney recalled the No. 7 entry was fairly damp from the last open crosscut outby a couple of blocks up to a water hole in front of the feeder. In entry Nos. 4 through 8, with the exception of rock dust on the mine roof and ribs up to a level of approximately one foot where sloughage from the ribs to the mine floor had begun, Tenney observed no visible rock dust at the base of the ribs or on the mine floor.

The procedure for rock dust collection of "samples to substantiate the violation when citing inadequate rock dust" is set forth in MSHA's Coal General Inspection Handbook at Chapter 4 in Section III (A). (Resp. Ex. 2). This section requires collection of mixed dust obtained from the floor, ribs and roof by the band or perimeter method. The sample should be thoroughly mixed, coned and quartered to cut the bulk of the sample to the desired amount. Section III(A) also permits collection of separate "supplies of dust from either the roof, ribs, or floor when deemed necessary." For example, when it is "impractical and unsafe" to collect full band or perimeter samples, floor samples may be collected separately. (*Id.*).

Tenney testified that a band sample "takes an extreme amount of time, it takes several minutes [to collect]. Its not something we do in a few seconds." (Tr.353). Instead of using the band method of collection, Tenney stated he collected five dust samples simply by sweeping loose material from the mine floor into a pan and then transferring the material into a bag. To determine the locations where dust samples would be collected, Tenney testified, ". . . they were just random. Take one here, take one there, and we were walking throughout the area, **and when I got to an area where I thought it was really bad**, I just took a sample." (Tr. 361) (Emphasis added).

Tenney was asked whether he should have taken the time to obtain band samples, particularly in this case where the samples would be used to support an alleged unwarrantable failure. "Perhaps I should have taken the method and the time involved in it. In this instance, the severity was so clear to me that it was not an area of concern." (Tr. 357). Nonetheless, Tenney admitted that band samples would have contained a higher percentage of incombustible content than the incombustible content contained in his mine floor samples. (Tr. 362-64).

Based on his conclusion that there was no visible rock dust on the mine floor in entry Nos. 4 through 8, Tenney issued 104(d)(2) Order No. 4889945 citing an alleged violation of the mandatory safety standard in section 75.403. This mandatory standard states in pertinent part:

> 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 be not less than 65 per centum . . . .

104(d)(2) Order No. 4889945 states:

> The incombustible content of the combined coal dust, rock dust and other dust of the St. Leo-9 South (058) section does not appear to be properly maintained. The mine floor and ribs of the #3 thru #7 entries from the 1st crosscut inby the section loading point (#4 crosscut), inby to the last open crosscut (#8 crosscut), have been poorly rock dusted at best during development. Many areas are black and the roadways are dry with coal having been ground to dust and coal fines by mobile equipment. The #7 entry from the last open crosscut outby for 400 feet shows no

evidence of rock dust on the floor. Condition is obvious to the most casual observer. The following spot samples were collected to support this order: (1) #7 entry 40 ft. outby #8 crosscut (2) #7 entry 30 ft. outby #7 crosscut (3) crosscut 3 to 4 #4 crosscut (4) crosscut 3 to 4 #5 crosscut (5) #6 entry midway between 7 & 8 crosscut. These samples are representative of entire area.

(Gov. Ex. 2).

Laboratory analysis of the rock dust sample obtained by Tenney reflected incombustible contents ranging from 23.6% to 36.9%, below the required 65% incombustible content required by section 75.403. (Gov. Ex. 3).

Inspector Tenney reviewed the preshift and onshift books for the 9 South section. No references to spillage or accumulations of coal were noted in the preshift examination report for the day shift of May 20, 1998. Because the accumulations of coal and the need for additional rock dust for the section were not listed in the preshift book, Tenney issued 104(d)(2) Order No. 4889946 alleging a violation of 30 C.F.R. § 75.360(a)(1). This mandatory safety standard provides, in pertinent part, ". . . a certified person designated by the operator shall make a preshift examination [for hazardous conditions] within 3 hours preceding the beginning of any shift . . ."

As previously noted, Danny Kuhn accompanied Tenney on his May 20, 1998, inspection. Kuhn, now retired, worked for Consol for 32 years. In the 15 years preceding his retirement, Kuhn was a safety inspector in Consol's safety department. Kuhn had been in the 9 South section on the day shift of May 19, 1998, to check on the abatement of a citation that inspector Tenney had issued on May 18, 1998. At that time, the construction work in the No. 1, 2, and 3 entries had been completed and the entries were being rock dusted with hoses that are connected to a track mounted bulk duster.

During the midnight shift beginning at 12:01 a.m. on May 20, 1998, corners were cut from coal pillars at the No. 6 entry at the No. 7 crosscut, and at the inby end of the belt trench in the No. 5 entry at the No. 7 crosscut, to widen these areas to enable equipment to negotiate turns. Additional cutting of the pillar in the No. 6 entry had been done at the time of Tenney's inspection. Consol's production foreman Thomas Zapach stated material cut from pillars during the bumping process was cleaned as soon as practicable, after the continuous miner and other equipment were moved so that the area could be cleaned.

