

MARCH 2005

COMMISSION DECISIONS AND ORDERS

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ADMINISTRATIVE LAW JUDGE ORDERS

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MARCH 2005

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

Secretary of Labor, MSHA v. Baylor Mining, Inc., Docket No. WEVA 2004-36. (Judge Hodgdon, Interlocutory Review of Judge's January 10, 2005 Order Denying Motion for Certification).

Secretary of Labor, MSHA v. Wake Stone Corporation, Docket No. SE 2004-185-M. (Judge Weisberger, unpublished Settlement decision issued February 14, 2005).

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

A Petition for Reconsideration was Denied in:

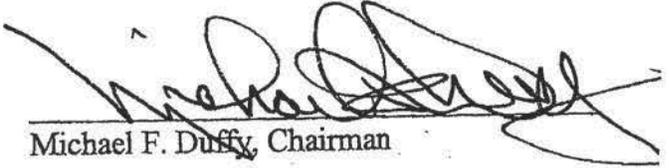
Secretary of Labor, MSHA v. Twentymile Coal Company, Docket No. WEST 2002-194. Commission decision issued March 18, 2005. (Published in this issue)

COMMISSION DECISIONS AND ORDERS

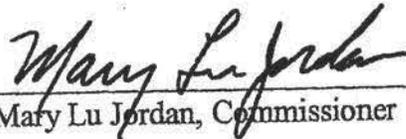
be contesting all citations. *Id.* Fann states that on July 7 and 14, 2004, he sent his intent to contest to MSHA by fax machine. *Id.* at 1-2. Fann states that, in September, he was surprised to receive a letter from MSHA notifying him that he had failed to timely contest the penalty proposal. *Id.* at 2. According to Fann, on September 23, 2004, he wrote to MSHA and on October 12, 2004, he contacted MSHA by telephone and he was informed the case would be re-opened. *Id.* Fann states that, on October 14, 2004, Judge Zielinski directed him to contact the Commission about re-opening the case. *Id.* A copy of the proposed assessment and related correspondence is attached to Fann's request to reopen. Fann did not provide any other supporting documentation. The Secretary states that she does not oppose Fann'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 Fann'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 Fann's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



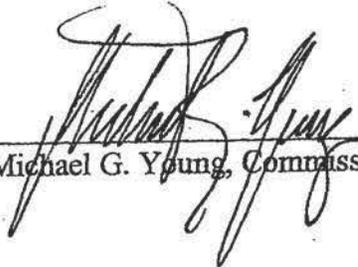
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 1, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2005-30-M
 : A.C. No. 05-00438-33522
 :
DICAPERL MINERALS CORPORATION :

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

ORDER

BY THE COMMISSION:

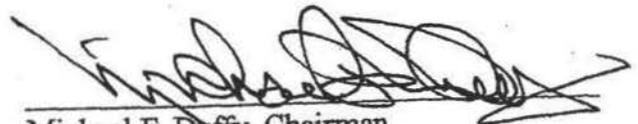
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On October 15, 2004, the Commission received from Dicaperl Minerals Corporation ("Dicaperl") a motion made by counsel to reopen a penalty assessment that had become a final order of the 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).

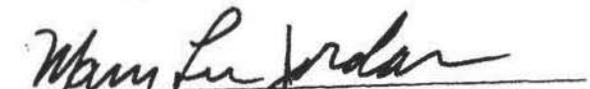
On July 30, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 05-00438-33522) to Dicaperl's El Grande Plant in Antonito, Colorado. In its motion, Dicaperl states that, upon receipt of the proposed assessment, an employee new to the mail processing position failed to bring it to management's attention. Mot. at 2. Dicaperl explains that, although the return receipt on the penalty proposal was signed on August 13, 2004, the employee who signed it was not familiar with procedures regarding civil penalties and, as a consequence, Dicaperl failed to timely file a hearing request. *Id.* at 2-3. A copy of Dicaperl's contest of civil penalty is attached to its motion. Dicaperl did not provide any other supporting documentation. The Secretary states that she does not oppose Dicaperl'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).

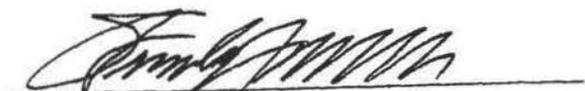
Having reviewed Dicapri’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Dicapri’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboieski, 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 1, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2005-9
v.	:	A.C. No. 05-00266-33560
	:	
NATIONAL KING COAL, LLC	:	

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

ORDER

BY THE COMMISSION:

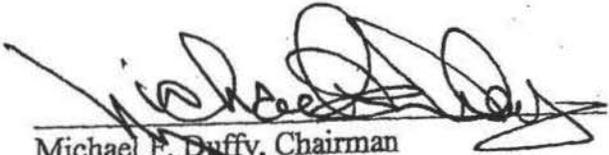
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On October 6, 2004, the Commission received from National King Coal, LLC (“NKC”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On August 3, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 05-00266-33560) to NKC’s King Coal Mine for Order No. 7631533 and Citation Nos. 7631303 and 7631304. In its motion, NKC states that on June 4, 2004, it contested Order No. 7631533, which is the subject of Docket No. WEST 2004-350-R, and is stayed before Judge Manning. Mot. at 2. NKC asserts that, upon receipt of the proposed assessment, the penalties were mistakenly paid and, as a consequence, NKC failed to timely request a hearing. *Id.* at 2-3. NKC explains that personnel in its accounting department inadvertently paid the penalties without management’s authorization and that it had intended to contest all three penalties. *Id.* at 2. NKC did not attach any supporting documentation to its motion. The Secretary states that she does not oppose NKC’s request for relief.

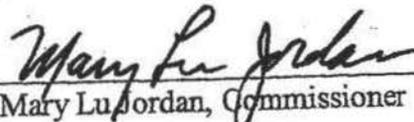
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

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.

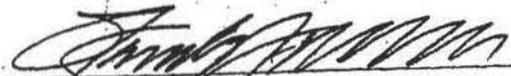
Having reviewed NKC’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for NKC’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



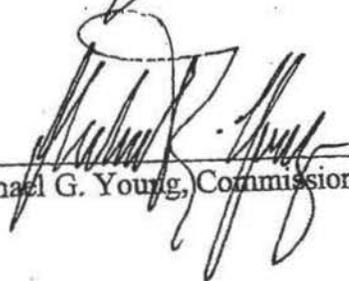
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboteski, 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 1, 2005

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

v.

ROGERS GROUP, INC.

:
:
:
:
:
:
:

Docket No. CENT 2005-25-M
A.C. No. 03-01640-37277

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On November 5, 2004, the Commission received from Rogers Group, Inc. ("Rogers") a letter requesting that the Commission 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).

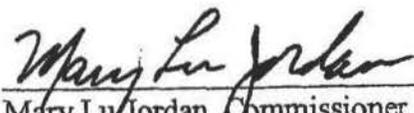
On September 9, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 03-01640-37277) to Rogers' Lowell Quarry in Benton, Arkansas. In its request, Rogers states that, due to an error by its safety administrator, it failed to file a hearing request in a timely manner. Letter at 1. Copies of the proposed assessment and related citations are attached to Rogers' request to reopen. Rogers did not provide any other supporting documentation. The Secretary states that she does not oppose Rogers' 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).

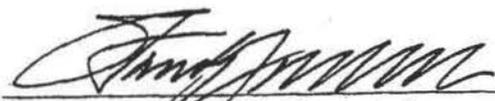
Having reviewed Rogers’ request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Rogers’ failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



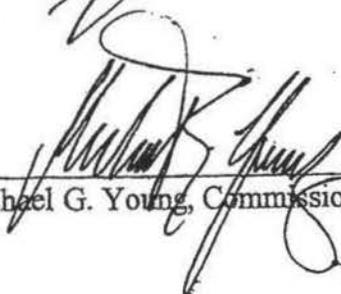
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 1, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2005-18-M
v.	:	A.C. No. 39-01393-37543
	:	
MICHAEL JOHNSON CONSTRUCTION	:	

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

ORDER

BY THE COMMISSION:

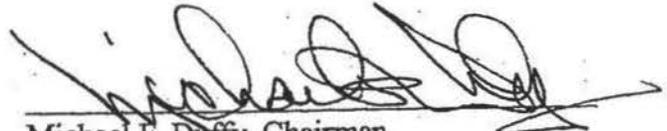
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On November 3, 2004, the Commission received from Michael Johnson Construction ("MJC") a letter requesting that the Commission reopen a penalty assessment that had become a final order 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).

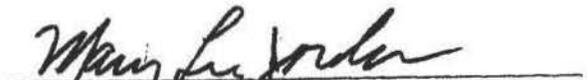
On September 14, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 39-01393-37543) to MJC's West Pit in Lake, South Dakota. In its request, MJC states that, upon receipt of the proposed assessment, it was misfiled and not located until October 28, 2004. Letter at 1. MJC further states that it does not dispute the citation, however, the "amount of the proposed penalty seems exorbitant" and it would create a financial burden on the company. *Id.* A copy of the proposed assessment is attached to MJC's request to reopen. MJC did not provide any other supporting documentation. The Secretary states that she does not oppose MJC'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).

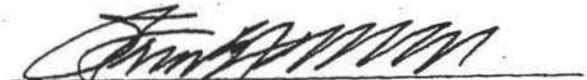
Having reviewed MJC’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for MJC’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Sabojeski, Commissioner



Michael G. Young, Commissioner

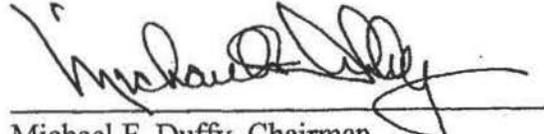
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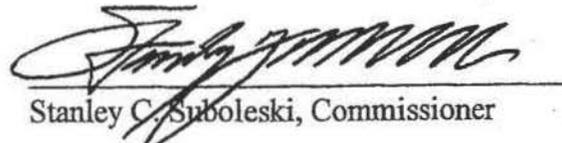
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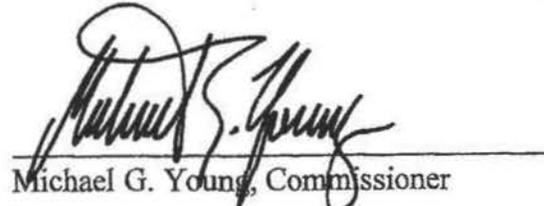
Upon consideration of the judge's certification, we hereby grant review of the judge's decision of January 12 and the issue of whether the private road that accesses National's cement plant is a "mine" within the definition of section 3(h)(1) of the Mine Act. 30 U.S.C. § 802(h)(1). Briefing shall be conducted in accordance with Commission Rule 76(c), 29 C.F.R. § 2700.76(c).



Michael F. Duffy, Chairman



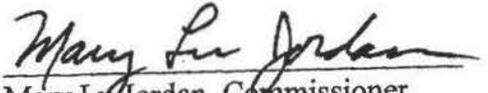
Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

Given that the judge should be able to resolve all outstanding issues relatively quickly, review of his January 12 decision at this stage would not materially advance the final disposition of this case. Accordingly, I would not grant interlocutory review.


Mary L. Jordan, 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 2, 2005

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

v.

BAYLOR MINING, INC.

:
:
:
:
:
:
:

Docket No. WEVA 2004-36

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 9, 2005, the Secretary of Labor filed with the Commission a petition for interlocutory review challenging Administrative Law Judge T. Todd Hodgdon's order denying her motion to certify for interlocutory review an earlier order by the judge. Unpublished Order dated Jan. 10, 2005 (ALJ). In his earlier order, Judge Hodgdon denied the Secretary's motion for reconsideration of his order granting in part the motion of Baylor Mining, Inc. ("Baylor") to compel the Secretary to disclose certain documents. *See* 26 FMSHRC 905 (Nov. 2004) (ALJ) (denying reconsideration); 26 FMSHRC 739 (Aug. 2004) (ALJ) (granting in part operator's motion to compel discovery).

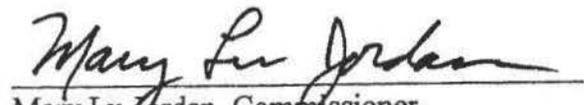
Upon consideration of the Secretary's petition for interlocutory review, we grant the petition.

The Secretary shall file her opening brief on or before 20 days from the date of issuance of this order. Baylor shall file its response brief on or before 15 days from service of the Secretary's opening brief. The Secretary may file her reply brief on or before 10 days from service of Baylor's response brief. The Secretary's opening brief and the operator's response brief shall not exceed 25 pages. The Secretary's reply brief shall not exceed 15 pages.

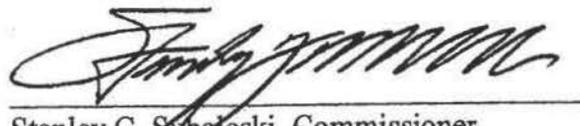
In the briefs, the parties shall address the issues raised in the Secretary's petition, including the historical practice of handling the statements of miner informants who also serve as witnesses in Mine Act proceedings; whether the disclosure of the subject statements at issue would reveal the miner witness' status (or that of any other miner) as informants; the applicability of the Commission's decision in *Secretary of Labor on behalf of Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (Nov. 1984) and subsequent Commission decisions addressing the informant's privilege to the current proceeding; and the applicability of the principles of the Jencks Act, 18 U.S.C. § 3500, to Mine Act proceedings.



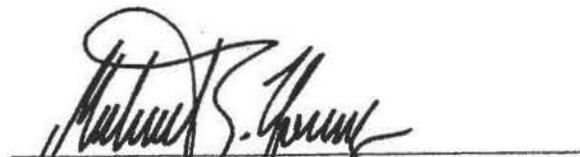
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Saboleski, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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March 4, 2005

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

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Docket No. EAJ 2001-2

v.

COLORADO LAVA, INC.

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Equal Access to Justice Act (“EAJA”), 5 U.S.C. § 504 (2004), and the Commission’s Procedural Rules implementing EAJA, 29 C.F.R. § 2704.100 et seq. (2004). Administrative Law Judge Avram Weisberger denied an application by Colorado Lava, Inc. (“Colorado Lava”) for attorneys’ fees under these provisions. 25 FMSHRC 667, 672 (Nov. 2003) (ALJ). We granted Colorado Lava’s petition for discretionary review challenging the judge’s decision. For the reasons set forth below, we affirm the judge’s decision.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

In October 1999, Andrew Garcia, who was employed at the Mountain West Colorado Aggregates (“MWCA”) bagging facility in Antonito, Colorado, made safety complaints to his supervisor regarding certain equipment. 25 FMSHRC at 668. Subsequently, Garcia complained to MSHA about the condition of this equipment. *Id.* In June 2000, Colorado Lava purchased the Antonito site and rehired all of the MWCA employees except for Garcia and a mechanic. *Id.*

The Secretary filed a complaint of discrimination on behalf of Garcia against Colorado Lava, alleging that the operator discriminated against him in violation of section 105(c) of the Mine Act. 23 FMSHRC 213 (Feb. 2001) (ALJ). At the conclusion of the Secretary's case, Colorado Lava made a motion to dismiss, which the judge granted. On appeal, the Commission vacated the judge's dismissal of the discrimination complaint and remanded the case for further proceedings. 24 FMSHRC 350, 356 (Apr. 2002). In his decision on remand, the judge found that the Secretary failed to establish that Colorado Lava discriminated against Garcia in violation of section 105(c) and dismissed the case. 25 FMSHRC 144, 152 (Mar. 2003) (ALJ). Garcia, proceeding without the Secretary, filed a petition for discretionary review. No two Commissioners voted to grant review. Notice, Apr. 29, 2003. He then appealed the decision to the Tenth Circuit Court of Appeals. 25 FMSHRC at 668 n.1. Subsequently, Garcia and Colorado Lava filed a stipulation to dismiss the appeal. *Id.*

B. The EAJA Proceeding

On March 14, 2001, Colorado Lava filed an Application for an Award of Fees and Expenses under EAJA. C.L. Appl.¹ In support of its application, Colorado Lava asserted that the Secretary's decision to proceed against it was not substantially justified. *Id.* at 6. On April 15, 2003, Colorado Lava filed an amended application for fees and expenses in the amount of \$49,574.13.² C.L. Amend. Appl. at 7-8. In its amended application, Colorado Lava also argued that under Commission EAJA regulation 29 C.F.R. § 2704.105(b), it should be awarded fees and expenses because the demand of the Secretary was substantially in excess of the decision of the Commission and unreasonable when compared with such decision. *Id.* at 6. It claimed that prior to the hearing, the Secretary had demanded that it pay Garcia \$50,000 in exchange for dismissing the case, in addition to the Secretary's proposed penalty of \$10,000. *Id.* at 6-7.

The judge ruled that Colorado Lava was not entitled to an award of fees and expenses under EAJA and denied the application. 25 FMSHRC at 672. He concluded that the Secretary's position in the case was substantially justified. *Id.* at 671. He also held that an award under section 105(b) of the Commission's EAJA regulations (providing for fees and expenses where the Secretary's demand is substantially in excess of the Commission's decision and is unreasonable compared to that decision) was only available to entities who did not prevail. *Id.* at 672. Finding that Colorado Lava was the prevailing party, he concluded that it was not entitled to any award under this provision. *Id.* Colorado Lava filed a petition for discretionary review, which the Commission granted.

¹ The judge stayed the proceeding pending the final disposition of the underlying discrimination case. Order, Apr. 20, 2001. On June 3, 2003, he issued a second order, continuing to stay the case.

² Colorado Lava also asked that it be awarded additional amounts (to be invoiced in the future) for the preparation and defense of the fee application. C.L. Amend. Appl. at 8.

II.

Disposition

This case presents a question of first impression for the Commission: can a *prevailing* party in an administrative proceeding obtain attorneys' fees and expenses based on the 1996 amendments to EAJA? These amendments expand the basis for recovering fees and expenses to include certain adversary proceedings against private parties where the government's demand is excessive and unreasonable. EAJA Amendments, Pub. L. No. 104-121, 110 Stat. 847, 862 (1996).

Section 504(a)(4), the pertinent portion of EAJA, provides:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

5 U.S.C. § 504(a)(4).

Although the judge's analysis focused almost exclusively on the Commission's EAJA regulations, it is the interpretation of section 504(a)(4) of the statute that ultimately governs the disposition of this case, as the regulations must be consistent with this statutory authority. *Adams v. SEC*, 287 F.3d 183, 190 (D.C. Cir. 2002), *citing Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990). Consequently, we first address whether this section of EAJA permits a fee award³ to Colorado Lava as a prevailing party, before analyzing the Commission's governing regulations.

A. The Language of Section 504(a)

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). Turning to the term at issue here, section 504(a)(4) does not specify whether the "party" seeking fees may

³ In addition to attorneys' fees, the 1996 EAJA amendments permit the award of certain litigation expenses. 5 U.S.C. §§ 504(a)(4) and 504(b)(1)(A). The use of the term "fees" herein also includes such costs.

be a prevailing party or a party that has not prevailed.⁴

As a threshold matter, we need not address whether the language in section 504(a)(4) is plain or ambiguous. Because EAJA is a statute of general applicability and not administered by the Secretary, the choice between the two varying interpretations of the statute is a question of law committed to the Commission for decision. Accordingly, no deference is due to the Secretary's construction. *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1339 (D.C. Cir. 2000); *Scafar Contracting, Inc. v. Sec'y of Labor*, 325 F.3d 422, 428 (3rd Cir. 2003).

The language of section 504(a)(4) itself strongly supports the Secretary's argument that Congress did not intend prevailing parties to receive fees under this provision inasmuch as it requires that a demand by an agency be "substantially in excess of the decision of the adjudicative officer" to trigger a fee award. 5 U.S.C. § 504(a)(4). The wording of the statute does not meaningfully apply to cases in which the fee applicant has prevailed and there is no penalty, as the concept of "excessive demand" only becomes significant when the baseline comparison is a number other than zero. Virtually every demand in cases where the fee applicant prevails on liability will not only be "in excess of" zero (the amount the prevailing party ultimately owes), but could be viewed as "substantially in excess" of zero, whether it is one hundred dollars, one thousand dollars, ten thousand dollars, or more. Thus, if this section applied to prevailing parties, they could argue that they meet the requirements of the "excessive demand" prong of section 504(a)(4) in nearly every instance, rendering it essentially meaningless (although the Secretary's demand must also be determined to be "unreasonable").

Moreover, the fact that section 504(a)(4) denies fees to a party who has "committed a willful violation of law" further supports the position that section 504(a)(4) does not apply to prevailing parties. This provision could only apply where there was a violation in the underlying merits proceeding. If a party is found to have willfully violated the law in a given matter, it could not also prevail. Indeed, the reference in section 504(a) to "violation" – be it willful or not – is inapposite in a matter where the fee applicant prevails and ultimately no violation is found. Consequently, the language of section 504(a)(4) indicates that Congress did not contemplate permitting prevailing parties to obtain fees under this provision.

