

COMMISSION DECISIONS

03-04-2004	Consolidation Coal Company	WEVA 2002-83	Pg. 138
03-04-2004	Consolidation Coal Company	WEST 2002-373	Pg. 142
03-12-2004	Cannelton Industries, Inc.	WEVA 2002-111-R	Pg. 146
03-18-2004	Frontier-Kemper Constructors Inc.	WEST 2003-279-M	Pg. 163
03-19-2004	Stillwater Mining Company	WEST 2004-140-M	Pg. 167
03-19-2004	Beco Construction Company	WEST 2003-104-M	Pg. 171
03-19-2004	Tim Glasscock employed by Maple Creek Mining	PENN 2003-198	Pg. 175
03-19-2004	Better Materials Corporation	PENN 2003-95-M	Pg. 179
03-19-2004	Kingwood Mining Company	WEVA 2004-50	Pg. 183
03-19-2004	Brown Sand, Inc.	WEST 2003-384-M	Pg. 186
03-19-2004	Black Hills Bentonite, LLC	WEST 2003-276-M	Pg. 190
03-19-2004	U.S. Quarried Slate Products, Inc.	YORK 2004-20-M	Pg. 194
03-19-2004	Duane Ross, employed by Maple Creek Mining	PENN 2004-17	Pg. 198
03-19-2004	Duane Ross, employed by Maple Creek Mining	PENN 2004-71	Pg. 202
03-19-2004	Philip Environmental Services, Inc.	CENT 2003-26-M	Pg. 206
03-23-2004	Enos Little, employed by Coastal Coal Co.	KENT 2003-280	Pg. 210
03-23-2004	RAG Emerlad Resources, LP	PENN 2004-16	Pg. 214
03-23-2004	Tacoma Diesel & Equipment, Inc.	WEST 2003-112-M	Pg. 218
03-23-2004	Hanson Permanente Cement, Inc.	WEST 2003-260-M	Pg. 221
03-23-2004	County Concrete & Construction	YORK 2004-3-M	Pg. 225
03-25-2004	Laredo Paving, Inc.	CENT 2003-35-M	Pg. 228
03-25-2004	RAT Contractors, Inc.	VA 2003-1	Pg. 231
03-25-2004	Cosby-Carmichael, Inc.	SE 2003-78-M	Pg. 234
03-25-2004	CKC Materials Division	WEST 2003-268-M	Pg. 238
03-25-2004	South Texas Aggregates, Inc.	CENT 2003-94-M	Pg. 242
03-25-2004	D.A. Doughy & Sons	WEST 2003-79	Pg. 246
03-25-2004	Leeco, Inc.	KENT 2004-50	Pg. 250
03-29-2004	E.C. Voit & Sons	LAKE 2003-130-M	Pg. 253
03-29-2004	Ray Brown Enterprises	SE 2003-43-M	Pg. 256
03-29-2004	Virgin Islands Quarry, Inc.	SE 2003-112-M	Pg. 260
03-29-2004	Keith Crabtree, emp. by Pro-Industrial Welding	SE 2003-203	Pg. 264
03-29-2004	Certified Road Constructors, Inc.	YORK 2003-62-M	Pg. 268
03-29-2004	Van Buren County Road Department	CENT 2003-187-M	Pg. 272
03-29-2004	Meridian Aggregates Company	CENT 2002-280-M	Pg. 276
03-29-2004	Celite Corporation	WEST 2002-465-M	Pg. 280

ADMINISTRATIVE LAW JUDGE DECISIONS

03-01-2004	Jim Walter Resources, Inc.	SE 2003-103-R	Pg. 284
03-09-2004	Hansen Truck Stop, Inc.	WEST 2003-284-M	Pg. 293
03-29-2004	Gochenour's Minerals & Mining	WEST 2003-453-M	Pg. 310

ADMINISTRATIVE LAW JUDGE ORDERS

03-26-2004	Jim Walter Resources	SE 2003-150-R	Pg. 317
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MARCH 2004

No cases were filed in which Review was granted during the month of March

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 4, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2002-83
v.	:	A.C. No. 46-01968-04392
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 17, 2002, the Commission received from Consolidation Coal Company ("Consol") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

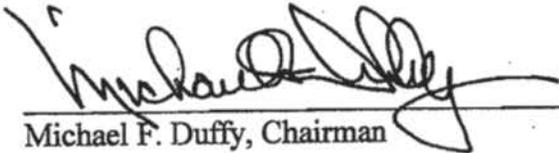
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

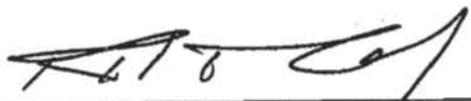
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

In its motion, Consol states that on January 17, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 46-01968-04392) to Consol's Blacksville No. 2 Mine. Mot. at 1. Consol further states that the proposed penalty assessment was issued in connection with a fatal injury to an employee of a contractor performing work at the mine. *Id.* Under an indemnification agreement with its contractor, the contractor is required to defend and indemnify Consol with respect to citations arising from the contractor's work. *Id.* Consol asserts that, at the time Consol received the proposed penalty assessment, various documents were being processed and forwarded to the contractor according to the indemnification obligations of the contract, and Consol was also served with a wrongful death suit by the estate of the contractor's employee. *Id.* Consol further asserts that, as a consequence of the exchange of documents with the contractor, the proposed penalty assessment was inadvertently mislaid and was only discovered after the time to file a timely request for hearing had passed. *Id.* at 1-2. Consol did not attach any supporting documentation to its motion. The Secretary states that she does not oppose Consol's request for relief.

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



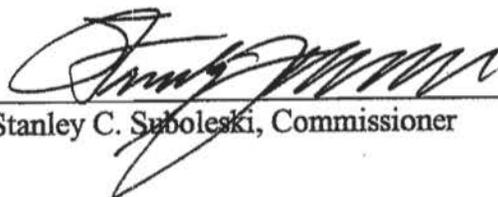
Michael F. Duffy, Chairman



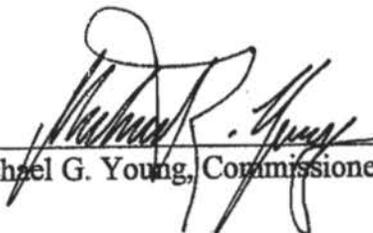
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 4, 2004

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

v.

CONSOLIDATION COAL COMPANY

:
:
:
:
:
:
:

Docket No. WEST 2002-373
A.C. No. 42-00079-03607

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 19, 2002, the Commission received from Consolidation Coal Company ("Consol") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

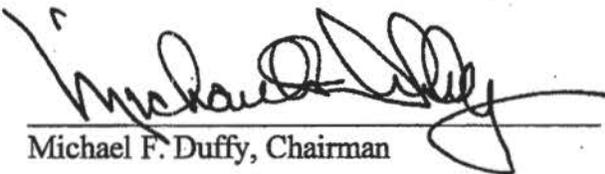
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

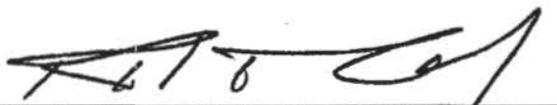
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On December 14, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 42-00079-03607) to Consol's Emery Mine in Emery, Utah. In its motion, Consol states that, at the time MSHA sent the proposed penalty assessment to its Emery Mine, the mine was idled. Mot. at 1. Consol further states that although the return receipt on the penalty proposal was signed on January 15, 2002, the employee who signed it was not familiar with MSHA procedures regarding civil penalties, and, as a consequence, Consol failed to timely file a hearing request. *Id.* Consol also states that it was aware that citations had been issued but it was unable to obtain a civil penalty conference with the appropriate MSHA district personnel. *Id.* Consol did not attach any supporting documentation to its motion. The Secretary states that she does not oppose Consol's request for relief.

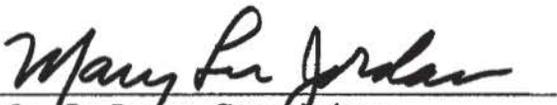
Having reviewed Consol's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Consol's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



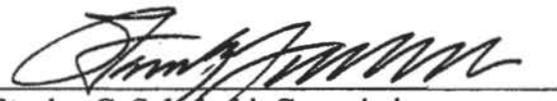
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suholeski, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 12, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 2002-111-R
	:	WEVA 2002-112-R
v.	:	
	:	
CANNELTON INDUSTRIES, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners¹

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

In this 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"), the Secretary of Labor petitioned for review of Administrative Law Judge T. Todd Hodgdon's determination that Cannelton Industries, Inc. ("Cannelton") did not violate 30 C.F.R. § 75.360(a)(1) because the "pumpers' exception" to the preshift requirements set forth in section 75.360(a)(2) applied.² 24 FMSHRC

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

² 30 C.F.R. § 75.360 provides in pertinent part:

(a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval

(2) Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and

707 (July 2002) (ALJ). For the reasons discussed below, we affirm the judge's determination.

I.

Factual and Procedural Background

Cannelton operated the Shadrick Mine (also referred to as the "Stockton" mine) an underground coal mine in Kanawha County, West Virginia. 24 FMSHRC at 707. On May 3, 2002, the mine was idled and put into non-producing status because it was unable to sell its coal and its stockpiles were growing too large. *Id.* Most of the miners were laid off. *Id.* All power was de-energized at the faces, and all face equipment was tagged out. Tr. 108, 452-53. Cannelton planned to reactivate the mine in the event coal sales improved. 24 FMSHRC at 708. To prevent the mine from flooding while it was idle, Cannelton kept approximately 70 to 80 electric pumps running. *Id.*; Tr. 107. On May 6 or 7, the company began sending certified personnel, mostly management employees, into the mine during each shift to check the pumps. 24 FMSHRC at 708. No preshift examinations were performed prior to the entry of these personnel. Tr. 38.

On May 13 and 14, Jeffrey Styers, a certified electrician and fireboss, accompanied by Daniel Baker, a certified mine foreman and electrician, traveled throughout the mine checking the pumps and the permissibility of the power centers. 24 FMSHRC at 708; Tr. 35, 41, 67-68, 340, 348, 350-51. At all times, Styers and Baker carried an MX-250 gas detector, which detects methane and sounds an alarm when oxygen in the mine atmosphere falls below a safe level. Tr.

the pumper conducts an examination for hazardous conditions, tests for methane and oxygen deficiency and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions found by the pumper shall be made and retained in accordance with § 75.363.

(b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:

....

(7) Areas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift.

100-03. They also were provided with an anemometer³ and smoke tubes to monitor airflow. Tr. 103-04, 130, 338, 343-44. From time to time, they took readings for methane and oxygen and checked air movement. Tr. 67, 347-48. Styers and Baker did not examine areas where energized trolley wires were located beyond where they worked or traveled. Tr. 375-76.

On May 15, 2002, Inspector Gilbert Young from the Department of Labor's Mine Safety and Health Administration ("MSHA") went to the Stockton mine to investigate a complaint that the mine was not conducting required weekly examinations. 24 FMSHRC at 708. After talking to Cannelton personnel and examining the company's preshift and on-shift examination books, Young issued two citations. *Id.* The first citation, No. 7191145, alleged a significant and substantial ("S&S")⁴ violation of section 75.360(a)(1). *Id.* The second citation, No. 7191146, which is not at issue in the current appeal, charged an S&S violation of section 75.364(b), which requires weekly examinations when miners have been working. *Id.* at 708, 710. Cannelton contested the citations and requested an expedited hearing on the matter. *Id.* at 708.

The judge found that the "pumpers' exception" in section 75.360(a)(2) applied and vacated the preshift citation. *Id.* at 708-10. His reasoning was based on the preamble to section 75.360, which states "[u]nder the final rule, *either* a preshift examination must be made in accordance with paragraph (a)(1) before a pumper enters an area, *or* certified pumpers must conduct an examination under paragraph (a)(2)." *Id.* at 709 (emphasis in original) (citations omitted). The judge concluded that where a pumper is the only person entering an idle mine and he examines the areas where he works and travels, the pumpers' exception provides the safeguards that a preshift examination would provide. *Id.* at 710. The judge further noted that it made little sense to double the exposure to possible hazards in the mine by requiring another examiner to preshift those areas where the pumper is going to travel and work. *Id.*

The Secretary filed a petition for discretionary review ("PDR"), challenging the judge's vacation of the preshift citation, which the Commission granted. Cannelton subsequently filed a motion to dismiss the PDR.

³ An anemometer is an instrument for measuring air velocity. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 19 (2d ed. 1997).

⁴ 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."

II.

Disposition

A. Motion to Dismiss PDR

As a preliminary matter, we address Cannelton's motion to dismiss the Secretary's PDR. Cannelton argues that when the PDR was granted, the Commission, which then consisted of only two Commissioners, lacked the authority to grant the Secretary's PDR. C. Mot. at 1. Cannelton relies primarily on Mine Act section 113(c), 30 U.S.C. § 823(c), which provides that the Commission may delegate to any group of three members all of the powers of the Commission and that two members shall constitute a quorum for a panel of three Commissioners. *Id.* at 2. It further asserts that Mine Act section 113(d)(2)(A)(iii), 30 U.S.C. § 823(d)(2)(A)(iii), does not alter Congress' limitation on the Commission's authority to conduct business but merely provides that two members must vote in favor of a petition. *Id.* at 2-3.

The Secretary opposes the motion to dismiss and contends that Cannelton's argument is at odds with the plain meaning of Mine Act section 113(d)(2)(A)(iii) and Commission Rule 29 C.F.R. § 2700.70(b). S. Opp'n. at 2. According to the Secretary, those provisions clearly state that only two Commissioners need be present and voting to grant review of a judge's decision. *Id.*

Although section 113(c) provides that "[t]he Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph," this language does not answer the question of whether the Commission was authorized to grant the PDR here. 30 U.S.C. § 823(i). Mine Act section 113(d)(2)(A)(iii) directly addresses the question at issue. It states: "Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission's procedural rules also require that "[r]eview by the Commission shall be granted only by affirmative vote of at least two of the Commissioners present and voting." 29 C.F.R. § 2700.70(b).

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. 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. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). The clear and unambiguous terms of Mine Act section 113(d)(2)(A)(iii) require two Commissioners to be present and to vote in favor of a petition for discretionary review for it to be successfully granted. Cannelton's assertion that the general language contained in section 113(c) overrides section 113(d)(2)(A)(iii) is not convincing. It is a rule of statutory construction that "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) (citation omitted). Moreover, if Congress had intended the interpretation

that Cannelton advocates, it would have had no reason to adopt section 113(d)(2)(A)(iii). *Accord* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 181 (6th ed. 2000) (“It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.”).

Cannelton’s other arguments similarly lack merit. The legislative history of the Mine Act does state, as Cannelton urges, that the Commission may delegate its powers to any group of three but it also clearly explains that review is granted on the vote of two Commissioners present. *See, e.g.*, S. Rep. No. 95-461, at 60 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1338 (1978) (“*Legislative History*”). Nor is Cannelton’s reliance on the National Labor Relations Act (“NLRA”) persuasive. Although the Commission is patterned, in part, after the National Labor Relations Board (“NLRB”) (*Legislative History* at 635-36), which must act with three members (29 U.S.C. § 153(b)), there is simply no parallel because the NLRA, unlike the Mine Act, contains no provision for discretionary review – an appeal from an administrative law judge is automatic upon filing. Moreover, permitting two Commissioners to vote on petitions when a quorum is not present does not result in delay, as Cannelton suggests. Rather, section 113(d)(2)(A)(iii) allows the business of the Commission to continue so that meritorious cases may proceed to briefing during the infrequent instances where there are only two sitting Commissioners.

Accordingly, we deny Cannelton’s motion to dismiss.

B. The Pumpers’ Exception to the Preshift Examination Requirement

The Secretary argues that the judge ignored the plain meaning of sections 75.360(a)(1), 75.360(a)(2) and 75.360(b), which, when read together, require that a preshift examination be performed in areas where pumpers do not work or travel. PDR at 7-11; S. Br. at 7-14; S. Reply Br. at 1-6.⁵ Cannelton responds that the Secretary’s interpretation ignores the “pumpers’ exception” to the preshift examination, which is intended to provide an alternative examination to the more common preshift examination in limited circumstances, such as those in the mine at issue. C. Br. at 1-2, 7-13.

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*

⁵ On November 5, 2002, the Secretary filed an unopposed motion for a two-week extension of time to file her reply brief. The Commission was unable to decide the motion at that time because it lacked a quorum. The Secretary then filed the reply brief on the date specified in the motion. We hereby grant the motion for extension of time and accept the reply brief.

Coal Co., 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. See *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

"In determining the meaning of regulations, the Commission . . . utilizes 'traditional tools of . . . construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union*, 917 F.2d at 44-46). In a plain meaning analysis, a provision at issue must be considered in the context of the language and design of the Secretary's regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996); see *Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999) (stating that reading the plain words of a provision *literally* can carry a different meaning than intended; meaning of the language, plain or not, depends on the context). The Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions. *New Warwick*, 18 FMSHRC at 1368. Additionally, "a regulation must be interpreted so as to harmonize with and not to conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citations omitted); see also *Canterbury Coal Co.*, 20 FMSHRC 718, 721-22 (July 1998) (referring to both Mine Act and regulatory history in plain meaning analysis).

This case presents a matter of first impression and hinges on whether the language in section 75.360(a) allows pumpers' examinations in lieu of preshift examinations. The Secretary contends that energized trolley wires in areas where certified pumpers do not work or travel must be preshifted when the certified pumpers perform examinations in areas where they work and travel pursuant to section 75.360(a)(2). Although she acknowledges that the pumpers' exception in section 75.360(a)(2) does not address the question of whether other areas of the mine – areas where certified pumpers do not work or travel – are required to be preshifted, the Secretary asserts that sections 75.360(a)(1) & (2) and 75.360(b), when read together, clearly require that the hazards set forth in section 75.360(b)(1)-(10) be examined in those areas where pumpers do not work or travel. S. Br. at 9-11. A reading of those sections fails to support her assertion.⁶

Section (a)(1) recites that "[e]xcept as provided in paragraph (a)(2) . . . , a certified person designated by the operator must make a preshift examination." 30 C.F.R. § 75.360(a)(1). Section (a)(2), which is the exception, states that "[p]reshift examinations . . . shall not be required" for areas where certified pumpers work or travel. 30 C.F.R. § 75.360(a)(2). Section (b) states that "[t]he person conducting the preshift examination shall examine for" a number of

⁶ While the Secretary enumerates the locations in section 75.360(b)(1)-(10), her brief focuses on section 75.360(b)(7), the provision involving examinations where energized trolley lines are located.

listed hazards. 30 C.F.R. § 75.360(b). Under a plain reading, the examinations required under section (b) do not apply to certified pumpers because they expressly do not have to conduct preshift examinations. In addition, section (a)(1) states: “No person *other than certified examiners* may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval.” 30 C.F.R. §75.360(a)(1) (emphasis added). All of the pumpers that entered the Cannelton mine were certified examiners. Tr. 65, 340. Thus, under the express terms of section 75.360(a)(1), a certified pumper does not need a preshift examination to enter or remain in the mine.

The Secretary’s intent in drafting this pumpers’ exception is set forth in the preamble to the final rule and accords with this plain meaning analysis. The preamble explains that the “proposed rule . . . allow[s] pumpers to conduct an examination in lieu of the preshift examination.” 61 Fed. Reg. 9764, 9791 (Mar. 11, 1996). The preamble further states:

Under a previous standard replaced in 1992, persons such as pumpers, who were required to enter *idle* or abandoned areas on a regular basis in the performance of their duties, and who were trained and qualified, were authorized to make examinations for methane, oxygen deficiency and other dangerous conditions for themselves. Under the final rule, *either* a preshift examination must be made in accordance with paragraph (a)(1) before a pumper enters an area, *or* certified pumpers must conduct an examination under paragraph (a)(2).

Id. at 9792 (emphasis added). Indeed, the preamble states on at least four occasions that the pumpers’ examination is an alternative to, or may be performed in lieu of, a preshift examination. *Id.* at 9765, 9791-92.

Moreover, the preamble is instructive regarding the trolley line issue. The preamble discusses the reason for excluding a revision to the proposed rule that would have explicitly permitted preshifting only the shaft and slope bottom area when this was the sole work being performed in an otherwise idle mine. In rejecting the revision, the preamble states “because areas where persons are not scheduled to work or travel are not required to be examined under the final rule, the change is unnecessary.” *Id.* at 9791-92. According to the preamble, then, the Secretary did not intend for the entire mine, including areas where energized trolley lines are located, to be examined when only shaft bottom work is ongoing, even when the miners performing that work are not certified. From the perspective of mine safety, it follows that, when only certified examiners/pumpers are in the mine, the examination requirements should be lesser, not greater.

The Secretary urges that, in furtherance of the remedial purposes of the Mine Act, the regulation be interpreted broadly, while the pumpers’ exception be read narrowly. S. Br. at 7. The Secretary submits that it would have been anomalous for her to have intended that hazards originating in areas of the mine where pumpers do not work or travel could go entirely

unexamined, while pumpers are working or traveling underground. PDR at 12; S. Br. at 11-12. Although it is true that the Mine Act must be construed broadly to achieve the goal of health and safety (*Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989)), and that exceptions to remedial legislation must be construed narrowly (*Local Union 7107, UMWA v. Clinchfield Coal. Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998)), it is not the role of the Commission to read into a regulation words that simply are not there. *Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 713 (June 2000); *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). If the regulation required that a preshift examination be performed before pumpers enter a mine, as the Secretary asserts, there would have been no need to include a pumpers' exception in section 75.360(a)(2). See 2A *Sutherland Statutory Construction* at 181 (effect must be given to every word, clause and sentence of a provision). Similarly, the pumpers' exception could have provided that all the examinations listed under section (b) be performed.⁷

The preshift examination is based upon Mine Act sections 303(d)(1) & (2), 30 U.S.C. § 863(d)(1) & (2), and must be construed in light of those sections. See *Canterbury Coal*, 20 FMSHRC at 721-22. Section 303(d)(1) provides in pertinent part that:

Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings⁸ of a coal mine, certified persons . . . shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section . . . for accumulations of methane[,] . . . shall make tests for oxygen deficiency . . . ; . . . test . . . to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards . . . as . . . the Secretary may from time to time require.

30 U.S.C. § 863(d)(1). Mine Act section 303(d)(2) states that “[n]o person (*other than certified persons* designated under this subsection) shall enter any underground area, except during any shift, unless an examination of such area . . . has been made within eight hours immediately preceding his entrance into such area.” 30 U.S.C. § 863(d)(2) (emphasis added). Although those sections do not address the unique circumstances involved here where the entire mine is idle, the pumpers' exception fulfills the intent of the statute in that it requires that all pumpers be certified

⁷ Section 75.364 requires weekly examinations of remote hazards, and the judge here ruled that Cannelton had to comply with that section. 24 FMSHRC at 710-11. Thus, the regulations contain additional safeguards, beyond the preshift examination, to detect hazards where pumpers do not work or travel.