Kuhn recalled the belt trench and overcasts were substantially completed during the day and afternoon shifts of May 19, 1998. However, Zapach testified additional trench cutting occurred on the day shift of May 20, 1998.

On the day of the inspection, Kuhn testified the bulk dusting hose was extended from the bulk duster in the track entry into the No. 3 crosscut between No. 3 and No. 6 entries. Kuhn testified that bulk rock dusting could not be accomplished until construction was complete. For example, Kuhn explained the trench was being cut in the roof of the No. 5 entry, the full length from the No. 4 crosscut through to the No. 7 crosscut. To ventilate the roof dust away from the continuous miner operator and roof bolters who were cutting the trench, the dislodged gray roof dust was blown inby the No. 5 entry along the No. 4, 5, 6, and 7 crosscuts obscuring previous inert rock dust that had been applied during the mining process. Kuhn explained that the mine floor could not be rock dusted until the trench and overcast debris was scooped and cleaned from the floor because the scoop would remove rock dust that was applied to the mine prior to the cleanup process.

In addition, equipment and trailing cables that were stored in the section during the construction phase had to be removed from the section so that the roads could be cleaned. With the exception of the two areas of accumulations resulting from the recent bumping of the pillars, both Kuhn and Zapach attributed the coal dust accumulations observed by Tenney to rib sloughage that was run over by mine equipment and distributed by shuttle car drags, rather than spillage from shuttle cars. Zapach stated that sloughage has inert rock dust content form the previously rock dusted ribs, although he conceded there may be instances where additional rock dusting is needed.

In summary, both Kuhn and Zapach testified that, like the No. 1 through No. 3 entries that had been thoroughly rock dusted immediately after construction work was completed, the No. 4 through 8 entries were to be bulk rock dusted as soon as construction was completed, the trench and overcast debris was cleaned from the mine floor, and the stored equipment with its trailing cables were moved out of the roadways.

II. Further Findings and Conclusions

In January 1998, jurisdiction over Consol's Loveridge No. 22 mine was transferred from MSHA's Fairmont West Virginia field office to MSHA's Bridgeport, West Virginia field office. After initially inspecting the mine, inspector Tenney and his supervisor in the Bridgeport office met with Consol's management personnel and informed them that their "rock dusting procedures and their clean-up was borderline to substandard." (Tr. 47-49). The company was told to "step up, to come forward, to increase their compliance level." (*Id.*). Having concluded Consol's past emphasis on cleanup and rock dusting under the jurisdiction of the Fairmont field office was inadequate, Tenney entered the 9 South Leo section, where construction rather than active mining, was occurring.

The three alleged violative conditions in issue concern impermissible coal dust accumulations, the failure to adequately rock dust, and the failure to note the cited conditions in the preshift examination book. In order to evaluate whether the Secretary has established, by a preponderance of the evidence, that the cited S&S violations occurred, and, if so, whether they are attributable to Consol's unwarrantable failure, the cited violations must be viewed in the context of the construction that was occurring in the 9 South Leo section on May 20, 1998.

A. Order No. 4889944 - Accumulations

i. Fact of Occurrence

Section 75.400, the cited mandatory standard, requires that coal dust and other combustible materials shall "not be permitted to accumulate in active workings." Since coal dust is a natural consequence of mining, the question is whether Consol "permitted" the accumulations to occur without making any effort to remove them. In applying section 75.400, the Tenth Circuit Court of Appeals has stated section 75.400 "prohibits permitting [coal dust] to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power & Light v Secretary of Labor*, 951 F.2d 292, 295 n.11, (10th Cir. 1991). Thus, resolution of whether Consol's actions constitute a violation of section 75.400 is dependent on the amount of time Consol allowed the accumulations to remain on the mine floor. Since the Mine Act is a strict liability statute, Consol may be held liable for violation of this mandatory safety standard without regard to fault. *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994).

The accumulations in the 9 South section that serve as the basis for the cited section 75.400 violation are coal accumulations from a bulldozed corner in the No. 6 entry at the No. 7 crosscut measuring 20 inches deep, by 12 feet long, by 8 feet wide, as well coal and roof rock dust accumulations, from one to two inches in depth, with deeper accumulations filling irregularities in the mine floor (potholes), in the No. 4 through No. 8 entries and crosscuts. The origin of the mine floor accumulations primarily was from coal rib sloughage that had been run over and ground into dust by battery operated scoops transporting blocks and overcasts. The ground sloughage material was combined with dark gray roof dust by shuttle car drags.