In addition, if a prevailing party could obtain fees under section 504(a)(4), section 504(a)(1) of EAJA would be compromised. Section 504(a)(1) explicitly provides a mechanism for prevailing parties to obtain fees, stating in pertinent part:

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

⁴ The definition of "party" in EAJA, rather, focuses on an applicant's net worth. See 5 U.S.C. § 504(b)(1)(B).

the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). Nothing in the text of section 504(a)(1) would prevent a prevailing party from including in its application under this provision the claim that it should obtain fees because the government made an excessive monetary demand.

The Commission has noted, in the preamble to the 1998 amendments to the Commission's EAJA regulations, "the showing of reasonableness of the Secretary's demand is analogous to the Secretary's burden of providing substantial justification." 63 Fed. Reg. 63172, 63173 (Nov. 12, 1998).⁵ Under Colorado Lava's theory, if a prevailing party is not able to obtain fees and expenses under section 504(a)(1) (because the agency position was substantially justified),⁶ it would nonetheless be eligible for fees under section 504(a)(4)'s "excessive and unreasonable" standard.⁷ This would give the prevailing party two opportunities for collecting fees under EAJA, with the determination for both claims essentially being whether the government acted reasonably. Thus, the party's argument that the government's demand was "excessive and unreasonable" would necessarily prove unsuccessful if the agency's position had already been held to be substantially justified.

Here, the judge found the Secretary's position "substantially justified." 25 FMSHRC at 671. Colorado Lava did not appeal this determination. However, because of this finding by the judge, even if the Commission were to hold that Colorado Lava was initially eligible to apply for fees under section 504(a)(4), to obtain a fee award the operator would have to prove not only that the Secretary's demand was excessive but that it was unreasonable. 5 U.S.C. § 504(a)(4). See *American Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 327 (D.C. Cir. 2004) ("AWC") ("the Secretary's initial demand only appear[ed] 'unreasonable' to the extent that her position in litigation and before the agency was not 'substantially justified'"). Colorado Lava cannot meet the requirement that the Secretary's demand was "unreasonable" because the Secretary's position has already been found to be substantially justified.

⁵ This overlap between findings made under section 504(a)(1) and section 504(a)(4) was noted by the National Transportation Safety Board in an EAJA proceeding. See *Administrator v. Lee H. Allen*, NTSB Order No. EA-4617, slip op. at 6 n.6 (Jan. 23, 1998), *aff'd*, *Allen v. National Transp. Safety Bd.*, 160 F.3d 431 (8th Cir. 1998) (even assuming section 504(a)(4) applied to administrative action, applicant would fail to meet standard for showing "unreasonable" action where NTSB found action to be "substantially justified").

⁶ The Supreme Court has defined "substantially justified" as a position that has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

⁷ However, under section 504(a)(4), a party's fees and expenses are limited to those incurred defending against the excessive demand, while those awarded to a prevailing party under section 504(a)(1) are not restricted in this manner.

We note also that EAJA sets forth different financial eligibility requirements for applicants under section 504(a)(1) and those under section 504(a)(4). 5 U.S.C. § 504(b)(1)(B). Generally, parties seeking fees pursuant to section 504(a)(1) must either be individuals with a net worth of two million dollars or less, or corporations or other organizations with a net worth of seven million dollars or less and which had not more than 500 employees at the time the adversary adjudication was initiated. *Id.* In contrast, parties seeking fees under section 504(a)(4) must be “small entities” as set forth in 5 U.S.C. § 601, which in turn defines “small entities” as small businesses under the Small Business Act, certain non-profit enterprises, and small governmental bodies with a population of less than fifty thousand. 5 U.S.C. § 601(3), (4) & (5). It is unlikely that Congress would have established different financial standards if a prevailing party could seek fees under section (a)(1) and/or section (a)(4).

Finally, in *L & T Fabrication & Construction, Inc.*, 22 FMSHRC 509 (Apr. 2000), the Commission characterized section 504(a)(4) as “expand[ing] the basis for recovering fees and expenses to include certain claims against private parties *who did not prevail* against the government.” *Id.* at 513 (emphasis added). The case, which presented the Commission with its first opportunity to interpret the 1996 EAJA amendments, involved the entitlement of a losing party to fees under section 504(a)(4).⁸

B. The Statutory Context

Our construction of section 504(a)(4) is supported by the entire statutory scheme of EAJA, including 28 U.S.C. § 2412(d)(1)(D).⁹ That section, enacted in the same public law as

⁸ Colorado Lava relies on an unreviewed decision by an administrative law judge for the Occupational Safety and Health Review Commission, *Sec’y of Labor v. Wolkow Braker Roofing Corp.*, Nos. 97-1773 and 98-0245, 2000 WL 1466087 (OSHRC-ALJ Sept. 13, 2000). That decision has no precedential impact here.

⁹ 28 U.S.C. § 2412(d)(1)(D) provides:

If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of *the judgment finally obtained by the United States* and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

(emphasis added).

5 U.S.C. § 504(a)(4), applies to court-awarded fees. We recognize that “each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole. . . . [A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole” 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.05 (6th ed. 2000). See also *Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999).

Section 504(a)(4) is referenced in section 2412(d)(1)(D), which states that the court shall award fees and expenses related to defending an excessive and unreasonable demand in a civil action “or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5.” 28 U.S.C. § 2412(d)(1)(D). Thus, section 504(a)(4) is linked with a corresponding provision of EAJA whose language explicitly limits awards to non-prevailing parties. See *Scafar Contracting, Inc.*, 325 F.3d at 425 (provisions in 5 U.S.C. § 504 and those in 28 U.S.C. § 2412 “are closely intertwined”). In holding that the term at issue (“final disposition”) was ambiguous, *id.* at 426, and should be construed to mean in section 504 what Congress explicitly stated it meant in the amended (and clearly-written) section 2412, the *Scafar* Court stated that “[t]his construction also creates continuity within the EAJA by aligning the meaning of the term ‘final disposition’ in § 504 with its counterpart in § 2412.” *Id.* at 432. See also *Adams*, 287 F.3d at 189 (noting that its interpretation of the term “final disposition” “will provide consistency among agency proceedings as well as with court cases”). Thus, under the Court’s reasoning, the limitation of section 2412(d)(1)(D) to non-prevailing parties should be found in the language of section 504(a)(4).

In interpreting 28 U.S.C. § 2412(d)(1)(D), a provision analogous to section 504(a)(4), the District of Columbia Circuit, in *AWC*, commented on the overlap of EAJA’s “substantial justification” and “excessive demand” prongs under 28 U.S.C. § 2412(d) as a basis of recovery.¹⁰ In *AWC*, the Court held that the Secretary’s position was not “substantially justified” in some but not all aspects of the litigation (which involved violations of regulations of the Occupational Safety and Health Administration). 364 F.3d at 323, 326-27. The Court stated that, “[t]he function of § 2412(d)(1)(D) is merely to permit *non*-prevailing parties to recover fees and expenses where the United States obtained a judgment that was substantially – and unreasonably – exceeded by its initial demand.” *Id.* at 328 (emphasis in original).

Colorado Lava argues that if Congress had intended to exclude prevailing parties from proceeding under section 504(a)(4), it would have said so. PDR at 8; C.L. Br. at 4. It bases this claim on the fact that in the corresponding section of EAJA relating to court-awarded fees, 28 U.S.C. § 2412(d)(1)(D), Congress did just that by stating that parties were entitled to recover fees and expenses only where the United States obtains a “judgment” that was substantially and

¹⁰ 28 U.S.C. § 2412(d)(1)(A), the counterpart to 5 U.S.C. § 504(a)(1), permits a court to award fees and expenses to a prevailing party unless the position of the United States was substantially justified or special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A).

unreasonably exceeded by its initial demand. *AWC*, 364 F.3d at 328. However, Colorado Lava's argument that Congress intended prevailing parties to be eligible for awards under section 504(a)(4) because it used the phrase "substantially in excess of the decision of the adjudicative officer" instead of the language in section 2412(d)(1)(D) ("substantially in excess of the judgment finally obtained by the United States") is explained by the terminology applied in administrative proceedings. Generally, the outcome of an administrative case is disposed of in a "decision" or an "order,"¹¹ whether the government prevails or not. Therefore, Congress would not have employed the same language "judgment finally obtained" in the EAJA section pertaining to administrative litigation.

Thus, the language of section 2412(d)(1)(D) supports the reading that section 504(a)(4) should also be limited to non-prevailing parties. This interpretation maintains consistency between the two provisions and creates a harmonious, coherent statutory framework guiding fee awards for both agency and court proceedings under the 1996 EAJA amendments.

C. The Legislative History

The legislative history of the 1996 amendments supports the reading that fee awards under section 504(a)(4) are limited to non-prevailing parties.¹² The most compelling section of the legislative history addressing the issue before us is found in a portion of the legislative summary submitted by Representative Henry Hyde, chief sponsor of the bill in the House of Representatives. That summary stated that the legislation would:

allow parties *which do not prevail* in a case involving the government to nevertheless recover a portion of their fees and cost [sic] in certain circumstances. The test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case and is unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.

142 Cong. Rec. E571, E573 (Apr. 19, 1996) (emphasis added).

¹¹ The Mine Act refers to "orders" and "decisions" in several sections. See 30 U.S.C. §§ 815(c)(2), 816 & 823(d)(1) (2000).

¹² Colorado Lava argues that the legislative history of EAJA should be disregarded (Reply Br. at 4, 8). We disagree. It is appropriate to examine legislative history to ensure our construction conforms to the statute as a whole and is consistent with its purpose. See *Local Union 1261 UMWA v. FMSHRC*, 917 F.2d 42, 46 (D.C. Cir. 1990) ("[t]he 'traditional tools of statutory construction' include not only the words of the statute, but also its relevant legislative history").

Furthermore, the House Report describing the 1996 amendments states that a “small entity would not be required to prevail in the underlying action; the final outcome must be, however, to require payment of an amount substantially less than what the agency sought to recover.” H.R. Rep. No. 500, 104th Cong., 2nd Sess. at 2 (1996). This requires that the party seeking fees ultimately made some payment, which would not be the case for a prevailing party. *See also* 142 Cong. Rec. S2148, S2159 (Mar. 15, 1996) (Committee legislative history for S. 942, the Senate bill containing the 1996 EAJA amendments) (the test for recovering attorneys’ fees is “whether the final outcome imposed or ordered in the case (whether a fine, injunctive relief or damages) is disproportionately less burdensome on the small entity than the government’s actual demand. . . . The test is whether the demand is out of proportion with the actual value of the violation.”).

D. The Commission’s EAJA Regulations

Our determination that the statute does not authorize a fee award to a prevailing party leads to the conclusion that the Commission’s EAJA regulations must also prohibit such an award. *See Adams*, 287 F.3d at 190 (“[Securities and Exchange] Commission’s regulation, ambiguous on its face, must be construed to avoid inconsistency with EAJA”). An analysis of the regulations indicates that this is the case.

Section 105(b) of the Commission’s EAJA regulations states in pertinent part:

If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant the fees and expenses related to defending against the excessive demand

29 C.F.R. § 2704.105(b).

In the preamble to the final EAJA regulations, the Commission stated that, while the current EAJA rules provide for awards to prevailing parties in cases where the Secretary’s position is not substantially justified, the new rule (29 C.F.R. § 2704.305) “eliminate[s] the reference to ‘prevailing’ party status because an EAJA award is no longer limited to proceedings involving a prevailing party but includes those proceedings in which the Secretary has made a substantially excessive and unreasonable demand.” 63 Fed. Reg. at 63174. In agreement with the judge, we note that the regulations delineate between “prevailing applicants” for purposes of an award under the “substantial justification” regulation, 29 C.F.R. § 2704.105(a), and “eligible applicants” for purposes of an award under the “excessive and unreasonable demand” regulation, 29 C.F.R. § 2704.105(b). 25 FMSHRC at 671. The judge emphasized the language setting forth the purpose of the regulations in 29 C.F.R. § 2704.100, comparing the provision that an “eligible party may receive an award *when it prevails*” unless the Secretary’s position is substantially

justified, with the statement that an “eligible party” may receive an award under the excessive demand prong. 25 FMSHRC at 671 (emphasis in original). In short, the language of the Commission’s regulations supports the Secretary’s position and is consistent with our reading of section 504(a).

III.

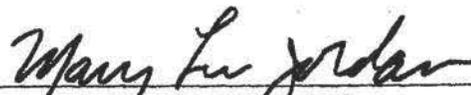
Conclusion

We thus conclude that a prevailing party in administrative proceedings may not rely on section 504(a)(4) to obtain attorneys’ fees under EAJA. We reach this conclusion based on the language of section 504(a)(4), the context of this provision within the overall framework of EAJA, and the legislative history of the 1996 EAJA amendments. In addition, case law and the Commission’s implementing regulations applying section 504(a)(4) support limiting this section to non-prevailing parties.

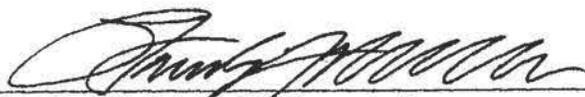
For the foregoing reasons, we affirm the judge’s decision.



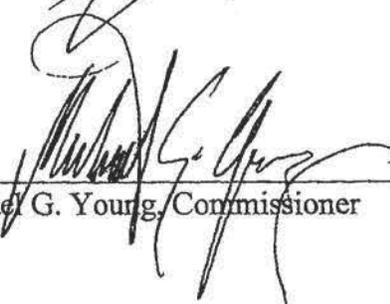
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



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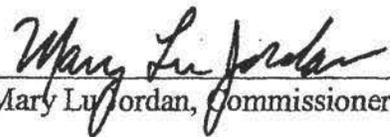
contacted MSHA's assessment office and was informed the proposed assessment was received by Vance on October 6, 2004. *Id.* Accordingly, Vance asserts, counsel filed the penalty contest on November 4, 2004. *Id.* Vance states that, on November 22, 2004, counsel received a letter from MSHA stating the penalties were not timely contested. *Id.* The affidavit of Ms. Charlson is attached to Vance's motion. Vance did not provide any other supporting documentation. The Secretary states that she does not oppose Vance'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).

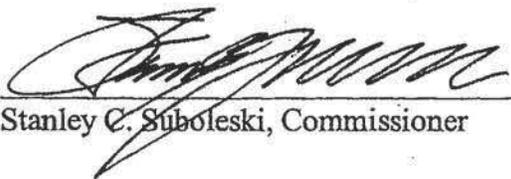
Having reviewed Vance's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Vance's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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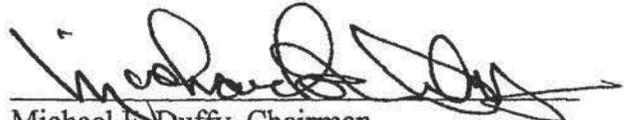
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Chief Administrative Law Judge Robert J. Lesnick
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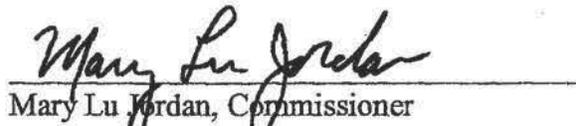
proposed assessment was received on the same date as the proposed assessment received by his co-worker, Terry J. Vance. *Id.* Radford asserts that, on October 13, 2004, Tami Charlson, counsel's legal assistant, contacted MSHA's assessment office and was informed that Vance's proposed assessment was received on October 6, 2004. *Id.* Accordingly, Radford asserts, counsel filed the penalty contest on November 4, 2004. *Id.* Radford states that, on December 6, 2004, counsel received a letter from MSHA stating the penalties were not timely contested. *Id.* A copy of Ms. Charlson's affidavit is attached to Radford's motion. Radford did not provide any other supporting documentation. The Secretary states that she does not oppose Radford'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 Radford'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 Radford's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



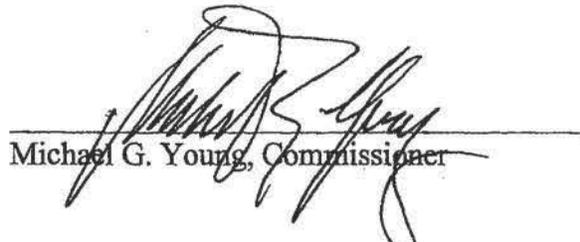
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 7, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-41
v.	:	A.C. No. 46-01271-39038
	:	
EASTERN ASSOCIATED COAL CORP.	:	

BEFORE: Duffy, Chairman; 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. (2000) (“Mine Act”). On December 7, 2004, the Commission received from Eastern Associated Coal Corp. (“Eastern”) 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).

On September 30, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 46-01271-39038) to Eastern’s Harris No. 1 Mine in Wharton, West Virginia. In its motion, Eastern states that, on the same day, Eastern’s parent, Peabody Energy, Inc., closed its Henderson, Kentucky office which had handled Eastern’s penalty contests and payments. Mot. at 1. Eastern asserts that on October 1, 2004, it informed its mines that penalties would be paid by its Charleston, West Virginia office and penalty contests would be handled by Peabody Energy’s law department in St. Louis, Missouri. *Id.* at 1-2. Eastern asserts that on October 27, 2004, the Harris No. 1 Mine forwarded the proposed assessment to Peabody Energy’s law department requesting payment for all

citations except Citation Nos. 7208626, 7221536, 7221537, and 7221538. *Id.* at 2. According to Eastern, a copy of the proposed assessment was forwarded by e-mail to the Charleston office for payment with a note to “check off” citations to be contested. *Id.* However, Eastern asserts the Charleston office never received the original proposed assessment and, as a consequence, it was not paid and Citations Nos. 7208626, 7221536, 7221537, and 7221538 were not contested. *Id.* Eastern did not attach any supporting documentation to its motion. The Secretary states that she does not oppose Eastern’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).

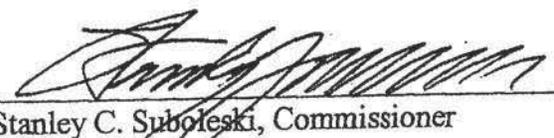
Having reviewed Eastern's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Eastern's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



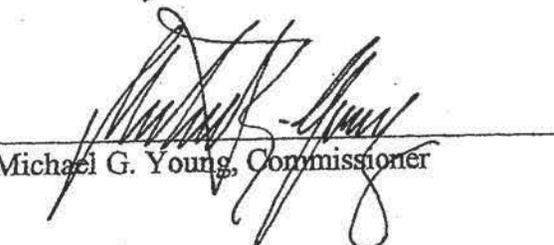
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 7, 2005

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

v.

KIRBY STONE COMPANY

:
:
:
:
:
:
:
:

Docket No. CENT 2005-60-M
A.C. No. 41-04355-28808

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On December 17, 2004, the Commission received from Kirby Stone Company ("Kirby") a letter 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).

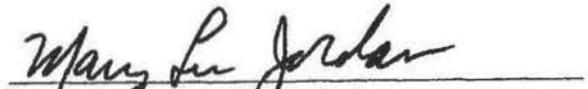
On June 9, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 41-04355-28808) to Kirby's Roach Quarry II. In its request, Kirby states that confusion caused by the transfer of business responsibilities due to a personal illness resulted in its failure to timely request a hearing. Letter at 1. Kirby asserts that it was not aware of the proposed assessment until informed by its quarry manager. *Id.* Kirby states that it has attempted to resolve this matter since early September without success. *Id.* Kirby did not attach any supporting documentation to its request. The Secretary states that she does not oppose Kirby'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 Kirby’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 Kirby’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 7, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-47
v.	:	A.C. No. 46-08645-30616
	:	
INDEPENDENCE COAL COMPANY	:	
d/b/a PROGRESS COAL COMPANY	:	

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On December 28, 2004, the Commission received from Independence Coal Company d/b/a Progress Coal Company ("Progress") 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).