⁸ “Active workings” is defined as “[a]ny place in a coal mine where miners are normally required to work or travel.” 30 C.F.R. § 75.2.

and that they examine for hazardous conditions, and test for methane, oxygen deficiency and proper air movement in all the areas where they work or travel.⁹

The Secretary asserts that allowing a pumpers' examination in lieu of a preshift examination may detract from safety because energized trolley lines located outside of the specific areas where the pumpers work or travel may go unexamined. While we are sympathetic to this concern, the regulations as currently written do not require a preshift examination of those trolley lines. It is, nonetheless, the Secretary's prerogative to change the regulation through notice and comment rulemaking.¹⁰ It is also important to note that the examination performed by the certified pumper under section 75.360(a)(2) is not sufficient to meet the requirements of section 75.360(b) if other persons have been scheduled to enter the mine area. 61 Fed. Reg. at 9792.

Accordingly, we affirm the judge's determination that when only certified pumpers enter an idle mine and those certified pumpers perform examinations where they work and travel, no preshift examination is required.

⁹ There is no evidence, nor does the Secretary even allege, that the certified persons in this case failed to perform the required examination for hazardous areas prior to attending to the pumps in the mine. This case is therefore clearly distinguishable from *Buck Creek Coal Co.*, 17 FMSHRC 8 (Jan. 1995), relied on by the dissent (slip op. at 14), in which a preshift examination was underway while the offending miners were in the mine attending to other maintenance duties, without authorization under either the preshift examination requirement or the pumpers' exception.

¹⁰ Notice and comment rulemaking would allow a thorough evaluation of alternative approaches before making a significant change in the regulations. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024, 1028 (D.C. Cir. 2000) (setting aside agency action where policy varied from existing rule).

III.

Conclusion

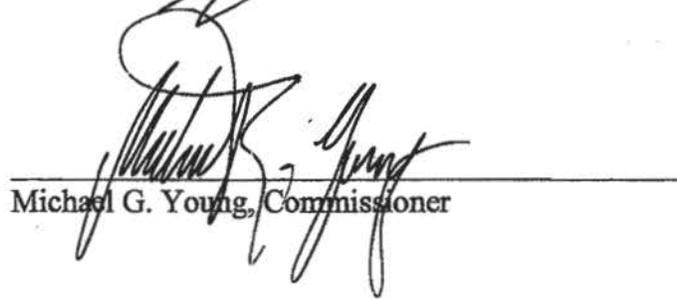
For the foregoing reasons, we deny Cannelton's motion to dismiss and we affirm the judge's vacation of Citation No. 7191145.



Michael F. Duffy, Chairman



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The preshift requirement in 30 C.F.R. § 75.360 is modified by a “pumpers’ exception” that on its face applies only to areas where pumpers are scheduled to work or travel. According to the plain language of the regulation, this exception is limited to those specified areas, and all other aspects of the preshift examination regulation remain in effect when this exception is invoked. I thus disagree with my colleagues that this exception relieves Cannelton of the duty to conduct a preshift examination of the areas at issue in this case — the energized trolley wires that are located beyond where the pumpers are scheduled to work or travel.

Section 75.360(a)(1) sets forth the overarching preshift examination requirement, calling for an examination no more than three hours before the start of an eight-hour shift when any person will work or travel underground.¹ Section (a)(2) creates a discrete exception to this requirement. It states that a preshift examination *of areas where pumpers are scheduled to work or travel* is not required if the pumper is a certified person and performs an examination.² This

¹ Section 75.360(a)(1) provides:

Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

² Section 75.360(a)(2) provides that:

Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and the pumper conducts an examination for hazardous conditions, tests for methane and oxygen deficiency and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous

relatively narrow exception is carved out of the broader language of section (a)(1), leaving the remainder of (a)(1) intact. In other words, the distinct exception in section (a)(2), covering a particularized area (where pumpers work or travel), leaves the remaining mandate of section (a)(1) undisturbed.

In the instant case, that remaining mandate is limited to an examination of the “[a]reas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift.” 30 C.F.R. § 75.360(b)(7). This is because the other mine areas subject to the preshift regulation are only required to be examined if persons are scheduled to work or travel there or equipment will be energized or operated at the specified locations. 30 C.F.R. § 75.360(b)(1)-(10). Because Cannelton’s mine is idled, no preshift examination is required in these other areas. It follows, however, that because section 75.360(a)(1) mandates a preshift examination (as described in section (b)) except in areas where a pumper is scheduled to work or travel, that the specific requirements of section (b)(7) still must be met in this case, as there are energized trolley wires in areas of Cannelton’s Shadrick mine that would not be visited by the pumpers as they carried out their duties.

In short, the regulation requires a preshift examination, creates one exception to this requirement, and continues to require a preshift examination in circumstances not explicitly covered by that exception. The clear language of the regulation compels this interpretation. Where the language of a regulatory provision is clear, its terms must be enforced as they are written unless the regulator intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002).

My colleagues contend that this case “hinges on whether the language in section 75.360(a) allows pumpers’ examinations in lieu of preshift examinations.” Slip op. at 6. This misstates the issue. There is no dispute that section 75.360(a) allows pumpers’ examinations in place of a preshift examination, *but* (and here is what this case actually hinges on) the pumpers’ examination can substitute for the preshift inspection only in “areas where pumpers are scheduled to work or travel.” 30 C.F.R. § 75.360(a)(2). The majority ignores this limitation contained in the pumpers’ exception.

Exceptions to remedial legislation must be narrowly construed. *Local Union 7107, UMWA v. Clinchfield Coal. Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998). In addition, the Mine Act should be broadly interpreted to achieve its goal of protecting the health and safety of miners. *Sec’y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989).

conditions found by the pumper shall be made and retained in accordance with § 75.363.

30 C.F.R. § 75.360(a)(2) (emphasis added).

Moreover, when there is an express exception, it is the only limitation on the operation of a statute³ and no other exception will be implied. 2A *Sutherland Statutory Construction*, § 47.11, at 250. See also *Klinger v. Dep't of Corrections*, 107 F.3d 609, 614 n.5 (8th Cir. 1997) (acknowledging that “[w]hen a statute lists specific exemptions, other exemptions are not to be judicially implied” (citation omitted)). “Under the principle of *expressio unius est exclusio alterius*, the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.” *United States v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992) (citations omitted). Accordingly, where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions. 2A *Sutherland Statutory Construction*, § 47.11 at 250-51. See also, *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 265-66 (3d Cir. 1999), *cert denied*, 528 U.S. 1138 (2000) (holding that under the well-established principle of *expressio unius est exclusio alterius*, the legislature’s explicit expression of one thing — here, certain exceptions to the overtime requirement — indicates its intention to exclude other exceptions from the broad coverage of the overtime requirement); *Sunland Constr. Co.*, 309 N.L.R.B. 1224, 1226 (1992) (holding that only enumerated classifications were excluded from the statutory definition of employee and accordingly, full-time, paid union organizers, who did not appear in these exclusions, were “employees” within the ordinary meaning of this provision); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984) (holding that since undocumented aliens were not among the few groups of workers expressly exempted from the National Labor Relations Act by Congress, they plainly come within the broad statutory definition of “employee”).

Permitting the “pumpers’ exception” to swallow the preshift requirement of section 75.360, as my colleagues do, is inconsistent with these core principles. Pursuant to these concepts, the “pumpers’ exception” in section 75.360(a)(2), clearly delineated as applying only to areas where pumpers work or travel, is limited to precisely those locations. Therefore, areas where pumpers do *not* work or travel are not encompassed by the exception and must be preshifted. No amount of interpretative legerdemain can alter this state of affairs.

In asserting that “a certified pumper does not need a preshift examination to enter or remain in the mine,” my colleagues in the majority also rely on the language in section 75.360(a)(1) providing that “[n]o person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval.” Slip op. at 6-7. This interpretation of section of 75.360(a)(1) in effect creates a wholesale exception to the preshift requirement as it applies to certified mine examiners. Under my colleagues’ view, the preshift requirement in the regulation simply does not apply to anyone certified to examine a mine. Thus, according to the majority, if an individual is certified, he or she is entitled to work or travel anywhere in a mine — not necessarily only in the course of preshift examination duties — and the operator is under no obligation to have performed a

³ “When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning.” 1A Norman J. Singer, *Sutherland Statutory Construction* § 31.6, at 723-24 (6th ed. 2000).

preshift examination first. If this interpretation were accurate, there would be no need for a “pumpers’ exception.” Pumpers who qualify for the exception are certified examiners and would have free range to enter and work in a mine when no preshift examination had been performed. The opening clause of section 75.360(a)(1) (“[e]xcept as provided in paragraph (a)(2) of this section,”) would therefore be superfluous.

The majority’s interpretation is also inconsistent with the Commission’s decision in *Buck Creek Coal Co.*, 7 FMSHRC 8 (Jan. 1995). That case involved a violation of section 75.360(a) when three miners entered a mine before the preshift examination had been completed and recorded at the surface. *Id.* at 9-10. The Commission affirmed the judge’s determination that Buck Creek violated the regulation, and found that the violation was significant and substantial. *Id.* at 12, 14. We emphasized that even though two of the three miners were certified inspectors, the violation was still significant or substantial. *Id.* at 14. We noted that these miners “entered the mine to repair a mantrap, not to inspect the mine, and there is no evidence their attention was focused on mine conditions rather than on the mantrap.” *Id.* Clearly the Commission recognized that the mere fact that a miner was a certified examiner did not abolish the preshift requirement as it applied to that miner. A more plausible explanation of the language relied on by the majority is that it simply permits certified examiners to go underground to perform their preshift exams. Without such language, it would be legally impossible for anyone to do so because every certified mine examiner would be barred from entering the mine until a preshift exam of the mine had been conducted. The language cited by my colleagues avoids this “Catch 22” situation.

Even if section 75.360(a)(1) could be read to exclude certified examiners from its coverage, the Secretary’s interpretation of the regulation — that certified examiners assigned as pumpers to remote areas of the mine are nevertheless entitled to the protection afforded by applying the preshift requirement to the areas located beyond where they are assigned to work or travel — is reasonable and entitled to deference. If a regulatory standard is either silent or ambiguous on a particular issue, the Commission will defer to the Secretary’s reasonable interpretation of the regulation. *Rock of Ages Corp.*, 20 FMSHRC 106, 111, 117 (Feb. 1998), *aff’d in part and rev’d in part*, 170 F.3d 148 (2d Cir. 1999). *See also Sec’y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6, 10 (D.C. Cir. 2003). We defer to the Secretary’s interpretation of a regulation when it is “logically consistent with the language of the regulations[s] and . . . serves a permissible regulatory function.” *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (citations omitted). As explained above, the Secretary’s interpretation is not only consistent with the language of section 75.360, it inexorably follows from that language.

The policy concerns underlying the Secretary’s position also demonstrate why her interpretation of the regulation is reasonable and serves a permissible regulatory function. Requiring a preshift of areas that may pose a hazard to the pumpers but that the pumpers will not examine (because they do not work or travel there) is consistent with the protective purposes of the Mine Act in promoting the health and safety of miners. Indeed, it would be incongruous if the Secretary had intended that hazards where pumpers work or travel would be discovered by the pumpers’ examination, but that hazards in other parts of the mine, where pumpers do not go would remain unexamined and, in all likelihood, undetected.

The Secretary's witnesses explained that failing to preshift the energized trolley wires in areas where Cannelton's pumpers do not work or travel would expose them to hazards that could injure or kill them. *See* Tr. 176-79, 224-25, 327-28. The mine contains between three and four miles of 300-volt energized trolley wires. Tr. 42-43, 44-46, 88, 256-57; Ex. C-2 (map showing locations of trolley wires). Record evidence demonstrated that if a fire were to start inby where the pumpers worked, its smoky by-products would probably travel outby and reach the pumpers. Tr. 83-84, 126, 155-56.

MSHA Inspector/Accident Investigator Gilbert Young testified that trolley wires, unlike other wires underground that carry electricity, are not insulated and, if dislodged, can easily create electrical arcs which result in a fire or explosion. Tr. 176-78, 224-25. He detailed the potential dangers as follows:

You've got energized trolley wire. You could have a fire, you know, roof could fall on the trolley wire, arc could fall on the ground, you could have arc catch the coal ribs on fire. . . . You could have smoke inhalation, burns.

Tr. 177; *see also* Tr. 280-81.

My colleagues also contend that if the regulation required a preshift examination to be performed before pumpers enter a mine, there would be no need for the exception in section 75.360(a)(2). Slip op. at 8. This ignores the rationale underlying the pumpers' exception: rather than requiring the preshift examiner to travel to a remote location in the mine where pumpers typically do their jobs, the exception permits the pumper to perform the examination there immediately prior to working. 61 Fed. Reg. 9764, 9792 (Mar. 11, 1996). Consequently, the preshift examiner is freed from having to travel to those areas. The exception is thus designed to eliminate lengthy additional trips for the preshift examiners, when the pumpers, who need to go to those far-reaching areas in any event to perform their jobs, may be certified to make the necessary examination.

In conclusion, the plain language of the regulation applies the pumpers' exception only to areas where pumpers work or travel. Even if this language were considered ambiguous, the Commission should defer to the Secretary's reasonable interpretation of the rule.⁴

⁴ Cannelton makes a general argument — providing no detailed factual basis whatsoever — that it did not receive notice that the regulation requires a preshift examination when only certified pumpers are in the mine. C. Br. at 16-17. This claim is unavailing. Of course, when the language in a regulation is clear, it follows that the standard provides fair notice. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997). Even if the language were considered ambiguous, Cannelton's notice argument would fail, as a reasonably prudent person, familiar with the realities of the mining industry and the protective purpose of the

For the above reasons, I would vacate the judge's decision, affirm the violation alleged in citation No. 7191145, and remand the case to determine if the violation was significant and substantial and for the assessment of an appropriate penalty.⁵


Mary Lu Jordan, Commissioner

standard, would recognize the hazardous condition the regulation seeks to prevent. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998). In addition, Cannelton had actual notice of the Secretary's interpretation of the regulation, and actual notice satisfies the notice requirement. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996). MSHA Ventilation Specialist Jerry Richards testified that he told the Cannelton safety manager "that if he done any work, that he would have to do all the examinations, the preshift and the weekly." Tr. 308; *see also* Tr. 434. He also testified that he told a safety engineer that "if you turn the breakers on . . . you're doing work. You got to do all the examination." Tr. 310-11. Cannelton offered no persuasive evidence to refute this testimony.

⁵ I agree with the majority that Cannelton's motion to dismiss should be denied.

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March 18, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2003-279-M
 : A.C. No. 02-02873-05511
 :
FRONTIER-KEMPER CONSTRUCTORS :
INCORPORATED :

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners¹

ORDER

BY: Duffy, Chairman; Jordan, Suboleski, and Young, 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 May 12, 2003, the Commission received from Frontier-Kemper Constructors Incorporated (“Frontier-Kemper”) a motion made by counsel to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Although Frontier-Kemper contested Citation No. 6273830,² when the penalty was

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

² Frontier-Kemper’s motion covered the penalties assessed for Citation No. 6273830 and Citation/Order No. 6292198, each of which is the subject of a contest proceeding, docketed at WEST 2003-98-RM and WEST 2003-541-RM, respectively. On July 28, 2003, Frontier-Kemper moved for leave to amend its original motion in order to strike its request for relief with respect to the penalty assessed for Citation/Order No. 6292198, on the ground that Frontier-Kemper had entered into an agreement with the Secretary of Labor whereby a number of citations and orders would be settled. Mot. to Amend at 2. Because the settlement agreement provides that Frontier-Kemper shall pay Citation/Order No. 6292198 as written and assessed, Frontier-Kemper is

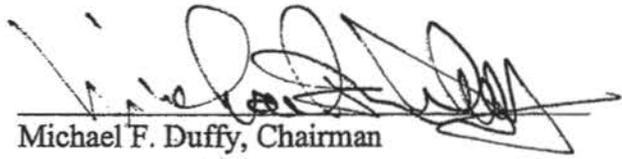
subsequently assessed for that citation in December 2002 (A.C. No. 02-02873-05511), Frontier-Kemper paid the \$399 proposed penalty the following month. Mot. to Reopen, Declaration of Robert A. Pond at ¶¶ 5, 12-13. In its motion to reopen, Frontier-Kemper asserts that payment was made inadvertently by an employee who was acting in the normal course of his or her duties but not involved in the Frontier-Kemper project that resulted in the citation, and who thus was not aware that Frontier-Kemper intended to continue to contest that citation. *Id.* at ¶¶ 11-12. Frontier-Kemper requests reopening in order to settle the assessment according to the terms of the agreement it reached with the Secretary covering Citation No. 6273830 and other citations. Mot. to Amend at 2. In a letter filed in response to Frontier-Kemper's motion to reopen but prior to its motion for leave to amend, the Secretary stated that she does not oppose the motion to reopen.

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

Having reviewed Frontier's submissions, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Frontier-Kemper's failure to timely contest the penalty proposal for Citation No. 6273830 and whether relief from the final order should be granted. If it is determined that such relief is

withdrawing its request to reopen the penalty assessed for that citation. *Id.* We grant Frontier-Kemper's motion for leave to amend, and will consider only the penalty assessed for Citation No. 6273830 as the subject of Frontier-Kemper's motion to reopen.

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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 19, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2004-140-M
 : Case No. 24-01490-10041
 :
STILLWATER MINING COMPANY :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 20, 2004, the Commission received from Stillwater Mining Company ("Stillwater") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

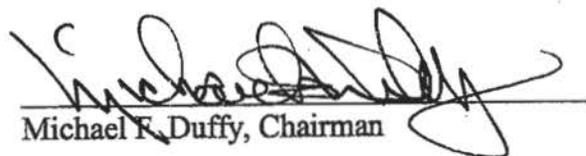
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

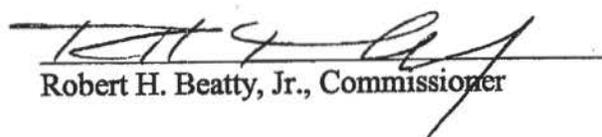
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On October 27, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Stillwater Citation Nos. 6269379 and 6269380. On October 7, 2003, MSHA issued a proposed penalty assessment (Case No. 000010041) in the amount of \$4,855 for 22 violations, including the subject citations, to Stillwater in Nye, Montana. In its motion, Stillwater states at the time that it received MSHA's proposed assessment, the employee responsible for handling the contest and payment of penalties had recently resigned. Mot. at 2. Stillwater also states that within thirty days after it received the penalty proposal, Steve Wood, Stillwater's Corporate Safety Director, submitted a contest of the proposed assessments for the subject citations and payment of the remaining assessments to MSHA's regional office in Pittsburgh, Pennsylvania. *Id.* Stillwater explains that it failed to timely contest the proposed assessment because Wood was not familiar with the procedure for contesting proposed assessments and sent the contest to MSHA's regional office, instead of MSHA's Civil Penalty Compliance Office in Arlington, Virginia as required. *Id.* Stillwater further states that it became aware of its mistake only after the thirty-day filing period had expired when its counsel reviewed MSHA's Data Retrieval System. *Id.* Stillwater attached to its motion the affidavit of Steve Wood, and copies of a letter from Steve Wood to MSHA, a check to MSHA dated October 24, 2003, and MSHA's proposed assessment. The Secretary states that she does not oppose Stillwater's request for relief.

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



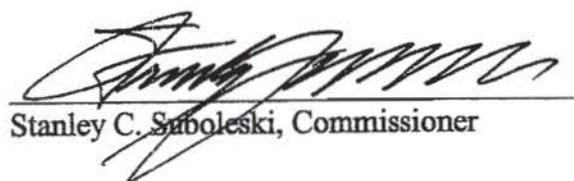
Michael F. Duffy, Chairman



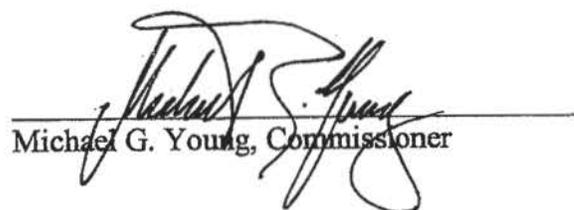
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2003-104-M
	:	A.C. No. 10-01827-05517
v.	:	
	:	Docket No. WEST 2003-105-M
	:	A.C. No. 10-01907-05515
BECO CONSTRUCTION COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”).¹ On December 2, 2002, the Commission received from Beco Construction Company (“Beco”) a request made by counsel to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

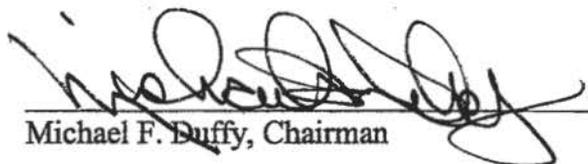
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“JWR”). In evaluating requests to

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-104-M and WEST 2003-105-M, both captioned *Beco Construction Company* and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12

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

On September 19, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 10-01907-05515) to Beco’s CH 2 Mine. On October 18, 2002, MSHA issued a proposed penalty assessment (A.C. No. 10-01827-05517) to Beco’s CH 1 Mine. Beco states in its request that it did not timely file requests for hearing because, when it received the assessments, it did not realize they involved new penalties and, thus, did not forward them in a timely manner to its legal counsel. Request To Reopen. Beco further asserts that its counsel sent a Notice of Contest to MSHA on November 11, 2002, and, at that time, it was unaware that the time for contest had lapsed. *Id.* The Notice of Contest is attached to Beco’s request to reopen. *Id.*, attach. Beco did not provide any other supporting documentation to its request. The Secretary states that she does not oppose Beco’s request for relief.