Consol admits the "bumping" residuals were allowed to remain on the mine floor from some time during the midnight shift beginning at 12:01 on May 20, 1998, when two pillars were bumped, until they were observed by inspector Tenney at approximately 10:00 a.m. the following morning. Tenney's speculation that the conditions he observed existed for approximately 12 shifts is difficult to reconcile with his testimony that mining in the 9 South section was "periodic" with very slow face advancement. However, since construction had occurred in the subject entries since at least May 18, 1998, it is reasonable to conclude the widespread accumulations from ground sloughage that was spread by shuttle cars existed for a minimum of several shifts.

As a general proposition, in defining a prohibited "accumulation" for section 75.400, the Commission has recognized that "some spillage of combustible materials may be inevitable in mining operations. However it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980) (*Old Ben II*). Whether conditions constitute a violation of section 75.400 should be committed to the broad discretion of the mine inspector. *Id.*

Here, the cited accumulations, consisting of sloughage that had been run over and dragged into the haul roads, were extensive. The combustible content of the ground up sloughage varied with the concentration of roof rock dust and other inert material mixed together by the shuttle car drags. Consol, by subordinating its cleanup responsibility to its desire to complete construction allowed these conditions to exist for several shifts. Accordingly, the Secretary has demonstrated the elements of a section 75.400 violation.

ii. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

Id. at 3-4 (footnote omitted). *See also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In determining if it is reasonably likely that a cited condition will result in serious injury, it is not necessary to show that miners were exposed directly to the resultant hazard at the time of the inspection. Rather, the Commission has stated an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986); *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (August 1985).

Applying the *Mathies* criteria, having concluded Consol violated section 75.400, the first element is satisfied. Because coal dust accumulations are potentially combustible, and, if combustion, *i.e.,* fire or explosion, were to occur, there is a reasonable likelihood that miners would sustain serious injury, the second and fourth elements of the *Mathies* test are met. The remaining criterion, a reasonable likelihood that the combustion hazard caused by the violation will result in injury, requires examining whether there was a "confluence of factors" present based on the particular facts surrounding the violation that would make a fire, ignition, or explosion reasonably likely. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of these factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Enlow Fork Mining Co., 19 FMSHRC 5, 9 (January 1997) citing Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf*, 10 FMSHRC at 500-03.

As a threshold matter, although minimal concentrations of .1% to .2% methane were present in the 9 South section on May 20, 1998, Consol's Loveridge No. 22 Mine liberates more than 1,000,000 cubic feet of methane in a 24 hour period subjecting the mine to spot inspections under section 103(i) of the Mine Act, 30 U.S.C. § 813(i). Thus, the cited extensive accumulations, that could be put in suspension by the drags on the shuttle cars, was a source of propagation in the event of a methane fire or explosion in any part of the mine.

In addition to the general methane explosion hazard originating in other areas of the mine, inspector Tenney testified about several potential ignition sources in the 9 South section. For example, Tenney noted continuous miner bits hitting sulfur balls, acetylene torches used for welding, and electrical trailing cables that were subject to damage as mining equipment drove over them, as potential ignition sources.

Accordingly, the evidence amply reflects a reasonable likelihood, given continued mining operations, that the hazard contributed to by the cited combustible accumulations will result in an event (a fire or explosion) causing injury of a reasonably serious nature. Consequently, the S&S nature of the subject section 75.400 violation shall be affirmed.

B. Order No. 4889945

Section 75.403, the cited mandatory standard, requires rock dust to be applied to the roof, ribs and floor of all underground mine areas so as to maintain "incombustible content of the **combined coal dust, [white, applied] rock dust, and other dust**" of less than 65 per centum. (Emphasis added). Upon his arrival on the 9 South section on May 20, 1998, Tenney's observations led him to believe the incombustible content of the combined dust found on the section was less than the 65 percent standard. (Tr. 171). I emphasize "combined dust," because violative samples taken from isolated coal spills, residuals of coal cut from coal pillars, and areas of coal sloughage, alone, are not evidence of inadequate rock dusting.

Sometime prior to beginning construction in the 9 South section, Tenney concedes the

section had been rock dusted during the course of the normal mining cycle when the entries were advanced. In fact, Tenney observed rock dust on the roof and halfway up the ribs. Kuhn, the company representative who accompanied Tenney during his inspection admits the section looked "bad" on May 20. 1998, because of the dark gray roof material that had been blown inby throughout the section to ventilate the construction roof dust away from the miner and roof bolter operators. Spillage of the roof debris in the haul roads was also likely. The shuttle car drags would mix the roof rock material that had fallen on the mine floor with the cited coal dust sources, such as sloughage that was run over by mine equipment.

Thus, the fact that the conditions of the mine floor and lower ribs looked black in color on May 20, 1998, is not in dispute. The issue is whether the general conditions in the 9 South section at that time constituted a violation of Section 75.403 because there was less than 65 percent incombustible content. Five rock dust samples obtained by Tenney, taken by sweeping samples from the mine floor into a pan, revealed incombustible contents ranging from 23.6% to 36.9%, below the required 65% incombustible content. However, Consol argues the samples taken by Tenney are not representative samples because Tenney did not use the band collection method that involves mixing roof, rib and mine floor dust.