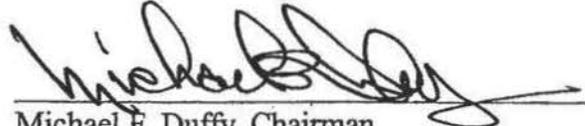
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On June 30, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 46-08645-30616) to Progress' Twilight MTR Surface Mine in Boone, West Virginia for 45 alleged violations, including Citation No. 4191465 and Order No. 4191466. In its motion, Progress states that on August 20, 2003, it had contested Citation No. 4191465 and Order No. 4191466, which are the subject of Docket Nos. WEVA 2003-240-R and WEVA 2003-241-R, and are stayed before Commission Administrative Law Judge T. Todd Hodgdon. Mot. at 1 & 4. Progress states the proposed assessment was sent by certified mail to the attention of Bryan Petrosky, Progress' safety

director, but that it was signed for by a temporary summer student employee on July 12, 2004. *Id.* at 2-3. Progress asserts that it was not until September 1, 2004, that Mr. Petrosky received the proposed assessment, placed check marks in the boxes next to the citations and orders he intended to contest, and requested that Progress' accounting department pay the assessment for the remaining citations. *Id.* Progress states that, on September 9, 2004, MSHA received its payment but not its contest of civil penalty. *Id.* at 2. According to Progress, MSHA did not understand which cases were being paid. *Id.* Progress asserts the check stub attached to its check listed three invoice numbers, one of which coincides with this case. *Id.* at 2-4. Progress attached copies of three documents to its motion: Mr. Petrosky's affidavit, its contest of civil penalty, and its record of payment. The Secretary states that she does not oppose Progress' 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 Progress' 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 Progress' failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 10, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2005-58-M
v.	:	A.C. No. 38-00310-43246
	:	
HANSON AGGREGATES, SE, INC.	:	

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

ORDER

BY THE COMMISSION:

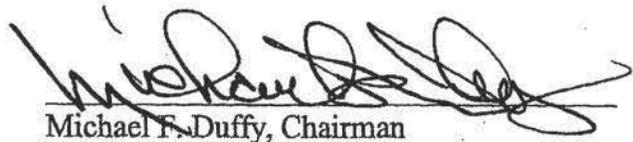
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 11, 2005, the Commission received from Hanson Aggregates, Southeast, Inc. (“Hanson”) a letter requesting that the Commission reopen a penalty assessment that had become a final 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 November 17, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 38-00310-43246) to Hanson’s Sandy Flat Quarry for Citation No. 6113730. In its letter, Hanson states that it contested Citation No. 6113730 on September 15, 2004, and that this contest proceeding is currently before Commission Administrative Law Judge Gary Melick under Docket No. SE 2004-241-RM. Hanson states that when it received the proposed penalty assessment for Citation No. 6113730, the assessment was “accidentally filed” rather than being sent to the company’s safety manager for action. The Secretary states that she does not oppose Hanson’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 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 failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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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 December 20, 2004.

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"); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993). 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 Dingess'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 Dingess's failure to respond to the show cause order and for further proceedings as appropriate.



Michael F. Duffy, Chairman



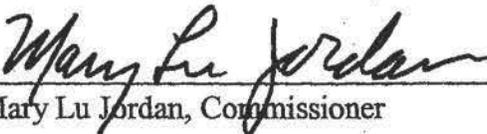
Stanley C. Suboteski, Commissioner



Michael G. Young, Commissioner

Chairman Jordan, dissenting,

I would deny Joel Dingess's request to reopen this matter. He seeks review of the judge's order of default, but has offered no explanation for his failure to timely file an answer to the Secretary's petition for assessment of penalty or to the judge's show cause order. This case is thus similar to *Cusic Trucking, Inc.*, 21 FMSHRC 701 (July 1999), in which the Commission denied the operator's request for relief from the final Commission decision because the operator had offered no reason for its failure to respond to the petition for penalty assessment or to the judge's show cause order. *Id.* at 702-03. We noted in *Cusic* that, as in the instant case, "the judge's show cause order . . . unambiguously and in plain language ordered [the operator] to 'send an Answer . . . within 30 days or show good reason for [failing] to do so.'" *Id.* at 702 n.1 (citation omitted). Given the complete lack of any explanation as to why this instruction was entirely disregarded, I would deny this request for relief from a final order. *See also Prairie Materials Sales Inc.*, 26 FMSHRC 800, 801 (Oct. 2004) (denying operator's petition for discretionary review because it did not address the validity of the Chief Judge's default order nor provide any reasons why the default order should be vacated). Accordingly, I respectfully dissent.



Mary Lu Jordan, Commissioner

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Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 10, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. CENT 2005-73-M
v. : A.C. No. 34-01299-42432
 :
MARTIN MARIETTA AGGREGATES :

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

ORDER

BY THE COMMISSION:

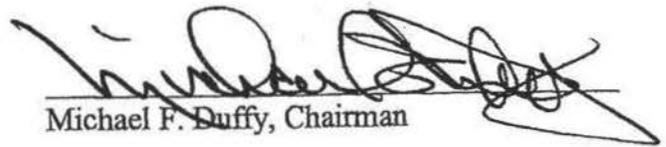
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On January 7, 2005, the Commission received from Martin Marietta Aggregates (“Martin Marietta”) a motion made by counsel to reopen a penalty assessment that had become a final order of 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).

During November 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 34-01299-42432) to Martin Marietta’s Davis Quarry. The proposed assessment was delivered to Martin Marietta’s Southwest Division Office in San Antonio, Texas. Mot. at 1. Martin Marietta asserts that on January 5, 2005, its counsel determined that the proposed assessment had been “misplaced and subsequently forgotten” in the confusion of an office move. *Id.* at 2. Martin Marietta contacted MSHA and obtained a copy of the proposed assessment and realized “it was delinquent in filing a contest.” *Id.* The Secretary states that she does not oppose Martin Marietta’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).

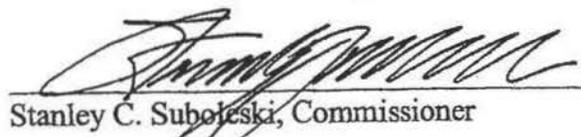
Having reviewed Martin Marietta’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Martin Marietta’s failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



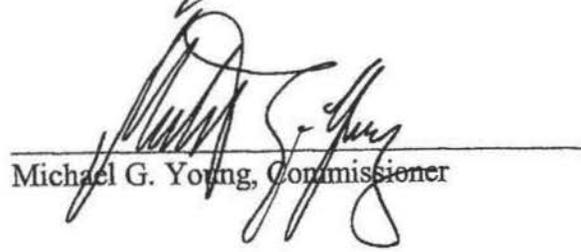
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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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 11, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), on :
behalf of WILFREDO MORALES :
 : Docket No. SE 2005-71-DM
v. :
 :
ARENERO RAFAEL COLON, INC. :

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

DECISION

BY THE COMMISSION:

This temporary reinstatement proceeding arises under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c)(2) (2000). On March 1, 2005, the Commission received from Arenero Rafael Colon, Inc. ("Arenero") a petition for review of Administrative Law Judge David Barbour's February 24, 2005 order temporarily reinstating Wilfredo Morales ("Morales") pursuant to section 105(c)(2) of the Act. 27 FMSHRC 160, 167 (Feb. 2005). *See also* 29 C.F.R. § 2700.45. On March 8, the Commission received the Secretary of Labor's opposition to Arenero's petition. For the reasons that follow, we grant the petition for review and affirm the judge's order requiring the temporary reinstatement of Morales.

Morales was a miner employed by Arenero as a heavy equipment operator until his discharge on July 6, 2004. On November 15, 2004, he filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c) of the Mine Act. Following an investigation, the Secretary of Labor determined that the discrimination complaint filed by Morales was not frivolously brought. On February 4, 2005, the Secretary filed an application for the temporary reinstatement of Morales. On February 15, 2005, an evidentiary hearing on the Secretary's application was held. On February 24, 2005, the judge issued his decision in which he temporarily reinstated Morales, concluding that the complaint was not frivolously brought.

Arenero operates a sand processing facility in San Lorenzo, Puerto Rico. 27 FMSHRC at 160. Once sand is extracted, it is loaded onto haulage trucks which are driven to the facility's processing plant. *Id.* To reach the plant, haulage drivers must descend a slope of approximately

15 degrees. *Id.* There are drops on both sides of the slope, and where the drops are located, the road is bermed with sand. *Id.*

On the morning of Thursday, July 1, 2004, Morales arrived at the mine to drive a haulage truck. *Id.* at 162. He and three haulage truck drivers who were contract employees went to the sand extraction area. *Id.* However, because it had rained the night before and the road was wet and slippery, the drivers were reluctant to drive back down the slope with loaded trucks because, according to Morales, they did not think it was safe. *Id.* at 161-62. Morales testified that in order for the haulage trucks to drive safely on the road, either the bulldozer needed to scrape the wet material from the sloped part of the road or the drivers needed to wait until the road was dried by the sun. *Id.* at 162; Tr. 23. On that day, however, according to Morales, the bulldozer broke down and could not scrape the wet material from the road. 27 FMSHRC at 162.

While the drivers waited for the mechanic to repair the bulldozer, supervisor Ruben Roman went to the extraction area to check on why the trucks had not arrived at the sand plant. *Id.* He stated that because the drivers had been able to travel to the top of the slope safely, the road was in good enough condition to travel down. *Id.*

Subsequently, German Colon, the plant manager and treasurer of the mine, traveled to the top of the slope. *Id.* at 163. When the drivers told him they were not hauling sand to the plant because the road was “not okay,” he replied that it was in good condition because their vehicles had gone up the slope safely. *Id.* Shortly thereafter, the drivers began hauling sand to the plant because they were concerned that Colon would fire them if they continued to refuse to drive. *Id.* at 164. By then, the sun had dried the road, making it safe to travel. *Id.*

Morales worked on Friday, July 2 and Saturday, July 3, 2004. On Saturday, Roman told him not to bring his truck to work on July 6, and that Colon wanted to meet with him. *Id.* On July 6, Colon met with Morales and discharged him. *Id.* Although there is conflicting testimony regarding the reasons articulated for the discharge, both Morales and Colon testified that Morales was fired, at least in part, for “insubordination.” *Id.*; Tr. 41, 143-44.¹

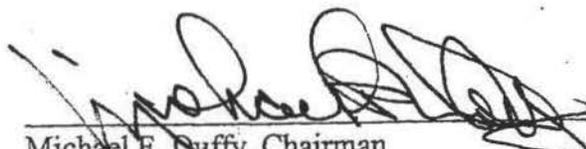
Under section 105(c)(2) of the Mine Act, “if the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). The Commission has repeatedly recognized that the “scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner’s discrimination complaint is frivolously brought.” *See Sec’y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). The Commission applies the substantial evidence standard in reviewing the judge’s determination regarding

¹ Colon testified that he also told Morales he was discharging him because his truck did not have an automated load cover, and because Morales’s work performance was poor. 27 FMSHRC at 164.

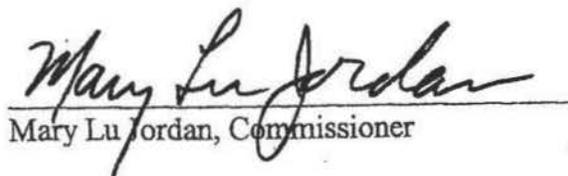
whether the complaint was frivolously brought. *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (Feb. 2000).

The only issue before us is whether substantial evidence supports the judge's determination that Morales's discrimination complaint was not frivolously brought. After careful review of the pleadings and record evidence, we conclude that the judge's determination that the complaint was not frivolously brought is supported by substantial evidence and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.

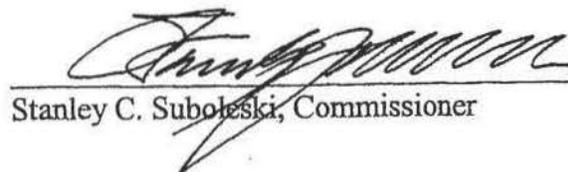
Accordingly, we affirm the judge's decision temporarily reinstating Morales.



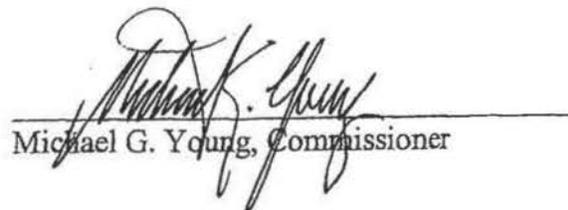
Michael F. Duffy, Chairman



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
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March 14, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2005-66
v.	:	A.C. No. 46-01271-36418
	:	
EASTERN ASSOCIATED COAL CORP.	:	

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

ORDER

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 4, 2005, the Commission received from Eastern Associated Coal Corp. (“Eastern”) 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).

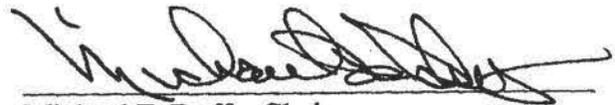
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On September 2, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 46-01271-36418, incorrectly cited in the body of Eastern’s Motion as A.C. No. 46-01271-39038) to Eastern’s Harris No. 1 Mine in Wharton, West Virginia. In its motion, Eastern states that on November 29, 2004, it discovered that it had inadvertently failed to contest the penalties for four citations in the proposed assessment, and failed to pay the remainder of the assessment. Mot. at 1. Eastern paid all of the penalties in the proposed assessment with the exception of the penalties for the four citations it wished to contest. *Id.* Eastern further asserts that on November 24, 2004, its counsel signed and mailed to the Commission a motion to reopen in these proceedings, but that this

motion appears to have been lost. *Id.* at 2. On January 29, 2005, Eastern's counsel confirmed that the Commission had not received a motion to reopen. *Id.* The Secretary states that she does not oppose Eastern'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 Eastern'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 Eastern'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



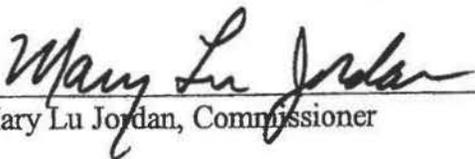
Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, Eastern has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). Its motion to reopen the penalty assessment, filed by counsel, states only that Eastern discovered "that it had inadvertently failed to contest four citations." Mot. at 1. Consequently, I respectfully dissent.



Mary Lu Jordan, 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 16, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2005-183-M
v.	:	A.C. No. 38-00130-33784 A
	:	
TERRY THOMPSON, employed by	:	
FOSTER DIXIANA CORPORATION	:	

BEFORE: Duffy, Chairman; 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. (2000) (“Mine Act”). On March 10, 2005, the Commission received from Terry Thompson 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 allegedly 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 and the Commission’s Procedural Rules, 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); 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.

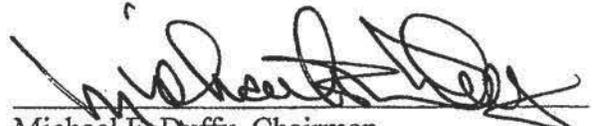
Terry Thompson is the Plant Manager at the Dixiana Mine in Columbia, South Carolina, owned by Foster Dixiana Corporation (“Foster Dixiana”). On May 12, 2003, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Foster Dixiana an order and citation alleging violations of mandatory health and safety standards. Mot. at 1. On August 6, 2004, MSHA mailed a proposed penalty assessment to Thompson alleging that he was liable for the May 12, 2003 order and citation under section 110(c) of the Mine Act. *Id.* at 2. Thompson

states that the proposed assessment against him was sent to the wrong address and that he did not receive it before the time to contest it had elapsed. *Id.* and Decl. of Terry Thompson at ¶¶ 7-10. Counsel for Thompson only learned of the Secretary's section 110(c) allegations against Thompson on February 11, 2005 in the course of inquiring as to whether MSHA would be filing any charges against him, and did not receive a copy of the assessment until February 28, 2005. Mot. at 2. Thompson also asserts that had he received the penalty proposal in a timely fashion, he would have contested it. Decl. at ¶ 11.

Counsel further states that related proceedings involving the charges against Foster Dixiana and a co-worker of Thompson are currently pending before Administrative Law Judge Gary Melick. Mot. at 3. Counsel has moved for a continuance of the hearing in the proceedings before Judge Melick scheduled for April 5, 2005. *Id.* The Secretary states that she does not oppose Thompson's request for relief.

Here, the proposed penalty assessment was mailed to an address at which Thompson no longer received mail. Thompson was not required to notify MSHA of his change of address under 30 C.F.R. § 41.12. Thompson received a copy of the proposed penalty assessment on February 28, 2005 through counsel. Under these circumstances, we conclude that Thompson did not "receive" the penalty assessment within the meaning of section 105(a) of the Mine Act and the Commission's Procedural Rules until February 28, 2005. *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). In his motion to reopen this matter, filed with the Commission on March 10, 2005 (well within the 30-day time period) and served upon the Secretary, Thompson clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Thompson timely notified the Secretary that he contests the proposed penalty. *Id.*

Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



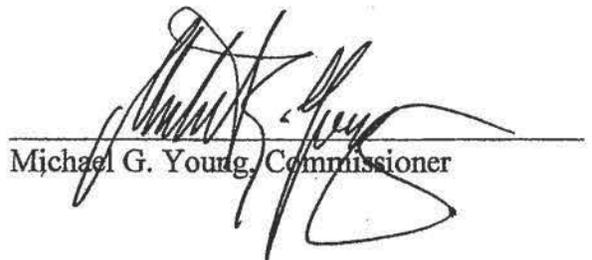
Michael F. Duffy, Chairman



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
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WASHINGTON, DC 20001

March 16, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEVA 2002-46
 :
EASTERN ASSOCIATED COAL CORP. :

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

DECISION

BY: Jordan, Suboleski, and Young, Commissioners

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). Administrative Law Judge T. Todd Hodgdon affirmed Citation No. 7195722 charging Eastern Associated Coal Corporation ("Eastern") with a violation of 30 C.F.R. § 48.11(a)(3).¹ 25 FMSHRC 30, 41-44 (Jan. 2003) (ALJ). We granted in part

¹ 30 C.F.R. § 48.11 provides in pertinent part:

(a) Operators shall provide to those miners, as defined in § 48.2(a)(2) (Definition of miner) of this subpart A, a training program before such miners commence their work duties. This training program shall include the following instruction, which is applicable to the duties of such miners:

- (1) Hazard recognition and avoidance;
- (2) Emergency and evacuation procedures;
- (3) Health and safety standards, safety rules, and safe working procedures;

Eastern's petition for discretionary review challenging the judge's decision affirming Citation No. 7195722. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

Eastern operates the Harris No. 1 Mine, an underground coal mine in Boone County, West Virginia. 25 FMSHRC at 30. The mine produces 3.9 million tons of coal per year. *Id.* In October 2001, Eastern planned to use the No. 4 entry in the mine's 4 East section to set up the face conveyor and shield for a longwall mining machine. *Id.* at 31. Due to a roof fall in the entry one crosscut outby, the entry had been narrowed to 18 feet. *Id.* Eastern needed an entry of at least 24 feet to set up the longwall equipment. Tr. 364-65. Longer roof bolts had been installed in the roof. 25 FMSHRC at 31. However, before widening the entry, Eastern decided to have polyurethane grout injected into the roof as additional support, because the roof was determined to be layered and cracked.² *Id.*

The roof grouting provisions in Eastern's roof control plan addressed various topics related to this task, including training, personal protection, roof control, fire protection, and spills associated with grout work. G. Ex. 6 at 29-33. It identified two roof control requirements, the installation of temporary supports and sag devices, which Eastern was required to follow when grouting was performed at the Harris Mine. *Id.* at 30.

Because Eastern does not do any grout work (Tr. 248, 317, 319), it hired ESS/Micon ("Micon"), a specialist with 18 years of experience doing such work, to perform the grout work at its mine. 25 FMSHRC at 31; Jt. Ex. 1 at 2 Stip. 12; Tr. 95; G. Ex. 16 at 3-4. Eastern provided hazard training to Micon employees Joe Deoskey and Tyler Pawich before their performance of the task. Tr. 314-15. Eastern showed the Micon employees a videotape to familiarize them with

(4) Use of self-rescue and respiratory devices . . . and

(5) Such other instruction as may be required by the District Manager based on circumstances and conditions at the mine.

30 C.F.R. § 48.2(a)(2) provides in relevant part "*Miner* means, for purposes of § 48.11 . . . , any person working in an underground mine, including any . . . short-term maintenance or service worker contracted by the operator"

² The grouting process involves drilling holes in the roof and injecting polyurethane grouting material under pressure. The grout seeps into the cracks in the roof and holds it together like glue. Jt. Ex. 1 at 3 Stip. 14; G. Ex. 15 at 9; G. Ex. 16 at 3, 9-10, 37, 69-70.

the mine's condition, and provided training on escapeways, self-contained self-rescuers (SCSRs), check in/check out and lock out/tag out procedures, mine communications, general hazards, and the general layout of the mine. Tr. 297-98, 300; R. Ex. 1. Eastern did not train the contract employees on its roof control plan, specifically the portion pertaining to roof grouting. 25 FMSHRC at 43.

On October 17, 2001, at approximately 5:10 a.m. on the midnight shift, Deoskey and Pawich were "gluing" (i.e., grouting) the roof when two pieces of the roof fell and struck Pawich. *Id.* at 31. The first, smaller piece hit Pawich in the head, stunning him and knocking him to the ground. *Id.* The second, larger piece landed on his right knee, crushing it and pinning him down. *Id.* Pawich received emergency treatment and was transported from the mine. *Id.* He received a permanently disabling injury to his knee. Tr. 83.