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



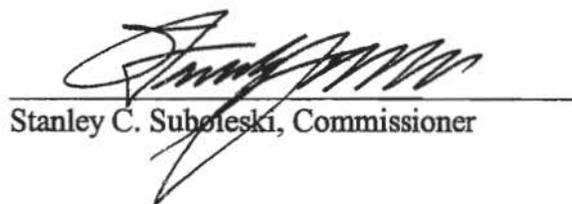
Michael F. Duffy, Chairman



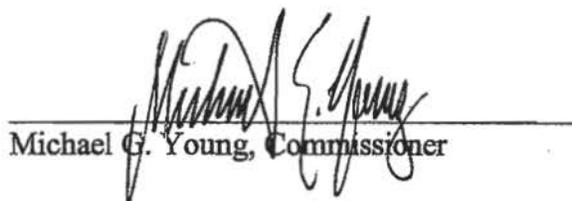
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket No. PENN 2003-198
v.	:	A.C. No. 36-00970-04296 A
	:	
TIM GLASSCOCK, employed by	:	
MAPLE CREEK MINING, INC.	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On September 24, 2003, the Commission received from Tim Glasscock a motion made by counsel to reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c) that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor’s proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); *see also* 29 C.F.R. 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

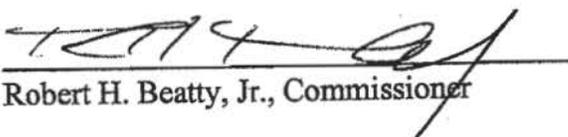
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to

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

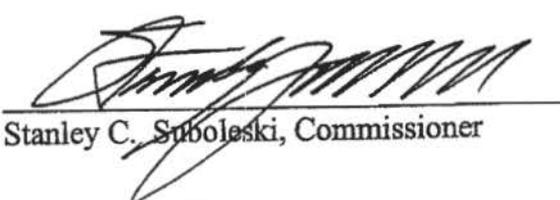
In his motion, Glasscock requests relief from the final order. He states that he never received a copy of the penalty assessment. *Mot. To Reopen Proceedings* at 1. In an affidavit attached to his motion, Glasscock states that the first notification he received regarding this penalty was in an August 25, 2003, letter sent by the Civil Penalty Compliance Office. *Aff.* at 2. According to Glasscock, that letter stated that payment of the assessed penalty was delinquent and that interest had begun to accrue on the penalty. *Id.* Glasscock claims that he received this letter on September 4, 2003, at an address in Finleyville, Pennsylvania while cleaning junk mail out of the mailbox there. *Id.* He also states that the house at that address has never been his permanent residence or mailing address, and that his mailing address since January 1988 has been a post office box in West Virginia. *Id.* at 1-2. Finally, Glasscock states that from January 1, 2003, through August 7, 2003, he resided at either his home in West Virginia or at a motel in Illinois. *Id.* at 2. The Secretary states that she does not oppose Glasscock’s request for relief.

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


Michael F. Duffy, Chairman


Robert H. Beatty, Jr., Commissioner


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 19, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 2003-95-M
 : A.C. No. 36-00518-05527
 :
BETTER MATERIALS CORPORATION :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On March 19, 2003, the Commission received from Better Materials Corporation (“BMC”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

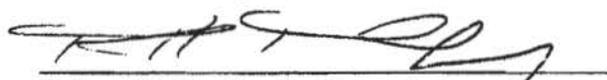
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On December 12, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 36-00518-05527) to BMC in Midlothian, Texas. In its motion, BMC states that it contested the underlying citation and a companion order, which are the subject of Docket Nos. PENN 2002-172-RM and PENN 2002-173-RM, and are stayed before Judge Weisberger. Mot. at 1. BMC also states that it failed to timely contest the proposed assessment related to the citation because it was also awaiting the proposed assessment for the companion order so that it could contest the two proposed assessments together. *Id.* BMC explains that it received the proposed assessment for the penalty related to the citation on December 31, 2002. BMC further explains that it finally sent its contest/hearing request for that penalty on January 31, 2003, under the belief that its contest was timely. *Id.* BMC further states that it was notified by MSHA's Civil Penalty Compliance Office by letter dated February 13, 2003 that its contest was untimely. *Id.* at 1-2. BMC did not attach any supporting documentation to its motion. The Secretary states that she does not oppose BMC's request for relief.

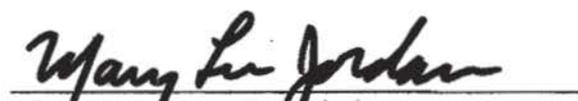
Having reviewed BMC's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for BMC's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



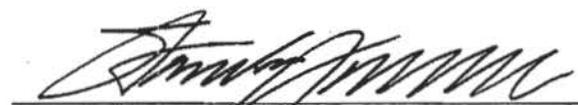
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket No. WEVA 2004-50
v.	:	A.C. No. 46-08751-12565
	:	
KINGWOOD MINING COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

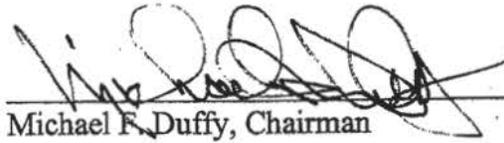
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On January 7, 2004, the Commission received from Kingwood Mining Company (“Kingwood”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

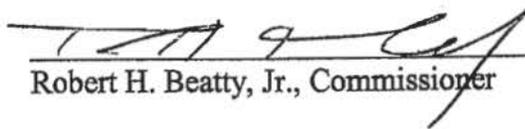
In its motion, Kingwood states that a secretary in its office inadvertently paid the penalties for several section 104(a) citations. Mot. at 1. It explains that these citations are associated with several section 104(d) orders that the operator has also received. *Id.* Kingwood asks that, in order to permit it to fully defend the allegations in the section 104(d) orders, proceedings be reopened in the cases involving the section 104(a) citations. *Id.* at 2. The Secretary states that she does not oppose Kingwood’s request for relief.

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

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



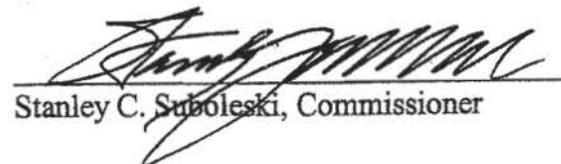
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEST 2003-384-M
ADMINISTRATION (MSHA)	:	A.C. No. 04-05330-05508
	:	WEST 2003-385-M
v.	:	A.C. No. 04-05330-05509
	:	WEST 2003-386-M
BROWN SAND, INC.	:	A.C. No. 04-05330-05510
	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 9, 2003, the Commission received from Brown Sand, Inc. ("Brown") a motion made by counsel to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-384-M through WEST 2003-386-M, all captioned *Brown Sand, Inc.* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12

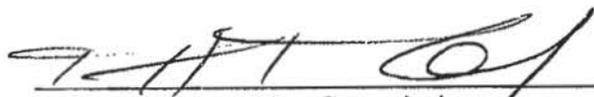
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil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

In its motion, Brown states that in late August 2002, it filed notices of contest in response to 29 citations the Department of Labor’s Mine Safety and Health Administration (“MSHA”) had issued to it earlier that month (Citation Nos. 6337115 through 6337143, docketed at WEST 2002-496-RM through WEST 2002-524-RM). Mot. at 2. Each of the notices stated that Brown was contesting, among other things, “any penalties assessed herein.” *Id.* Because it included this language in its contests, Brown believed it did not have to respond to three subsequent penalty assessments (A.C Nos. 04-05330-05508 through 04-05330-05510) issued to it by MSHA in February and March 2003, which covered 27 of the 29 citations. Mot., Decl. of David Donnell at 4. Brown asserts it was always its intent to contest the penalty assessments related to the citations. *Id.* The Secretary states that she does not oppose Brown’s request for relief.

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



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Arlington, VA 22209-2247

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 19, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2003-276-M
ADMINISTRATION (MSHA)	:	A.C. No. 48-00243-05554
	:	
	:	Docket No. WEST 2003-277-M
v.	:	A.C. No. 48-00617-05545
	:	
	:	Docket No. WEST 2003-278-M
BLACK HILLS BENTONITE, LLC	:	A.C. No. 48-01539-05506

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On May 9, 2003, the Commission received from Black Hills Bentonite, LLC (“Black Hills”) a motion made by counsel to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

On April 3, 2003, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued three proposed penalty assessments (A.C. Nos. 48-00243-05554, 48-00617-05545, and 48-01539-05506) to Black Hills. In its motion, Black Hills states that on January 31, 2003, it contested three underlying citations, which are the subject of Docket Nos. WEST 2003-149-RM through 2003-151-RM, and are stayed before Judge Bulluck. Mot. at 1-2. Black Hills also states that MSHA subsequently modified the citations to non-S&S, low negligence and gravity, and on April 3, 2003, issued proposed penalty assessments for the three contested

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-276-M, WEST 2003-277-M, and WEST 2003-278-M, all captioned *Black Hills Bentonite, LLC*, and involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

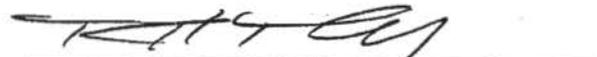
citations in the amount of \$55 each, along with proposed assessments for five other citations, which are not the subject of Black Hills' initial contest or its request to reopen. *Id.* at 2. Black Hills further states that it failed to timely contest the proposed assessments related to the contested citations, because it inadvertently paid the assessments for both the contested and uncontested citations. *Id.* Black Hills attached an affidavit supporting its motion. *See id.*, Ex. A. The Secretary states that she does not oppose Black Hills' request for relief.

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

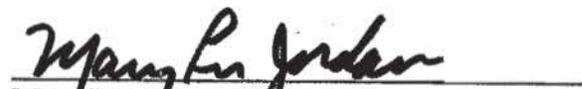
Having reviewed Black Hills' motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Black Hills' failure to timely contest the penalty proposal and whether relief from the final order should be granted. If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



Michael F. Duffy, Chairman



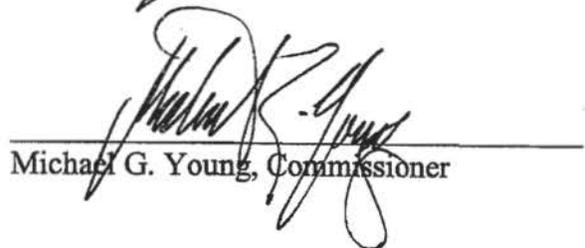
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 19, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. YORK 2004-20-M
 : A.C. No. 43-00396-10233
 :
U.S. QUARRIED SLATE PRODUCTS INC. :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 31, 2003, the Commission received from U.S. Quarried Slate Products Inc. (“U.S. Quarried”) a motion made by counsel to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

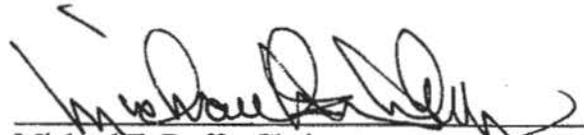
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

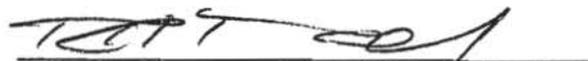
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

In its motion, U.S. Quarried states that on August 18, 2003, MSHA conducted an inspection that resulted in the issuance of four citations, including Citation Nos. 6009085 and 6009086. Mot. at 2. It further states that while the Department of Labor's Mine Safety and Health Administration ("MSHA") proposed civil penalties relating to Citation Nos. 6009085 and 6009086, it conducted a special investigation regarding the remaining two citations and did not propose penalties as to those citations. *Id.* U.S. Quarried further states that, because the special investigation was ongoing, it did not realize that it was required to file a hearing request with respect to Citation Nos. 6009085 and 6009086 in order to preserve its rights to contest those citations. *Id.*; Attach A at 2. U.S. Quarried further submits that, due to inadvertent error in its office, the proposed assessment form was misplaced and not brought to the attention of its owner. *Id.* U.S. Quarried attached to its motion an affidavit of Drew Turner, the owner of U.S. Quarried, and copies of Citation Nos. 6009085 and 6009086. Attachs. A, B & C. The Secretary states that she does not oppose U.S. Quarried's request for relief.

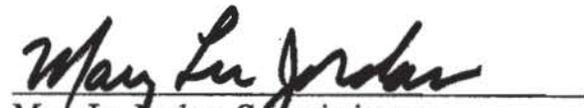
Having reviewed U.S. Quarried's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for U.S. Quarried's failure to timely contest the penalty proposals and whether relief from the final orders should be granted.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



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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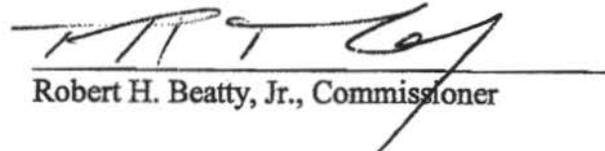
from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and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

In his motion, Ross states he received a proposed penalty assessment (No. 36-00970-11102 A) which was dated October 15, 2003. Mot. at 1. He further states that on that proposed penalty assessment form there was a notation that showed an outstanding balance of \$5,500 for the subject proposed penalty assessment (No. 36-00970-04180 A). *Id.* Ross explains that he never received a copy of the subject proposed penalty assessment (No. 36-00970-04180 A), as evidenced by a certified mail receipt notice relating to the subject penalty assessment. *Id.* The receipt did not contain a signature in the space provided for the recipient’s signature. *Id.* Finally, Ross requests that, if this case is reopened, it should be consolidated with Docket No. PENN 2003-192, which he alleges involves a penalty assessment against Mr. Paul Henry arising from the same events giving rise to the subject proposed penalty assessment. *Id.* at 3. The Secretary states that she does not oppose Ross’ request for relief.

Having reviewed Ross' motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Ross' failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, the judge shall dispose of Ross' motion to consolidate proceedings, and this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.¹



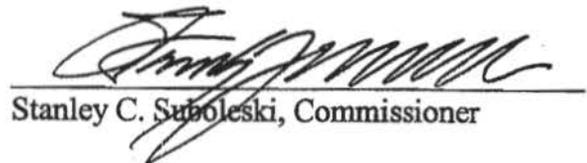
Michael F. Duffy, Chairman



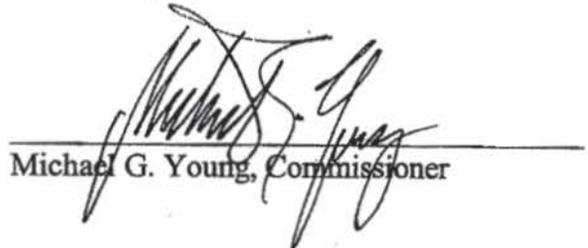
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

¹ On this same date, we are separately issuing an order relating to Ross' request for relief from a final order in Docket No. PENN 2004-71 (A.C. No. 36-00970-11102 A). If the judge grants relief in the subject proceeding and Docket No. PENN 2004-71, he shall take such action, if any, to consolidate the proceedings as he deems appropriate.

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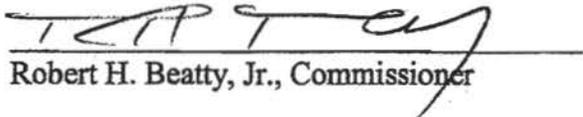
from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and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

In his motion, Ross states that the subject proposed penalty assessment (No. 36-00970-11102 A) was issued to him on October 15, 2003. Mot. at 1. Ross further submits that on October 31, 2003, he served a copy of a Notice of Contest challenging the proposed penalty assessment to the Commission, a regional Office of the Solicitor with the Department of Labor, and to the Department of Labor’s Mine Safety and Health Administration’s Civil Penalty Compliance Office (“Compliance Office”). *Id.*; Ex. 1, at 3. Attached to the Notice of Contest was a copy of his request for hearing (“green card”) and a copy of the subject citation. Ross states that he received from the Commission’s Docket Office a copy of the Notice of Contest, which was stamped with the date of November 3, 2003. Ross explains that when his counsel contacted the Commission’s Docket Office to inquire of the status of the case, his counsel was informed that the case had not been assigned to a judge because the Compliance Office had not processed the Notice of Contest. Mot. at 1-2. Ross states that he was subsequently informed by the Compliance Office that it had no record of the Notice of Contest. *Id.* at 2. The Secretary states that she does not oppose Ross’ request for relief.

Having reviewed Ross' motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Ross' failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.¹



Michael F. Duffy, Chairman



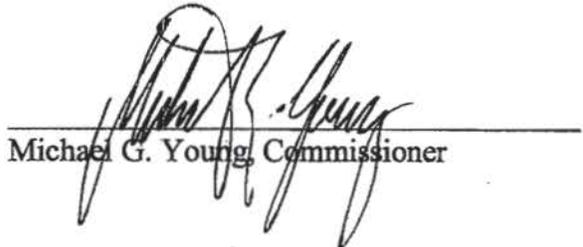
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

¹ On this same date, we are separately issuing an order relating to Ross' request for relief from a final order in Docket No. PENN 2004-17 (A.C. No. 36-00970-04180 A). If the judge grants relief in the subject proceeding and Docket No. PENN 2004-17, he shall take such action, if any, to consolidate the proceedings as he deems appropriate.

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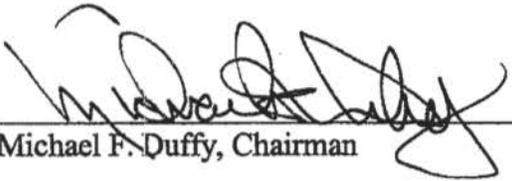
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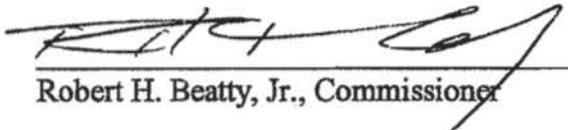
harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

In its motion, Philip Environmental states that on September 12, 2001, it received from the Department of Labor's Mine Safety and Health Administration ("MSHA") a proposed penalty assessment in the amount of \$15,000 relating to a citation issued in April 2000. Mot. at 1-2. It further states that on October 1, 2001, it timely mailed a request for hearing on its counsel's letterhead to MSHA contesting that proposed penalty assessment. *Id.* at 1; Attach A. Philip Environmental explains that although MSHA allegedly has no record of the request for hearing, the Secretary moved to stay a companion case pending the proceeding of the subject case. Mot. at 1-3. Finally, it submits that its hearing request might have been delayed by the anthrax/mail problems that took place during the fall of 2001. *Id.* at 3. Philip Environmental attached to its motion a letter dated October 1, 2001, from the operator's counsel to MSHA contesting the penalty assessment; a Stay Order dated January 19, 2001; and a motion to stay by the Secretary of Labor dated January 17, 2001. Attachs. A, B & C. The Secretary states that she does not oppose Philip Environmental's request for relief.

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



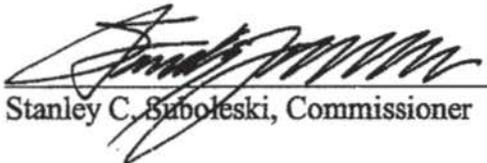
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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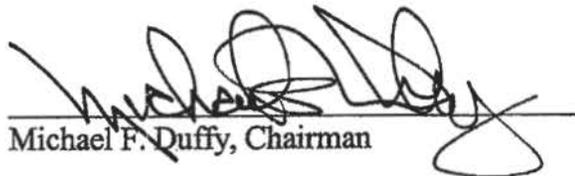
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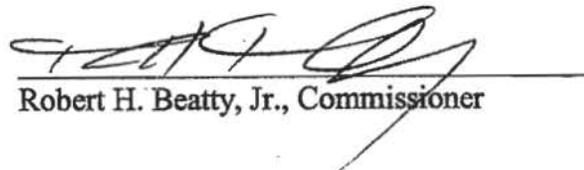
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil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

On June 28, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 15-18161-03541 A) to Little alleging a violation of section 110(c) of the Mine Act. In his request to reopen, Little states that he did not timely file a request for hearing because neither he, his employer Coastal Coal, nor his counsel was served with the proposed assessment when it was issued. Mot. 1-2. After the deadline to file a request for hearing had passed, on April 7, 2003, counsel for Little received a copy of the proposed assessment along with a copy of a certified mail receipt postmarked August 6, 2002. *Id.* at 2. Little further asserts that his counsel telephoned MSHA, and was informed that because MSHA had never received the request for hearing, a letter demanding payment had been issued. *Id.* Counsel also learned that a default judgment had been issued against Little. *Id.* According to Little, MSHA then reviewed his file and found the original copy of the proposed assessment showing that it was returned without a signature of the recipient. *Id.* Little did not attach any supporting documentation to his request. The Secretary states that she does not oppose Little’s request for relief.

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



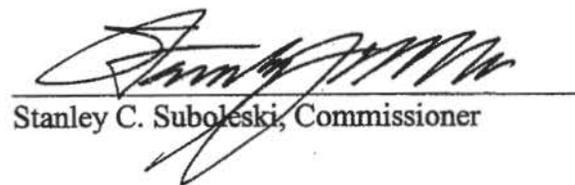
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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March 23, 2004

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

v.

RAG EMERALD RESOURCES, LP

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:
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:
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:
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Docket No. PENN 2004-16
A.C. No. 36-05466-04193

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On November 6, 2003, the Commission received from RAG Emerald Resources, LP (“RAG Emerald”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

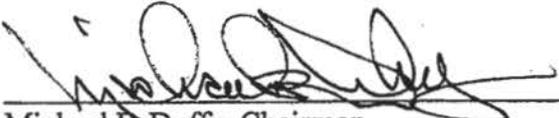
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

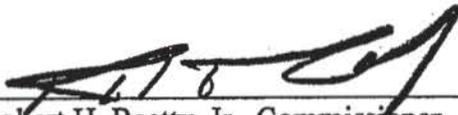
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On February 14, 2003, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7084326 to RAG Emerald. In its motion, RAG Emerald states that on June 11, 2003, MSHA issued a proposed civil penalty assessment (A.C. No. 36-05466-04193) covering several citations including Citation No. 7084326. Mot. at 1-2. RAG Emerald further states that on July 3, 2003, RAG Emerald paid the penalties for all the citations except Citation No. 7084326. *Id.* at 2. It also states that it timely filed a "green card" contesting the proposed penalty for Citation No. 7084326. *Id.* Finally, RAG Emerald states that MSHA's Office of Assessments has informed it that RAG Emerald is delinquent with regard to the penalty proposed for Citation No. 7084326 and that MSHA has no record of a "green card" having been received for that penalty proposal. *Id.* RAG Emerald attached the following documentation to its motion: Citation No. 7084326; the proposed civil penalty assessment; the computer record of operator's payment; and an affidavit of its Safety Manager. The Secretary states that she does not oppose RAG Emerald's request for relief.

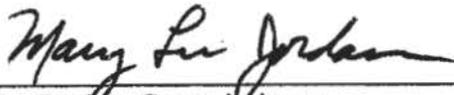
Having reviewed RAG Emerald's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for RAG Emerald's alleged failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



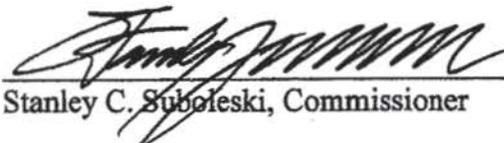
Michael F. Duffy, Chairman



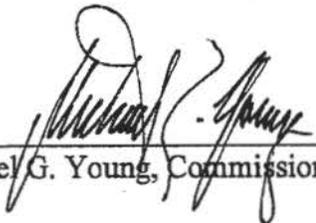
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 23, 2004

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

v.

TACOMA DIESEL & EQUIPMENT INC.