Provisions in MSHA's policy manuals, such as the band sample procedures for dust sample collection in MSHA's Coal General Inspection Handbook, are not officially promulgated and they are not binding on the Commission. *Utah Power*, 12 FMSHRC at 969 *citing King Kob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981). Moreover, the question of whether a band sample is required to support a rock dust violation is not a matter of first impression. Rather, the Interior Board of Mine Operations Appeals, the predecessor of this Commission, addressing Section 304(d) of the 1969 Coal Act that contains the identical language in section 75.403, has held that laboratory results of floor samples alone may be the basis for establishing a violation of an incombustible content standard. *North American Coal Corporation*, 1 MSHC 1130, 1134 (1974).

While floor samples alone may be adequate to support a section 75.403 violation, the analysis does not stop there. The floor samples must be taken from representative areas of the mine floor, rather than from areas where discrete coal accumulations are located. Although Tenney testified that he took the floor samples randomly, he stated that he took the samples from areas that he thought "[were] really bad." (Tr. 361). When asked to clarify the apparent contradiction between his "random" sampling and his selection of "bad areas," Tenney responded, "I would say that I picked out the areas that I was confident the rock dust content was the lowest." (Tr. 367).

When an MSHA inspector departs from recommended procedure by collecting floor samples instead of band samples as representative of mine conditions, the Secretary must bear the burden of demonstrating the samples are representative. Here, Tenney's selection of areas where he believed rock dust content was the lowest renders the samples unrepresentative, thus voiding the laboratory findings.

Hence, the Secretary is left solely with Tenney's observations. Observations alone, particulary in this case where there were significant quantities of dark gray roof dust throughout the 9 South section, are inadequate to support a section 75.403 violation. Accordingly, 104(d) Order No. 4889945 shall be vacated.

C. Order No. 4889946

Order No. 4889946 cites an alleged violation of section 75.360 that requires "a certified person designated by the operator shall make a preshift examination within 3 hours preceding the beginning of any shift during which any person is scheduled to work or travel underground." Thus, the operative time frame for determining the period during which conditions should have been noted in the preshift book is the three hour period before the beginning of the 8:00 a.m. day shift on May 20, 1998, or from 5:00 a.m. to 8:00 a.m.

Consol admits that bumping material that occurred during the midnight shift immediately preceding the May 20, 1998, day shift had not been cleaned from the mine floor. The evidence also reflects areas of sloughage that had been run over by mine equipment and pushed into the haul entries were also present at least 3 hours before the beginning of the May 20, 1998, day shift. As discussed above, these conditions constituted hazardous conditions. Such hazards must be noted in the preshift book. Even though it was noted that the mine section was idle, construction personnel were present on the section. Accordingly, Consol's failure to note these hazardous accumulations in the preshift examination book constitutes a violation of section 75.360.

With regard to the S&S issue, the Commission has stated that thorough preshift examinations are fundamental to coal mine safety. *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (January 1995). The failure to note existing coal dust accumulations in the preshift examination book contributes to the continuing presence of a hazardous condition. As a consequence, given the above discussion about the likelihood of serious injury occurring as a result of the combustion hazard, it is reasonable to conclude that the cited violation of section 4889946 was properly designated as S&S in nature.

D. The Unwarrantable Failure Issue

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. A finding of unwarrantable failure requires evidence of unjustifiable or aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.,* 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Ordinarily, allowing accumulations to exist for several shifts clearly would constitute a very serious breach of the duty to clean combustible accumulations with all deliberate speed that section 75.400 imposes on operators. Thus, it is easy to dismiss the respondent's construction defense and consider this matter as a routine coal dust accumulation case attributable to an unwarrantable failure. However, to do so would ignore the mining cycle by superimposing the routine standards for cleanup that apply after an entry has been driven and roof bolted to a construction area where active mining is not in progress.

The degree of negligence associated with violative coal dust accumulations must be evaluated on a case-by-case basis. The Commission has noted that the totality of circumstances are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the accumulations, the length of time the violation was permitted to exist, the operator's efforts to eliminate the condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Windsor Coal Company*, 21 FMSHRC 997 (September 1999).

That accumulations existed for several shifts is not in dispute. The central issue is whether Consol's failure to remove the cited accumulations is unjustifiable and inexcusable given the facts of this case. The Secretary has confronted Consol with a dilemma. The Secretary insists that it is inexcusable for Consol to have proceeded with construction activities without first cleaning and rock dusting the 9 South section. However, the evidence reflects that Consol's ability to clean and rock dust the section prior to completion of construction was greatly impaired.