Two MSHA inspectors, David Sturgill and T. L. Workman, began conducting an investigation of the accident around 10:00 a.m. on October 17. 25 FMSHRC at 31. After viewing the accident scene and interviewing the witnesses, the inspectors issued five citations, which Eastern contested. *Id.*

The judge affirmed Citation No. 7195722, at issue in this appeal. *Id.* at 44. He rejected the Secretary's designation of the citation as significant and substantial under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), a ruling the Secretary did not appeal. *Id.* The judge also affirmed another citation, vacated the remaining three citations, and assessed a total penalty of \$874, the amount proposed by the Secretary for the two citations he affirmed. *Id.* at 44-45.

With regard to Citation No. 7195722, the judge noted that the evidence was undisputed that Eastern did not provide training on the portion of its roof control plan covering roof grouting to Micon employees Deoskey and Pawich before they performed the grout work. *Id.* at 43. The judge found that section 48.11(a)(3) required the operator to provide hazard training to independent contractors working at the mine infrequently or for short periods of time. *Id.* He also concluded that it was reasonable to expect that Eastern, during hazard training of the Micon employees, would cover the aspects of its roof control plan which specifically address the type of work that the Micon employees performed at the mine. *Id.* The judge rejected Eastern's argument that the standard was impermissibly vague. *Id.* at n.10. He also rejected Eastern's argument that training on its roof control plan's grouting procedures would be covered under task training pursuant to 30 C.F.R. § 48.7, and provided by Micon to its employees. *Id.* at 43.

Eastern filed a motion requesting oral argument. The Secretary filed a motion to strike a portion of Eastern's reply brief pertaining to its argument that the Commission should reconsider its position on deference to the Secretary's interpretation of a regulation. Mot. at 1-2. Eastern filed a response opposing the Secretary's motion. E. Opp'n at 1. The Commission denied the Secretary's motion to strike and heard oral argument on November 9, 2004. Unpublished Orders dated Oct. 20, 2004.

II.

Disposition

Eastern argues that the judge erred in his finding that it violated 30 C.F.R. § 48.11 by not providing training to Micon's employees on the polyurethane grouting provisions of its roof control plan, and maintains that it provided adequate hazard training to Micon's employees. PDR at 5-6; E. Br. at 6, 8. Eastern contends that the judge misconstrued section 48.11 by failing to take into account the overall regulatory scheme for training, which supports its position that its roof control plan was not required to be covered in hazard training under section 48.11, but rather would have been included within task training provided by Micon to its employees. PDR at 6-13; E. Br. at 11-17. Eastern asserts that the judge erred by concluding that the roof control plan's roof grouting provisions should have been part of hazard training, especially because its employees are not competent to provide such training since Eastern does not perform grout work. PDR at 8-9; E. Br. at 17-19. Eastern also contends that the regulation is impermissibly vague and therefore, fails to provide adequate notice. PDR at 13-15; E. Br. at 20-22.

The Secretary responds that the judge correctly held that Eastern violated section 48.11(a)(3) by failing to provide its independent contractors training on its roof control plan's grouting provisions during hazard training. S. Br. at 8. The Secretary contends that section 48.11 is ambiguous and that deference should be given to her reasonable interpretation of the standard. *Id.* at 8-10. She asserts that the judge correctly found that training in safe grouting procedures set forth in the roof control plan was to be covered in hazard training, and she argues that the approved and adopted roof control plan carries the same legal authority as a mandatory safety standard, which clearly falls under the terms of section 48.11(a)(3). *Id.* at 10-13. The Secretary maintains that the preamble to section 48.11 requires mine-specific conditions applicable to the miner's task be included in hazard training, that the roof control plan was mine-specific, and that Eastern was responsible for conveying such information to all employees working at its mine, including independent contractors. *Id.* at 14-23. The Secretary contends that Eastern failed to demonstrate that the regulation is impermissibly vague, and asserts that a reasonably prudent mine operator would understand that the regulation required Eastern to train Micon's employees on the portion of its roof control plan pertaining to the type of work that Micon was hired to perform. *Id.* at 26-29.

Eastern replies that the provisions of the roof control plan relating to grouting procedures are not specific to its mine and thus, are not appropriate material for hazard training. E. Reply Br. at 1-5. Eastern disputes that the regulation is ambiguous and purports that the Secretary's interpretation is not entitled to deference nor is her interpretation reasonable because it defeats the safety purpose of the regulation. *Id.* at 7-9. It further contends that the Commission should not defer to the Secretary because the bifurcated scheme of the Mine Act created the Commission as an independent body with specific jurisdiction and policy-making authority. *Id.* at 9-13.

A. Interpretation of 30 C.F.R. § 48.11

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 Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

Section 48.11 requires an operator to provide hazard training to miners defined under 30 C.F.R. § 48.2(a)(2), which includes any "short-term maintenance or service worker contracted by the operator." The regulation further requires that such training provide instruction on "health and safety standards, *safety rules*, and *safe working procedures*" related to a miner's duties before such miner commences work. 30 C.F.R. § 48.11(a)(3) (emphasis added). It is undisputed that Micon's employees fall under the definition of miner in section 48.2(a)(2), and that Eastern was required to provide hazard training to Micon's employees prior to their performing roof grouting at the Harris Mine. *See* 25 FMSHRC at 43. However, the parties dispute whether hazard training of Micon's employees should have included Eastern's roof control plan's grout provisions.

Because section 48.11 does not explicitly address whether hazard training must include provisions of a mine's roof control plan, we conclude that the language of section 48.11 is ambiguous as to its application to the facts of this case. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 693 (July 2002) (concluding that the regulation was ambiguous where its plain language did not address fact situation at issue). We must determine whether the Secretary's interpretation is reasonable. *Cannelton Indus., Inc.*, 26 FMSHRC 146, 159 (Mar. 2004) (Comm'r Jordan, dissenting) ("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.") (citing *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)).

In analyzing the reasonableness of the Secretary's interpretation, we begin with the language of the regulation. Section 48.11 specifies that an operator provide hazard training on safe working procedures and health and safety standards that are "applicable to the duties of such miners." Thus, the language of the regulation indicates that an operator is required to tailor its hazard training to the work of the miner being trained. Where a miner is engaged in limited work in an area that presents fewer hazards, that miner would receive less comprehensive hazard training.

The Secretary's intent with regard to the language of the regulation is further evidenced by the preamble that accompanied the publication of the final training rules in the Federal Register. 43 Fed. Reg. 47,454 (1978). The Secretary addressed the particular problems posed by the training needs of contract miners and service maintenance workers. *Id.* at 47,454-55. The Secretary stated, in explaining her approach to training these miners:

Such workers, if not given any training, could expose not only themselves but other miners to unnecessary risks. These workers should, therefore, have periodic instruction concerning the hazards they may encounter from time to time at the extraction or production site. Accordingly, MSHA has added sections . . . which would require the operator to acquaint such individuals with the specific hazards they may confront at the mine.^[3]

Id. at 47,455. The Secretary further addressed the unique problem of "specialized contract" miners who "come onto mine property for short duration to perform their tasks and then move to other sites." *Id.* The Secretary noted, "They are skilled at their particular tasks and need only be acquainted with the specific hazards they may encounter at the mine site." *Id.* Thus, it is apparent that the Secretary intended that hazard training for these miners be altered, when necessary, to fit the nature and location of their tasks.

MSHA's published guidance regarding this regulatory scheme is consistent with this approach to hazard training. In MSHA's Program Policy Manual, the Secretary explains that hazard training is specific to the duties of the miner and involves training on hazards that a miner may encounter in performing his or her job at a particular mine. III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 48, at 14b and 25 (1990) ("PPM"). Regarding hazard training requirements for independent contractors pursuant to sections 48.2(a)(2) and 48.11, the Secretary explained that:

Independent contractor exposure to hazards varies from situation to situation. Hazard training must be tailored to fit the training needs

³ The scope of the hazard training for this category of miners varies depending on the nature and location of their duties. Indeed, as the Secretary noted, in some instances a "checklist" of hazards would suffice. 43 Fed. Reg. at 47,455.

of the particular contractor. Training these contractors receive must be of sufficient content and duration to thoroughly cover the mine-specific conditions, procedures, and safety devices. Training must include hazards incident to the performance of all job assignments by the contractor at the mine.

III *PPM*, Part 48, at 14b. Thus, an operator is required to tailor its hazard training of contract employees according to their work and conditions under which they perform. Here, Micon's employees were performing a task for which Eastern's roof control plan contained certain mine-specific requirements, i.e., the installation of sag meters and supplemental supports. *See* 25 FMSHRC at 31; G. Ex. 6 at 30. The language and intent of the regulation indicate that mine-specific hazards, safety standards and procedures that pertained to the task of grouting would be appropriately addressed in their hazard training.

In the preamble to the publication of the final training rule, the Secretary explained that "[t]hese rules are intended to insure that miners will be effectively trained in matters affecting their health and safety, with the ultimate goal of reducing the frequency and severity of injuries in the Nation's mines." 43 Fed. Reg. at 47,454. Applying the hazard training regulation to require a mine operator to train its contractors' miners on mine-specific safety matters fully effectuates this purpose. Eastern had included in its roof control plan the requirement to follow certain safety procedures for grouting work, in particular, the use of temporary roof supports and sag devices. Micon's task training could not be expected to include mine-specific hazards and conditions, such as those addressed in the roof control plan.⁴ Thus, Eastern was required to insure that the Micon employees received adequate hazard training on the safety procedures contained in its roof control plan that pertained to the task that they were to perform. Had Eastern provided to Micon the relevant portions of its roof control plan, the Secretary contends it would have satisfied its hazard training requirement under section 48.11. Oral Arg. Tr. 55-56. In short, the Secretary's interpretation of the hazard training regulation represents a common-sense application of the training regulations under the facts of this case.⁵

⁴ Specialist contractors, such as Micon, who may perform work at dozens of individual mines each year, would be challenged to keep abreast of the continually changing hazards, rules and procedures at each of these mines. Thus, hazard training must, for very practical reasons, be the responsibility of the mine operator.

⁵ Commissioners Suboleski and Young believe that MSHA's inclusion in the roof control plan of what is essentially a task training obligation under Part 48, most of which does not concern roof control, appears to have contributed to Eastern's confusion over whether the document applied to contractors or to only Eastern's own employees who required task training. Further, the length and variety of the content in the document obscured the two critical elements that pertained to the hazard training of Micon's employees - the requirement to install safety posts and sag meters. While the operator is properly held accountable for its failure to provide the information to its contractors, Commissioners Suboleski and Young hope that the Secretary

Eastern contends that its employees are not competent to provide such training. However, the operator's primary role in the hazard training of contractors should be to provide mine-specific safety information. While it may or may not, for example, be true that Eastern could not competently train the Micon employees in the installation of a sag meter, Eastern was nonetheless responsible for informing the Micon miners of the mine-specific requirement to install sag meters any time that grouting was being performed.⁶

Based on the foregoing, we conclude that the Secretary's interpretation of section 48.11, requiring Eastern to train the Micon employees on certain provisions of its roof control plan relevant to the tasks the contract employees were to perform, is reasonable.

B. Notice

Eastern argues that section 48.11 is impermissibly vague and fails to provide adequate notice regarding the scope of hazard training. PDR at 13-15; E. Br. at 20-22. The Secretary argues that Eastern has failed to demonstrate that the regulation is impermissibly vague and that a reasonably prudent mine operator would understand that the regulation required Eastern to train Micon's employees on the portion of its roof control plan pertaining to the type of work that Micon was hired to perform. S. Br. at 26-29. However, the record indicates that Eastern had actual notice of its obligation to train the Micon employees regarding its roof control plan.

MSHA required Eastern to include provisions in the plan covering grouting even though Eastern's miners never performed such work. 25 FMSHRC at 39; Tr. 336-37. The plan explicitly required that the operator provide training in safe grouting procedures. G. Ex. 6 at 29. Section C of the grouting provisions in the plan entitled "Training," states that "[a]ll persons working directly with the polyurethane grouting process . . . shall be properly trained in the approved plan requirements, hazards, [and] safety precautions . . ." *Id.* (emphasis added). By the very terms of its plan, therefore, Eastern was required to train all miners performing grout work in its mine on the plan's requirements, including the use of temporary supports and sag devices.⁷ *Id.* at 29-33. Thus, Eastern had actual notice of the requirement that it train Micon miners in safe grouting procedures.

will more clearly and directly communicate required action to operators, making both compliance and enforcement easier and more certain.

⁶ Micon employee Deoskey testified that he did not routinely use either of the safety devices specified in Eastern's roof control plan when performing his grouting work, but did so only on a mine-specific basis, when conditions warranted. G. Ex. 16 at 64-65. In this case, the Secretary has made a determination that mine conditions required specific safety precautions, which were required under the mine's roof control plan. G. Ex. 6 at 30.

⁷ For Micon's workers, only the special features that are pertinent to hazard training were required.

Additionally, the roof grouting provisions in Eastern's roof control plan specifically identified two roof control requirements, the use of temporary supports and sag devices, which Eastern was required to follow in roof grouting work at the Harris Mine. G. Ex. 6 at 30. These requirements fit into the category of "safe working procedures" and "safety rules," which are subjects required to be covered under hazard training. Based on the nature of the material in the roof control plan concerning grout work, Eastern had actual notice that, under its roof control plan, it was required to train or see that Micon trained its employees on the plan's requirements related to roof grouting.

Further, under the circumstances of this case, Eastern had constructive knowledge of its obligation to train the Micon employees on its roof control plan pursuant to section 48.11. Section 48.11, as reflected in the preamble in the Federal Register and the PPM, provided Eastern notice of the application of the regulation to the facts in this case. *See* discussion *supra*, slip op. at 6-7. As the Secretary explained in the preamble and the PPM, such training must be tailored to the duties of the miner receiving training and must address the circumstances applicable to the mine in which the work is to be performed.⁸ *See* 43 Fed. Reg. at 47,454-55; III PPM, Part 48, at 14b. This constructive notice is sufficient to satisfy any due process concerns.

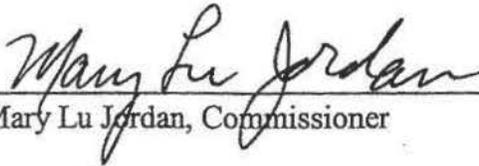
Accordingly, because Eastern had both actual notice and constructive notice of its obligation to see that Micon's employees were trained in the roof control plan, we reject Eastern's contention that the regulation is unconstitutionally vague.

⁸ Eastern argues that, because MSHA's district manager forced inclusion of the grouting provision onto all mines in the district, the provision is not specific to the Harris Mine, and is thus not required for hazard training. Eastern could have refused to add this provision and litigated the issue of being forced to include non-mine-specific items in its roof control plan before the Commission. *See, e.g., RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 77 (Feb. 2004). However, it did not do so and now must abide by the provision it adopted.

III.

Conclusion

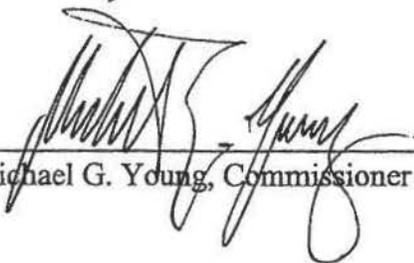
Accordingly, we affirm the judge's decision.



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Chairman Duffy, dissenting:

This is a simple case made unduly complex by the Secretary's enforcement choices. Finding those choices to be unwarranted and, arguably, a case of regulatory overreaching, I respectfully dissent.

The facts themselves are straightforward. Eastern Associated Coal Corporation ("Eastern") encountered hazardous roof conditions in the No. 4 entry of the company's No. 1 Mine. 25 FMSHRC 30, 31 (Jan. 2003) (ALJ). Not possessing the unique expertise to address the problem, Eastern contracted with ESS/Micon ("Micon") to rehabilitate the entry by injecting grout into the unsound roof. *Id.* Prior to proceeding, however, Eastern agreed to an amendment to its roof control plan, proffered by MSHA, which set forth specific guidelines, the compliance with which was necessary to secure MSHA's approval of the grouting activity.¹ *Id.* at 39. The plan was amended, the contract was let, and prior to the commencement of the work by Micon, Eastern's Training Specialist, John Knabb, provided what he considered adequate and appropriate hazard training to Micon's employees.² Tr. 312-15.

Early in the course of the grouting procedure, Tyler Pawich, a Micon employee, was seriously injured by a roof fall, and authorized representatives of the Secretary investigated. As a result of that investigation, MSHA determined that Eastern's roof control plan had been violated on three counts: (1) employees were not trained as to the grouting provisions of the roof control plan in contravention of Section C(1) of the plan; (2) adequate temporary supports were not installed in contravention of Section E(2) of the plan; and (3) sag devices were not installed in contravention of Section E(3) of the plan.

In citing Eastern for violating 30 C.F.R. § 75.220(a)(1), which governs the development and approval of roof control plans, MSHA included only counts (2) and (3). Count (1), the training violation, was instead cited several days later under 30 C.F.R. § 48.5(a), which mandates 40 hours of training for new miners. 25 FMSHRC at 42 n.9.³ That citation was subsequently

¹ Eastern considers the mine plan amendment to have been unilaterally imposed upon it without much opportunity for recourse and with little or no thought as to whether it was tailored specifically to the conditions in the No.1 Mine. Indeed, it appears that the guidelines are an off-the-shelf set of generic requirements that MSHA imposes as a matter of course. That issue is not before the Commission, however, inasmuch as Eastern acceded to the agency's demand without lodging a legal challenge at the time the guidelines were adopted.

² Mr. Knabb had 24 years experience as a certified training specialist. Tr. 291. If anyone can be considered an expert witness as to the scope and application of the training regulations in this case, it would be Mr. Knabb.

³ The record establishes that Micon's employees had received all the comprehensive new miner training and refresher training required under the regulations. *See E. Br.* at 7.

modified to allege a violation of 30 C.F.R. § 48.11, which requires hazard training for persons working in an underground mine. 25 FMSHRC at 41-42 & n.9:

There should be no distinction between the training violation and the other two violations; they are all subsumed in Citation No. 3568565, which charges a violation of section 75.220(a)(1). The upshot of the Secretary's enforcement decision to cite the hazard training regulation in addition to the roof control plan standard constitutes, for lack of a better term, "double dipping" with respect to the training violation. In other words, applying the logic used by the Secretary to justify the citation of a violation under section 48.11, should Eastern have been cited for a violation of Section E(2) of the roof control plan as well as for a violation of 30 C.F.R. § 75.210 since both provisions govern the installation of temporary roof support? Likewise, should double citations have been issued for violations of Section E(3) of the roof control plan and 30 C.F.R. § 75.214, since both provisions address requirements for the use of supplemental roof support materials, e.g., sag devices?

The answer, of course, is "no" in each instance. Duplicate citations for the same violative condition are foreclosed under well-established case law holding that the Secretary cannot issue separate citations under two different standards unless those standards "impose separate and distinct duties" upon an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003 (June 1997); *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993).⁴

Here, the parties have stipulated that hazard training was provided by Eastern; the dispute is whether it was adequate. However, the Secretary is asserting that section 48.11 was violated only to the extent that Eastern did not train Micon's employees regarding the grouting requirements set forth in the amendment to the roof control plan – precisely the requirement set forth in Section (C)(1) of the plan. Section 48.11 did not impose separate and distinct duties upon Eastern that were not already imposed by Section (C)(1) of the roof control plan. The invocation of section 48.11 by the Secretary was superfluous and contrary to the principles adopted by the Commission in the cases cited above.

Of equal concern are the lengths to which the Secretary has gone in order to characterize the training at issue here as "hazard" training. Mr. Knabb, the expert witness in this case, testified that training employees in the particulars of the grouting guidelines is intrinsically a type of task training, not hazard training. MSHA's witness, inspector Sturgill, in essence, agreed. Tr. 102-03 (defining task training as "the training on a specific job that you're going to be doing" and agreeing with Eastern's counsel that "the roof control plan tells you how to do the job of

⁴ It could be argued that the Commission's decision in *Western Fuels-Utah* also supports the proposition that when two standards – one general and one specific – address the same condition, the specific standard is the more appropriate one to cite. "Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence . . . used to support the violation of the specific standard, we would not have found them duplicative." 19 FMSHRC at 1004 n.12.

injecting grout into the roof safely”). Unfortunately, MSHA’s task training regulation applies only to machinery and equipment operators or those engaged in blasting operations, and then only if they are being assigned to those duties for the first time. 30 C.F.R. § 48.7. It would appear that, notwithstanding the existence of a precise, on-point, mandatory standard expressly aimed at the training sought to be provided in this case, i.e., Section (C)(1) of the roof control plan, the Secretary has adopted section 48.11 as a default standard even though it is counterintuitive to hold that instruction on how to go about performing a task is “hazard training.”