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:

Docket No. WEST 2003-112-M
A.C. No. 45-03290-05502 D896

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 12, 2002, the Commission received from Tacoma Diesel & Equipment Inc. ("Tacoma") correspondence which we construe as a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

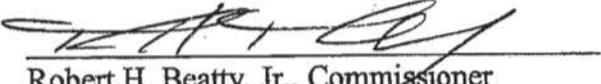
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

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

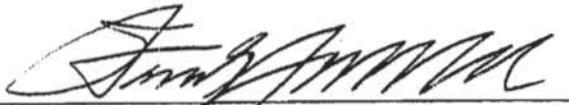
Tacoma's request to the Commission was made via a hand-written telecopier cover sheet from its service manager, Jay Henderson. Therein Henderson states he would have filed a timely request for hearing but thought that Tacoma had 45 days to do so. Tacoma attached a copy of the proposed penalty assessment ("green card") issued on October 3, 2002, with Henderson's signature dated November 12, 2002. There is a check in the box on the green card indicating that the operator wanted to contest the penalty and have a hearing on all the violations listed in the proposed assessment. The Secretary states that she does not oppose Tacoma's request for relief.

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


Michael F. Duffy, Chairman


Robert H. Beatty, Jr., Commissioner


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 23, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2003-260-M
 : A.C. No. 04-04075-05607
 :
HANSON PERMANENTE CEMENT, INC. :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 25, 2003, the Commission received from Hanson Permanente Cement, Inc., ("Hanson") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

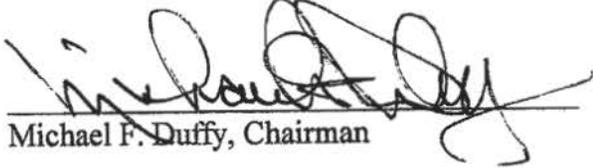
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

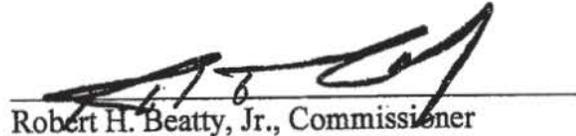
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 04-04075-05607) to Hanson's Permanente Plant. In its motion, Hanson states that on February 7, 2003, it timely contested MSHA's proposed civil penalty assessment by faxing a copy of a contest letter to MSHA's Office of Assessments and by also sending the letter by certified mail. Mot. at 2; Affidavit of Yvonne J. Kohlmeier (Attach. to Mot.) at 1 ("Kohlmeier Aff."). Hanson further states that its counsel received confirmation that MSHA had received the contest letter. Mot. at 2. Hanson also states that, by a letter dated April 2, 2003, MSHA informed Hanson that it was delinquent with regard to the proposed civil penalty assessment in this case. *Id.* Finally, Hanson states that, on April 21, 2003, MSHA's Office of Assessments informed counsel's legal secretary that it had no record of the contest letter filed by Hanson. Kohlmeier Aff. at 2. Hanson attached the following documentation to its motion: notices of contest of a citation and order; the letter contesting the civil penalty assessment; the confirmation of a facsimile sent to MSHA; and an affidavit of counsel's legal secretary. The Secretary states that she does not oppose Hanson's request for relief.

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



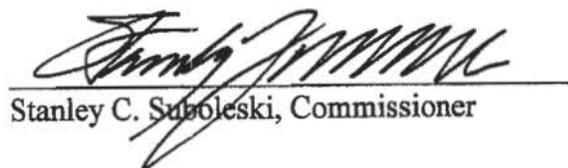
Michael F. Duffy, Chairman



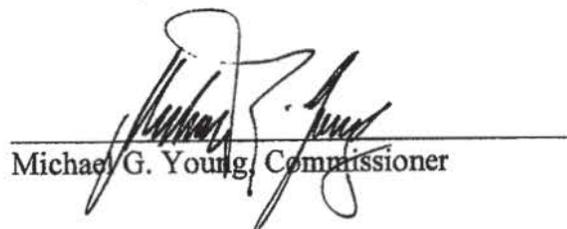
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Szobleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 23, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2004-3-M
v.	:	A.C. No. 17-00306-05517
	:	
COUNTY CONCRETE AND	:	
CONSTRUCTION CO., INC.	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On October 16, 2003, the Commission received from County Concrete and Asphalt Company (“County Concrete”) correspondence which we construe as a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

County Concrete’s motion to the Commission was made via a letter from its President, Morrill Worcester. Worcester acknowledges failing to file a timely response to the proposed assessment that is the subject of these proceedings (A.C. No. 17-00306-05517). Mot. at 1. As grounds for relief he cites the seasonal nature of County Concrete’s operations and a change in management at the company in the fall of 2002. *Id.* The Secretary states that she does not oppose County Concrete’s request for relief.

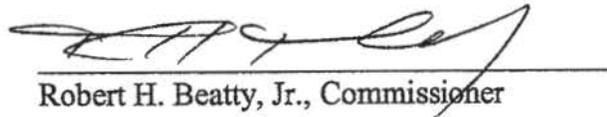
We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

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

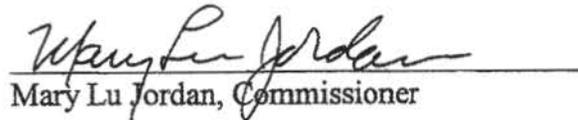
Having reviewed County Concrete’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for County Concrete’s failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



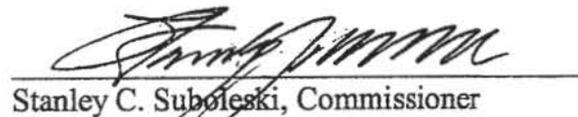
Michael F. Duffy, Chairman



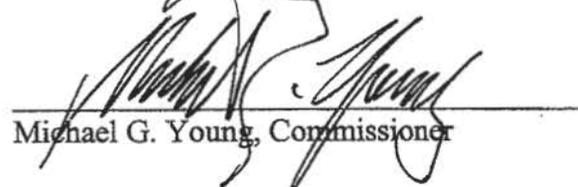
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 25, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. CENT 2003-35-M
v. : A.C. No. 41-04027-05504
LAREDO PAVING, INC. :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On January 10, 2003, former Chief Administrative Law Judge David Barbour issued to Laredo Paving, Inc. (“Laredo Paving”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On March 6, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to his show cause order. On April 4, 2003, the Commission received from Laredo Paving a petition for discretionary review requesting that the Commission vacate the judge’s dismissal order and reopen the proceeding. The Secretary of Labor does not oppose the petition filed by Laredo Paving.

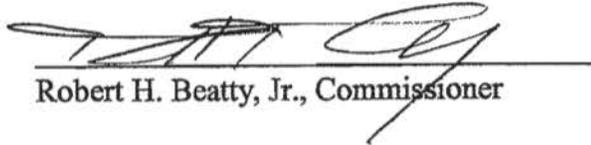
In its petition, Laredo Paving asserts that, after it received the Secretary’s petition for assessment of penalty, it forwarded a letter to the judge denying the violations and requesting a hearing. Pet. at 1. It further explains that it did not subsequently respond to the judge’s show cause order because it was involved in settlement negotiations with the Secretary and did not understand that a response was necessary. *Id.* Laredo Paving submits that after it received a fully executed Stipulation and Motion to Approve Settlement, it received the Order of Default. *Id.* at 1-2. It states that it subsequently received a letter from Judge Barbour explaining that he had not received the Stipulation and Motion to Approve Settlement at the time that he issued the Order of Default. *Id.* at 2.

The judge's jurisdiction in this matter terminated when his decision was issued on March 6, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, 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). The petition was timely filed.

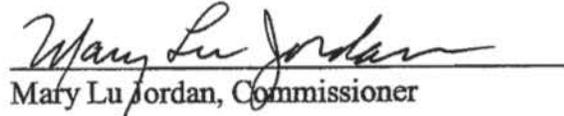
On April 15, 2003, the Commission issued a direction for review, granting Laredo Paving's petition. We hereby remand this matter to the Chief Judge to determine whether good cause exists to excuse its failure to respond to the show cause order and for further proceedings as appropriate.



Michael F. Duffy, Chairman



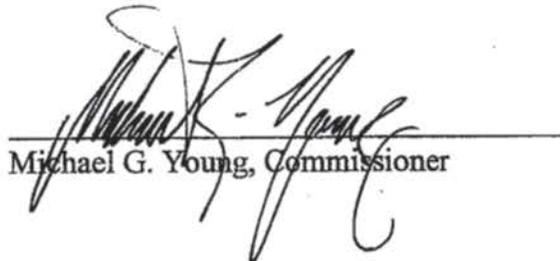
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 25, 2004

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

v.

RAT CONTRACTORS INC.

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Docket No. VA 2003-1

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 20, 2002, former Chief Administrative Law Judge David Barbour issued to RAT Contractors Inc. (“RAT Contractors”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On March 12, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to his show cause order.

On April 9, 2003, the Commission received from the president of RAT Contractors a letter setting forth RAT Contractors’ reasons for challenging the Secretary’s petition for assessment of penalty. Mot. at 1. RAT Contractors also states that it was “no longer in business as of June 25, 2002.” *Id.* We construe RAT Contractors’ letter as a request for relief from the judge’s Order of Default.

The judge’s jurisdiction in this matter terminated when his decision was issued on March 12, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, 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). The Commission has not directed review of the judge’s

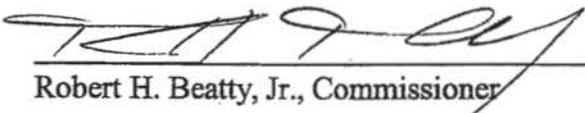
order here, which became a final decision of the Commission on April 21, 2003.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

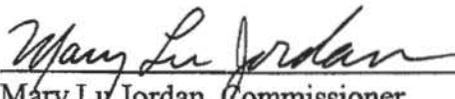
Other than stating that it was out of business as of June 25, 2002, RAT Contractors has provided no explanation for its failure to answer the judge’s show cause order. The Secretary states that she takes no position on the operator’s request for relief. On the basis of the present record, we are thus unable to evaluate the merits of RAT Contractors’ position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse its failure to respond to the show cause order and for further proceedings as appropriate.



Michael F. Duffy, Chairman



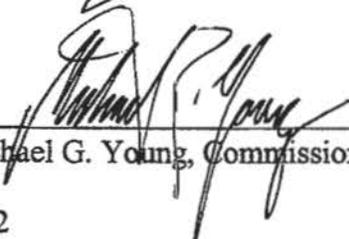
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 2004

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

v.

COSBY-CARMICHAEL, INC.

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Docket No. SE 2003-78-M
A.C. No. 01-00678-05552

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On February 26, 2003, the Commission received from Cosby-Carmichael, Inc. (“Cosby-Carmichael”) a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 25, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 01-00678-05552) to Cosby-Carmichael’s Cosby #1 Pit in Dallas County, Alabama. In its motion, Cosby-Carmichael states that it never received MSHA’s proposed assessment and learned of the assessment when it received a notice of delinquent penalty from MSHA’s Civil Penalty Compliance Office dated February 12, 2003. Mot. Cosby-Carmichael also states that it telephoned MSHA and spoke with an MSHA employee, who informed it that the proposed assessment was sent certified mail on October 26, 2002 and was returned to MSHA unclaimed on November 9, 2002. *Id.* The MSHA employee also faxed to Cosby-Carmichael a copy of the proposed assessment. *Id.* Cosby-

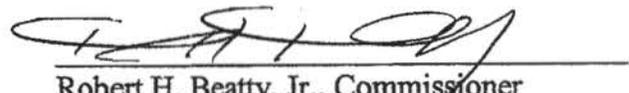
Carmichael further states that “Mr. Carmichael picks up [the operator’s] mail Monday through Friday” from the Selma, Alabama U.S. Post Office, and does not recall receiving any notices. *Id.* Cosby-Carmichael attached to its motion a copy of MSHA’s notice of delinquent penalty and proposed assessment. The Secretary states that she does not oppose Cosby-Carmichael’s request for relief.

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

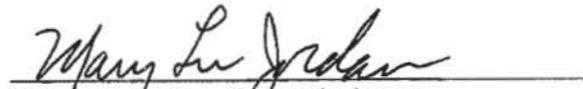
Having reviewed Cosby-Carmichael's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cosby-Carmichael's failure to timely contest the penalty proposal and whether relief from the final order should be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



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 25, 2004

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

v.

CKC MATERIALS DIVISION

:
: Docket No. WEST 2003-268-M
: A.C. No. 02-01221-05528
: Docket No. WEST 2003-269-M
: A.C. No. 02-01221-05529
: Docket No. WEST 2003-270-M
: A.C. No. 02-01221-05530

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act").¹ On July 16, 2003, Administrative Law Judge David F. Barbour issued to CKC Materials Division ("CKC") an Order to Show Cause in each of the three dockets for failure to answer the Secretary's petitions for assessment of penalty. On September 23, 2003, Chief Judge Robert J. Lesnick issued an Order of Default in each docket dismissing these civil penalty proceedings for failure to respond to the show cause orders. On October 17, 2003, the Commission received from CKC a petition for discretionary review in the form of a Motion to Reopen requesting that the Commission vacate the judge's dismissal orders and reopen the proceedings.

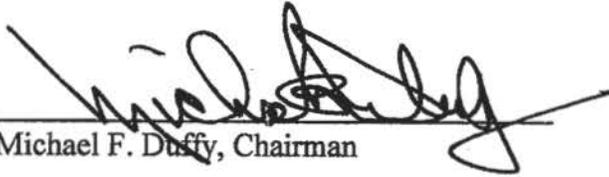
The Chief Judge's jurisdiction in this matter terminated when his Orders of Default were issued on September 23, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-268-M, WEST 2003-269-M, and WEST 2003-270-M, which are all captioned *CKC Materials Division* and involve issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

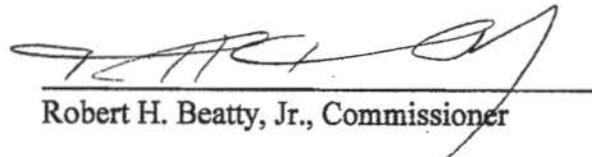
§ 2700.70(a). The petition was timely filed. On October 31, 2003, the Commission granted the petition and stayed briefing pending the issuance of a further order.

In its petition, CKC asserts that it failed to file answers to the Secretary's petitions for assessment of penalty or to the judge's orders to show cause because the owner of the company was "extremely ill" and the company's General Manager was not able to consult with the owner and file answers to the show cause orders. PDR at 1. Attached to CKC's petition is the affidavit of the company's General Manager in support of its allegations. In her response to the petition, the Secretary of Labor agreed that the Motion to Reopen was a timely filed petition for discretionary review but requested that the Commission direct the company to explain in detail why the owner's illness prevented the General Manager from responding to the Commission's orders.

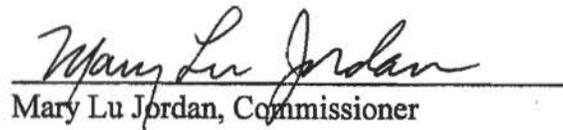
In the interests of justice, we hereby remand this matter to the Chief Judge to determine whether good cause exists to excuse CKC's failure to respond to the show cause orders and for further proceedings as appropriate.



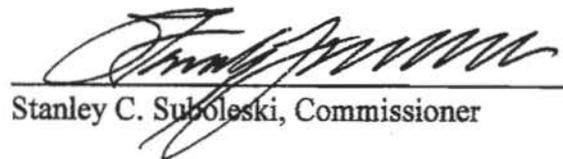
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 25, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2003-94-M
ADMINISTRATION (MSHA)	:	A.C. No. 41-04325-05501
	:	Docket No. CENT 2003-95-M
v.	:	A.C. No. 41-04014-05505
	:	Docket No. CENT 2003-96-M
SOUTH TEXAS AGGREGATES, INC.	:	A.C. No. 41-03696-05519

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act").¹ On December 5, 2002, the Commission received from South Texas Aggregates, Inc. ("South Texas") a request for fine reductions, which we construe as a request to reopen penalty assessments that had become final Commission orders pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

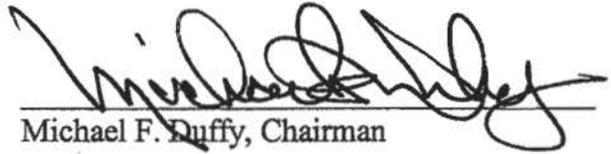
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2003-94-M, CENT 2003-95-M, and CENT 2003-96-M, all captioned *South Texas Aggregates, Inc.* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12

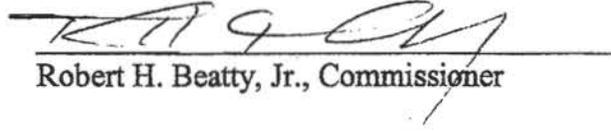
In its request, South Texas, apparently proceeding pro se, states that it mistakenly responded to proposed penalty assessments it received by sending a letter, dated October 21, 2002, to the Department of Labor's Office of the Solicitor in Dallas, Texas, requesting fine reductions for the penalty assessments. Mot., Attach. at 1. South Texas asserts that it realized its error when a representative of the Solicitor's Office called to say she did not have copies of the citations mentioned in the letter. Mot. The proposed penalty assessments were issued between May 31 and August 30, 2002, by the Department of Labor's Mine Safety and Health Administration. Attach at 3. We note that, when South Texas sent its October 21 letter to the Office of the Solicitor, the proposed penalty assessments had already become final orders of the Commission pursuant to section 105(a) of the Mine Act. The Secretary states that she does oppose South Texas' request for relief.

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

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



Michael F. Duffy, Chairman



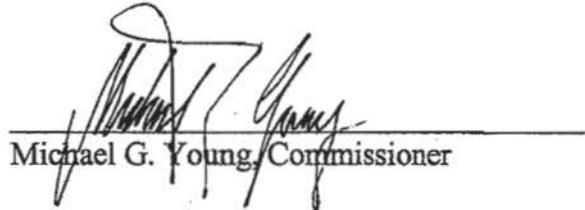
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 25, 2004

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

v.

D.A. DOUGHTY & SONS

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Docket No. WEST 2003-79
A.C. No. 35-03414-05506

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

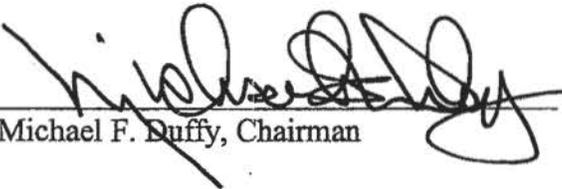
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On November 14, 2002, the Commission received from D. A. Doughty & Sons (“Doughty”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its request, Doughty, apparently proceeding pro se, states that it never received notice from the Department of Labor’s Mine Safety and Health Administration’s (“MSHA”) of the underlying citation. Mot. It also asserts that it did not receive the proposed penalty assessment, issued by MSHA on February 25, 2002, until the end of March 2002, apparently alleging that the proposed penalty assessment was sent to the wrong address. *Id.* Doughty also states that the proposed penalty assessment did not have a special narrative that should have been included with the assessment. *Id.* Doughty attached to its request a copy of the proposed penalty assessment. *Id.* The Secretary states that she does not oppose Doughty’s request for relief.

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

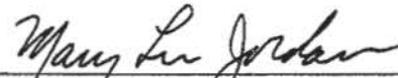
Having reviewed Doughty's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Doughty's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



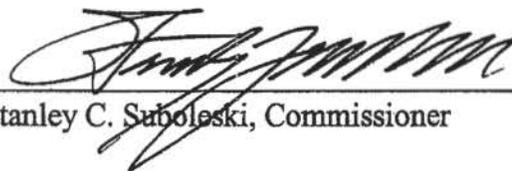
Michael F. Duffy, Chairman



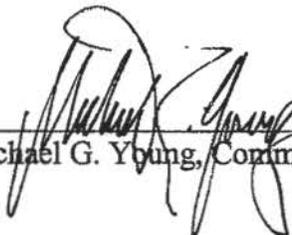
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 25, 2004

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

v.

LEECO, INCORPORATED

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Docket No. KENT 2004-50
A.C. No. 15-17497-07578

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 15, 2003, the Commission received from Leeco, Incorporated ("Leeco") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

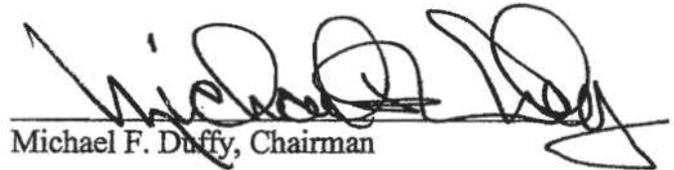
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In its request, Leeco states that it received a proposed penalty assessment dated September 6, 2003. Mot. Leeco further states that on September 18, 2003, Patrick Schoolcraft checked the specific violations to be contested for the purpose of having a formal hearing set. *Id.* Leeco also alleges that after it sent in this document, it never received any response. *Id.* Leeco attached to its request a copy of the proposed penalty assessment. Attach. The Secretary states that she does not oppose Leeco's request for relief.

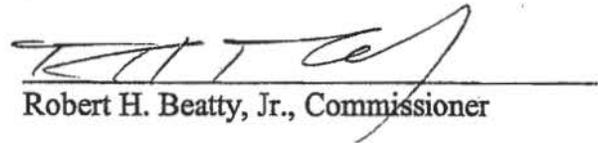
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("JWR"). In evaluating requests to

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

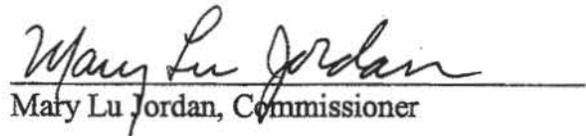
Having reviewed Lecco’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lecco’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



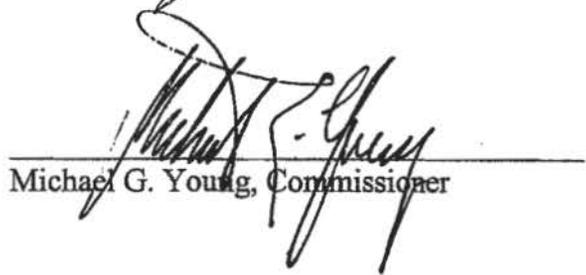
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Saboleski, Commissioner



Michael G. Young, Commissioner

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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 29, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. LAKE 2003-130-M
 : A.C. No. 47-00811-05510
 :
E.C. VOIT & SONS :

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On June 9, 2003, the Commission received from E.C. Voit & Sons (“Voit”) correspondence which we construe as a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

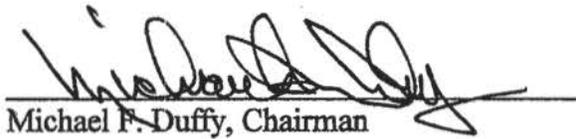
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

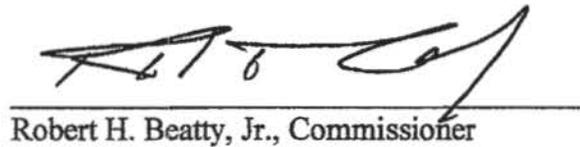
On October 31, 2002, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 47-00811-05510) to Voit’s mine in Madison, Wisconsin. In its request, Voit states that it believed that it had requested a hearing to contest the penalty assessment but had not heard anything further about the hearing. Mot. Voit did not attach any supporting documentation to its request. The Secretary states that she does not oppose Voit’s request for relief.