There were numerous pieces of mining equipment for the new 1D section, as well as for the 9 South section, that had been stored inby and outby the tailpiece. These pieces of machinery were equipped with lengthy trailing cables that were stored along the base of the ribs. During construction it was difficult to maneuver this equipment until pillars were bumped where necessary. While this equipment was stored, trenches and overcasts were cut in the mine roof that generated large quantities of mine roof rock dust. This mine roof dust was ventilated away from the continuous miner and roof bolt operators by directing the roof dust inby in the Number 4 through 7 entries. At what point during the construction process was it appropriate for Consol to withdraw all of this equipment to make the entries and crosscuts accessible for cleaning? If it had done so, at what point would Consol have to again withdraw all of the equipment to scoop and rock dust after construction activities had resumed?

Clearing the section for cleaning during construction was difficult. In this regard, it took several shifts to remove the equipment, scoop the area, and bulk rock dust in order to abate Order No. 4889944. From the time the 104(d) order was written at 10:30 a.m., Consol worked all of its crews and all of the equipment around the clock to abate the order. To correct the cited conditions Consol had to move two continuos miners, two loading machines and two roof bolters. The continuous miner and loading machine cables, that were stored along the ribs, also had to be removed. Both the continuous miner cables and the loading machine cables are

approximately 1,000 feet long. Consol was not finished cleaning the section when Tenney arrived at the mine at 5:00 a.m. the following day. The order was terminated at 7:00 a.m. on May 21, 1998. Thus, it took approximately 20 hours to clean and rock dust the section. When viewed in this context, the question is whether Consol's decision to briefly delay cleanup and bulk dusting in the 9 South section until it had completed construction, like it had done for the No. 1 through No. 3 entries, constitutes aggravated conduct.

In recognizing Consol's difficulty in cleaning the section under these circumstances, I am not trivializing the significance of hazardous accumulations, or, ignoring Consol's responsibility to remove the accumulations. However, an operator's continuing obligation to remove coal accumulations must be distinguished from whether its failure to do so is egregious behavior properly characterized as aggravated, unjustifiable, or inexcusable conduct. As discussed below, Consol's history of section 75.400 violations demonstrates that accumulation violations are most often not attributable to unwarrantable conduct. Of necessity, accumulations are permitted during certain stages of the mining cycle. For example, accumulations remain on the mine floor during the continuous mining and roof bolting process because it is not practicable to remove the accumulations until the continuous miner can be backed out of the entry. *Utah Power*, 12 FMSHRC at 967.

While not dispositive of the unwarrantable failure issue, it is noteworthy that MSHA investigated this matter and decided not to pursue an action under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that requires a showing that mine management "knowingly" violated the subject mandatory standards. (Resp. Ex. 3). Such a showing requires demonstrating aggravated conduct on management's part constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Finally, the concepts of "notice" and "a history of repeated similar violations" must be distinguished. A history of numerous repeated similar violations is not necessary to establish that an operator was on notice. Notice may be established based on a history of only one similar violation where an operator claims, for mitigation purposes, that it was not aware of a particular safety hazard, or, that it did not understand a particular safety standard.

In the present case, the Secretary asserts Consol's conduct constitutes unwarrantable failure because it was on notice as a consequence of its history of section 75.400 coal dust accumulations violations. However, in the current case, notice is not in issue, in that Consol does not assert that it was unaware of its responsibility to promptly remove coal dust accumulations. Rather, the mitigating circumstances relied on by Consol concern issues concerning section construction. Thus, Consol's conduct must be evaluated on the basis of its behavior during construction, without regard to Consol's obvious awareness, as well as the awareness of all other operators, that operators are responsible for promptly cleaning coal dust accumulations.

During the two year period preceding the issuance of the orders in issue, from May 20, 1996, through May 19, 1998, Consol was cited for 88 violations of section 75.400. Of these 88 violations, two were attributable to Consol's unwarrantable failure. Of the 88 violations, 44 violations were assessed $50 penalties and characterized as non-S&S. The majority of the civil penalties assessed for the S&S violations ranged between $267 and $595.

Although Consol's history of numerous section 75.400 violations is a relevant consideration under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and warrants increasing the civil penalty to encourage deterrence, I am not persuaded, as the Secretary suggests, that Consol's history of violations elevates its behavior to aggravated conduct. Such an approach is inconsistent with the statutory language of section 104(d) that sets forth the circumstances for the Mine Act's graduated enforcement scheme. In *Greenwich Collieries*, 12 FMSHRC 940 (May 1990) the Commission noted:

> **The focus of section 104(d) is upon the operator's unwarrantable conduct. Section 104(d) seeks to discourage repetition of such conduct** by placing the operator on a probationary "chain." This probationary period, backed up by the threat of a withdrawal order, is "among the Secretary's most powerful instruments for enforcing mine safety." UMWA v. FMSHRC, supra, 768 F.2d at 1479.

12 FMSHRC at 945. (Emphasis added). Using repeated similar violations to establish that an operator has unwarrantable character shifts the statutory focus by imposing withdrawal sanctions on operators with a history of repetitious violations rather than a history of repetitious unwarrantable conduct. While this powerful enforcement procedure may be desirable, it is not authorized by the plain language of the statute.