Regulated persons – be they human or corporate – who are subject to civil or even criminal sanctions for their transgressions are entitled to know, in advance, precisely what their government expects of them. Thus, the Commission has consistently held that due process requires that the Secretary provide mine operators adequate notice of their compliance responsibilities with regard to mandatory safety and health standards. *E.g., Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The most compelling reason for citing Eastern under section 75.220(a)(1), and, by implication, under Section (C)(1) of the roof control plan, is that it eliminates the issue of whether Eastern had adequate notice of its responsibilities to train Micon’s employees under the training regulations or to see that they were trained in the particulars of the grouting requirements incorporated into Eastern’s plan.

On the other hand, in order to uphold a citation under section 48.11, one must accept the Secretary’s amphibological premise that 30 C.F.R. § 48.11(a)(3) is simultaneously “ambiguous,” S. Br. at 8-9, and “not impermissibly vague,” S. Br. at 26. One must also accept the Secretary’s expansive and contorted conception of hazard training arrived at by connecting random interpretive dots lurking in various hideaways in the regulatory history and subsequent policy pronouncements. Lastly, one must accept that the Secretary’s interpretation as to the scope of section 48.11(a)(3), only now fully revealed on review, should have been readily apparent to Eastern prior to the events giving rise to this proceeding.⁵

Adequate notice of Eastern’s training responsibilities for the Micon employees was clearly provided when the Secretary required that Section(C)(1) be incorporated into Eastern’s roof control plan. Had the Secretary referenced that section in the citation alleging a violation of 30 C.F.R. § 75.220(a)(1), I would have no hesitation in upholding it.⁶ The requisite notice is

⁵ The Secretary’s assertion that Eastern should have anticipated that section 48.11 would be applied in the manner argued here would be more convincing if MSHA had cited that section in the first place. MSHA’s confusion surrounding the proper training provision to cite in the week following the investigation belies any notion that the application of section 48.11 to the circumstances in this case should have been obvious to a “reasonably prudent person.” *See Alabama By-Products*, 4 FMSHRC at 2129.

⁶ Eastern essentially argues that it would be illogical to expect an operator who lacks the expertise in a specialty such as roof grouting to train the employees of an independent contractor

lacking, however, with respect to a citation charging a violation of section 48.11(a)(3) under which MSHA has had to employ exegetical jujitsu to make the standard fit the offense.⁷

Accordingly, I would reverse the decision below.



Michael F. Duffy, Chairman

in the arcana of that process. After all, it is the operator's lack of practical knowledge and experience that compels contracting out the activity in the first place. That may well be true, but, as the Secretary argues, Eastern's responsibility in this regard could have been met simply by providing Micon and its employees with a copy of the grouting guidelines that the operator agreed to incorporate into its roof control plan. Oral Arg. Tr. 55.

⁷ I agree with two of my colleagues who express a hope that "the Secretary will more clearly and directly communicate required action to operators, making both compliance and enforcement easier and more certain." Slip op. at 7-8 n.5. I strongly suspect, however, that if this particular citation is upheld, any incentive to provide that guidance will be lost. Indeed, it seems to me that, in the future, whenever something untoward happens to an employee of an independent contractor, and notwithstanding the employee's having been fully trained by his own employer as to the safety aspects of his job, MSHA will be motivated to assert post hoc that the operator's hazard training must have been deficient in some fashion. I doubt whether that advances the cause of accident prevention, particularly when, as is the case here, there is an explicit requirement to provide training in the task to be performed that the Secretary has ignored.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2005

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2005-190-M
 : A.C. No. 35-03260-43979 J874
 :
AMERICAN ON SITE; JEREMIAH INC. :

BEFORE: Duffy, Chairman; 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. (2000) (“Mine Act”). On February 14, 2005, the Commission received from American On Site; Jeremiah Inc. (“AOS-Jeremiah”) a letter that 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).

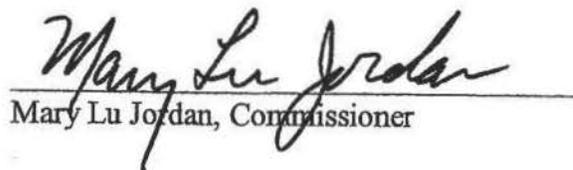
On November 26, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) served a proposed penalty assessment (A.C. No. 35-03260-43979 J874) to AOS-Jeremiah, which was shown as a contractor on the proposed assessment (the mine name is shown as Harvey W. Buche Road Building, Inc.). In the letter, AOS-Jeremiah’s president, David Bush, inquires about the status of the penalty assessment. He also refers to prior correspondence relating to another case. The Secretary states that she does not oppose AOS-Jeremiah’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 AOS-Jeremiah’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 the company’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



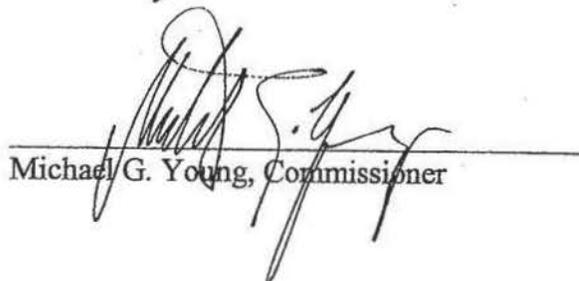
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 18, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2005-188-M
ADMINISTRATION (MSHA)	:	A.C. No. 26-00002-24523
	:	
v.	:	Docket No. WEST 2005-189-M
	:	A.C. No. 26-00002-27057
PREMIER CHEMICAL LLC	:	

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

ORDER

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").¹ On February 10, 2005, the Commission received from Premier Chemical LLC ("Premier") two letters addressed to the Department of Labor's Mine Safety and Health Administration ("MSHA") inquiring as to the status of MSHA's proposed penalty assessments designated A.C. No. 26-00002-24523 and A.C. No. 26-00002-27057. Both penalty assessments had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). We construe the letters as requests that the Commission reopen the penalty assessments.

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).

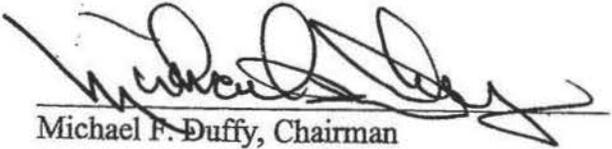
MSHA issued the proposed assessments on April 15, 2004 (No. 26-00002-24523) and May 13, 2004 (No. 26-00002-27057). Attached to Premier's requests are letters from MSHA's

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2005-188-M and WEST 2005-189-M, both captioned *Premier Chemical LLC* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

Office of Assessments. As to No. 26-00002-24523, MSHA explains to Premier that although the company attempted to contest the proposed penalty, it did not do so in a timely manner (the deadline for the contest was May 27, 2004, but MSHA did not receive Premier's contest until June 3, 2004, five days late). Similarly, as to No. 26-00002-27057, MSHA explains to Premier that its contest of the proposed penalty was untimely filed with MSHA (the deadline for the contest was June 23, 2004; MSHA received Premier's contest on July 14, 2004, 21 days late). Premier did not provide any other supporting documentation, nor did it offer any explanation of why it failed to contest the penalty proposals in a timely fashion. The Secretary states that she does not oppose Premier'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 Premier'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 Premier's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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 18, 2005

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

v.

TWENTYMILE COAL COMPANY

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Docket No. WEST 2002-194

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

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

In this civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”), Administrative Law Judge Richard W. Manning determined that owner-operator Twentymile Coal Company (“Twentymile”) had been properly cited for six violations of mandatory safety standards committed by its independent contractor, Precision Excavating, Inc. (“Precision”). 25 FMSHRC 352, 358-62 (July 2003) (ALJ). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) had cited Precision for the same conditions described in the citations issued to Twentymile. *Id.* at 353. The Commission granted Twentymile’s subsequent petition for discretionary review of the judge’s decision. For the reasons set forth below, we reverse the judge’s decision and vacate the citations issued to Twentymile.

I.

Factual and Procedural Background

Twentymile operates the Foidel Creek Mine, an underground coal mine in Routt County, Colorado. 25 FMSHRC at 352. Twentymile hired Precision to remove clay from the No. 2

¹ Commissioner Beatty participated in the consideration of this matter, but his term expired before issuance of this decision.

refuse pile, which was located on the surface area of the mine. *Id.* at 355. Precision operated a pan scraper and service truck to perform its duties at the refuse pile. *Id.* at 353. Twentymile did not own, operate, or maintain that equipment. *Id.*

On August 30, 2001, MSHA Inspector Michael Havrilla inspected the surface areas of the mine, including the No. 2 refuse pile. *Id.* at 355. During his inspection, the inspector observed Precision employees operating the service truck at the refuse pile. *Id.* at 356. At that time, Precision employees had been working at the refuse pile for about one week. Tr. 40. Inspector Havrilla inspected the service truck and concluded that he would issue five citations to Precision alleging the following violations: (1) a violation of 30 C.F.R. § 77.412 because the service truck had an inoperable pressure gauge on the air compressor; (2) a violation of 30 C.F.R. § 77.400(a) because there was a ten-by-ten inch opening on the compressor which would allow contact with the drive belts and pulley; (3) a violation of 30 C.F.R. § 77.1110 for failure to examine a fire extinguisher on the service truck at least once every six months; (4) a violation of 30 C.F.R. § 77.1103(a) because there were three unlabeled metal containers of gasoline on the service truck; and (5) a violation of 30 C.F.R. § 77.1103(a) because a plastic container of gasoline on the service truck did not meet National Fire Protection Association requirements. 25 FMSHRC at 356.

When Inspector Havrilla discussed the alleged violative conditions with Precision's lead man, he discovered that Twentymile had not examined Precision's equipment when the equipment was first brought onto the property. *Id.* The inspector decided to speak with Diane Ponikvar, a safety representative with Twentymile. *Id.* As the inspector was driving to the mine office, he observed that the diesel fuel tank of Precision's pan scraper was leaking, and he told the scraper's operator to shut down the equipment. *Id.* The inspector issued an additional citation alleging a violation of 30 C.F.R. § 77.404 to Precision because the scraper was being operated in an unsafe condition due to the leaking fuel tank. *Id.*

When the inspector arrived at the mine office, he informed Ms. Ponikvar of the conditions that he had observed and that he would be issuing the six citations to Precision. Tr. 37, 103. Ms. Ponikvar contacted Precision personnel and directed them to remove their equipment to the parking lot. 25 FMSHRC at 356; Tr. 37-38. She informed Precision employees that they would have to abate the citations and that Twentymile would examine the equipment before it would be allowed back on-site. 25 FMSHRC at 356; Tr. 37. The inspector then informed Ponikvar that he was issuing the same citations to Twentymile. 25 FMSHRC at 356; Tr. 103, 105. The inspector testified that he believed that it was appropriate to cite Twentymile in part in order to address a problem he perceived with contractor violations at the mine and because citing Twentymile would bring more attention to the violations. 25 FMSHRC at 359, 361; Tr. 33-35, 42; Gov't Ex. 2 at p. 20. Ms. Ponikvar testified that the inspector told her that he was citing Twentymile in order to teach it a lesson regarding its failure to inspect the equipment. 25 FMSHRC at 361; Tr. 105.

Twentymile challenged its six citations and the matter proceeded to hearing before Judge Manning. Twentymile and the Secretary of Labor entered into a number of stipulations. They stipulated that the issue before the judge was whether it was appropriate for the Secretary to cite Twentymile for the conditions described in the citations. 23 FMSHRC at 353. The parties further stipulated that if the judge determined that Twentymile had been properly cited, the parties agreed to the designations set forth in the citations, and that the penalties proposed by the Secretary were consistent with section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *Id.*

The judge affirmed the six citations issued to Twentymile. *Id.* at 362. The judge reasoned that the Secretary did not abuse her discretion in citing Twentymile, based upon the inspector's belief that there was a problem with contractor violations at the mine and that citing Twentymile would bring more immediate attention to the problem. *Id.* at 359, 361. The judge determined that, although the inspector's enforcement decision was subjective rather than based on an objective, comprehensive analysis of contractor violations at the mine, such action did not rise to the level of arbitrary or capricious action sufficient to support a finding of abuse of discretion. *Id.* at 361. The judge reasoned that the inspector believed that the conditions needed to be brought to Twentymile's attention because they were obvious and he learned that the equipment had not been inspected by Precision or Twentymile. *Id.* at 359, 361.

In addition, the judge concluded that the citations fit within the first and fourth factors set forth in MSHA's enforcement guidelines used by inspectors to determine when an owner, in addition to an independent contractor, ought to be cited for the contractor's violation. *Id.* at 359-60 (citing III MSHA, *Program Policy Manual*, Part 45, 45 Fed. Reg. 44,494, 44,497 (July 1, 1980) ("Enforcement Guidelines")). As to the first factor, whether the owner-operator contributed to the violation by act or omission during the course of the independent contractor's work, the judge concluded that Twentymile contributed to the equipment violations by failing to inspect the equipment or to ensure that Precision inspected it. *Id.* As to the fourth factor, whether the owner had control over the condition requiring abatement, the judge concluded that Twentymile controlled the equipment by reserving the right to remove the equipment from the site and by inspecting other contractor equipment during safety audits. *Id.* at 360. Accordingly, the judge assessed civil penalties in the sum of \$900, the amount proposed by the Secretary. *Id.* at 362.

Twentymile filed a petition for discretionary review challenging the judge's decision, which the Commission granted. In addition, Twentymile filed a request for oral argument. The Commission granted the request and heard oral argument on June 29, 2004.

II.

Disposition

A. Whether the Secretary May Issue Dual Citations under the Mine Act

Twentymile asserts that it should not be held liable for the violations committed by its independent contractor, Precision. T. Br. at 8-29. Twentymile argues that sections 3(d) and 104(a) of the Mine Act, 30 U.S.C. §§ 802(d) and 814(a), clearly provide that an operator is liable for only its own violations, and that court and Commission precedents holding that an owner-operator may be held liable for the violations of independent contractors are contrary to such statutory language.² *Id.* at 8-9; T. Reply Br. at 3-4. It maintains that the definition of “operator” set forth in section 3(d) of the Mine Act was expanded to include independent contractors in order to require that independent contractors be held liable for their own violations as “fully responsible operators.” T. Br. at 9-10, 13, 15; Oral Arg Tr. 20, 60-61. The Secretary responds that she has the authority to cite an owner-operator, independent contractor or both for a violation by an independent contractor, and that her interpretation of the Mine Act is entitled to deference and should be accepted because it is a permissible statutory construction S. Br. at 5-6, 7-17.

Since passage of the Mine Act, the Commission and courts have consistently recognized that, in instances of multiple operators, the Secretary generally may proceed against an owner-operator, an independent contractor, or both, for violations by the independent contractor.³ *See, e.g., Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359-60 (Sept. 1991); *Old Ben Coal Co.*, 1

² Section 3(d) of the Mine Act defines “operator” as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). Section 104(a) describes the manner in which the Secretary may issue a citation to an operator, stating in part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that *an operator* of a coal or other mine subject to this Act, has violated this Act, or any mandatory health or safety standard, . . . he *shall*, with reasonable promptness, *issue a citation to the operator.*

30 U.S.C. § 814(a) (emphasis added).

³ Prior to passage of the Mine Act, the Commission and courts concluded that provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), generally permitted the Secretary to cite an owner-operator, independent contractor, or both, for violations by the independent contractor. *See Republic Steel Corp.*, 1 FMSHRC 5, 9-11 & n.13 (Apr. 1979); *Bituminous Coal Operators’ Ass’n, Inc. v. Sec’y of Interior*, 547 F.2d 240, 246-47 (4th Cir. 1977).

FMSHRC 1480, 1483 (Oct. 1979); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998), 1998 WL 3613, **2. The Commission and courts have reached this conclusion by reading section 3(d) together with other enforcement provisions of the Mine Act⁴ and by relying upon pertinent legislative history.⁵ See *Old Ben*, 1 FMSHRC at 1481-83; *Cyprus*, 664 F.2d at 1119; *Brock v. Cathedral Bluffs Shale Oil Co.*, 976 F.2d 533, 535 (D.C. Cir. 1986). In so holding, courts have rejected the argument advanced by Twentymile in this proceeding that independent contractors were added to the definition of “operator” in section 3(d) of the Mine Act in order to “insure that the party controlling the work would be held *solely* responsible” for its violations. *Cyprus*, 664 F.2d at 1119 (emphasis in original); T. Br. at 9-10. Courts have explained that, by expanding the definition of operator to include independent contractors, “Congress was clearly concerned with the *permissive* scope of the Secretary’s authority, not with the *mandatory* imposition of statutory duties on independent contractors.” *Nat’l Indus. Sand Ass’n v. Marshall*, 601 F.2d 689, 703 (3d Cir. 1979) (“NISA”) (emphasis in original); see also *Cyprus*, 664 F.2d at 1119. We therefore conclude that Twentymile has not advanced a compelling reason for overturning a body of precedent that spans nearly twenty-five years.⁶

⁴ See, e.g., *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 797 (4th Cir. 1981) (citing section 110(a) of the Mine Act, 30 U.S.C. § 820(a), which provides that “the operator of a . . . mine in which a violation occurs . . . shall be assessed a civil penalty by the Secretary.”).

⁵ We disagree with Twentymile’s assertion that it is inappropriate to consult legislative history and that, in any event, the legislative history does not support dual citations. T. Br. at 12-14; T. Reply Br. at 6-9. The Commission and courts have recognized that consulting legislative history is appropriate as an aid to construction, even when the meaning of the statutory language is plain. See, e.g., *Jim Walter Res., Inc.*, 22 FMSHRC 21, 24 & n.5 (Jan. 2000); *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44, 46 (D.C. Cir. 1990). Moreover, courts have relied upon the subject legislative history as support for the conclusion that an operator may be cited for the violations of its independent contractor. *Cyprus*, 664 F.2d at 1119; *Cathedral Bluffs*, 796 F.2d at 535.

⁶ Be that as it may, we are mindful of the fact that the same quarter-century following passage of the 1977 Act has provided independent contractors such as Precision more than sufficient notice of their responsibilities to provide their miners with a safe and healthful workplace in conformance with the Act and the mandatory safety and health standards. Recognition of that fact must necessarily be considered in determining the appropriate allocation of liability for violations committed by contractors while performing services on mine property. Thus, for example, the assumption made by the court in *Cyprus*, 664 F.2d at 1119, that mine operators are in a better position than contractors to know the compliance responsibilities under the Act and the standards, no longer applies to a contractor such as Precision which has extensive experience under the Mine Act.

B. Whether the Secretary Has Unreviewable Discretion

The Secretary argues that her decision to cite Twentymile for Precision's violations is essentially unreviewable by the Commission because there is no meaningful standard against which to review her exercise of discretion. S. Br. at 6, 17-23. Twentymile responds that the Mine Act authorizes the Commission to review the Secretary's exercise of discretion. T. Reply Br. at 13-15. Consistent with our precedent, we reject the Secretary's argument. *Old Ben*, 1 FMSHRC at 1484; *W-P Coal Co.*, 16 FMSHRC 1407, 1410-11 (July 1994).

In asserting that she has unreviewable enforcement authority, the Secretary relies upon cases such as *Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985), and its progeny that involve preclusion of review under section 701(a)(2) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2). As the Commission has previously recognized, section 507 of the Mine Act⁷ expressly provides that section 701 of the APA does not apply to Commission proceedings. *Old Ben*, 1 FMSHRC at 1483-84. Thus, we find such authority cited by the Secretary to be inapplicable.

Furthermore, the Mine Act does not contemplate that the Secretary's enforcement decisions are unreviewable by the Commission. Section 113 of the Mine Act, 30 U.S.C. § 823, contains no limits on the Commission's review on questions pertaining to the exercise of the Secretary's enforcement discretion.⁸ To the contrary, the breadth of the Commission's review is broad. The Commission, in its discretion, may grant review if a "substantial question of law, policy or discretion is involved" (30 U.S.C. § 823(d)(2)(A)(ii)(IV)), and the Commission's review authority extends to cases in which no party has filed a petition for review (30 U.S.C. § 823(d)(2)(B)).⁹

⁷ Section 507 of the Mine Act provides that, "Except as otherwise provided in this Act, the provisions of . . . sections 701-706 of [5 U.S.C.] shall not apply to the making of any order, . . . or decision made pursuant to this Act, or to any proceeding for the review thereof." 30 U.S.C. § 956.