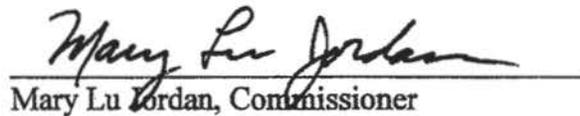
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a).

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

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


Michael F. Duffy, Chairman


Robert H. Beatty, Jr., Commissioner


Mary Lu Jordan, Commissioner


Stanley C. Suboleski, Commissioner


Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 29, 2004

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

v.

RAY BROWN ENTERPRISES

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Docket No. SE 2003-43-M
A.C. No. 38-00638-05533

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 11, 2003, former Chief Administrative Law Judge David Barbour issued to Ray Brown Enterprises ("RBE") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On April 3, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to his show cause order.

On May 7, 2003, the Commission received from a representative of RBE a petition for discretionary review setting forth RBE's reasons for failing to answer the Secretary's petition for assessment of penalty and to respond to the judge's show cause order. Mot. at 2. RBE states that beginning in February 2003, it was engaged in settlement negotiations with the Secretary. *Id.* RBE also states that the parties reached an agreement on February 20, 2003, that the Secretary mailed the agreement to the operator on March 5, and that the operator signed and mailed the agreement along with a check back to the Secretary on April 2. *Id.* RBE further states that before the parties could forward the settlement to the judge, he issued his default order dismissing the proceeding. *Id.* No supporting documentation was attached to the RBE petition. The Secretary states that she does not oppose RBE's request for relief.

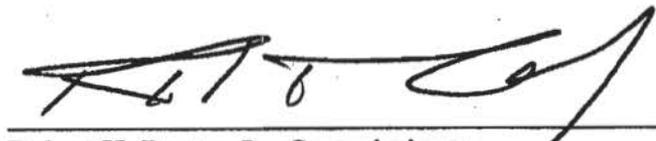
The judge's jurisdiction in this matter terminated when his decision was issued on April 3, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 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). The Commission has not directed review of the judge's order here, which became a final decision of the Commission on May 5, 2003.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed RBE's request, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse RBE's failure to respond to the show cause order and for further proceedings as appropriate.



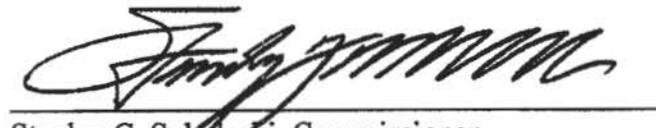
Michael F. Duffy, Chairman



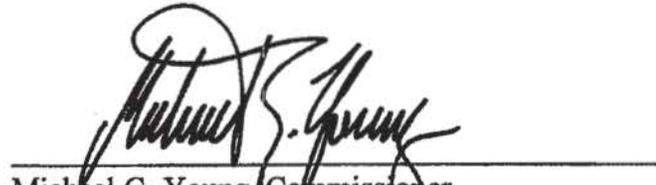
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 29, 2004

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

v.

VIRGIN ISLANDS QUARRY, INC

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Docket No. SE 2003-112-M
A.C. No. 55-00013-05508

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 14, 2003, the Commission received from Virgin Islands Quarry a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

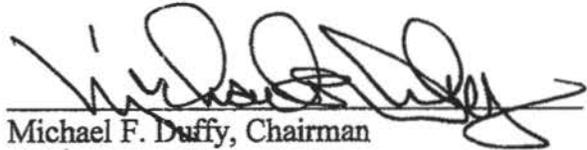
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In its request, Virgin Islands Quarry states that it made a decision to contest the penalty and mailed the necessary documents. Mot. It further states that it appeared as if the designated office did not receive the documents. *Id.* It also asserts that it received a final order letter from the Civil Penalty Compliance Office dated April 9, 2003. *Id.*

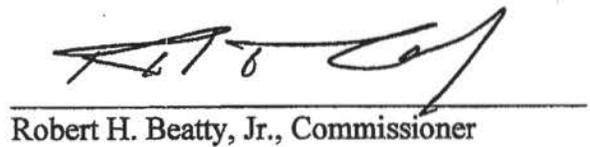
In her Response to Request to Reopen Assessment (“Response”), filed May 28, 2003, the Secretary presents a fairly detailed summary (with attachments) of the correspondence between the operator and the Mine Safety and Health Administration’s Civil Penalty Compliance Office. Response at 1. The Secretary further states that because Virgin Islands Quarry has identified no grounds for reopening the penalty assessment, she requires additional information before she can express her position on the operator’s motion. Response at 2-3.

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

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



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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OH&S Manager
Virgin Islands Quarry, Inc.
P.O. Box 641 Kingshill
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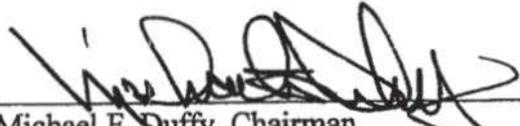
W. Christian Shumann, Esq.
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Arlington, VA 22209-2247

Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

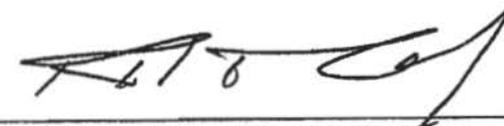
states that he and another representative of PIW participated in a conference call with Leslie John Rodriguez of the Secretary of Labor's Regional Solicitor's Office in Atlanta, Georgia, and expressed to him PIW's desire to consolidate the case against PIW with the case against Crabtree, the sole principal and owner of PIW. *Id.* On September 22, 2003, Rodriguez contacted PIW regarding the failure of Crabtree to respond to the proposed penalty assessment. *Id.* It is Crabtree's position that he was not aware that he had to file a separate notice after the discussion regarding consolidation of the cases, and he requests reopening to contest the penalty assessment in the case against him. *Id.* at 1-2. The Secretary states that she does not oppose Crabtree's request for relief.

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

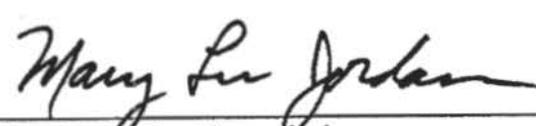
Having reviewed Crabtree's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Crabtree's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



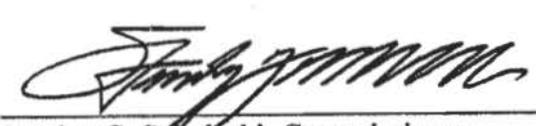
Michael F. Duffy, Chairman



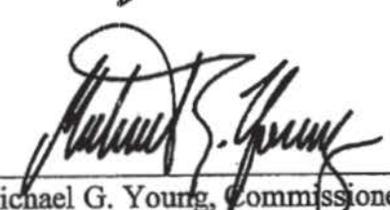
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. YORK 2003-62-M
	:	A.C. No. 30-00927-05531
CERTIFIED ROAD	:	
CONSTRUCTORS, INC.	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On April 3, 2003, the Commission received from Certified Road Constructors, Inc. (“CRC”) a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

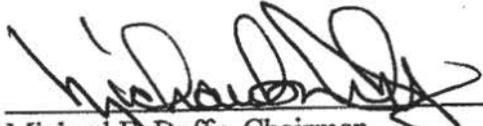
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In its request, CRC states that two citations were included in the proposed assessment, issued on October 31, 2002, that is the subject of these proceedings (A.C. No. 30-00927-05531). Mot. CRC states its Safety Director responded to the assessment by paying the proposed penalty for one citation but checked the box on the assessment sheet indicating that CRC requested a conference on the other citation. *Id.* Upon being notified by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) in early March 2003 that the penalty for the unpaid assessment was delinquent, CRC attempted to determine from MSHA what had happened to its request for a conference on the second citation. *Id.* CRC states that it was unsuccessful in doing

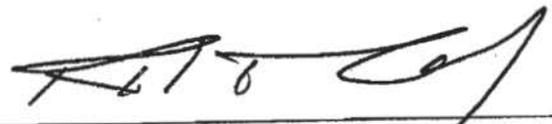
so. *Id.* Attached to CRC's request is a copy of the assessment, which does not indicate which citation was paid and which citation the operator wished to conference. The Secretary states that she does not oppose CRC's request for relief.

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

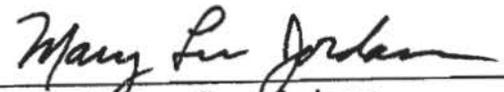
Having reviewed CRC's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for CRC's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



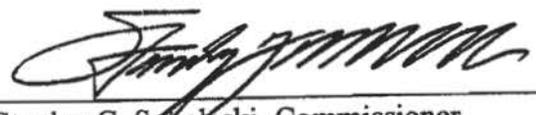
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Soboleski, Commissioner



Michael G. Young, Commissioner

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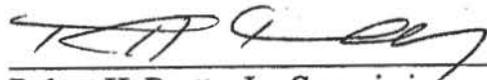
Id. The Secretary states that she does not oppose Van Buren's request for relief.

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

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



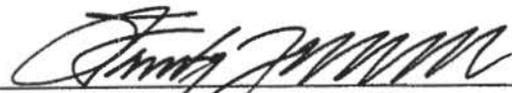
Michael F. Duffy, Chairman



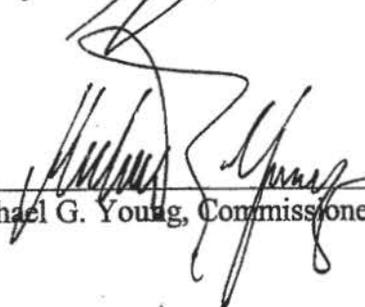
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 29, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2002-280-M
	:	A.C. No. 03-01614-05552
v.	:	
	:	
MERIDIAN AGGREGATES COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 19, 2002, former Chief Administrative Law Judge David Barbour issued to Meridian Aggregates Company (“Meridian”) an Order to Show Cause for failure to answer the Secretary of Labor’s petition for assessment of penalty. On February 5, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to his show cause order.

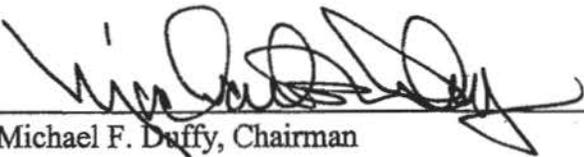
On October 23, 2003, the Commission received from a representative of Meridian a motion to reopen the case setting forth a chronology of events in order to explain its failure to answer the Secretary’s petition for assessment of penalty and to respond to the judge’s show cause order. Mot. at 1. Meridian claims that it sent a response to the citations and proposed penalties on October 2, 2002. *Id.* It further asserts that it received a certified return receipt notice showing that the response had been delivered and received by the Secretary on January 8, 2003. *Id.* Meridian attached copies of its response and the return receipt. *Id.*, attach. The Secretary states that she does not oppose Meridian’s request for relief.

The judge’s jurisdiction in this matter terminated when his decision was issued on February 5, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for

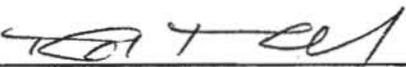
discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission has not directed review of the judge's order here, which became a final decision of the Commission on March 17, 2003.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

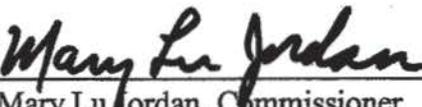
Having reviewed Meridian's request, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Meridian's failure to respond to the show cause order and for further proceedings as appropriate.



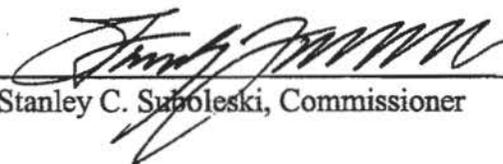
Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 29, 2004

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

v.

CELITE CORPORATION

:
:
:
:
:
:
:

Docket No. WEST 2002-465-M
A.C. No. 04-02848-05583

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

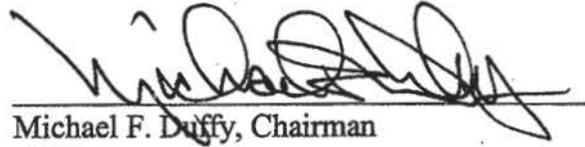
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 5, 2002, the Commission received from Celite Corporation ("Celite") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

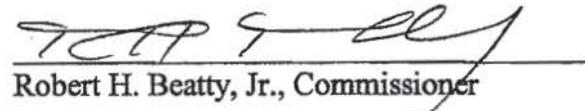
In its request, Celite, proceeding pro se, contends that on November 26, 2001, it timely submitted a request for a hearing to contest one (Citation No. 7960850) of four violations listed in proposed penalty assessment (A.C. No. 04-02848-05583). Mot. It maintains that on July 22, 2002, it learned that the Department of Labor's Mine Safety and Health Administration ("MSHA") had not received its hearing request for Citation No. 7960850. *Id.* Celite did not attach any supporting documentation to its request. The Secretary states that she does not oppose Celite's request for relief.

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

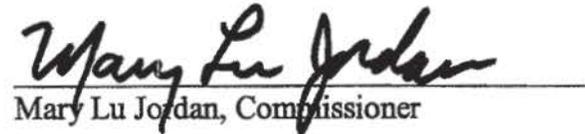
Having reviewed Celite's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Celite's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



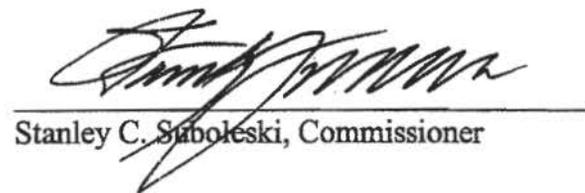
Michael F. Duffy, Chairman



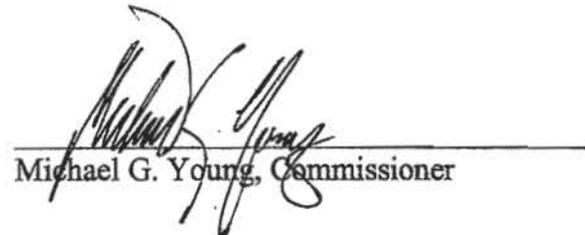
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Saboleski, Commissioner



Michael G. Young, Commissioner

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Washington, D.C. 20001-2021

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 1, 2004

JIM WALTER RESOURCES, INC.	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. SE 2003-103-R
v.	:	Citation No. 7670930; 03/13/2003
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2003-104-R
MINE SAFETY AND HEALTH	:	Order No. 7670931; 03/13/2003
ADMINISTRATION (MSHA),	:	
Respondent.	:	Docket No. SE 2003-114-R
	:	Order No. 7671112
	:	
	:	Docket No. SE 2004-115-R
	:	Order No. 7671113
	:	
	:	Mine: No. 4
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner,	:	Docket No. SE 2004-54-A
	:	A.C. 01-01247-09962
v.	:	
	:	Mine: No. 7
JIM WALTER RESOURCES, INC.	:	
Respondent.	:	

DECISION

Appearances: Warren B. Lightfoot, Jr., Maynard Cooper & Gale, P.C., Birmingham, AL, for Jim Walter Resources, Inc.;

Guy W. Hensley, Walter Resources, Inc., Brookwood, AL, for Jim Walter Resources, Inc.;

Sharon D. Calhoun, Dana L. Ferguson, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, GA., for the Secretary of Labor.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon notices of contest filed by Jim Walter Resources,

Inc. (Jim Walter) challenging three orders issued to it by the Secretary of Labor, and the special findings set forth therein. Additionally, at the hearing on this matter held in Birmingham, Alabama, on October 22, and 23, 2003, the parties agreed to present for decision the various penalty factors required to be found by the Commission, in the event it is found that Jim Walter violated a mandatory standard, as set forth in Section 110(I) of the Federal Mine Safety and Health Act of 1977 (the Act). Subsequent to the hearing the Secretary filed a petition for assessment of civil penalty seeking penalties for the violations alleged in Docket Numbers SE 2003-114-R, and 115-R.

I. Docket No. SE 2003-103-R

At the hearing, the parties reported that the issues raised by the notice of contest have been settled. The Secretary presented a joint motion to dismiss the notice of contest. Based on the Secretary's representations, the motion was granted and this case was ordered dismissed.

II. Docket No. SE 2003-104-R

At the hearing, the Secretary moved to dismiss the notice of contest asserting that the parties settle the issues raised by the notice of contest. The Company did not object to this motion, and based on the Secretary's assertions, the motion was granted and the notice of contest was ordered dismissed.

III. Docket Nos. SE 2003-114-R (Order No. 7671112), and 115-R (Order No. 7671113)

A. Introduction

On April 16, 2003, at approximately 9:00 a.m., MSHA Inspector John Thomas Terpo, along with Keith Plylar, an employee of Jim Walter who accompanied the inspector as a representative of the miners, and Jack Gravely, an outby foreman employed by Jim Walter, inspected the Entry No. 4 longwall section of Jim Walter's underground No. 7 Mine. The roof of the entry was supported by bolts and straps. In addition, the roof was supported by two parallel rows of cribs placed on five foot centers that extended the entire 3,000 foot length of the entry¹. The cribs were designed to extend from the floor to the roof. Cap boards ("T" boards) and wedges were placed on top of the cribs, where necessary, to ensure that the cribs were flush with the roof. According to Terpo, he observed that from spad 15348 through spad 15429, a distance of approximately two thousand feet, all the cribs in this area were loose, as they were not secured against the roof. Terpo testified that this condition was very obvious, as he observed gaps between the roof and the top of the cribs of at least one-half inch. According to Terpo, he measured 50% of the cribs in this area with a tape, and there was a three inch gap between the top of most of the cribs and the roof. Also, "T" boards were hanging down from some of the

¹The Roof Control Plan provides for a single row of cribs.

loose cribs. In traveling inby, the group walked between the rows of cribs. However, at various points the area was “dangered off” with signs directing them not to proceed between the rows, but to detour and continue walking in-by between the outside of the crib rows and the rib. In addition, Terpo observed “unstable roof” in two places and had to detour between the outside of the cribs and the rib. One of these areas contained fractured and loose roof along with rocks, some hanging down in the center of the entry. These conditions continued for seventy-five linear feet. Continuing inby, Terpo encountered another area of bad roof which extended ninety feet, requiring the group to detour, and he did not enter these areas. However, according to Terpo, in each instance when he walked between the ribs and cribs, and looked up at the top of the ribs and the roof, he noticed three inch gaps between the top of the cribs and the roof in these two areas. According to Terpo, every time he tapped the roof in the seventy-five foot and ninety foot areas where there was bad roof, small particles came down. Terpo indicated that he saw numerous rocks in these areas that were approximately four feet long and two to three feet wide.

Terpo opined that the gaps between the top of the cribs and the roof had existed for more than twenty-four hours. He stated that cribs, being made out of wood, shrink due to exposure to air, but that in his experience, it would take approximately four weeks for the wood to shrink to a point where a gap of three inches would be created, and most of the cribs were three inches from the roof.

On April 16, Terpo issued Order No. 7671112 alleging a violation of 30 C.F.R. 75.220(a)(1) (Jim Walter’s roof control plan²), that was significant and substantial, and resulting from its high negligence and unwarrantable failure. He also issued Order No. 7671113 alleging a violation of 30 C.F.R. § 75.364(h)³ that was significant and substantial, and due to Jim Walter’s high negligence and unwarrantable failure. This order alleges that in a weekly examination on April 15, the examiner failed to record fractured loose roof in five separate locations in Entry No. 4, and that cribs, required by the roof control plan, were not installed properly against the roof in two locations where fractured loose roof existed.

B. Docket No. SE 2003-114-R (Order No. 7671112)

I. Violation of Jim Walter’s Roof Control Plan (30C.F.R. § 75.220(a)(1))

At the hearing, Jim Walter admitted that, “technically”, it violated the roof control plan (Tr 23). Based upon this admission which is supported by the evidence of record, I find that Jim

²The roof control plan requires, inter alia, that the tailgate entry of the longwall panel”... will be systematically supported using a single row of cribs” (Exhibit C-1)

³Section 75.364(h) provides that, regarding weekly examinations, “... a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations ... shall be made.”

Walter did violate its roof control plan, and Section 75.220(a)(1), 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)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

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

In *United States Steel Mining Co. 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 found above, Jim Walter did violate a mandatory standard, inasmuch as the cribs in question did not properly support the roof in violation of its roof control plan. However, the roof in the entry in question was supported by bolts and straps. There is not any evidence in the record that these items of support were either improperly installed, maintained, or not all in good condition. Further, although the roof control plan requires the installation of a single row of cribs, Jim Walter had installed an additional row which provided a double row of support cribs in this entry.

In essence, Jim Walter argues that the violation was not significant and substantial in that the roof was well supported and not hazardous; that there is insufficient evidence that although some of the cribs were not touching the roof this condition contributed to the hazard of a roof fall; that there was not a reasonable likelihood of a roof fall occurring; and that in the event of such an accident only one person would be injured. I note that Gravely, who accompanied Terpo during the inspection, was asked in direct examination whether there was any loose rock in the ninety and seventy-five foot areas referred to by Terpo, he answered, no. I find that this testimony is insufficient to rebut Terpo's testimony that in these areas the roof was bad. Gravely subsequently conceded that in these areas "the top was fractured". (Tr. 228). Further, Gravely was asked whether he saw any other areas of loose roof, aside from the seventy-five and ninety foot areas, he testified as follows: "I scaled down some other loose roof areas, yes, sir." (Tr. 235). This testimony does not contradict Terpo's testimony that, aside from the hundred and sixty-five feet that he dangled off, there were two areas of fractured and loose roof along with rocks hanging down the center of the entry. Also, Terpo's testimony that whenever he tapped the roof in the 75 foot and 90 foot areas where there was bad roof small particles came down, is further evidence of loose roof. I do not find support in the record for Jim Walter assertions that this testimony of Terpo's has been contradicted by Plylar and Gravely. Plylar's testimony does not establish that he observed Terpo continuously throughout the entire inspection. He was asked, on cross-examination, whether he was "pretty much able to see" Terpo's actions the entire time - down the entry and back - and he stated, "yes sir". (Tr 202). He was then asked as follows: "You never saw him bump the roof, did you?" And his answer was "I don't remember seeing it". (Tr 202). I find this testimony not definite enough to contradict the specific testimony of Terpo regarding his actions, especially in light of my observations of the latter's demeanor while testifying, which I found indicated that his testimony in this area was credible. Further, since Gravely did not positively testify that he observed Terpo continuously throughout the inspection, I find that his answer in the negative, to a question by Respondent's counsel on direct-examination as to whether he had ever seen Terpo hit or bump the roof "at anytime", (Tr. 225) insufficient to contradict the testimony of Terpo relating to his actions in this regard.