I am not suggesting that prior similar violations are always immaterial. There may be situations where repeated violative conduct is important in demonstrating an unwarrantable failure because the violative conduct is specific, such as a repeated failure to trim hazardous stockpiles. However, here, a history of a generic failure to clean coal dust accumulations, that may have occurred because of an unknown myriad of circumstances, may not be used to establish that an operator's current violative conduct is habitual. Consequently, in this case, where notice is not in issue, and specific habitual violative conduct has not been shown, Consol's history of violations does not provide an adequate basis for elevating its moderate negligence on May 20, 1998, to unjustifiable or inexcusable conduct.

Accordingly, I conclude Consol's failure to clean the cited accumulations, and its failure to note the conditions in the preshift examination book because construction on the section was not yet complete, were not attributable to its unwarrantable failure. Thus, 104(d) Order Nos. 4889944 and 4889946 shall be modified to 104(a) citations.

III. Civil Penalty

Section 110(i) of the Act provides the statutory criteria for to determining the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil 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.

The parties have stipulated that Consol is a large mine operator and that the civil penalties initially proposed by the Secretary in this matter will not affect Consol's ability to continue in business. As discussed above, the violations are of serious gravity and are attributable to no more than Consol's moderate negligence. Consol's immediate suspension of construction activities and its concerted efforts to achieve compliance are not viewed as a mitigating circumstance since Consol was obliged to rapidly abate the cited conditions. Finally, although Consol's history of numerous similar 75.400 violations does not provide an adequate basis for elevating its conduct to an unwarrantable failure, its significant violation history is a basis for increasing the civil penalty for Citation No. 4889944 to encourage greater efforts of future compliance.[1]

Accordingly, consistent with the statutory penalty criteria, a civil penalty of $3,500.00 shall be assessed for the violation of section 75.400 cited in modified Citation No. 4889944, and a civil penalty of $1,500.00 shall be assessed for the violation of section 75.360 cited in modified Citation No. 4889946.

IV. The Settlement Agreement

The parties' settlement agreement with respect to remaining 104(d)(2) Order Nos. 4703193, 4703221 and 4703222 was granted on the record. (Tr. 696). Consol agreed to a reduction in civil penalty from $27,000.00 to $4,500.00. The settlement terms included vacating Order No. 4703222, and modifying 104(d)(2) Order No. 4703221 to a 104(a) citation and imposing a $1,500.00 civil penalty. 104(d)(2) Order No. 4703193 remained unchanged although the civil penalty was reduced from $9,000.00 to $3,000.00.

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[1] The $3,500 civil penalty imposed herein for Consol's section 75.400 violation is significantly higher than the penalties proposed by the Secretary for Consol's prior section 75.400 violations.

ORDER

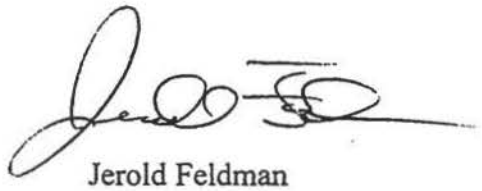
ACCORDINGLY, IT IS ORDERED that 104(d)(2) Order No. 4889945 **IS VACATED.**

IT IS FURTHER ORDERED that 104(d)(2) Order Nos. 4889944 and 4889946 **ARE MODIFIED** to a 104 citations to reflect that the cited violations of sections 75.400 and 75.360 were not attributable to Consolidation Coal Company's unwarrantable failure.

IT IS FURTHER ORDERED that Consolidation Coal Company shall pay a $3,500.00 civil penalty for modified Citation No. 4889944, and a civil penalty of 1,500.00 for modified Citation No. 4889946.

IT IS FURTHER ORDERED, consistent with the parties' settlement agreement reached at trial, that 104(d)(2) Order No. 4703222 **IS VACATED**, and, Consolidation Coal Company shall pay civil penalties of $1,500.00 for modified 104(a) Citation No. 4703221, and $3,000.00 for 104(d)(2) Order No. 4703193.

IT IS FURTHER ORDERED that Consolidation Coal Company pay a total civil penalty of $9,500.00 in satisfaction of the subject orders and citations. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the total $9,500.00 civil penalty, this matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3868
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March 7, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-272
Petitioner	:	A. C. No. 15-16856-03536
v.	:	
KYBER COAL COMPANY,	:	Docket No. KENT 95-276
Respondent	:	A. C. No. 15-16856-03537
	:	
	:	Docket No. KENT 95-280
	:	A. C. No. 15-16856-03538
	:	
	:	Docket No. KENT 95-284
	:	A. C. No. 15-16856-03539
	:	
	:	Docket No. KENT 95-288
	:	A. C. No. 15-16856-03540
	:	
	:	Docket No. KENT 95-689
	:	A. C. No. 15-16856-03544
	:	
	:	Docket No. KENT 95-692
	:	A. C. No. 15-16856-03542
	:	
	:	Docket No. KENT 95-697
	:	A. C. No. 15-16856-03547
	:	
	:	Docket No. KENT 95-701
	:	A. C. No. 15-16856-03545
	:	
	:	Docket No. KENT 95-707
	:	A. C. No. 15-16856-03548
	:	
	:	Docket No. KENT 95-713
	:	A. C. No. 15-16856-03543
	:	
	:	Docket No. KENT 95-715
	:	A. C. No. 15-16856-03546
	:	
	:	Docket No. KENT 95-776
	:	A. C. No. 15-16856-03549
	:	
	:	Elmo No. 5 Mine