⁸ Section 104(h) of the Mine Act further detracts from the Secretary's argument that she has unreviewable enforcement discretion. Section 104(h) provides that any citation or order issued under that section "shall remain in effect until modified, terminated or vacated by the Secretary or [her] authorized representative, *or modified, terminated or vacated by the Commission or the courts pursuant to section 105 or 106.*" 30 U.S.C. § 814(h) (emphasis added).

⁹ Issues involving the question of whether the Commission may review the Secretary's enforcement discretion pertain to the Commission's jurisdiction, and the Commission is not required to defer to the Secretary's interpretation of Commission jurisdiction. *W-P*, 16 FMSHRC at 1410; *Drummond Co.*, 14 FMSHRC 661, 674 n.14 (May 1992); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993).

The Commission has explained that these powers were given to the Commission as the “ultimate administrative review body” under the Act in order to “enable [the Commission] to ‘develop a uniform and comprehensive interpretation of the law,’ providing ‘guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.’” *Old Ben*, 1 FMSHRC at 1484 (citations omitted). As the Commission has reasoned, these “provisions demonstrate that the Commission was intended to play a major role under the [Mine] Act by reviewing the Secretary’s enforcement actions and formulating mine safety and health policy on a national basis.” *Id.* Given the Commission’s unique and independent role under the Mine Act, we reaffirm our prior holdings and conclude that the Commission’s review of the Secretary’s action in citing an operator is appropriate to guard against an abuse of discretion. *Id.*; *W-P*, 16 FMSHRC at 1411.

C. Whether the Secretary Abused Her Discretion in Citing Twentymile

Twentymile maintains that the Secretary abused her discretion in citing Twentymile – in addition to its independent contractor Precision – for the six violations committed by Precision. T. Br. at 19-29. Twentymile argues that the Secretary exercised her discretion in such a way as to deviate from her own policy guidelines for taking enforcement actions against independent contractors, that she failed to consider the proper factors in determining whether to cite a production-operator for an independent contractor’s violation, and that the MSHA inspector did not conduct a proper investigation of whether independent contractor violations were a serious problem at the mine before issuing the citations. The Secretary answers by contending that issuance of the citations to Twentymile was consistent with MSHA’s Enforcement Guidelines, *supra* at 3, and that Twentymile has otherwise failed to meet its burden of showing an abuse of discretion. S. Br. at 24-30.

The Commission has held that the general test to be used in determining whether a production-operator has improperly been cited for violations committed by its independent contractor is whether the Secretary has committed an “abuse of discretion” in issuing such citations.¹⁰ *Mingo Logan*, 19 FMSHRC at 249; *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan. 1998). In applying this general test, the Commission must determine whether the Secretary’s decision to cite the production-operator for violations committed by its independent contractor “was made for reasons consistent with the purpose and policies” of the Mine Act. *Old Ben*, 1 FMSHRC at 1485; *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982); *Extra Energy*, 20 FMSHRC at 5.

¹⁰ As explained by the Commission, “[a]buse of discretion may be broadly defined to include errors of law.” *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623, n.6 (Oct. 1991). Furthermore, “the choice of sanction is largely within an agency’s discretion; the reviewing court may overturn it only if it is unwarranted in law or unjustified in fact.” *Id.* (citation omitted). “‘Abuse of discretion’ is a phrase which sounds worse than it really is.” *Id.* (citation omitted).

Over the years, the Commission has considered a number of factors on a case-by-case basis in determining whether the Secretary's citation of a production-operator is "consistent with the purpose and policies" of the Mine Act. The principal factors are summarized below:

- (1) Whether the production-operator, the independent contractor, or another party was in the best position to affect safety matters. *E.g.*, *Phillips*, 4 FMSHRC at 553; *Bulk*, 13 FMSHRC at 1360-61; *Extra Energy*, 20 FMSHRC at 5. In this regard, one of the key questions is whether the independent contractor has adequate size and mining experience to address safety concerns. *Calvin Black Enter.*, 7 FMSHRC 1151, 1155 (Aug. 1985);
- (2) Whether, and to what extent, the production-operator had a day-to-day involvement in the activities in question. *E.g.*, *Extra Energy*, 20 FMSHRC at 5-6. A closely related factor is "the nature of the task performed by the contractor." *Calvin Black*, 7 FMSHRC at 1155;
- (3) Whether the production-operator contributed to the violations committed by the independent contractor. *E.g.*, *Calvin Black*, 7 FMSHRC at 1155; and
- (4) Whether the production-operator's actions satisfy any of the criteria set forth in the Secretary's Enforcement Guidelines.¹¹ "In addition [to the factors above], the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied." *Extra Energy*, 20 FMSHRC at 5. The guidelines provide that enforcement action may be taken against a production operator for violations committed by its independent contractor in any of the following four situations: "(1) when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement." 45 Fed. Reg. at 44,497. As explained below, the four criteria overlap in certain respects with the factors separately applied by the Commission in such cases.

¹¹ The Enforcement Guidelines were issued by the Secretary in 1980 as an appendix to regulations requiring that independent contractors provide certain information to production-operators before beginning work and establishing procedures under which independent contractors could obtain MSHA identification numbers. 45 Fed. Reg. at 44,494, 44,497. The Enforcement Guidelines set forth four criteria to be used by MSHA inspectors in determining whether to cite a production-operator for the violations of its independent contractor. The Commission has repeatedly recognized that the Enforcement Guidelines are policy statements that are not binding on the Secretary and do not alter the compliance responsibilities of production operators or independent contractors. *E.g.*, *Mingo Logan*, 19 FMSHRC at 250-251.

Based upon our review of the record in this case, we conclude that the Secretary's decision to cite Twentymile for the violations committed by its independent contractor Precision was not "consistent with the purpose and policies" of the Mine Act and constituted an abuse of discretion. Consideration of the various factors outlined above establishes that there was an insufficient basis in the record for issuing the citations to the production operator in addition to the independent contractor.

1. Which Entity Was in the Best Position to Prevent the Violations

The record shows that the independent contractor Precision was in the "best" position to prevent the violations in question.¹² Precision was hired because of its special expertise in working with refuse piles (Tr. 69-71, 85) and is an experienced independent contractor that is familiar with MSHA's safety standards. Tr. 117. Importantly, the violations in question all involved equipment owned and maintained solely by Precision. 25 FMSHRC at 353. Moreover, Precision carried out its work without direct or continuing supervision from Twentymile (Tr. 71, 85). Under the terms of the contract between Precision and Twentymile, Precision was required to comply with all MSHA safety and health standards. T. Ex. 26; Tr. 71-72. In addition, Twentymile provided a safety guide to Precision that included specific provisions requiring a preshift examination of all equipment and the repair of all safety defects. T. Ex. 27; Tr. 73, 121; 25 FMSHRC at 357. The safety guide also contained provisions relating to each of the six cited conditions and required Precision to correct the conditions before the equipment was operated at the mine. 25 FMSHRC at 357.

As the Commission stated in *Phillips*, where "[l]arge, skilled contractors were retained for their expertise in an important and familiar facet of mine construction" and the contractor "created a violative condition and is in the best position to eliminate the hazard and prevent it from recurring," the Secretary's decision to proceed against the production operator is inconsistent with the purpose and policies of the Act. 4 FMSHRC at 553 (dismissing the production operator as a party and substituting the independent contractor in its place). "In many circumstances . . . it should be evident to an inspector at the time that he issues a citation or order that an identifiable contractor created a violative condition and is in the best position to

¹² The dissenting opinion does not argue, and cannot argue based on the record, that Twentymile was in the "best" position to prevent the violations. Instead, it maintains only that Twentymile was in an "excellent" position to affect safety (slip op. at 22), which is not the test used by the Commission. See *Extra Energy*, 20 FMSHRC at 5 ("whether the operator is in the best position to affect safety"). As demonstrated below, the record shows that Precision was clearly in the "best" position to affect safety and prevent the violations in this case. Moreover, contrary to the dissenting opinion (slip op. at 22 n.3), because determining whether the operator was in the "best" position to prevent the violations is just one of the factors to be considered by the Commission, a conclusion that an independent contractor was in the "best" position does not, by itself, mean that the Secretary is foreclosed from issuing dual citations in appropriate circumstances.

eliminate the hazard and prevent it from recurring.” *Id.* (quoting *Old Ben*, 1 FMSHRC at 1486).

In *Calvin Black*, the Commission reiterated the principles expressed in *Phillips* that should guide the Secretary in determining the party against whom she should proceed. 7 FMSHRC at 1155.¹³ Those factors include “the size and mining experience of the independent contractor [and] the nature of the task performed by the contractor,” in addition to which party contributed to the violation and was in the best position to eliminate the hazard and prevent its recurrence.¹⁴ *Id.*

Here, Precision was an experienced contractor carrying out customized mining activities (removal of clay from the refuse pile) and performing those duties autonomously. The violations all involved Precision’s equipment. 25 FMSHRC at 353. Precision was familiar with the Mine Act and MSHA’s regulations, and Twentymile had favorable experience with Precision in this regard.¹⁵ Tr. 85. These factors all support citing the contractor, Precision, and holding it solely accountable for compliance with the Mine Act.

¹³ We note that the facts in this case are readily distinguishable from those in *Calvin Black*, where the Commission ruled that the production operator should be liable for safety standard violations where the independent contractor’s employees worked at the mine only intermittently, the employees (geologists) lacked experience in working in mines, and the employees were generally unfamiliar with MSHA’s standards. 7 FMSHRC at 1155-56.

¹⁴ While our dissenting colleague characterizes *Phillips* and *Calvin Black* as “cases that the Commission has declined to follow for at least the past ten years” (slip op. at 21), those decisions have not been overruled, and the propositions for which they are cited in our opinion are still valid. Although both cases were decided when the Secretary was following a policy of citing “owners only” for violations committed by their independent contractors, their general discussions of factors to be considered in determining whether an owner-operator should be cited for its independent contractor’s violations are still applicable today in determining whether the Secretary has abused her discretion in citing an owner-operator or production operator for its independent contractor’s violations. Here, we rely on portions of the decisions in *Phillips* and *Calvin Black* as setting forth some of the factors to be considered in determining whether an abuse of discretion occurred.

¹⁵ The record in this case establishes that Precision had an excellent compliance and accident record. For the two-year period prior to August 30, 2001, Precision had received no citations from MSHA despite the fact that it had worked for Twentymile and other mines during that period. 25 FMSHRC at 358. During the four-year period preceding August 2001, Precision had no reportable injuries. *Id.*

2. Extent of the Production Operator's Involvement in Relevant Activities

Twentymile did not have a significant, continuing involvement in the work specifically being performed at the refuse pile – the stripping and hauling of clay. Although Twentymile did have a substantial, continuing involvement with the underground operations and certain other surface areas at its Foidel Creek Mine, Precision was hired to perform the work at the No. 2 Refuse Pile because of its special expertise with refuse piles.¹⁶ Tr. 69, 74, 85. Because of the nature of the tasks being performed, Precision was responsible for providing the equipment to be used at the refuse pile and for operating it. T. Ex. 26 (Ex. C). No Twentymile employees worked at or near the refuse pile (Tr. 85-86), although Dave Wallace, Twentymile's supervisor of surface operations, testified that he checked on Precision's progress at the refuse pile once each day or day and one-half. Tr. 85. While Twentymile regularly performed general safety audits at the mine that would at some point include equipment at the refuse pile (Tr. 120), the contract between Twentymile and Precision provided that Precision was responsible for complying with all applicable safety requirements. T. Ex. 26; Tr. 71-72. There was no evidence that Twentymile ignored the defects complained of or was directly involved in creating the violative conditions.

In the context of the relationship between the parties, Twentymile's involvement appears to be nothing more than prudent oversight of the contractor's compliance with the contract for services at the refuse pile, including the safety and health provisions of the contract. Punishing a production operator for such steps taken to "ensure" contractor compliance is contrary to the intent of the Mine Act and our precedent in these cases. *See, e.g., Phillips*, 4 FMSHRC at 553. The Secretary asserts that Twentymile should be liable for failing to either inspect the equipment or ensure that Precision would do so. Oral. Arg. Tr. 35-38. But there is no standard requiring production operators to inspect each piece of equipment every time it enters a mine site, and as will be further discussed under factor 3, *infra*, Twentymile did, through the contract, require that Precision inspect the equipment. Given Twentymile's limited involvement in the activities at the refuse pile, we cannot say that this factor supports the decision to cite Twentymile in this case.

3. Whether the Production Operator Contributed to the Violations

The record establishes, foremost, that Twentymile did not directly contribute to the violations that are involved in these citations. The violations involved Precision's equipment at the refuse pile, and no Twentymile employees were involved in any way in operating or

¹⁶ The dissenting opinion suggests that because Twentymile had substantial involvement with the underground operations and certain other surface areas of the mine, it should *automatically* be treated as having substantial involvement with the refuse pile. Slip op. at 22-23. However, where a production operator contracts with an independent contractor to perform specified work in a discrete area of the mine site (such as the refuse pile here) and the production operator's employees will not be subjected to hazards in that area, the extent to which the production operator should be regarded as involved with activities within that area should be determined on a case-by-case basis.

maintaining that equipment. Tr. 85-86. There is no other evidence that Twentymile took any action that directly contributed to the violations.

Moreover, the record does not establish that Twentymile contributed to the violations through any significant omission on its part. In order for a production operator to contribute to a violation through an omission, that omission must be a significant one. Whenever an independent contractor commits a violation, there is almost always some action that a production operator could theoretically have taken that might have prevented the violation. Without a "significant" threshold, the production operator could be found to have contributed to the violation in virtually every situation, and this contribution factor essentially would be a meaningless test. See the discussion regarding satisfaction of the Secretary's Enforcement Guidelines, *infra*, at 12-14.

Although the Secretary argues that Twentymile contributed to the violations through omission by not having inspected Precision's equipment before it entered the mine site or subsequently (S. Br. at 28-29), for the following reasons, we conclude that this does not constitute a significant omission under the circumstances of this case.

As an initial matter, it is important that MSHA's regulations nowhere require that a production operator inspect an independent contractor's equipment before it enters the mine site. In the absence of any such explicit requirement, we are reluctant to impose one.¹⁷ Accordingly, the fact that Twentymile did not inspect Precision's equipment before it entered the mine site each day does not, by itself, mean that Twentymile contributed to the violations through a significant omission.¹⁸

In *Extra Energy*, 20 FMSHRC at 6, the Commission provided guidance regarding the measures a production operator should take in order not to contribute to an independent contractor's violation. In that case, a security guard employed by an independent contractor died from carbon monoxide poisoning because the car in which he was sitting at the mine site during his watch was defective. The Commission ruled that the production operator contributed to the equipment violation because it "took no measures to ensure that the cars were safe, either by inspecting them itself or by requiring that [the independent contractor] did so." *Id.* Stated somewhat differently, we believe that the appropriate test in such a case is whether the

¹⁷ Significantly, Precision's service truck entered the mine site daily to service its equipment at Twentymile's site, as well as at other locations (Tr. 21, 86), indicating that it exercised complete control over its equipment. Thus, Precision was in the best position to inspect its equipment to ensure compliance with MSHA's regulations.

¹⁸ In addition, Twentymile undertook general safety audits at the mine that would have eventually included the equipment at the No. 2 Refuse Pile. Tr. 120. Since Precision had been working at the mine for only one week prior to MSHA's issuance of the citations (25 FMSHRC at 355; Tr. 62-63), Twentymile had not yet conducted an inspection at the refuse pile.

production operator took reasonable steps under the circumstances to ensure that the independent contractor's equipment is safe, either by inspecting the equipment itself or by requiring that the independent contractor conduct inspections of the equipment.

In the instant case, we conclude that Twentymile took reasonable measures to ensure that Precision inspected its equipment and complied with MSHA's safety standards. The contract between Precision and Twentymile required that Precision comply with MSHA's safety standards. T. Ex. 26; Tr. 71-72. Likewise, the safety guide that Twentymile gave to Precision explicitly required that Precision conduct preshift examinations of its equipment and correct any safety defects. T. Ex. 27; Tr. 121-122. Moreover, Precision was advised that it was subject to safety audits and inspections to ensure its compliance with the Mine Act (Tr. 120), and Twentymile exercised reasonable diligence and oversight by having mine management regularly check on the refuse pile project. Tr. 85. We conclude that these measures constituted a reasonable approach to ensuring that the equipment was safe. Therefore, Twentymile did not contribute, through omission, to the violations involving Precision's equipment.

Moreover, we conclude that the reasoning relied upon by the ALJ in finding that Twentymile had not done enough to ensure the safety of the equipment does not withstand scrutiny. The ALJ agreed that Twentymile had taken "important steps" to ensure that the equipment in question had been inspected. 25 FMSHRC at 360. However, he believed that Twentymile employees should have additionally asked Precision employees whether the equipment had been inspected when the equipment entered the mine each day or after it arrived at the refuse pile. *Id.* Given the clear requirement that Precision conduct preshift examinations of its equipment, we disagree that it was necessary for Twentymile employees to ask Precision employees additionally whether the equipment had been inspected each time that the equipment entered the mine site or after it reached the refuse pile. Contrary to the ALJ's position that a production operator must necessarily "follow-through" on a requirement that an independent contractor inspect its equipment (25 FMSHRC at 360), *Extra Energy* provides only that a production operator must "ensure that the [equipment was] safe, either by inspecting the [independent contractor's equipment] itself or by requiring that [the independent contractor] did so." 20 FMSHRC at 6. It was reasonable and sufficient for Twentymile, through the contract and the safety guide, to require expressly that Precision carry out such inspections on its own.

4. Whether Any Criteria in the Secretary's Enforcement Guidelines Were Satisfied

In addition to the three factors above that traditionally have been applied by the Commission in cases where both production operators and independent contractors are involved, the Commission has also considered whether any of the four criteria in the Secretary's non-binding Enforcement Guidelines have been satisfied. *Extra Energy*, 20 FMSHRC at 5. We also examine the criteria in this case because the MSHA inspector relied upon them in issuing the

citations (Tr. 35) and the Secretary relied upon them on appeal (S. Br. 26-27, 29-30).¹⁹

Before discussing the four individual criteria in the Enforcement Guidelines, we reiterate that a particular criterion should be found to be satisfied only if a significant threshold has been reached. In other words, a criterion is not satisfied unless the production operator's involvement in the violation extends beyond the minimal level that would be found with regard to virtually every independent contractor violation. For example, as discussed above, in virtually every case it would be possible to find some action that the production operator could have taken that might have prevented the independent contractor's violation, thereby arguably showing that the production operator contributed to the violation through omission. Similarly, the fourth criterion is whether the production operator had "control" over the actions of the independent contractor. Because virtually every agreement between a production operator and independent contractor will give the production operator some minimal control over the independent contractor's activities, e.g., the ability to order the independent contractor to leave the production operator's property, the degree of control must also be significant in order to satisfy that criterion.²⁰ If the guidelines were construed so broadly as to be satisfied with regard to essentially every independent contractor violation, the test based on the four criteria would be meaningless. Accordingly, we conclude that a particular criterion is satisfied only if the production operator's involvement is in some way "significant," i.e., it exceeds the minimal level that would be present with regard to virtually every independent contractor violation.

¹⁹ While we have acknowledged that the Enforcement Guidelines are not binding on the Secretary, slip op. at 8 n.11, we cannot agree with our dissenting colleague's refusal to apply them, slip op. at 23, in light of MSHA's and the Secretary's reliance on them. Further, the "broad leeway" that the dissent would accord the Secretary to issue citations to mine operators, slip op. at 21, becomes boundless discretion (and unreviewable) absent consideration of the Secretary's Enforcement Guidelines to review the Secretary's exercise of enforcement discretion. More significantly, mine operators must be able to rely on the Enforcement Guidelines in guiding their conduct vis a vis their contractors.

²⁰ *In Bulk*, 13 FMSHRC at 1360, the Commission found that the Secretary had satisfied the criterion in citing the independent contractor rather than its subcontractors where the independent contractor had "substantial control" over the condition requiring abatement. Our use of "substantial" in that case correlates to our use of "significant" in other cases and our use of that term in this case.