I also take cognizance of Gravely's opinion that a crib which does not quite touch the roof is not a hazard "if there is good roof above it" (Tr. 229). However, he was asked if it would be a hazard if there was loose roof above a crib that was not tight with the roof and he answered as follows: "It would just depend on how far the crib was from the top. If it was pretty close, I would say no because the top could still settle on the crib." (Tr. 229). In this connection, Gravely testified, in contrast to Terpo, that from the seventy-five foot area down towards the headgate, the majority of the cribs were only a half inch from the roof; and that from the beginning of the crib line down to the seventy-five foot area the cribs were "tight against the roof" (Tr. 226). I place more weight on the testimony of Terpo that in the cited approximately 2000 foot linear distance, from spad 15348 through spad 15429, there was a three-inch gap between the top of most of the cribs and the roof, inasmuch as this conclusion was based upon his tape measurements of 50 % of the cribs in this area. In contrast, Gravely did not take any measurements. I find Gravely's testimony that he observed Terpo taking a measurement with a ruler only on one occasion, and Plylar's testimony that he did not observe anyone taking

measurements of the loose cribs, insufficient to rebut Terpo's testimony in the absence of any foundation in the record that either of these witnesses continuously watched Terpo's actions throughout the inspection. I observed Terpo's demeanor while testifying on this point, and find his testimony credible.⁴ Further, the record does not contain any contradiction of Terpo's testimony that in the seventy-five and ninety foot areas there were gaps between the cribs and the roof, some of the roof was fractured.

Considering all of the above, I find that the weight of the evidence establishes that, when inspected, the roof conditions were somewhat hazardous. Further, since the cribs, designed to provide roof support, were not flush with the roof for an extensive distance in the entry in violation of the roof control plan, I find that the violative conditions contributed to the hazard of a roof fall. Additionally, I note the following existed in the cited areas: loose rocks as testified to by Terpo, and not specifically contradicted by other witnesses; loose material that had to be scaled; fractured roof, especially in a 75 foot and 90 foot area where cribs were not flush against the roof; and extensive areas in the entry where the cribs were not in contact with the roof. Based on these conditions there was a reasonable likelihood of the occurrence of an injury producing event, i.e., a roof or a rock fall. Further, taking into account the extensive area affected, I find that it has been established that, given the continuance of normal mining operations, i.e., a weekly examination of the area, that there was a reasonable likelihood of a roof fall causing death or serious injury. Thus, for all the above reasons, I conclude that this violation was significant and substantial.

3. Unwarrantable Failure

On April 15, 2003, the day prior to the inspection at issue, Richard Sandlin, Jim Walter's outby foreman, conducted a weekly examination of the entry in question. Sandlin indicated that, in his inspection, he did not see any hazardous conditions. He also indicated that he did not see any condition that would have been reasonably likely to have resulted in an event where there would be an injury of a reasonably serious manner.

Sandlin testified that as he walked down the entry he looked at the cribs, and most cribs seemed close to the top, although in a couple of places two or three cribs were loose. He described the gap between these cribs and the roof as approximately one-half to one inch. According to Sandlin, the roof was well supported with roof bolts and straps which were in good shape. He indicated that he did not see any seventy-five foot or ninety foot areas of loose rock. However, Sandlin indicated that he observed fractured roof in ten to twelve different places; and the longer crack in the roof extended twenty linear feet. Sandlin scaled loose pieces in these fractured areas. He was asked whether he left any loose rock unscaled when he left the entry and he answered "to my knowledge, no, sir." (Tr. 243).

⁴I also find some corroboration in Plylar's testimony that most of the gaps that he observed in the two thousand foot area cited were between three and six inches, although he did not measure them.

On the other hand, I take cognizance of Terpo's testimony that the gaps between the cribs and the roof were "obvious". In this connection, Plylar corroborated Terpo's testimony regarding the existence of three inch gaps between some cribs and the roof. Based on Terpo's experience, I find his testimony credible that the cribs, made out of wood, shrink upon exposure to air, and it would take approximately four weeks for the wood to shrink to where a gap of three inches would be created. In this connection, as discussed above (III(B)(2), *infra*), I find the credible evidence establishes that a significant number of cribs were three inches from the roof. A further indication of the obviousness of the gaps between the roof and the top of the cribs is found in Gravely's testimony wherein he indicated that 50 % of the wedge boards that had been inserted between the top of the crib and the roof to eliminate the gap were loose, and 20 to 25% had fallen out.

I find that the record establishes the existence of the following conditions in the areas cited by Terpo on April 16, 2003: loose cribs that extended for a significant distance in the entry; that these conditions were obvious; and that in two areas consisting of a total one hundred and sixty-five feet, in addition to loose cribs the roof was fractured. In the context of the combination of these conditions, I find it more likely than not that at least some of these hazardous conditions had existed for some time prior to April 16.⁵ I thus find that the existence, on April 16, of violative conditions of extensive areas where the cribs did not touch the roof, to have been the result of a degree of negligence on the part of Jim Walter that was more than ordinary and reached the level of aggravated conduct. For these reasons I find that it has been established that the violation herein was as the result of Jim Walter unwarrantable failure. (See *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987))

C. Docket No. SE 2003-115-R (Order No. 7671113)

I. Violation of 30 C.F.R. § 75.364(h)

Essentially, for the reasons set forth above, (III (B)(3) *infra*), I find that the weight of the evidence establishes the existence of hazardous conditions in the area in question on April 16, 2003, at the time of Terpo's inspection. Specifically, that for more than two thousand linear feet cribs were not in contact with the roof. In addition, within this section, the roof was fractured in two areas totaling one hundred and sixty-five feet, and the roof was loose and contained loose rocks in some places. Due to the significant number of cribs involved, and the extensive area of fractured roof, combined with the presence of loose rock and loose roof, I find that, in combination, it was more likely than not that at least some of these hazardous conditions were in existence when the area was inspected by Sandlin the previous day. The weekly examination report does not contain any notation of hazardous conditions. Accordingly, I find that Jim Walter did violate Section 75.364(h), *supra*, which requires, as pertinent, a record of the results of the weekly examination "... including a record of hazardous conditions found during each examination"

⁵I thus reject Sandlin's testimony regarding the conditions of the cribs on April 15.

2. Significant and Substantial

I reiterate my finding that the violative condition of cribs not being in contact with the roof constitutes a significant and substantial violation for the reasons set above, (III (B)(2) infra). Accordingly, I conclude that if the condition itself was a significant and substantial violation, then for the same reasons, the failure to report such a condition constitutes a significant and substantial violation.

3. Unwarrantable Failure

As set forth above, hazardous conditions were present at the time of Sandlin's examination. Due to the extensive nature of these conditions the failure to report constitutes more than ordinary negligence and reaches the level of aggravated conduct and hence is found to be an unwarrantable failure (See *Emery, supra*).

D. Penalties

1. Order No. 7671112

I find, based on the parties' stipulations, that Jim Walter demonstrated good faith abatement, and that a reasonable penalty will not impair its ability to continue in business. Neither party offered any argument that Respondent's size should be accorded any significant weight in evaluating the penalty to be imposed. I take cognizance of the history of violations as set forth in Respondent's Exhibit No. 1.⁶ Essentially, for the reasons set forth above, III (B)(3) infra, I find that the level of Respondent's negligence was high. Further, for essentially the same reasons set forth above, III (B)(2) infra, I find that the level of gravity of this violations was high.

Taking into account the above factors referred to in Section 110(i) of the Act, giving most weight to Respondent's high negligence, and the high level of gravity of the violation herein which could have led to a fatality, I find that a penalty of \$6,000.00 is appropriate for this violation.

2. Order No. 7671113

I find, based on the parties' stipulations, that Jim Walter demonstrated good faith abatement, that a reasonable penalty will not impair its ability to continue in business. Neither

⁶I have considered Jim Walter's arguments that the history of violations should not be a negative penalty factor inasmuch as none of the violations in the report indicated that it was on notice of crib deficiencies, or problems with compliance with 30 C.F.R. §§75.220(a)(1) or 364 (b). However, in evaluating all the elements set forth in Section 110(i) of the Act I place most weight on the factors of negligence and gravity due to their high level (III(B)(2), and III (C)(2), infra).

party offered any argument that Respondent's size should be accorded any significant weight in evaluating the penalty to be imposed. I take cognizance of the history of violations as set forth in Respondent's Exhibit No. 1.⁷ Essentially, for the reasons set forth above, III (C)(3) *infra*, I find that the level of Respondent's negligence was high. Further, for essentially the same reasons set forth above, III (C)(2) *infra*, I find that the level of gravity of this violations was high.

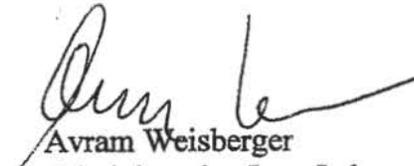
Taking into account the above factors referred to in Section 110(i) of the Act, giving most weight to the Respondent's high negligence, and the high level of gravity of the violation herein which could have led to a fatality, I find that a penalty of \$1,400.00 is appropriate for this violation.

III. Order

It is **Ordered** that the Orders at issue be affirmed as written, and that the Notices of Contest, Docket Nos. SE 2003-114-R and 2003-115-R, be **Dismissed**.

It is further **Ordered** that, pursuant to the Secretary's Joint Motion to Dismiss which was granted, Docket Nos. SE 2003-3-R and 2003- 4 be **Dismissed**.

It is further **Ordered** that Respondent pay a total civil penalty of **\$7,400.00** for the violation of Order Nos. 7671112, and 7671113.


Avram Weisberger
Administrative Law Judge

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/sc

⁷Supra, n.6.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 9, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-284-M
Petitioner	:	A. C. No. 04-04441-05514
	:	
v.	:	Docket No. WEST 2003-429-M
	:	A. C. No. 04-04441-05501
HANSEN TRUCK STOP, INC.,	:	
Respondent	:	Hansen Pit & Mill

DECISION

Appearances: Isabella M. Del Santo, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, on behalf of Petitioner;
Charles F. Hansen, Sr., Fortuna, California, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petitions allege that Hansen Truck Stop, Incorporated, ("Hansen") is liable for fourteen violations of the Act and mandatory safety and health standards applicable to surface metal/nonmetal mines. A hearing was held in Eureka, California, and the parties submitted briefs following receipt of the transcript.¹ The Secretary proposes civil penalties totaling \$1,935.00 for the violations. For the reasons set forth below, I find that Hansen committed the alleged violations and impose civil penalties totaling \$1,366.00.

¹ Respondent's brief included several photographs, copies of photographs, and additional information regarding one of the citations at issue. The Secretary objected to Respondent's attempt to supplement the record, noting that no foundation was provided for the photographs, and arguing that the material should have been offered into evidence at the hearing. Respondent offered no explanation of either the materials, or the reason that they were not presented at the hearing. The additional evidence submitted with Respondent's brief will not be considered as part of the record upon which this decision is based.

Findings of Fact - Conclusions of Law

Background

Charles F. Hansen, Sr., the 89 year old president of Hansen Truck Stop, Inc., owns a 160 acre ranch, which is located adjacent to U.S. Highway 101, two miles south of Fortuna, California. A number of business ventures are operated at that location, including a gas station and coffee shop. In the 1950's Mr. Hansen began to mine sand and gravel from a bar in a river that flows through the property. Sand and gravel is removed from the river bar by a front-end loader and is trucked to a processing area. The processing area includes a washer, a crusher, related conveyor belts, stockpiles and parking areas for loaders, haul trucks and other equipment used in the mining operation. The conveyors and other equipment, including mobile equipment, were assembled over the years as Mr. Hansen acquired used and discarded items. He fabricated the plant equipment almost entirely from parts that he bought as scrap metal. Mr. Hansen purchased used trucks and loaders for a few thousand dollars for use in the operation, or as a source of parts to keep other equipment operational.

The sand-gravel operation is an incidental part of Respondent's business activities. For the twelve-month period ending on July 31, 2003, Hansen had sales of nearly \$8 million, the bulk of which was from sales of gasoline and diesel fuel. Only \$89,368, just over one percent, was derived from the sale of gravel. Ex. P-40. Sand and gravel are recovered from the river bar only during a few weeks each year, and the plant equipment is operated very intermittently by Jim Shawver, a young employee who works in support of all of Hansen's commercial efforts.² As Mr. Hansen explained, the plant is run only when there is nothing else to do, or if processed material is needed. Tr. 175. Much of the material is used on Hansen's property. Gravel is used to surface the area around the coffee shop, and sand is used as bedding in lofting sheds for livestock. Hansen sells gravel to customers, whose employees use one of Hansen's loaders to remove it from the stockpile and place it into their trucks.

Regulations implementing sections 103(h) and 109(d) of the Act require that all mine operators file a legal identity report with the Department of Labor's Mine Safety and Health Administration ("MSHA"), identifying the mine, the mine's owners, persons who control it, and providing other information. 30 C.F.R. Part 41. On March 13, 1990, Charles Hansen, Sr., filed a Legal Identity Report Form No. 2000-7, identifying the sand and gravel mine as "Hansen Pit & Mill," and its owner, as Hansen Truck Stop, Inc. Mr. Hansen was identified as the president of the corporation and also as an "owner" of the mine. Ex. P-2. Section 103(a) of the Act requires that surface metal/non-metal mines be inspected by MSHA twice each year.

According to Mr. Hansen, when MSHA commenced inspections, "that's when we seemed to have all the trouble." Tr. 210. Hansen readily acknowledges that MSHA has jurisdiction over that portion of its operation in which sand and gravel is removed from the river

² One other person occasionally operates part of the plant. Tr. 176.

bar. It contests the citations at issue here, in part, to advance its principle contention that the plant area is not a mine and does not fall within MSHA's jurisdiction. Tr. 35, 126-29, 227. Secondly, it challenges MSHA's jurisdiction to inspect the plant when it is not operating. Tr. 118, 179.

Jurisdiction

Section 4 of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Federal Mine Safety and Health Act of 1977, provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h) of the Act defines the term "mine," in part, as:

"coal or other mine" means (A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, . . . structures, facilities, equipment, machines, tools, . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing . . . minerals,

30 U.S.C. § 802(h)(1).

The legislative history of the Act makes clear that Congress intended that the Act's coverage provisions be interpreted broadly. The Senate Committee report emphasized that "what is considered to be a mine and to be regulated under this Act [should] be given the broadest possible interpretation, and . . . doubts [should] be resolved in favor of inclusion of the facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978).

The Commission and the courts have recognized that Congressional intent and have applied the Act's provisions to a wide variety of mining operations, including mining and preparation facilities similar to those at the Hansen Pit and Mill. In *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979), the court held that the processing of material dredged from a river bed, in which sand and gravel was separated from a burnable material, brought Stoudt's facilities within the Act's definition of the term "mine," even though Stoudt was not involved in the actual extraction of minerals from their natural deposits. The court noted:

We agree with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that

was to be conveyed by the word is much more encompassing than the usual meaning attributed to it – the word means what the statute says it means. (footnote omitted).

602 F.2d at 592.

In *Watkins Engineers & Constructors*, 24 FMSHRC 669, 672-76 (July 2002), the Commission held that cement plants were mines because their operations fell within the Act's definition of the term "milling," deferring to the Secretary's broad interpretation of that term as including processes like "crushing" and "grinding." See also *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994) (sand dredging operation that included screening and separation of water from sand subject to Act's jurisdiction); *W.J. Bokus Industries*, 16 FMSHRC 704 (April 1994) (whether equipment is within Act's jurisdiction is determined by whether it is used or is to be used in the work of extracting or milling minerals, rather than by ownership or location on a mine site).

Hansen's mining operations easily fit within the Act's definition of the term "mine." The extraction of sand and gravel from natural deposits in the river bar is clearly covered, as Hansen readily concedes. Hansen fails, however, to recognize that the processing of sand and gravel through the crusher and wash plants constitutes "milling," as that term has been interpreted by the Commission and the courts, such that its facilities fall within the statutory definition of a "coal or other mine." As the court noted in *Stouidt's Ferry*, the concept of a "mine," as used in the Act, is "much more encompassing than the usual meaning attributed to it."

Hansen's challenges to jurisdiction must be rejected.³ MSHA was statutorily obligated to inspect the "milling" operation, i.e., the crusher and wash plant and associated areas, and the equipment used in those operations.

The timing of MSHA's inspection was also appropriate. While Hansen operated only intermittently, its limited facilities were not officially shut down for any specified period. Hansen's quarterly reports to MSHA showed at least some hours worked for each of the four quarters preceding the inspection. Tr. 26-27. As discussed more fully *infra*, equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time. See, e.g., *Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843 (April 1981) (equipment

³ Although not raised by Hansen as an objection to jurisdiction, it is also clear that its operations affect interstate commerce. It sold \$89,368.00 worth of gravel to customers in its 2002-2003 fiscal year, and used gravel on its own facilities, at least one of which is part of a business that engages in interstate commerce. It is well established that the Commerce Clause has been broadly construed and that Congress may regulate highly localized commercial activities because even small scale efforts, when combined with other similar operations, can influence interstate pricing and demand. See *Harless Towing, supra*, 16 FMSHRC at 686.

located in a normal work area and capable of being used must be in compliance with safety standards).

While Hansen cannot escape MSHA jurisdiction over its mineral extraction and milling operations, it does have some control over when those operations could be subjected to MSHA's scrutiny. Rather than operate its plant facilities on a sporadic basis, it could choose to operate the plant only during specified time periods, e.g., in conjunction with its removal of material from the river bar. During periods when the equipment would not be operated, Hansen could notify MSHA that its milling operations would be temporarily shut down for some specified time, and it would not be subject to inspections during such periods. 30 C.F.R. § 56.1000; tr. 28. Of course, Hansen would have to notify MSHA before restarting operations, and would then be subject to inspection.⁴

The Inspections

David Small has served as an MSHA inspector for over three years and had thirty years of mining experience before joining MSHA. He attempted to inspect the Hansen Pit and Mill in July 2002, but was prevented from doing so by Mr. Hansen, who maintained that the plant was not within MSHA's jurisdiction. Hansen agreed to drive Small around the property in his pickup truck, and Small observed the plant, two haul trucks and a front-end loader in operation. Tr. 19-20. Small returned to the Hansen Pit and Mill on September 10 and 11, 2002, to inspect the plant and related equipment.⁵ The parties stipulated that the plant was not in operation at the time of the inspection. In the course of the inspection he issued 26 citations, 14 of which are contested in these proceedings on jurisdictional and other grounds.⁶

Citation Nos. 6343225 and 6343248

Citation Nos. 6343225 and 6343248 allege violations of 30 C.F.R. § 56.9300(a), which requires that:

- (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to

⁴ Whether customer use of a loader to move material from a stockpile to a truck would be deemed part of the mining operation is open to question. However, the sale and loading of finished material may not fall within the Act's definition of milling. *See Harless Towing, supra*, 16 FMSHRC at 684 n.3.

⁵ Hansen was not removing material from the river bar at the time, and that portion of the operation was not inspected.

⁶ The remaining citations are contested in other cases pending before the Commission. Proceedings in those cases have been stayed pending resolution of these cases.

overturn or endanger persons in equipment.

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

Citation No. 6343225 was issued by Small on September 10, 2002, after he observed that no berm was provided on the access road leading to the pan feeder in the wash plant area. He estimated that the unbermed part of the road was about 13 feet wide and, for 75 feet of its length, there was an 8 foot drop-off. He questioned Shawver and determined that the road was used by loaders and smaller vehicles on a regular basis. He concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected, and that the violation was due to the operator's moderate negligence. A civil penalty of \$207.00 is proposed.

Citation No. 6343248 was issued on September 11, 2002, after Small observed that there was no berm on a portion of the haul road next to the crusher plant area. He estimated that the unbermed part of the road was 175 feet long and that there was a 6 foot drop-off adjacent to it. He determined, through conversations with Shawver, that the road was used by loaders and smaller vehicles on a regular basis. Small concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected, and that the violation was due to the operator's moderate negligence. A civil penalty of \$207.00 is proposed.

The Violations

There was virtually no evidence offered by Respondent to rebut Small's testimony regarding Citation No. 6343225. The hazard presented by the drop-off was that any vehicle that left the roadway might overturn, threatening serious injury or death to its operator. Even if the vehicle did not overturn, the threat of serious injury was substantial. Considering the size of the wheels on the largest pieces of equipment that used the road, there should have been berms at least three feet high on the sides of that portion of the roadway.

As to Citation No. 6343248, Respondent presented evidence that at least a portion of the road had a berm. Exhibit R-3 is a photograph depicting what appears to be a slope up to the elevated road and old conveyors and booms on either side of a portion of it. Small acknowledged that the equipment may have satisfied the berm requirement for the limited portion of the roadway affected, but reiterated that the portion which was the subject of the citation had no berms, much less any approaching the three foot minimum required.

These unbermed, elevated roadways had drop-offs sufficient to cause a vehicle to overturn or endanger persons in equipment that used the road. I find that these roads were maintained in violation of the regulation.

Significant and Substantial

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

The Commission has explained that:

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

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

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

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

These violations of the berm standard presented a safety hazard, the possibility that a piece of mobile equipment would leave the roadway, travel out of control down the slope and either overturn or come to rest in a violent manner. Small testified, based upon his experience, that the operator of such equipment might be thrown about inside the cab and could suffer crushing injuries and/or cuts from broken glass during any rollover. Potential injuries from such events range from lacerations and contusions, to broken bones and death. Exhibit P-6 is a report of an accident that resulted in fatal injuries to the operator of a loader that traversed the unbermed edge of an elevated roadway, encountered a nine foot drop-off and overturned. A serious injury could easily result in the event that a piece of mobile equipment left the elevated portions of the roadways. Given that the roads were used with some frequency, it is also reasonably likely that such an event would occur.

I find that these violations were significant and substantial. I also agree with Small's assessment that the operator's negligence was moderate.

Citation Nos. 6343229, 6343233 and 6343235

Citation Nos. 6343229, 6343233 and 6343235 allege violations of 30 C.F.R. § 56.14107(a), which provides:

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

Citation Nos. 6343229, 6343233 and 6343235 were issued on September 10, 2002, based upon Small's observation that the v-belt drive and fan blade units on Clark loaders 275A and 275B and a Euclid haul truck, company # 2, were not guarded. They were located about five feet above ground and could be reached by a person standing next to the engine compartments. Small determined that the violations were unlikely to result in a permanently disabling injury because persons were not required to be in the area when the units were running. He concluded that the violations were not significant and substantial, that one person was affected by each, and that the operator's negligence was moderate. A civil penalty of \$55.00 is proposed for each violation.

Hansen offered no evidence to challenge Small's description of the conditions which led him to issue these citations. With the exception of the haul truck, its sole defense is based upon its challenge to MSHA's jurisdiction and its position that the equipment was not subject to inspection because it was not operating at the time.

The standard at issue, like other safety standards applicable to mobile equipment, is intended to protect miners from being exposed to hazards caused by the operation of defective equipment. In general, such standards must be complied with even though the equipment is not actually being used or is not scheduled to be used during a particular shift. *Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960 (May 1990).