ORDER GRANTING MOTION FOR A RULING IN LIMINE
ORDER DENYING MOTION FOR REMAND
ORDER DENYING MOTION FOR LEAVE TO FILE REPLY BRIEF

In these civil penalty cases the Secretary is petitioning for the assessment of civil penalties against Kyber Coal Company for approximately 219 alleged violations of mandatory safety standards for underground coal mines. The matters are part of the Berwind series of cases in which the Secretary alleged that five entities, Berwind Natural Resources Corporation (Berwind), Kentucky Berwind Land Company (Kentucky Berwind), Jesse Branch Coal Company (Jesse Branch), Kyber Coal Company (Kyber) and AA&W Coal Company (AA&W) were liable jointly and severally for numerous violations of mandatory safety standards at the Elmo No. 5 Mine. The cases arose out of an explosion that occurred at the mine on November 30, 1993. The explosion took the life of one miner.

AA&W did not contest the Secretary's assertion of jurisdiction, but the other four companies did. Each of the four argued that they were not operators under section 3(d) of the Mine Act (30 U.S.C. §802(d)) and hence they were not liable for the alleged violations. The cases were assigned to me, and I bifurcated them in order to determine first the jurisdictional questions. Following a ruling on cross motions for summary decision and a hearing on the jurisdictional aspects of the cases, I held that Berwind, Kentucky Berwind, and Jesse Branch were not operators, but that Kyber was (Berwind Natural Resources Corporation, et al., 18 FMSHRC 202 (February 1996)). On appeal, the Commission upheld this result, albeit on the basis of a different rationale (Berwind Natural Resources Corporation, et. al., 21 FMSHRC 1284 (December 1999)). Thus, of the four entities who contested the Secretary's assertion of jurisdiction, only Kyber remained a party subject to potential liability for civil penalties should the Secretary prove her allegations regarding the merits of the alleged violations. Because of this, the Commission remanded the matter to me for further proceedings as to Kyber (21 FMSHRC at 1325).

After receiving the remand, I ordered counsels for Kyber and the Secretary to engage in extensive prehearing discussions on a number of issues and to report the results of their discussions in an on-the-record conference (see Order (January 12, 2000)). In the meantime, Kyber has filed two motions. One motion seeks a ruling in limine that the Secretary improperly proposed assessments based upon a theory of joint and several liability. The motion goes on to request that if violations are found to have existed, civil penalties be assessed against Kyber according to the criteria of section 110(i) of the Act (30 U.S.C. § 820(i)) and according to the Secretary's regulations (30 C.F.R. Part 100) as those criteria and regulations individually apply to Kyber. The other motion seeks a ruling that because the Secretary improperly assessed the proposed civil penalties, the penalties be remanded to the Secretary for recalculation on the basis of the criteria and regulations as they apply individually to Kyber (Kyber Motion For Ruling In Limine and Contingent Motion for Remand (February 8, 2000)).

The Secretary opposes the motions and argues the courts and the Commission long have accepted the concept of joint and several liability in multiple operator situations and that the proposed penalties were assessed properly. The Secretary asserts that the term "operator" in section 110(i) of the Act can refer to joint operators where multiple entities are running a mine

and that the civil penalty criteria enumerated in section 110(i) can be applied to the combined operation of a mine as easily as to separate companies (Sec. Resp. 3-4). Additionally, the Secretary opposes remanding the cases for recalculation of the penalties. She states that "the Commission, as the ultimate determiner of the suitability of penalties, can make a determination de novo on that question at the time of trial" (Id. 5).

The Secretary's Petitions and The Proposed Penalties

The Secretary's petitions name Kyber as the Respondent and state that Berwind, Kentucky Berwind, Jesse Branch, Kyber and AA&W each are "jointly and severally liable for the penalties associated with the [alleged] violations" (Petition 2). In Exhibit A of the petitions the Secretary additionally states, "The same proposed assessment was issued jointly and severally to AA&W. . . ., Jesse Branch . . . , [Kentucky] Berwind . . ., and Berwind . . . for the violations alleged" (see e.g., Exhibit A (Docket No. KENT 95-272)). (Exhibit A is a form that "list[s] the alleged violations and the proposed penalties" (29 C.F.R. §2700.28(b)). It contains the Secretary's evaluation of the civil penalty criteria and reveals how the Secretary determined the proposed assessments.)