The dissenting opinion states that Twentymile had "sufficient" control over the conditions needing abatement in that Twentymile reserved the right to remove violative equipment from its property. Slip op. at 24. By using the word "sufficient," the dissenting opinion recognizes that the extent of the production operator's control must exceed some threshold before the control criterion can be satisfied. Our establishment of the "significant" threshold is entirely consistent with this proposition.

a. Whether the production operator contributed either to the violations in question or to their continued existence

As discussed above with regard to the factors separately considered by the Commission (slip op. at 8-13), we have concluded that Twentymile took reasonable measures to ensure that Precision inspected its equipment and complied with MSHA's safety standards. Accordingly, Twentymile did not contribute to Precision's violations either by direct action or through any significant omission on its part. For the same reasons, the record does not indicate that Twentymile contributed in any significant way to the continued existence of the violations in question.²¹ Thus, the first and second criteria of the Enforcement Guidelines have not been met by the Secretary.

b. Whether the production operator's employees were threatened by the hazards

The record further indicates that Twentymile's employees were not threatened in any significant way by the safety hazards associated with the violations in question. The workers at the refuse pile were exclusively Precision employees, and testimony established that no Twentymile employees worked near the refuse pile. Tr. 85-86. Although the inspector contended that Twentymile's fire brigade might some day be required to extinguish a fire resulting from Precision's equipment (Tr. 26), this speculative possibility alone is not sufficient to satisfy this criterion. As the ALJ found, "[Twentymile's] employees were not exposed to the hazards presented by the violations in any meaningful sense Moreover, a production-operator would always respond to a fire or other emergency involving a contractor's equipment. Under the Secretary's interpretation, virtually all contractor violations would expose the production-operator to citations under this factor." 25 FMSHRC at 360, n.2. On appeal, the Secretary does not challenge this finding.

c. Whether the production operator had significant control over the condition in question

Twentymile had no significant or special control over the conditions requiring abatement in this case. Indeed, the ALJ found that "Twentymile did not have direct control over the cited equipment." 25 FMSHRC at 360. Although, under its contract with Precision, Twentymile had the right to order Precision to remove its equipment from the mine site, there is no indication that this provision gave Twentymile any rights that any other production operator would not typically have had. In *Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871 (Aug. 1984), *rev'd*, 796 F.2d 533

²¹ Moreover, the MSHA inspector admitted on cross-examination that, in applying the first two criteria under the Enforcement Guidelines, he concluded that Twentymile had contributed to the violations and their continued existence simply because it had failed to prevent them. Tr. 57-58. He further conceded that, pursuant to that approach, the first two criteria "would apply to virtually every contractor situation" *Id.* The inspector's testimony emphasizes the need to apply the criteria in such a way that the test is meaningful and only significant actions or omissions meet the criteria.

(D.C. Cir. 1986), the Commission concluded that similar standard contract language (reserving the right to monitor work and to terminate the contract if the independent contractor disregarded applicable laws) was not sufficient to satisfy the control criterion in the Secretary's Enforcement Guidelines:²²

The rights reserved by [the production operator] are basic contractual rights universally reserved in well-drafted contracts in this industry and others. To hold that the mere presence of such language satisfies the criterion of "control" under the Secretary's independent contractor enforcement guidelines, would vitiate the very essence of the guidelines. The plain fact is that if the contractual provisions in this case constitute "control" for citation purposes, every production-operator could be cited for every contractor violation. This result has long been criticized as ineffective enforcement of mine safety statutes and was ostensibly abandoned by the Secretary upon the adoption of his new policy. [Citations omitted.]

We hold that before a production-operator can be deemed to "control" a contractor's activities sufficient to justify the issuance of a citation to it for a contractor's violation, some functional nexus, beyond the contractual nexus reflected here, must be demonstrated linking the production-operator's involvement with the contractor's violation.

6 FMSHRC at 1876.

If the Secretary were found to have met the control criterion with regard to Twentymile in this case based on the contractual right to remove Precision's violative equipment, then virtually every production operator could automatically be found liable for its independent contractor's violations, thereby rendering the four-criteria test essentially meaningless. Accordingly, the fourth criterion has not been met in this case and cannot provide a basis for upholding the Secretary's action.

²² The Commission's decision was subsequently overturned on appeal because the D.C. Circuit concluded that the Commission had improperly applied the Enforcement Guidelines as "binding norms." *Cathedral Bluffs*, 796 F.2d at 538-39. Although the D.C. Circuit ruled that the Commission cannot apply the Enforcement Guidelines as though they are regulations, the court's decision did not prohibit the Commission from considering the criteria as factors to be examined in determining whether the Secretary has abused her discretion, and the Commission has considered them in this manner. *E.g., Extra Energy*, 20 FMSHRC at 5. Accordingly, the Commission's reasoning in *Cathedral Bluffs*, 6 FMSHRC 1871, regarding how individual criteria should be applied remains valid today.

5. The Additional Rationale Relied Upon By the MSHA Inspector

The specific rationale given by MSHA inspector Havrilla for citing Twentymile in this case provides no additional basis for upholding the citations. According to the inspector, he issued the citations to Twentymile, as well as to Precision, on August 30, 2001, because he believed that there was a “serious problem” with contractor violations at the Foidel Creek Mine. Tr. 35. He primarily based his conclusion that there was a serious problem on the number of violations he found and the fact that the equipment had not been inspected. *Id.* He further stated that he believed that the criteria in the Enforcement Guidelines had been satisfied. *Id.*

To the extent that the inspector issued the citations to Twentymile as well as Precision because of the number of violations and the absence of inspections, the question to be resolved remains whether the Secretary’s action was “consistent with the purpose and policies of the Act.”²³ That question hinges upon an analysis of the factors traditionally applied by the Commission. As discussed above, that analysis shows that issuance of the citations to Twentymile was unwarranted in this case. Thus, the inspector’s subjective conclusion that there was a “serious problem” with independent contractor violations at the mine is not an independent justification for citing the production operator in this case.

* * *

In summary, we conclude that none of the factors traditionally applied by the Commission in determining whether a production operator should be cited for its independent contractor’s violations, including the criteria in the Enforcement Guidelines, support the issuance of the citations to Twentymile in this case.²⁴ Moreover, the MSHA inspector’s additional rationale for

²³ To the extent that the inspector may have believed that there was an increasing trend of contractor violations at the Foidel Mine, the record indicates that the inspector did not conduct an analysis of recent contractor violations at the mine before issuing the citations. Tr. 52. In addition, for the two-year period preceding August 30, 2001, Precision – the independent contractor hired by Twentymile – had received no citations from MSHA despite the fact that it had previously worked for Twentymile and other mines during that period. 25 FMSHRC at 358. For the preceding four-year period, Precision had no reportable injuries. *Id.* Moreover, the record does not otherwise indicate the existence of a significant problem with contractor violations at Twentymile’s mine within the past two years. Because the inspector’s apparent belief that a “serious problem” with independent contractor violations existed was not supported by an objective analysis, it is insufficient, particularly in light of the foregoing analysis of the factors traditionally applied by the Commission, to support the issuance of citations to Twentymile.

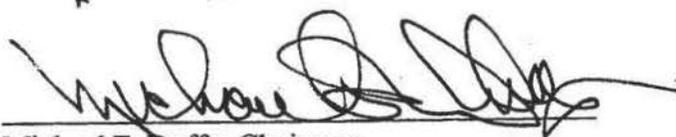
²⁴ The cases cited by our dissenting colleague for the proposition that our decision in this case is inconsistent with longstanding Commission precedent are all distinguishable. In *W-P*, the Commission concluded that, because of *W-P*’s “substantial” involvement in numerous activities at its mine, it should also be liable for its production contractor’s violations. 16 FMSHRC at

issuing the citations to Twentymile does not provide an independent basis for this action. Based on the analysis set forth above, we conclude that the Secretary's action in issuing citations to Twentymile for the violations of Precision in this case was not "consistent with the purpose and policies" of the Mine Act, was not supported by substantial evidence, and therefore constituted an abuse of discretion.

III

Conclusion

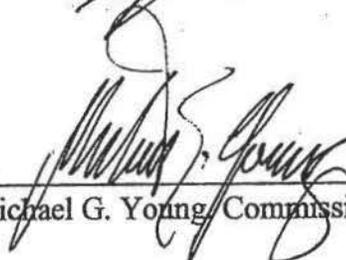
For the foregoing reasons, we reverse the judge's decision and vacate the citations issued to Twentymile.



Michael F. Duffy, Chairman



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

1411. That case did not involve an independent contractor hired to perform a specified, discrete task as does this case. In both *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989), and *Mingo Logan*, 19 FMSHRC at 250, the Commission found that the production operator's employees were exposed to hazards caused by the independent contractor's violations – a situation unlike this case. In *Bulk*, the production operator (BethEnergy) was *not* issued citations for violations at its mine. Instead, the issue was whether Bulk, BethEnergy's independent contractor, should be liable for violations committed by individual truck drivers who were deemed to be its subcontractors. 13 FMSHRC at 1356, 1360-61. Finally, in *Extra Energy*, the Commission held that the production operator was properly cited for its independent contractor's violations where the production operator took no steps to either inspect the vehicle in question or require, as Twentymile did here, that the independent contractor inspect it. 20 FMSHRC at 6.

Commissioner Jordan, concurring and dissenting:

I concur with the conclusion of my colleagues in the majority that we need not overturn precedent holding that, under the Mine Act, the Secretary of Labor may properly cite an owner-operator, independent contractor, or both for a violation of an independent contractor. In addition, I concur with my colleagues that the Commission may review the Secretary's enforcement decision in citing an operator. However, I disagree with the majority's conclusion that the Secretary abused her discretion in issuing the subject citations to Twentymile.

The majority has dramatically departed from longstanding Commission precedent in its consideration of whether the Secretary abused her discretion in citing Twentymile. During the past twenty years, the Commission has not vacated the Secretary's enforcement decision to cite an owner-operator for an independent contractor's violation.¹ See, e.g., *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (Aug. 1989); *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994); *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan. 1998).

The Commission has affirmed the Secretary's enforcement decisions to cite an owner-operator for contractor violations in recognition of the liability scheme of the Mine Act, which places responsibility for violations at a mine on the owner-operator of the mine whether those violations were committed by the operator's employees, agents, or contractors. *Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1359 (Sept. 1991); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (Feb. 1997), *aff'd*, 133 F.3d 916, 1998 WL 3613 (4th Cir. 1998) ("MSHA may hold Mingo Logan, because of its operator status, strictly liable for all violations . . . that occur at the mine site, whether committed by one of its employees, or an employee of one of its contractors."). The owner-operator's fault may be taken into account only in the context of assessing a civil penalty based upon the operator's negligence. 30 U.S.C. § 820(i); *Int'l Union, UMWA v. FMSHRC*, 840 F.2d 77, 83-84 & n.13 (D.C. Cir. 1988) (noting that while the Mine Act establishes an operator's liability without regard to fault, fault may be considered in the context of penalty assessment). Long-accepted policy reasons supporting citing an owner-operator for contractor violations include the fact that an owner is generally in continuous control of conditions at the entire mine; the owner is more likely to know federal health and safety requirements; and the owner should not be able to evade responsibility for such requirements by using independent contractors. *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119-20 (9th Cir. 1981).

In affirming the Secretary's decisions to cite-owner operators, the Commission has also been guided by the recognition of the discretion afforded the Secretary in making enforcement

¹ It appears that the Commission last affirmed the vacation of a citation issued to a production-operator in circumstances in which the Secretary had also issued an identical citation to an independent contractor in *Cathedral Bluffs Shale Oil Co.*, 6 FMSHRC 1871, 1872-1877 (Aug. 1984), *rev'd*, 796 F.2d 533, 535 (D.C. Cir. 1986). The Commission's decision was reversed on appeal because the Commission had erroneously considered as binding the Secretary of Labor's Enforcement Guidelines. *Brock v. Cathedral Bluffs*, 796 F.2d at 537-39.

decisions. In *Cathedral Bluffs*, the court noted that “courts have traditionally been most reluctant to interfere” with an agency’s exercise of enforcement discretion, and that “policies underlying that restraint extend as well to interference by a quasi-judicial agency that has no enforcement responsibilities, such as the . . . Commission.” 796 F.2d at 538. Referring to that precedent, the Commission has stated that “[c]ourt precedent makes clear that the Secretary has retained wide enforcement discretion and that courts have traditionally not interfered with the exercise of that discretion.” *Consolidation Coal*, 11 FMSHRC at 1443 (citing *Brock v. Cathedral Bluffs*, 796 F.2d at 538). For the past twenty years, the Commission has exercised such restraint in reviewing the Secretary’s enforcement decisions in recognition of the Secretary’s “wide” enforcement discretion. *W-P*, 16 FMSHRC at 1411; *Bulk*, 13 FMSHRC at 1359-60.

An owner-operator cannot avoid liability for independent contractor violations at its mine unless the Secretary abused her discretion in citing the owner-operator. *W-P*, 16 FMSHRC at 1411; *Mingo Logan*, 19 FMSHRC at 249-50. Twentymile “bears a heavy burden” in proving that the Secretary abused her discretion by citing it. *Mingo Logan*, 19 FMSHRC at 249 n.5; *Extra Energy*, 20 FMSHRC at 5. In cases in which the Commission has reviewed the Secretary’s decision to cite an operator, the Commission has repeatedly recognized that it may find an abuse “only if there is no evidence to support the decision or if the decision is based on a misunderstanding of the law.” *Mingo Logan*, 19 FMSHRC at 249-50 n.5 (emphasis added).

In evaluating the evidence supporting the Secretary’s decision to cite an operator, the Commission has considered various factors, including:

the operator’s day-to-day involvement in the mine’s operations (*Mingo Logan*, 19 FMSHRC at 250; *W-P*, 16 FMSHRC at 1411), whether the operator is in the best position to affect safety (*Bulk Transp.*, 13 FMSHRC at 1361) and whether the enforcement action is consistent with the purpose and policies of the Act (*Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (Oct. 1979)).

Extra Energy, 20 FMSHRC at 5.

While the majority recognizes the first part of the Commission’s test, that an abuse of discretion may include errors of law (slip op. at 7 n.10), it fails to mention that “[a] litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary’s decision.” *Extra Energy*, 20 FMSHRC at 5 (citing *Mingo Logan*, 19 FMSHRC at 249-50 n.5).

In addition, the majority raises the threshold of the evidence necessary to support the Secretary’s enforcement decision. For instance, while the Commission has considered “the operator’s day-to-day involvement in the mine’s operations” (*Extra Energy*, 20 FMSHRC at 5 (citing *Mingo Logan*, 19 FMSHRC at 250); *W-P*, 16 FMSHRC at 1411), the majority has considered “[w]hether, and to what extent, the production operator had a day-to-day involvement

in the activities in question.” Slip op. at 8 (emphasis added). In *W-P*, the Commission affirmed a citation issued to a owner-operator for a citation alleging a failure to maintain a bathhouse floor “even though an independent contractor operated the mine,” and was contractually responsible for controlling the mine and complying with mine safety and health laws. *Mingo Logan*, 19 FMSHRC at 250; *W-P*, 16 FMSHRC at 1408. In considering whether the owner-operator was “sufficiently involved with the mine” to support the Secretary’s decision to proceed against it, the Commission did not narrow its consideration to the operator’s involvement with maintenance of the bathhouse floor. Rather, it considered that the owner-operator was involved in such general activities as preparing the mine map, calculating mining projections, visiting the mine to “discuss production and other matters,” and waiving fees owed by an independent contractor. *W-P*, 16 FMSHRC at 1411.

Moreover, the majority bases its conclusion on a Commission decision subsequently reversed by the D.C. Circuit, and also relies heavily upon cases that the Commission has declined to follow for at least the past ten years. First, try as they might, my colleagues fail to successfully resuscitate the Commission’s decision in *Cathedral Bluffs*, 6 FMSHRC 1871, which was overturned by the D.C. Circuit. *Cathedral Bluffs*, 796 F.2d at 537-39. In fact, the majority’s inflexible adherence to the Secretary’s Enforcement Guidelines is precisely what the D.C. Circuit cautioned against when it referred to “[t]he four criteria which the Commission’s decision requires the Secretary to observe so rigidly.” 796 F.2d at 538. In addition, the majority repeatedly cites *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982), and *Calvin Black Enter.*, 7 FMSHRC 1151 (Aug. 1985) regarding principles that “should guide the Secretary in determining the party against whom she should proceed.” Slip op. at 10; *see also* slip op. at 7-11. In 1994, the Commission distinguished *Phillips*, explaining that the decision “was directed to the Secretary’s earlier policy of pursuing only owner-operators for their contractors’ violations” and that since that time the Secretary’s “policy has been broadened to include pursuit of independent contractor-operators in some instances.” *W-P*, 16 FMSHRC at 1410; *see also Cathedral Bluffs*, 6 FMSHRC at 1873 (stating that the “rationale . . . relied on to vacate the citation at issue in *Phillips* [was] not relevant” in part because that citation had been issued as a result of the Secretary’s “‘owners-only’ policy.”). In *Calvin Black*, the Commission applied the principles enunciated in *Phillips*. 7 FMSHRC at 1155. Since at least 1994, the Commission has not relied upon *Phillips* or *Calvin Black* in its decisions reviewing the Secretary’s enforcement decisions.

The majority attempts to construct a veneer of moderation by maintaining that it is simply taking into account “the factors traditionally applied by the Commission in determining whether a production-operator should be cited for its independent contractor’s violations,” slip op. at 17, and insisting that its views are consistent with viable prior Commission case law. In fact, it has turned the legal standard in this area on its head. Instead of the Secretary having broad leeway to cite an operator (unless she abuses her discretion), it appears that, under the majority’s ruling, the Secretary is prohibited from citing an operator unless she meets the factors set forth by my colleagues, slip op. at 8, and surpasses the high bar the majority has erected by insisting that the criteria in the Secretary’s Enforcement Guidelines are satisfied only if a “significant threshold has been reached.” Slip op. at 14.

Applying relevant Commission precedent leads inexorably to the conclusion that substantial evidence supports the judge's determination that the Secretary did not abuse her discretion in citing Twentymile.² While the majority questions the quality and quantity of the evidence supporting the Secretary's decision to cite Twentymile, there is no dispute that there is evidence to support the Secretary's decision sufficient to satisfy the low threshold traditionally required by the Commission.

First, Twentymile, as the owner-operator, had the overall responsibility of running the mine and was substantially involved in the day-to-day operations. Twentymile hired independent contractors and reviewed their safety records. Tr. 67-70. Twentymile maintained a constant presence at the mine during the time that Precision performed its services for Twentymile. Tr. 15-17, 94, 143. Twentymile's surface operations supervisor, Dave Wallace, traveled to the refuse pile and checked Precision's work every day or day and-a-half. Tr. 94-95. Wallace testified that if he had seen a safety problem while he was there, he would have told Precision to fix it. Tr. 95. Twentymile conducted periodic safety inspections of its facilities that were not restricted to its equipment and miners, but that encompassed an area of the mine and all equipment in the area, whether it belonged to Twentymile or an independent contractor. Tr. 101-02, 111-12. Twentymile's involvement in day-to-day mining activities far "surpasses that of the operator in *W-P*, [16 FMSHRC 1407]." *Mingo Logan*, 19 FMSHRC at 250.

Furthermore, Twentymile was in an excellent position to affect safety.³ If Twentymile found violative equipment while inspecting contractor's work, it required its contractor to correct the condition, or it required the contractor to remove the equipment from the site, as it did with respect to Precision's equipment. Tr. 78-79, 94-95, 105, 111-12, 129-30. Twentymile also

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

³ While we recognize that no one factor is dispositive, my colleagues insist that only the operator in the "best" (as opposed to an excellent) position to prevent the violations should be cited. Slip op. at 9-10 & n.12. I do not read the Commission cases cited by the majority in so narrow a fashion. To do so is inconsistent with our determination that MSHA may issue dual citations. In this case, both operators were in a position to affect safety. Precision was certainly capable of maintaining its equipment but, in Inspector Havrilla's experience, bringing Twentymile's influence to bear had proven to be a potent force. In 1999, concerned about the number of contractor violations at this mine, the inspector warned Twentymile that both it and its contractors would be cited if the number of violations was not reduced. 25 FMSHRC at 356-57; Tr. 34. The inspector testified that he noticed a subsequent decrease in the number of violations by independent contractors. 25 FMSHRC at 356-57; Tr. 35.

demonstrated its ability to affect safety by refusing to allow the cited equipment back on-site until Twentymile had inspected the equipment.⁴ Tr. 108. In addition, Twentymile provided site-specific hazard training to contractors' employees and ensured that such employees had MSHA-required training. 25 FMSHRC at 357-58; Tr. 110-11, 117-18.

Because the Secretary's Enforcement Guidelines are not binding, I need not also consider whether the Enforcement Guidelines were satisfied in order to uphold the Secretary's actions in citing Twentymile. *Mingo Logan*, 19 FMSHRC at 250-51. However, while failure to satisfy the criteria is not fatal to an enforcement decision (*id.* at 250), the Commission has relied upon satisfaction of the criteria in concluding that there was no abuse of discretion (*e.g.*, *Bulk*, 13 FMSHRC at 1360). For the first time since the Commission's decision was reversed in *Cathedral Bluffs*, 796 F.2d 533, the majority has relied on the Enforcement Guidelines to support its conclusion that the Secretary abused her discretion.⁵

Moreover, in applying the Enforcement Guidelines, the majority has raised the level of evidence necessary to satisfy its criteria.⁶ The majority states that "a particular criterion should be found to be satisfied only if a significant threshold has been reached," (slip op. at 14) and applies this standard *de novo*. The Commission has not previously articulated such a standard. In fact, such a high evidentiary threshold seems inconsistent with the Commission's recognition that the Guidelines need not even be satisfied in order to uphold the Secretary's enforcement decision, or that an enforcement decision must be affirmed unless there is "no evidence" to support it. *Mingo Logan*, 19 FMSHRC at 250 & n.5.