In *Mountain Parkway*, the term “used” was interpreted broadly to include equipment that was “parked in the mine in turn-key condition and had not been removed from service.” *Id.* at 963. The Commission relied on *Ideal Basic Industries, Cement Div., supra*, which held that equipment located in a normal work area, capable of being operated, had been “used” within the meaning of the standard there at issue.⁷ In *Good*, the Commission reiterated that “[a]s long as the cited equipment is not tagged out of operation and parked for repairs” a standard requiring that braking systems be maintained in functional condition was fully applicable. 23 FMSHRC at 997. These cases make clear that the operator could properly be cited for any defective conditions on mobile equipment, unless the equipment had been effectively taken out of service.

Small had confirmed with Shawver that the plant and related equipment had been operated within the past week or two. Mr. Hansen testified that the plant was operated sporadically – “[w]hen we have nothing else to do or want something for ourselves.” Tr. 175. Shawver, or the other employee who occasionally operated the plant, could have used the loaders or truck at any time. They were parked in an area where equipment would normally be found, were operable, and had not been tagged out or otherwise designated as equipment that could not be used. Mr. Hansen testified that he has never tagged or locked out any piece of equipment.⁸ Tr. 170-71, 173, 177-78.

Respondent claimed that the Euclid haul truck was not operational and that the engine had been taken out of it in September 2002. Tr. 171-72. However, this claim, like other exculpatory information presented or alluded to during the hearing, was not presented effectively and appears to be erroneous. The claim was that the engine in the truck had blown up prior to the inspection and that it would not run for more than 30 seconds. Tr. 172, 195-96. To repair it, an engine was pulled from a similar truck and put into the Euclid #2. Tr. 171-72, 217-18. However, Small testified that Shawver told him that the truck was in good condition. At Small’s request, Shawver started the truck and, after letting it warm up, drove it about 600 feet to a grade where the parking brake was checked. The truck was then driven back to its parking place and shut down. Tr. 150-52, 233. Small was not cross-examined on the status of the truck. The citation was terminated in March 2003, because the truck was then inoperable because the engine had been removed. Tr. 152; ex. P-37. It appears that the engine in the Euclid #2 that Small cited was pulled after the inspections, and was used to replace a blown engine in a vehicle different from the one cited. I find that the Euclid haul truck cited by Small was fully operational at the

⁷ The standard at issue in that case, 30 C.F.R. § 56.9-2 (1978), required that defects be corrected “before the equipment is used.”

⁸ Mr. Hansen testified that if he didn’t want a piece of equipment to be used, the key was simply taken out of it and “probably” hidden in the office. Tr. 177-78. There was no evidence that keys to the mobile equipment were not readily available on the days the inspection was conducted.

time of the inspection.⁹

The Secretary has carried her burden with respect to these citations. The conditions at issue have been held to violate the standard in prior cases, *See, e.g., Wake Stone Corp.*, 23 FMSHRC 454, 457 (April 2001)(ALJ). I also agree with the assessments of gravity and negligence noted in the citations.

Citation No. 6343236

Citation No. 6343236 was issued on September 10, 2002, and alleges a violation of 30 C.F.R. § 56.14101(a)(2), which provides: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." At Small's direction, Shawver parked an unloaded Euclid haul truck, Company #2, on an approximate 4% grade, placed the gear selector in neutral and set the parking brake. When he released the service brakes, the truck rolled downward. The truck was used to move material around the mine site and had been observed in operation in July 2002. Tr. 57. Because the service brakes on the truck were functional and the site was generally level, Small determined that the violation was unlikely to cause an injury, that any injury would result in lost work days, that the violation was not significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$55.00 is proposed.

Aside from the claim that the truck was not operational, *see* discussion *supra*, Hansen offered no evidence to rebut the Secretary's proof of this violation, relying instead on its jurisdictional challenges. I find that Hansen violated the subject regulation, as alleged, and that the gravity and negligence determinations made by Small were accurate.

Citation No. 6343237

Citation No. 6343237 was issued on September 10, 2002, and alleges a violation of 30 C.F.R. § 56.14132(a), which provides that "Seat belts shall be provided and worn in haulage trucks." Small observed that the Euclid haul truck, which was the subject of Citation No. 6343236, was not equipped with a seat belt. Tr. 63. He determined that the violation was reasonably likely to cause a permanently disabling injury, that the violation was significant and substantial, that one person was affected, and that the operator's negligence was low. A civil penalty of \$150.00 is proposed.

⁹ Mr. Hansen's recollection regarding the inspection differed markedly from Small's in many respects and, in one instance, was contradicted by his own witness. Tr. 196. In general, I have credited Small's testimony as to the conduct of the inspection and descriptions of various conditions cited.

The Violation - Significant and Substantial

Hansen does not dispute that there was no seat belt in the truck. I have previously held that the truck was operational and available for use at the time of the inspection. The violation was also significant and substantial. As noted in the discussion of Citation Nos. 6343225 and 6343248, there were unbermed roads at the site that presented the possibility of the truck leaving the roadway and overturning. There were also other vehicles that operated on the site, increasing the likelihood of an unexpected encounter that might have resulted in a collision or the truck leaving the roadway. I find that the violation was significant and substantial and that the negligence of the operator was low.

Citation Nos. 6343241, 6343242 and 6343243

Citation Nos. 6343241, 6343242 and 6343243 allege violations of 30 C.F.R. § 14107(a), the guarding standard discussed *supra*. They were issued on September 11, 2002, and were addressed to three distinct conditions. Citation No. 6343241 was issued because there was no guard provided for the self-cleaning tail pulley on the jaw conveyor. This pulley was about two feet above ground level and Small believed that persons would be in proximity to it during normal operations. Tr. 69; ex. P-15, P-16, P-17. Self-cleaning tail pulleys are particularly dangerous because they have grooved surfaces that can easily grab and hold things, such as clothing or limbs, and draw a person into the pulley, resulting in serious injury or death. Tr. 74. Small determined that it was reasonably likely that the violation would result in a fatal injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$259.00 is proposed.

Citation No. 6343242 was issued because there was no guard provided for the smooth tail pulley on the 3/4 minus conveyor. Small observed that this pulley was located about one foot above ground level and believed that persons would typically be in the area during normal operations. Tr. 82-84; ex. P-19, P-20. He concluded that the violation was reasonably likely to result in a permanently disabling injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$207.00 is proposed.

Citation No. 6343243 was issued because no adequate guard was provided on the v-belt drive unit on the hammer mill drive motor. Small observed that the unit was about four feet above ground level and believed that persons were required to be in the area when the plant was running. Tr. 88-91; ex. P-21, P-22, P-23. He concluded that the violation was reasonably likely to result in a permanently disabling injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$207.00 is proposed.

The Violations

Hansen attempted to defend against these alleged violations by presenting evidence that the plant had not been operated for some time prior to the inspection and that adjustments were being made to the feeder. Shawver testified that the plant had not run in “about a year,” except for a short period a week or two before the inspection to make adjustments in preparation for planned operations in September, when material was to be removed from the river. Tr. 212. However, he later stated that it had been a “few months” since it had been operated. Tr. 213. Mr. Hansen also claimed that the plant had not been operated for some time, but also stated that it was operated whenever there was nothing else to do or finished product was needed. Tr. 175. Small testified that the plant was operating in July and, when recalled to the witness stand, reiterated that Shawver had told him that the plant had been run for production purposes a week or two before and that nothing had changed at the plant since that time. Tr. 234.

This defense, like the “inoperable truck” defense discussed previously, was not presented in an organized fashion and was not supported with documentation. The evidence offered by Hansen as to when the plant was run is also inconsistent. I find that the plant, like much of the mobile equipment, was operated sporadically in the condition that it was in when the inspection was conducted. Guards may have been removed, but they were not removed solely to allow adjustment of the equipment, i.e., the equipment had been operated, and most likely would have been operated, without the guards having been replaced.

The conditions described by Small in his testimony, the citations, related documents and pictures, clearly establish that the moving machine parts in question were not adequately guarded, in violation of the subject regulation.

Significant and Substantial

The pulleys and belt drive that are the subjects of these three citations present obvious and serious hazards to any person who might come into contact with them while they are in operation. The self-cleaning tail pulley is particularly hazardous because of its capacity to pull persons into the pulley and fast-moving belt. Any injury suffered by a person encountering these hazards would clearly be serious, most likely fatal in the case of the self-cleaning tail pulley. Ex. P-18. The crucial issue is whether it was reasonably likely that an injury would result from these violations, the third *Mathies* criteria.

Small testified that his assessment that the violations were S&S was based upon his understanding, from his experience and information provided by Shawver, that persons were required to be in the area of the hazards while the equipment was operating to monitor operations and to clean. Tr. 72-73, 85-86, 94. He also observed several shovels in the area of the tail pulley. Tr. 73. However, Shawver testified that no clean-up was done while the equipment was running, because of the likelihood of injury caused by rocks falling off the equipment. Tr. 206, 216. Small’s conclusions in that regard, as expressed in his testimony and related

documentation, were somewhat conclusory, and his only direct contradiction of Shawver's testimony was a one-word response to a leading question. Tr. 75-76.

Shawver was presented as a witness by Mr. Hansen, a person inexperienced in presenting a legal case, and he impressed me as a credible witness. I accept his testimony on this issue and find that he, the primary operator of the plants, did not clean around the pulleys or v-belt drive while the equipment was being operated. I also find that, because of their desire to avoid falling rocks, neither he, nor any other person, was likely to be in close proximity to those devices while they were in operation. In addition, the v-belt drive was at least partially guarded. Ex. R-1A, P-22. While the guarding was inadequate, it did significantly reduce the possibility that anyone in the area would encounter that hazard. The photographs of the tail pulley and the v-belt drive, exhibits P-17 and P-22, depict the absence or inadequacy of guards, but are of little value in determining the accessibility of those hazards to persons who might have been in the area.¹⁰

On the specific facts of this case, I find that the conditions at issue in these citations were not reasonably likely to result in an injury, and that these violations were not S&S.

Citation No. 6343251

Citation No. 6343251 was issued on September 11, 2002, and alleges a violation of 30 C.F.R. § 56.14130(i), which requires that seat belts on loaders and other mobile equipment "shall be maintained in functional condition, and replaced when necessary to assure proper functioning." Small observed that the buckle portion of the seat belt in Hansen's Caterpillar 988 front-end loader, Serial no. 87A9205, was missing, rendering it non-functional. Tr. 113. He concluded that the violation was reasonably likely to result in a permanently disabling injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$207.00 is proposed.

Hansen offered no evidence to contest the alleged violation. I find that the regulation was violated, as alleged. I also find, for the reasons discussed with respect to Citation No. 6343237, that the violation was significant and substantial. I agree with Small's assessment of the operator's negligence.

Citation No. 6343252

Citation No. 6343252 was issued on September 11, 2002, and alleges a violation of 30 C.F.R. § 46.11(b), which provides, in pertinent part:

You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at

¹⁰ Mr. Hansen cross-examined Small in an effort to show that the photographs were taken from positions that distorted or misrepresented the actual conditions. Tr. 96-104.

a mine site, including . . . [c]ustomers, including commercial over-the-road truck drivers.

Small determined that Hansen was not providing site-specific hazard awareness training to persons, such as truck drivers, who entered the mine site. He concluded that the violation was reasonably likely to result in an injury resulting in lost work days or restricted duty, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$161.00 is proposed.

The Violation - Significant and Substantial

Hansen stipulated that it had not provided site-specific hazard training to persons who entered the mine site. Small's determination that the violation was significant and substantial was based upon the fact that over-the-road truck drivers employed by customers regularly entered the mine site and self-loaded their trucks from the stockpile. That was the only area of the mine site in which he observed non-miners. Tr. 126-27. He testified that there was a risk of injury for such untrained persons because they might have encountered hazards that they were not aware of, such as, an electrical hazard or an unguarded tail pulley or v-belt drive. Tr. 123-24. Lack of knowledge of traffic patterns was also a concern.

The only significant evidence of the presence of non-miners on the site was of truck drivers who loaded their trucks from the stockpile.¹¹ There is nothing to suggest that they ever ventured into other areas of the plant, where they might encounter an electrical hazard, a v-belt drive or a conveyor tail pulley. Two such drivers testified at the hearing. Both were highly experienced drivers and operators of heavy equipment, and had been to the site hundreds of times. Tr. 185-86, 189. They were obviously very familiar with the limited plant/stockpile area and the road that led to the site. Hansen's sand/gravel operation is most likely quite localized, and the drivers that testified were most likely typical of the customers that entered the mine site. Under the circumstances, I find that it is unlikely that an injury would result from this violation, i.e., it was not S&S.

Citation No. 6343253

Citation No. 6343253 was issued on September 11, 2002, and alleged a violation of 30 C.F.R. § 56.4201(a)(2), which requires annual inspections of fire extinguishers and provides:

At least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire

¹¹ There is evidence that recreational users, fishermen, etc., frequented Hansen's property. However, there is no evidence that such persons ever visited the plant area or any area of the mine site, other than the river bar and roads leading to it.

extinguishers will operate effectively.

Small examined tags on a number of fire extinguishers in the plant area and observed that the last maintenance check was recorded to have occurred in March 2000. He concluded that the violation was unlikely to result in an injury, that any injury that might result would produce lost work days or restricted duty, that the violation was not significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$55.00 is proposed for this violation.

Hansen asserts only its jurisdictional and procedural defenses to this alleged violation. I find that the regulation was violated, and that Small's assessments of gravity and operator negligence were accurate.

Citation No. 6343256

Citation No. 6343256 was issued on September 11, 2002, and alleged a violation of 30 C.F.R. § 56.12028, which provides:

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

Small reviewed Hansen's records of continuity and resistance testing and determined that the last test had been performed in May 2001, more than a year prior to his inspection. He determined that the violation was unlikely to result in an injury, but that if an injury occurred, it would be fatal. He also determined that the violation was not significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of \$55.00 is proposed.

Hansen essentially admits this violation, relating in its post-hearing brief that its previously employed electrician had closed his business and that it now has a new electrician who will perform the testing and keep the required records. I find that the regulation was violated, and that Small's assessments of gravity and operator negligence were accurate.

The Appropriate Civil Penalties

Hansen is a small mine and very small controlling entity. A computer-generated report of Hansen's history of violations shows that seven violations were issued and paid as a result of inspections conducted over five days in the August 2001 time frame. Ex. P-39. Hansen does not claim that payment of the proposed penalties would impair its ability to continue in business. The violations, gravity and negligence assessments, with respect to each alleged violation, are discussed above.

Docket No. WEST 2003-284-M

Citation Nos. 6343225 and 6343248 were affirmed as significant and substantial violations. Civil penalties of \$207 were proposed for each violation, based upon an assessment that took into account the small size of the operator and the history of violations. Considering the factors enumerated in section 110(i) of the Act, I impose penalties of \$207 for each of these violations.

Citation Nos. 6343229 and 6343236 were affirmed. Single penalty assessments of \$55 were proposed for each violation. Considering the factors enumerated in section 110(i) of the Act, I impose penalties of \$55 for each of these violations.

Citation No. 6343237 was affirmed as a significant and substantial violation. A civil penalty of \$150 was proposed, based upon an assessment that took into account the small size of the operator and the history of violations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of \$150 for this violation.

Citation Nos. 6343241, 6343242 and 6343243 were affirmed. However, the violations were not found to have been significant and substantial. Rather, they were found to be unlikely to result in a serious injury. Civil penalties in the amount of \$259, \$207 and \$207, respectively, were proposed by the Secretary. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of \$100 for Citation No. 6343241 and \$55 for each of the other violations.

Citation No. 6343251 was affirmed as a significant and substantial violation. A civil penalty of \$207 was proposed, based upon an assessment that took into account the small size of the operator and the history of violations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of \$207 for this violation.

Citation No. 6343252 was affirmed. However, it was not found to have been significant and substantial. Rather, it was found to be unlikely to result in a serious injury. A civil penalty in the amount of \$161 was proposed by the Secretary. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of \$55 for this violation.

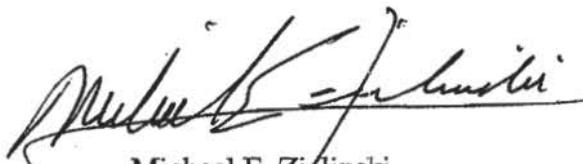
Citation Nos. 6343253 and 6343256 were affirmed. Single penalty assessments of \$55 were proposed for each violation. Considering the factors enumerated in section 110(i) of the Act, I impose penalties of \$55 for each of these violations.

Docket No. WEST 2003-429-M

Citation Nos. 6343233 and 6343235 were affirmed. Single penalty assessments of \$55 were proposed for each violation. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of \$55.00 for each violation.

ORDER

Citation Nos. 6343225, 6343248, 6343229, 6343233, 6343235, 6343236, 6343237, 6343251, 6343253 and 6343256 and are **AFFIRMED**. Citation Nos. 6343241, 6343242, 6343243 and 6343252 are **AFFIRMED**, as modified. Respondent is directed to pay a civil penalty of \$1,366.00 within 45 days.



Michael E. Zielinski
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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March 29, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-453-M
Petitioner	:	A.C. No. 04-05509-05152
	:	
v.	:	Docket No. WEST 2004-4-M
	:	A.C. No. 04-05509-07088
GOCHENOUR'S MINERALS & MINING,	:	
Respondent	:	Cryo-Genie Mine

DECISION

Appearances: John D. Perez, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner; Robert J. Clanin, Gochenour's Minerals & Mining, El Cajon, California, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Gochenour's Minerals & Mining ("Gochenour"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve three citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of \$175 for the alleged violations. An evidentiary hearing was held in San Diego, California. The parties introduced testimony and documentary evidence and, at the close of the hearing, presented oral argument.

I. BACKGROUND

Gochenour operates an underground gemstone mine in San Diego County, California. The mine produces tourmaline, aquamarine, morganite, and other minerals. During an inspection of the mine on November 17, 2002, MSHA Inspector Chad Hilde issued Citation No. 6349417, alleging a violation of 30 C.F.R. § 57.6132(b). Inspector Hilde inspected the mine again on May 21, 2003 and issued two citations. Citation No. 6351424 alleges a violation of 30 C.F.R. § 57.12008. At the beginning of the hearing, the Secretary agreed to vacate Citation No. 6351425.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 6349417

This citation alleges a violation of section 57.6132(b) as follows:

The booster and explosives magazines had not been equipped with electrical bonding straps between the door and the metal frame structure. Employees at the site were exposed to the possibility of personal injury from explosion by the door lacking equal conductivity to the structure.

Inspector Hilde determined that an injury was unlikely and that any injury would reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature (“S&S”) and that Gochenour’s negligence was low. The safety standard provides, in part:

Metal magazines shall be equipped with electrical bonding connections between all conductive portions so that the entire structure is at the same electrical potential. Suitable bonding methods include welding, riveting, or the use of securely tightened bolts where individual metal portions are joined.

The Secretary proposes a penalty of \$55 for this citation.

Inspector Hilde testified that he observed two metal explosives magazines at the mine. (Tr. 11). The doors were attached to the magazines with metal hinges. He testified that there was no bonding strap between the door of each magazine and structure of the magazine. Although Inspector Hilde determined that it was unlikely that anyone would be injured by this condition, he was concerned that, over time, the continuity between the door and the magazine would not be maintained. He testified the “body and the door of the magazine would not be at the same continuity if electricity doesn’t carry across the hinge.” (Tr. 14). If someone who had built up static electricity touched the door, a spark might be created as the electricity arcs across the hinges. (Tr. 15). The inspector testified that a bonding strap would prevent such arcing. He admitted that it was unlikely that such an arc would detonate explosives in the magazines.

The magazines were built by Robert J. Clanin, the operator of the mine. The hinges were welded to the metal body of the magazines. Clanin testified that he built these magazines to meet the specifications of San Diego County and the Bureau of Alcohol, Tobacco, and Firearms (“ATF”). (Tr. 49). He further testified that California OSHA, ATF, and MSHA had previously inspected the magazines and none of these agencies raised any questions about the lack of electrical bonding connections. Clanin stated that MSHA did not cite this condition until its third

inspection of the magazine. (Tr. 50). He abated the condition by bolting automobile battery cables between the door and body of each magazine. *Id.* Clanin used a multimeter to test the resistance between the door and the body of the magazines both before and after he abated the citation. In each case he measured zero ohms of resistance. (Tr. 50, 68; Ex. R-3). As a consequence, Clanin does not believe that there was a violation. The safety standard requires that the entire structure be at the same electrical potential. His measurements demonstrate that the magazines complied with the standard. The hinges were welded to the body and door of each magazine. He contends that there were electrical bonding connections between all conductive portions of the magazines. Because the magazines are in constant use, corrosion and rust would not develop to such an extent in the hinges as to create any electrical resistance. Clanin testified that there was almost no chance that static electricity would create a spark across the hinges and that the explosives were not so sensitive that such a spark would detonate the explosives.

As noted by Clanin, the safety standard does not specifically require bonding straps. The standard does, however, require “electrical bonding connections between all conductive portions.” I find that it defies logic to characterize hinges as “electrical bonding connections.” Hinges are devices attached to a door that allow the door to swing open. Hinges are not designed to conduct electricity or to provide electrical bonding between the door and the body of a structure. The safety standard provides that “electrical bonding connections” must be installed to ensure that “the entire structure is at the same electrical potential.” I find that the hinges were not electrical bonding connections.

Gochenour established that, at the time the citation was issued, the entire structure of each magazine, including each door, was at the same electrical potential. That fact does not establish that electrical bonding connections were present. The hinges were not presenting any electrical resistance on May 21, 2003, but that does not make them “electrical bonding connections.” As the magazines age there is a risk that resistance will develop across the hinges so that the doors will no longer be at the same electrical potential. A bonding strap greatly reduces that risk. I find that the Secretary established a violation of section 57.6132(b).

I find that the violation was not serious. The likelihood of a spark or arc developing from the buildup of static electricity was quite remote. It was also highly unlikely that if such a spark occurred it would trigger any sort of ignition of the explosives in the magazine. I also find that Gochenour was not negligent with respect to this violation. I credit the testimony of Clanin that the magazines had been previously inspected by ATF, the State of California, and MSHA. In addition, at the time of MSHA’s inspection, the entire structure of each magazine was at the same electrical potential, which is the objective of the safety standard.

B. Citation No. 6351424

This citation alleges a violation of section 57.12008 as follows:

There was approximately three inches of exposed conductors where the wires entered the main switch box on the portable generator. Power wires shall be insulated adequately where they pass into or out of electrical compartments. The exposed insulation on the conductors will eventually weather or be damaged by the vibration of the generator, exposing persons to electric shock. The generator is used daily as needed to provide power both above and underground and is located between the portal and magazines.

Inspector Hilde determined that an injury was unlikely but, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that Gochenour's negligence was high. The safety standard provides:

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

The Secretary proposes a penalty of \$60 for this citation.