A review of the Secretary's petitions and the exhibits makes clear that the Secretary applied the same penalty criteria to all of the alleged operators. She did so even though most, if not all of the criteria, were based upon AA&W's operation of the mine. For example, the criterion of the appropriateness of the penalty to the size of the business was based upon the tonnage attributed to AA&W and the operator's history of previous violations was based upon the prior violations issued to AA&W. The Secretary made no attempt independently to apply the penalty criteria to Kyber or to any other of the Berwind-related entities. In essence, when it came to proposing penalties, Kyber was treated as though it were AA&W.

The Commission found that at all times relevant, Kyber was an operator because "Kyber was substantially involved in the mine's operation" (Berwind, 21 FMSHRC at 1294) and the Commission agreed that "Kyber's active participation and its authority to actively participate in the decision-making process regarding the daily development of the mine . . . rendered . . . [Kyber] an operator within the meaning of the Act" (Berwind, 21 FMSHRC at 1295). As an operator, Kyber will be liable, jointly with AA&W, for the penalties assessed for all violations that are found to have existed at the mine.

However, although Kyber and AA&W will be liable jointly, their shared liability should not be confused with their status as operators. Kyber and AA&W are individual, not unitary, operators. In this regard, it is worth noting that they do not possess common management, they do not share common ownership, and one does not have such pervasive control over the other that they should be treated as one (see Berwind, 21 FMSHRC at 1317). Because they are individual operators of the same mine they are entitled to have the Secretary propose penalties on the basis of the penalty criteria as the criteria apply individually to them. Therefore, I conclude the Secretary incorrectly proposed the civil penalties for which she petitioned.

Is A Remand Appropriate

Having found the Secretary erred in proposing the penalties, the question is whether a remand to re-propose them is appropriate. As the parties recognize, the Commission has held that in certain circumstances it has the authority to require the Secretary to re-propose penalties in a manner consistent with the Part 100 penalty regulations. The Commission's goal in ordering the Secretary to do so is to guard against arbitrary agency action (Youghiogheny & Ohio Coal Co., 9 FMSHRC 673 (April 1987) (Youghiogheny & Ohio Coal Co.)). There are considerations in the subject cases that at first glance seem to call for a remand. The Secretary has, in fact, acted arbitrarily in proposing penalties, and Kyber has objected to the Secretary's action (see Youghiogheny & Ohio Coal Co., 9 FMSHRC at 679-680)). In fact, not only has Kyber objected in the motions under consideration, she raised the same objection much early in the proceedings (see Kyber Motion To Stay Further Proceedings (March 22, 1995)). Moreover, it could well be, as Kyber maintains, that re-proposed penalties would make more likely a comprehensive settlement of the cases.

However, the question of a remand essentially is one of discretion rather than of law, and while I recognize that there are factors which well might justify an order requiring the Secretary to re-propose the penalties, I conclude the factors are overshadowed and outweighed by another consideration. An order remanding the cases would not be "intercession by the Commission at an early stage of the litigation" (Drummond Company, Inc., 14 FMSHRC 661, 667 (May 1992)). Rather, these cases, which now have proceeded to the point where the merits of the alleged violations can be adjudicated, are among the oldest, if not the oldest, on the Commission's docket, and they must be resolved. Any further delay, such as that occasioned by a remand, only would make the disappearance of witnesses and the fading of memories more likely than they are already. The public, the industry, miners — and, perhaps above all, the parties — all have an interest in bringing these cases to a conclusion.

Therefore, I will not order these matters remanded for re-proposal of the penalties. In choosing to exercise my discretion in this manner I am mindful of the potential prejudice to Kyber caused by the Secretary's erroneous initial proposed assessments. However, I believe that any prejudice can be "cured" by applying the statutory civil penalty criteria as they relate to Kyber in any independent assessments I make based on the record evidence.

ORDER

For the reasons stated above Kyber's motion for a ruling in limine is **GRANTED**. In addition, Kyber's motion to remand is **DENIED**. Finally, Kyber's Motion for Leave to File Reply Brief also is **DENIED**.

My Order of January 12, 2000, remains in effect. Under the order Kyber and the Secretary have an obligation to confer and to discuss (1) all disputed issues of fact and law, (2) matters that can be subject to stipulations, (3) the validity of the subject citations and order (4) the amount of the penalties, and (5) possible settlement of all or any part of the cases. In view of my ruling on Kyber's motion in limine, when the parties confer and discuss these matters, they are directed to consider the statutory civil penalty criteria and the bearing of the criteria on the cases solely as the criteria relate to Kyber.

The parties are reminded that a prehearing conference will take place at 8:30 a.m., on April 18, 2000, and continuing to April 19, if necessary, to report on the results of the parties discussions and on their preparations for trial.

David F. Barbour
Chief Administrative Law Judge

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