Inspector Hilde testified that the "electrical cord coming out of the generator had been strung through a metal opening" that was not bushed. (Tr. 17). This opening in the front of the electrical box appeared to be where a gauge had once been present. (Tr. 24, 34-35). The outer jacket of the cord was missing where it entered the box on the generator and the individual insulated wires were exposed. It looked like the outer jacket on the conductor had been "yanked and pulled out." (Tr. 24). The inspector testified that weathering and the vibration of the generator could cause the insulation to "wear out" allowing the bare wires to come into contact with the metal frame of the generator. *Id.* The generator was the only power supply for the mine. Inspector Hilde determined that it was unlikely that anyone would be injured by the condition because the insulation around the individual conductors was in good condition. If the wires became exposed to bare copper, a fatal accident could occur. He determined that Gochenour's negligence was high because the violation was obvious. (Tr. 20). When Inspector Hilde terminated the citation, he wrote that the "outer sheathing now enters the box, eliminating the hazard." Larry Larson, a supervisory MSHA inspector, accompanied Hilde on the inspection and he supported Hilde's testimony. He believes that the cited conductor entered the front of the electrical box on the generator through a gauge opening. (Tr. 39-40).

Mr. Clanin's description of the generator and the condition of the electric cord is quite different. He testified that the citation was issued on the power conductor entering the back of the box on the generator. (Tr. 60). Exhibit R-1 consists of two photographs of the generator that

were taken a few weeks before the hearing. Clanin testified that the photograph on the right shows the front of the box with two conductors exiting the box at the bottom. Inspectors Hilde and Larson testified that, when they inspected the mine, a black conductor exited the box from the front through one of the black holes that can be seen on the right photo of Exhibit R-1. They testified that there was no bushing present and the outer jacket on the conductor had been pulled back or was not present where the conductor entered the front of the box. Clanin testified that no conductors have ever exited the electrical box through the old gauge holes on the front. (Tr. 58, 71). Clanin testified that the cited condition is illustrated on the left photo of Exhibit R-1. He stated that he abated the condition by wrapping electrical tape around the conductor at the point where it entered the back of the box. (Tr. 53). Clanin testified that a grommet was present but it could not be easily seen because it had been painted over. Clanin does not dispute that there was no outer jacket on the conductor where it entered the box, but he contends that the conductor was not in that condition the day before. (Tr. 57). Clanin believes that one of the inspectors may have pulled the outer jacket back while they were at the mine before he arrived at the mine that day. Clanin testified that he has had a history of problems with MSHA's Redlands, California office, especially with Mr. Larson. (Tr. 63). Larson denies that he pulled on any power conductors. (Tr. 73).

Dana Gochenour, the owner of the mine, testified that he bought the generator in 2001. He stated that it was his understanding that the conductor coming out of the back of the electrical box was cited by MSHA. (Tr. 45). He testified that he cannot recall any conductors exiting the electrical box through the gauge holes on the front of the electrical box. *Id.* Gochenour stated that the only modification made to the electrical box on the generator after it was purchased was the addition of another conductor at the bottom of the box. (Tr. 47).

The testimony of the witnesses contrasts sharply with respect to the condition of the generator on at the time of the inspection. Both inspectors testified that the cited conductor exited the electrical box on the front through one of the unused gauge holes. Inspector Hilde reviewed his notes from the day of the inspection, but the notes did not provide any clarification as to the location of the cited condition. Clanin and Gochenour testified that conductors have never exited the generator through the front of the electrical box. Although the photographs are useful in trying to understand the disputed testimony, they are not helpful in the resolution of the dispute because they were taken a few weeks before the hearing. Gochenour and Clanin both believe that the cited condition was on the generator side of the electrical box where a conductor entered the box from the back.

Clanin and Gochenour are in a better position to know the details about the condition of the generator than the inspectors because they work in and around the generator on a daily basis. MSHA inspectors only visit the mine for brief periods and they see many portable generators during the course of their mine inspections. The exact location of the alleged violation was not well documented by the inspectors in the citation itself or in their notes. They did not take any photographs. For purposes of this decision, I credit the testimony of Gochenour and Clanin as to the configuration of the conductors on the generator on the day of the inspection. Nevertheless, I

find that the Secretary established a violation because the operator did not dispute that the outer jacket on one of the conductors was not present where it entered the electrical box. The parties dispute the location of the cited conductor, but not the condition of the outer jacket. I note that there was a grommet at that location which reduced the danger created by the cited condition. This grommet was not a bushing because it did not act to keep the electrical conductor securely in place. (See R-1, left photo). I do not credit Mr. Clanin's testimony and evidence that the inspectors created the condition by pulling on the conductor.

I find that the violation was not serious. The likelihood of an injury was not great because of the presence of the grommet. If, through weathering or vibration, bare conductors were exposed, a fatal accident would be possible. I find that the operator's negligence was moderate to low. The condition was not as obvious as Inspector Hilde believed and it is not clear how long the condition had existed.

III. APPROPRIATE CIVIL PENALTIES

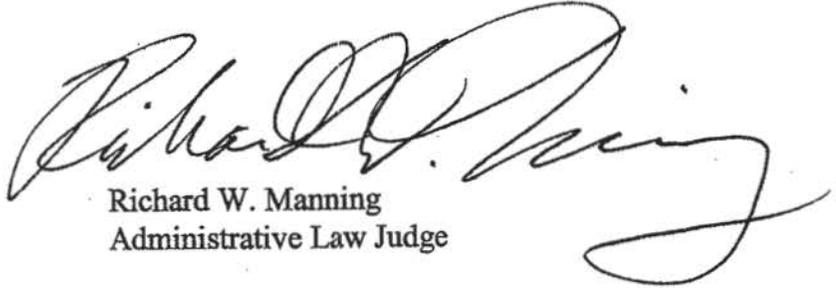
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that Gochenour has no history of previous violations. Gochenour is a small mine operator. All of the violations were abated in good faith. As discussed above, the violations were not serious and Gochenour's negligence with respect to the violations was low in one citation and moderate in the other. The penalties assessed in this decision will not have an adverse effect on Gochenour's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2003-453-M		
6349417	57.6132(b)	\$10.00
WEST 2004-004-M		
6351424	57.12008	50.00
6351425	57.4102	Vacated
		<hr/>
	TOTAL PENALTY	\$60.00

For the reasons set forth above, Citation Nos. 6349417 and 6351424 are **AFFIRMED** and Citation No. 6351425 is **VACATED**. Gochenour's Minerals and Mining is **ORDERED TO PAY** the Secretary of Labor the sum of \$60.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001-2021

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March 26, 2004

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2003-150-R
v.	:	Order No. 7670455; 06/26/2003
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2003-151-R
MINE SAFETY AND HEALTH	:	Order No. 7670457; 06/27/2003
ADMINISTRATION (MSHA),	:	
Respondent	:	No. 5 Mine
	:	Mine ID 01-01322

DENIAL OF MOTION FOR FOR PROTECTIVE ORDER

The Secretary of Labor has moved for a protective order barring the depositions of three employees of her Mine Safety and Health Administration (MSHA). For reasons that follow, the motion is **DENIED**.

PROCEDURAL BACKGROUND

In Docket No. SE 2003-150-R, Jim Walter Resources, Inc. (JWR) seeks review of Citation No. 7670455 pursuant to Section 105(d) of the Mine Act (30 U.S.C. § 815(d)). In Docket No. SE 2003-151-R, JWR seeks review of subsequently issued Order No. 7670457. Citation No. 7670457 was issued on June 26, 2003, by MSHA Inspector Stephen Harrison. The inspector cited JWR for a violation of 30 C.F.R. § 75.334(b)(1) at its No. 5 Mine. The citation alleges that “the bleeder system for the I-panel was not being maintained in a manner to continuously dilute and move methane-air mixtures and other gases . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine” (Citation 1). The citation further states that the finding of violation is based on a review of the mine examination books for the longwall panel and bleeder split and on methane readings recorded therein over a 16-day period (June 17, 2003 through June 25, 2003). The readings “taken collectively indicate that the bleeder system can no longer handle the current methane liberation” (Citation 2).

Section 75.334(b)(1) requires the bleeder system for a longwall “to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases from the worked-out area away from active workings and into a return air course.” Inspector Harrison

cited the violation at 7:00 p.m. He gave JWR until 6:00 p.m. the following day to abate the violation (Citation 1-2).¹

On June 27, Harrison returned to the mine. He determined that the citation had not been abated and, at 7:45 p.m., he issued Order No. 7670457. The inspector stated on the order that JWR had “failed to make improvements to enhance the effectiveness of the longwall bleeder system,” in that the system continued “to liberate high quantities of methane” and could not “continuously dilute the m[e]thane to safe operating levels” (Order). The order was issued pursuant to Section 104(b) of the Mine Act (30 U.S.C. § 814(b)), which requires an inspector to issue an order when he or she determines a violation has not been abated within the period of time set for abatement and that the abatement time should not be further extended.

JWR filed the contests, contending it had not violated section 75.334(b)(1). JWR asserted the methane readings which the inspector used were under the methane level prohibited by law. Although the citation noted an “upward trend” in methane, JWR maintained “An ‘upward trend’ that does not reach the lawful limit cannot be the foundation of a valid citation or order” (Notice of Contest 2-3). It further argued that at the time it was cited, there was full compliance with the mine’s approved ventilation plan. In addition, JWR took issue with the inspector’s findings regarding S&S, gravity and the company’s negligence (Id. 3-4). Finally, JWR asserted the inspector did not “articulate a reasonable abatement action and did not establish a reasonable time period for JWR to abate the alleged violative conditions” (Id. 4).

The contests were assigned to then Commission Administrative Law Judge Irwin Schroeder, and Judge Schroeder ordered the parties to submit, inter alia, a summary of their legal arguments, a list of exhibits to be offered in evidence, and a list of witnesses to be called, with a summary of the testimony to be given by each witness (Prehearing Order). Pursuant to the order, the Secretary listed six witnesses. In addition to Inspector Harrison, she included the chief of the ventilation division of MSHA Safety and Health Technologies Center, who would testify regarding his inspection and investigation of the cited area and his resulting evaluation of the evaluation of the cited bleeder system; an MSHA ventilation specialist who accompanied the chief of the division during the chief’s inspection, who would testify regarding his observations during the inspection; the Assistant District Manager of MSHA District 11, Gary Wirth, who would testify regarding his contact with JWR concerning compliance with section 75.334(b)(1) and his contact JWR regarding its abatement efforts after the citation was issued; and two MSHA inspectors who also inspected the cited area, who would testify regarding the results of their inspection. The Secretary further stated that she would call several miner witnesses (Sec’s Response 4-6).

With regard to the citation, the Secretary maintained the primary issue was whether JWR

¹ Harrison also found the violation was a significant and substantial contribution to a mine safety hazard (S&S), that it was reasonably likely to result in lost workdays or restricted duty for ten miners and that it was the result of JWR’s moderate negligence.

violated the standard and argued JWR did so when it failed to maintain an effective bleeder system to continuously dilute and move methane-air mixtures away from active workings. The Secretary asserted that “compliance with this standard requires more than simply directing air into a bleeder system if that system is not sufficient or is not effective to move methane . . . out of worked-out areas and away from active workings” (Sec.’s Response 7).

With regard to the order, the Secretary maintained that the issues were whether JWR took “substantial steps to abate the violation” and whether it “showed a lack of good faith in attempting to come into compliance” (Sec.’s Response 7).

JWR responded to Judge Schroeder’s order by naming ten persons from mine management who would testify that the conditions described by Inspector Harrison were inaccurate and/or exaggerated, that the cited bleeder system was adequately controlling the air passing through the area and was continuously moving methane-air mixtures in “substantial compliance” with applicable regulations, that the inspector improperly designed the violation S&S, that the inspector failed to provide a reasonable abatement period and that the on-site conditions did not support Harrison’s gravity and negligence findings (Preliminary Statement 4-5).

A hearing was scheduled for December 2, 2003, and the parties began discovery.² As part of its discovery effort, JWR noticed its intent to depose Chris Weaver, MSHA Investigation Specialist, Coal Mine Safety and Health, Arlington, Virginia; John Langston, MSHA’s Assistant Administrator of Coal Mine Safety and Health, Arlington, Virginia; and Richard Gates, MSHA’s District Manager of District 11, Birmingham, Alabama, and the Secretary moved for the protective order at issue.

The Secretary would have me bar the depositions on several grounds. She asserts that none of the three men have firsthand, direct knowledge of the facts related to the issuance of the citation and order.³ Consequently, in the Secretary’s view, nothing about which the proposed deponents can be questioned is relevant to the issues in the cases.

² Subsequently, the hearing was continued to allow more time for discovery. A short time later, Judge Schroeder left the Commission, and the cases were reassigned to me.

³ The Secretary states that Langton and Weaver are based in Arlington, Virginia, that Langton never has been to the No. 5 Mine and that Weaver’s primary connection to the cases was to contact “John Urosek and William Spens, two MSHA employees, and [facilitate] their travel to the . . . mine to aid in the investigation of the adequacy of the ventilation and in the effort to abate the hazardous levels of methane on the . . . [l]ongwall” (Motion 6-7). The Secretary states that Gates’s connection with the citation and order was “to consult with his inspection staff and to advise them regarding the proper courses of action” (Id.7).

The Secretary also asserts discussions between the proposed deponents and MSHA personnel are protected by the work product and deliberative process privileges (Motion 8) and that Langton's and Gates's official positions (she terms them "high government officials") exclude them from being deposed except under extraordinary circumstances, which do not exist here (Id.).

JWR responds that its intent to depose Langton, Weaver and Gates is based upon statements made by Wirth when he was deposed by JWR. JWR notes that Wirth stated he called Weaver the night the citation was issued and that Weaver reviewed the language of the citation with Wirth (Contestant's Response 1, citing Exh. C 173-174). In a sworn declaration submitted by the Secretary, Weaver adds that he and Wirth "discussed various legal and factual issues, including courses of action to solve the methane problems on the . . . [I]ongwall [panel]" (Motion, Exh. D 2). Weaver also acknowledges that Wirth sent him a "draft copy of the citation . . . for my review" (Id.).

JWR also notes Wirth's statement that once the citation was issued, JWR's written abatement proposal was sent by fax to MSHA headquarters in Arlington, Virginia, and that Wirth discussed the proposal with Langton and Weaver (Contestant's Response, Exh. C 195). Wirth described the decision to issue the order as a "collaborative decision" involving Wirth, Harrison, Gates, Langton and Weaver. (He also thought Urosek and Calhoun "probably" were involved (Id. 237)). In a sworn statement submitted by the Secretary, Langton agreed that he was contacted by Wirth and Gates "about issuance of the citation and order" and that his discussions "involved expressions of opinion, recommendations and proposed courses of action to take after the facts were provided to me by . . . Wirth" (Motion, Exh. C 2). Likewise, Gates agreed he, too, consulted with Wirth and Harrison "about circumstances relating to the hazardous conditions that existed on the [I]ongwall [panel], about . . . options for clearing up these conditions and about necessary enforcement actions to insure compliance and abatement" (Id., Exh. E 3). Like Langton, he stated that his discussions "involved expressions of opinion, recommendations and proposed courses of action based on the facts provided to me by . . . Wirth and . . . Harrison (Id. 4).

Finally, JWR asserts that UMWA leaders "pressured" MSHA to issue the citation and order, that Langton, Weaver and Gates have explicit knowledge of the pressure and that a "proper subject of inquiry is when how . . . [they] gained this knowledge" (Contestant's Response 3). JWR argues it needs to be able to conduct "reasonable discovery" into the issue of whether the citation and order were the result of bad faith or arbitrary action on MSHA's part (Id.).

RULING

I:

ARE THE PROPOSED DEONENTS LIKELY TO HAVE RELEVANT INFORMATION?

In general, JWR is entitled to all relevant factual information in possession of the Secretary that has properly been requested through discovery, unless disclosure is barred by a privilege. Therefore, the first question is whether any of the proposed deponents are in possession of information relevant to the issues in the contests.

In both proceedings, the primary issue is whether the conditions observed and cited by Inspector Harrison constituted a violation of Section 75.334(b)(1). Relevant information would be the conditions observed by the inspector and others as reflected in the language of the contested citation. Equally relevant would be the reasons why the inspector and others believed the conditions constituted a violation of the standard.⁴ If the decision to issue the citation was based in part on Wirth's consultation with Weaver, then the role Weaver played in drafting the language that reflects the conditions would be relevant to the issue of whether the citation as issued reflects a violation of the standard.⁵ Weaver may be deposed about his consultation with Wirth, his input into the language of the citation, his opinion as to whether the conditions constituted a violation, and his input and opinions about other findings on the face of the citation, unless such information is protected by privilege.

In addition, in his sworn statement, Langton agreed Wirth had contacted him regarding the issuance of the citation (and the order) and that they had discussed the facts and the courses of action to take (Motion, Exh. C 2). To the extent their discussions involved the existence of the alleged violation and setting of the abatement time, they are relevant and Langton may be deposed about them, unless such information is protected by privilege.

According to Langton, he and Gates also discussed issuance of the citation and the "proper courses of action to take" (Motion, Exh. C 2). To the extent these discussions involved the existence of the alleged violation, they are relevant and Gates may be deposed about them, unless such information is protected by privilege.

⁴ See Contestant's Response, citing C 173-174 (Wirth's description of his consultation with Weaver).

⁵ The Secretary's contention that the men cannot be deposed because they do not have "firsthand, direct knowledge of the facts" is rejected (Motion 7). Such knowledge may have a bearing on the weight assigned to their information, but, it is not a sine qua non for relevance.

If a violation existed, then the next primary issue is whether the time set for abatement was reasonable and if the Secretary abused her discretion in failing to extend that time (Energy West Mining Company, 18 FMSHRC 565, 568 (April 1996)). Abuse of discretion is determined by considering factors such as the degree of danger an extension would have caused miners, the diligence of JWR in attempting to meet the time originally set for abatement, and the disruptive effect an extension would have had on operating shifts (see, e.g., Clinchfield Coal Co., 11 FMSHRC 2120, 2128 (November 1989)).

Wirth stated in his deposition that the decision to issue the order, and, hence, the decision, that it was not reasonable to further extend the time for abatement was “collaborative” and involved, among others, Weaver, Langton and Gates (Contestant’s Response, citing C 237). Weaver’s role, if any, in deciding the time should not be further extended is relevant to the issue of the validity of the order and, unless barred by privilege, is subject to discovery. Moreover, since Wirth included Gates and Langton among the “collaborators” in the decision to issue the order (see Contestant’s Response C 237) – a role strongly implied by Langton’s and Gates’s statements (Motion, Exh. C 2, E. 3) – the parts they played, if any, in deciding the time for abatement was reasonable and should not be further extended are relevant and, unless barred by privilege, are subject to discovery.⁶

II.

IS THE INFORMATION PROTECTED BY PRIVILEGE?

The Secretary argues that the work product and deliberative process privileges protect the proposed deponents’ “mental impressions, consultative conversations and expressions of regulatory concern” (Motion 8). The Secretary asserts that “the only basis JWR can have in seeking to depose Langton, Gates and Weaver is to inquire into the decision-making processes and procedures of these officials . . . and to inquire as to the nature and substance of their consultations with subordinates and fellow enforcement personnel. These inquiries are prohibited under the deliberative process privilege” (Id. 14-15).

The “deliberative process” privilege protects,

the “consultative functions” of government “by maintaining the confidentiality of ‘advisory opinions,’ recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.” The privilege attaches to inter- and intra-agency communications that are part to the

⁶ As noted, JWR also seeks to question Langton, Weaver and Gates as to their “explicit knowledge of UMWA pressure,” pressure that it alleges may underlie issuance of the citation and order (Contestant’s Response 3). Such questions are irrelevant to the fundamental issues in the case and are not subject to discovery.

deliberative process preceding the adoption and promulgation of an agency policy.

Jordan v. United States Dept. of Justice, 591 F.2d 753, 772 (D.C. Cir. 1978) (citations omitted). For the privilege to apply, the communications between subordinates and superiors must be “antecedent to the adoption of an agency policy” and the communications must be “deliberative,” which means they “must be related to the process by which policies are formulated” (Id. 774). The purpose for the privilege is to allow “government officials freedom to debate alternative approaches in private” (In re Sealed Case, 121 F3d 729, 737(D.C. Cir. 1997).

Given these principles, to the extent the proposed deponents’ communications involve the actual issuance of the citation and order, the communications are not protected. As has been noted, there is reason to believe that Weaver, Langton and Gates communicated about and participated in the actual issuance of the citation. If so, they were part of the decision-making process based on the particular circumstances at the mine as they understood them. If JWR can question Harrison and Wirth about the reasons for issuing the citation, I see no reason why JWR cannot likewise question Wirth, Langton and Gates regarding their roles.

The same is true regarding Weaver, Langton and Gates and the collaborative role they played in determining that the order should be issued. According to Wirth, they were components of the decision-making process to not further extend the time for abatement, a process based on the conditions and circumstances at the mine as they understood them. JWR questioned Harrison and Wirth about the reasons for issuing the order, and I see no reason why JWR cannot also question their collaborators about their participation in the decision.

I reject the Secretary’s privilege argument because I conclude there is a difference between the process of adopting a policy and the process of implementing the policy based on particular conditions and circumstances. Questioning Weaver, Langton and Gates about communications that lead directly to the issuance of the citation and order does not impinge upon the freedom of MSHA officials to debate alternatives. Rather, it is questioning that is sui generis to the particular circumstances and conditions that resulted in the specific contested enforcement actions, and, in my view, it should be allowed.

III.

ARE DEPOSITIONS BARRED BECAUSE THE PROPOSED DEONENTS ARE HIGH GOVERNMENT OFFICIALS?

The Secretary argues that the proposed deponents are exempt from deposition by virtue of the official positions they hold. However, and with all due respect to the proposed deponents, they are not the type of “top government officials” to whom the protection usually is extended (see, e.g., Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982), cert. denied sub nom Schenberg v. Bond, 459 U.S. 878 (1982) (seeking to depose state governor); Kyle Engineering Co. v.

Kleppe, 600 F.2d 226, 231-232 (seeking to depose administrator of a federal agency); Warren v. Camp, 396 F.2d 52, 56 (6th Cir. 1968) (seeking to depose Comptroller of the Currency). Moreover, the information about which they may be questioned cannot be obtained elsewhere, but, rather, concerns their communications with Harrison and Wirth and with one another that lead directly to the citation and order at issue. In sum, given the direct roles the proposed deponents may have played with respect to the issuance of the citation and order, no reason is apparent to me why they should not be deposed.⁷

David F. Barbour
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Administrative Law Judge
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⁷ Certainly, the depositions will not be unduly burdensome, in that JWR has offered to travel to Arlington, Virginia, to depose Langton and Weaver. Gates's office is located in Birmingham, Alabama, and he will be no more inconvenienced than were Wirth and Harrison, who already have been deposed.