Even if I were to apply the Enforcement Guidelines, I would conclude that substantial evidence supports the judge's conclusion that the first and fourth factors were satisfied. Twentymile contributed to the equipment violations by an act or omission during the course of

⁴ Twentymile was not required to inspect the equipment in order to abate five of the subject citations. Tr. 108; Gov't Ex. 2 (Citation Nos. 7618775, 7618777, 7618788, 7618884, 7618886).

⁵ In *Cathedral Bluffs*, the Commission reasoned that evidence that the Secretary contended satisfied the Enforcement Guideline criteria would be present in any contractual relationship and that the Enforcement Guidelines would be vitiated if such evidence were sufficient to subject a production-operator to liability. 6 FMSHRC at 1874-76. The majority's reasoning in this case is strikingly similar to the reasoning employed by the Commission in *Cathedral Bluffs*, from which my colleagues quote extensively. Slip op. at 16.

⁶ As the majority states (slip op. at 14 n.20), in *Bulk*, the Commission concluded that the Secretary had satisfied an Enforcement Guidelines criterion where the cited operator exhibited "substantial control" over the condition requiring abatement. 13 FMSHRC at 1360. While there was evidence of substantial control in *Bulk*, the Commission did not hold that such evidence was necessary to satisfy the evidentiary threshold in future cases. *Id.*

Precision's work because it is undisputed that Twentymile did not inspect Precision's equipment when the equipment entered the mine or at any time when it was working at the refuse pile. 25 FMSHRC at 360; Tr. 35, 87-88, 105-06, 119. Nor did Twentymile take adequate measures to ensure that Precision inspected its equipment by inquiring as to whether it had inspected its equipment.⁷ Tr. 35, 93, 126-27. I agree with the judge that requiring Twentymile to "follow-through" in this manner is reasonable, particularly given Twentymile's actions in requiring its contractors to present evidence that its employees meet MSHA's training requirements. 25 FMSHRC at 360. Moreover, the Enforcement Guidelines clearly provide that an owner-operator is required to assure compliance with regulations applicable to independent contractors' work. 45 Fed. Reg. at 44497 ("This overall compliance responsibility of production-operators includes assuring compliance with the standards and regulations which apply to work being performed by independent contractors at the mine.").

In addition, I conclude that substantial evidence supports the judge's finding that Twentymile had sufficient control over the conditions that needed abatement in that Twentymile reserved the right to remove violative equipment from its property. Tr. 75, 78-79, 104, 109. Also, Twentymile conducted safety audits of its facilities, including the performance and equipment of its contractors on-site. Tr. 101-02, 111-12. If Twentymile found violative equipment, it required its contractor to correct the condition, or it required the contractor to remove the equipment from the site, as it did with respect to Precision's equipment. Tr. 78-79, 94-95, 105, 112.

⁷ Although Twentymile may have contractually required Precision to inspect its equipment or to maintain its equipment in a certain manner, such contractual arrangements do not absolve Twentymile of responsibility for violations by Precision. *See Republic Steel Corp.*, 1 FMSHRC 5, 11 (Apr. 1979) ("A mine owner cannot be allowed to exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship in which miners are not its employees and the ability to control the safety of its workplace is restricted."). In any event, even a contractual document provided to Precision explicitly acknowledges that although MSHA may cite an independent contractor, Twentymile is "not completely relieve[d] . . . from all responsibilities or liabilities." T. Ex. 26 (Ex. D); Tr. 77.

In conclusion, given Twentymile's involvement in the mine's day-to-day affairs, its position to affect safety, its failure to inspect or ensure that the vehicles were inspected, and its control over the conditions that required abatement, I conclude that Twentymile has failed to prove that "there is no evidence to support the [Secretary's] decision" to cite it for the equipment violations. *Mingo Logan*, 19 FMSHRC at 249-50 n.5; *Extra Energy*, 20 FMSHRC at 6. Thus, substantial evidence supports the judge's determination that the Secretary did not abuse her discretion in citing Twentymile for the six violations. Given the record evidence and my reluctance to join my colleagues in discarding twenty years of Commission and court precedent in this area, I would affirm the judge's ruling.


Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 22, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 2004-187-R
	:	WEVA 2004-188-R
v.	:	WEVA 2004-195-R
	:	
SPEED MINING, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

In these consolidated contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000), the Commission had granted the petition for review filed by Speed Mining, Inc. ("SMI") of an administrative law judge's determination that SMI had in two instances violated terms of a modification previously issued by the Department of Labor's Mine Safety and Health Administration to SMI. *See* 26 FMSHRC 708, 710-13 (Aug. 2004) (ALJ). On February 3, 2005, in response to a joint motion filed by the Secretary of Labor and SMI requesting that the Commission hold the issuance of a decision in abeyance while the parties discuss settlement in this and related cases, the Commission agreed to do so until March 21, 2005.

¹ Commissioner Suboleski recused himself in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been delegated to exercise the powers of the Commission.

SMI has now moved, pursuant to Commission Procedural Rules 10 and 11, 29 C.F.R. §§ 2700.10 and 2700.11, to withdraw its petition, and states in its motion that the Secretary of Labor supports the motion. Having considered the motion, we grant permission to withdraw the petition.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 23, 2005

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

v.

WAKE STONE CORPORATION

:
:
:
:
:
:
:
:

Docket No. SE 2004-185-M
A.C. No. 31-02071-26994

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. ("Mine Act" or "Act"). On January 13, 2005, Administrative Law Judge Avram Weisberger issued an unpublished decision in which he granted the motion of the Secretary of Labor for summary decision with regard to a violation of 30 C.F.R. § 56.14132(a) by Wake Stone Corporation ("Wake Stone") and denied Wake Stone's motion for summary decision. Dec. at 3. The judge also stated that the record did not contain sufficient evidence to allow him to assess a civil penalty and ordered the parties either to file a statement setting forth stipulations as to the factors in section 110(i) of the Act, to file evidence with regard to any contested factor, or to request an evidentiary hearing on any contested factor. *Id.* On February 4, 2005, the Secretary's Conference and Litigation Representative filed an Answer to Judge's Summary Decision Motion for Part 110(i). In that pleading, the Secretary stated that the parties "have discussed and agreed upon a settlement under [section] 110(i), in this case, to be the original fine of \$60.00. Wake Stone would like it noted that the amount of the fine was never an issue." In that document, the Secretary also moved that the settlement be approved by the judge. On February 14, 2005, the judge issued an unpublished Decision Approving Settlement in which he granted the motion for approval of settlement and ordered that Wake Stone pay a penalty of \$60 within 30 days of the order.

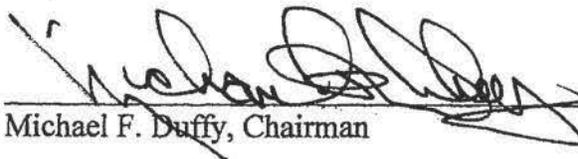
On March 14, 2005, the Commission received from Wake Stone correspondence which we construe to be a timely petition for discretionary review. In that petition, Wake Stone seeks

to challenge the rulings contained in the judge's decision of January 13, 2005.

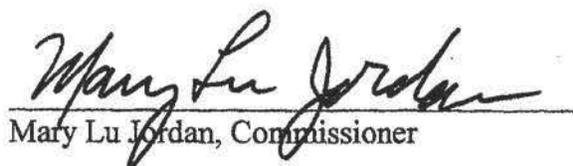
The judge's jurisdiction over this case terminated when he issued his decision approving settlement on February 14, 2005. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Wake Stone's correspondence to be a timely filed petition for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

It appears from the record that the judge's decision granting the Secretary's motion to approve settlement may have been based on a misunderstanding between the parties regarding what they agreed should be settled and/or a misunderstanding by the judge regarding what agreement, if any, the parties had reached. Although the February 14 Decision Approving Settlement indicates that the parties had agreed that the case should be settled *in toto*, that \$60 was an appropriate penalty, and that the case should be dismissed, Wake Stone's petition seems premised on the assumption that there remains a live controversy between the parties and that the settlement agreement involved only the amount of any penalty that might be imposed, not whether Wake Stone had committed a violation in the first instance. Moreover, the Answer to Judge's Summary Decision Motion for Part 110(i) filed by the Secretary on behalf of the parties is ambiguous in key respects. In short, it is unclear whether the parties achieved a true meeting of the minds in their response to the January 13 decision and whether the February 14 decision reflects any settlement that the parties had mutually agreed upon.

Based on the present record, it appears that the judge may have prematurely dismissed the proceeding. In the interest of justice, we vacate the judge's February 14 decision and remand this matter to the judge for further proceedings as appropriate. *See RBS, Inc.*, 26 FMSHRC 751 (Sept. 2004).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 11, 2005

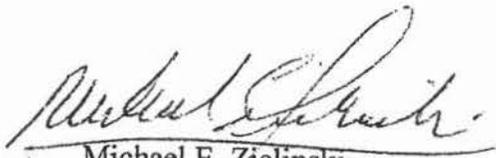
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2003-207-M
Petitioner	:	A. C. No. 29-00473-05542
v.	:	
	:	Docket No. CENT 2004-49-M
SOUTHWEST CONCRETE & PAVING	:	A. C. No. 29-00473-11213
Respondent	:	
	:	Docket No. CENT 2004-87-M
	:	A. C. No. 29-00473-15815
	:	
	:	Docket No. CENT 2004-192-M
	:	A. C. No. 29-00473-08804
	:	
	:	Mimbres Pit Mine

DECISION APPROVING SETTLEMENT

Before: Judge Zielinski

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The parties have negotiated an agreed resolution of the petition and, by motion, seek approval of the settlement agreement and dismissal of the cases. The Secretary has agreed to modify four of the citations at issue and it is proposed that the total penalty for the violations at issue be reduced from \$1,439.00 to \$967.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the citations are hereby amended as proposed in the motion and that Respondent pay a penalty of \$967.00 within 30 days.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 28, 2005

CUMBERLAND COAL RESOURCES, LP,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2004-73-R
	:	Order No. 7067355; 1/24/2004
v.	:	
	:	Docket No. PENN 2004-74-R
SECRETARY OF LABOR,	:	Citation No. 7067356; 1/24/2004
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-75-R
Respondent	:	Citation No. 7083200; 1/16/04
	:	
	:	Docket No. PENN 2004-85-R
	:	Order No. 7066999; 2/4/2004
	:	
	:	Docket No. PENN 2004-86-R
	:	Citation No. 7067000; 2/4/2004
	:	
	:	Docket No. PENN 2004-87-R
	:	Order No. 7067001; 2/7/2004
	:	
	:	Docket No. PENN 2004-88-R
	:	Citation No. 7067003; 2/7/2004
	:	
	:	Docket No. PENN 2004-104-R
	:	Order No. 7069906; 2/14/2004
	:	
	:	Docket No. PENN 2004-105-R
	:	Citation No. 7069907; 2/14/2004
	:	
	:	Cumberland Mine
	:	Mine ID 36-05018
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2004-181
Petitioner	:	A. C. No. 36-05018-29162
	:	
v.	:	

CUMBERLAND COAL RESOURCES, LP, : Docket No. PENN 2005-8
Respondent : A. C. No. 36-05018-38538
: Cumberland Mine

DECISION

Appearances: Leon E. Pasker, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania, and James B. Crawford, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf of Petitioner; R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Notices of Contest filed by Cumberland Coal Resources, LP ("Cumberland"), and Petitions for Assessment of Civil Penalties filed by the Secretary of Labor ("Secretary"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. At issue are four imminent danger orders, and five citations charging that the bleeder system on Cumberland's No. 49 longwall panel was ineffective.¹ A hearing was held in Pittsburgh, Pennsylvania. The parties entered into 51 stipulations prior to the hearing, and submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling \$3,874.00 for the violations. For the reasons set forth below, three citations and two orders are affirmed, two citations and two orders are vacated, and civil penalties totaling \$2,496.00 are imposed.

Findings of Fact - Conclusions of Law

Background

Cumberland Coal Resources, LP, formerly RAG Cumberland Resources, LP, operates a large underground coal mine, the Cumberland mine, in Greene County, Pennsylvania. Cumberland uses the longwall as its primary mining method, and has successfully completed nearly fifty longwall panels. Toward the latter part of 2003, it was preparing to commence mining on a new panel, No. 49 ("LW49"), which was located in a new district of the mine, i.e., there were no other panels adjoining the new panel. Over the years, Cumberland's longwall panels had increased in size. LW49 was to be over 12,000 feet long and 1,250 feet wide, at the

¹ The petition in Docket No. PENN 2005-8 was filed after the hearing. The parties stipulated that all issues involved with respect to the alleged violations, including those related to the amount of any civil penalty, were to be litigated at the hearing. Two citations in Docket No. PENN 2004-181 were not at issue in the hearing and were settled. A separate Decision Approving Settlement was issued with respect to those citations on November 29, 2004.

time, the largest panel ever mined by Cumberland.

An important aspect of ventilating any longwall panel is its bleeder system. Bleeder systems, pursuant to regulation, must effectively and “continuously, dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings.”² Bleeder systems have evolved over time, as panels have grown larger. Most earlier panels used “wraparound” bleeder systems, in which fans located outby produced air flow for both face ventilation and the bleeder system. In wraparound bleeder systems, a portion of the main air flow moving inby in the headgate entries is split off at the face and routed into and around the worked-out area. Through a system of ventilation controls, a negative pressure differential is created at the back, most inby, corner of the tailgate side of the longwall, and methane in the worked-out area, the gob,³ is drawn inby, away from the face, into bleeder entries which transport it to the surface. The methane is diluted as it moves out of the gob, such that by the time it enters the travelable bleeder entries, the outermost entries that surround the panel, its concentration is reduced to less than 4.5%. In more recent years, Cumberland and other operators have used bleeder fan systems, in which the bleeder entries are connected to a bleeder fan shaft located inby, or behind, longwall panels. Cumberland planned to use such a bleeder system for LW49. However, it encountered delays in developing the bleeder fan shaft, and anticipated a significant “problem,” i.e., the longwall would be ready to begin production, but the bleeder shaft would be weeks or months away from being operational. Tr. 1308-09.

In October 2003, Cumberland abandoned development of the bleeder fan shaft, and determined to use a wraparound bleeder system for LW49. Air flow would be generated by existing fans located a considerable distance from the mouth of the panel. It performed computer simulations of the wraparound system and determined that it would be acceptable for mining the first 10,000 feet of the panel. Tr. 1317. Another ventilation shaft was scheduled to come on line in April of 2004, which was expected to enhance ventilation flow both at the face and in the bleeder system. Tr. 1318-21. It was proposed that the new shaft be connected to the LW49 ventilation system by a six-foot diameter shaft, referred to as the “shaft within a shaft.” Cumberland prepared an addendum to its general ventilation plan, describing provisions specific to LW49, and notified miners’ representatives of its plan to use a wraparound bleeder system. On November 7, 2003, it submitted the addendum to the Secretary’s Mine Safety and Health Administration (“MSHA”). On December 9, 2003, MSHA approved the proposed ventilation plan addendum for mining the first 8,000 feet of the panel, by which time the additional

² 30 C.F.R. § 75.334(b)(1); *RAG Cumberland Resources, LP*, 26 FMSHRC 639, 647 (Aug. 2004) (appeal pending).

³ “Gob” is “[t]he space left by the extraction of a coal seam into which . . . the immediate roof caves.” Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms*, 239 (2d ed. 1997).

ventilation from the new shaft was expected to be available.⁴

When notified about the proposed change to a wraparound bleeder system, officials of the United Mine Workers of America (“UMWA”) expressed concerns. Timothy Hroblak, chair of the union’s safety committee, had worked at Cumberland for 25 years, primarily on longwalls. He was concerned that the wraparound system would not have sufficient capacity. In his experience, earlier panels that had successfully used a wraparound system had been considerably smaller, 5,000 - 6,000 feet long and 600 - 700 feet wide. They also had been mined with four entries on the headgate and tailgate sides, whereas LW49 had been set up for use with a bleeder fan system using three entries. Jeffrey Mihalik, a safety committeeman, had similar concerns. The union’s concerns were raised in meetings with Cumberland officials, but did not prompt a change in the plan.

LW49 was laid-out as a large rectangle, 12,000 feet long by 1,250 feet wide, oriented generally in an east-west direction. The panel connected with the main mine entries on its west side. Ex. R-1. Three headgate entries, including one each for the track haulage and conveyor belt, extended along the south side, which was also referred to as “40 butt.” Three tailgate entries were on the north side, which was also referred to as “48 butt.” The outermost of those entries, the #1 tailgate entry and the #3 headgate entry inby the face, were the travelable bleeder entries. At the east, or most inby, side of the panel, the headgate and tailgate entries were connected by two pairs of crosscuts, #86 and #87, and #88 and #89, which were referred to as the “ladders.” The most inby of those entries, crosscut #89, was part of the travelable bleeder system, and connected with the #1 tailgate entry and the #3 headgate entry. The two outby entries, crosscuts #86 and #87, were referred to as the set-up ladder, i.e., longwall equipment was set up in crosscut #86 prior to the start of mining.

Mining of LW49 commenced on December 28, 2003. Stip. 15, 17. On December 30, 2003, the roof had not yet fallen behind the shields, and it was necessary to place canvas along the shields to channel the ventilation along the face, an occurrence that is not unusual. Stip. 18. In early January 2004, the panel experienced a number of “gas-outs,” i.e., mining was halted because of a high methane level at some monitoring point. Monitors on the face were set to deenergize the longwall when the methane concentration reached 2%. Most of the gas-outs were caused by high methane readings at a monitor on the tailgate. Ex. R-43. Cumberland’s mine, like others located in the “Pittsburgh Coal Seam,” is a very “gassy” mine and liberates large amounts of methane. It is subject to spot inspections every five days, pursuant to section 103(i) of the Act. Tr. 135.

On January 4, 2004, Cumberland made a change to the LW49 ventilation system, coursing return air out the #3 entry on the tailgate, which had been on intake. The #3 tailgate entry was the entry immediately adjacent to the block of coal being removed. Cumberland did

⁴ In addition to the panel-specific plan, Cumberland had an approved ventilation plan, dated March 3, 2003, for the overall mine and longwall panels in general. Ex. Jt-2.

not seek, or obtain, MSHA's approval before implementing the change. Stip. 19. On January 7, 2004, another air change was made. The belt entry, the #1 entry on the headgate side, which had been an intake air course, was changed to neutral or outby air flow, and the #3 headgate entry was switched from return air to intake air.⁵ Cumberland did not seek, or obtain, MSHA's approval before implementing the change. Stip. 20. On January 8, Cumberland sent a letter to MSHA requesting approval of the changes. The request was eventually withdrawn because of intervening events. Stip. 21.

A third air change was made on January 11. A regulator was moved on the tailgate side to move pressure from outby to inby. Cumberland did not seek, or obtain, MSHA's approval before implementing the change. Stip. 22. On January 12, Cumberland submitted a proposed addendum to its ventilation plan, incorporating the changes that had been made. Stip. 23; ex. Jt-4. The proposed addendum was eventually withdrawn because of intervening events. Stip. 23. On January 12, Robert Kimutis, Cumberland's senior mine engineer, was told that MSHA planned to conduct an evaluation of the bleeder system. Stip. 23. After January 12, methane delays were significantly reduced and production was significantly increased. Ex. R-43.

As a new longwall starts up, it is not unusual to experience ventilation problems, particularly until there is a substantial roof fall behind the shields. The system is dynamic, and may remain so until mining "completes a square," i.e., mining proceeds as far as the panel is wide, here 1,250 feet. Tr. 1654-55, 1912-14. However, the number of air changes made to LW49 was unusual.

Because of concerns expressed by miners' representatives, MSHA inspector Anthony R. Guley, Jr., and assistant district manager Thomas E. Light, Jr., inspected LW49 on January 13, 2004. They were accompanied by Robert Bohach, Cumberland's manager of safety, and miners' representative Hroblak. Guley and Light were not aware of the ventilation changes that had been made by Cumberland, or the revisions to the ventilation plan that had been submitted. They reviewed records and were surprised to learn that a methane concentration of 4.2% had been recorded at one of the bleeder evaluation points. After going underground, they found the changes that had been made to the ventilation system, and realized that the December 9 ventilation plan that they had reviewed prior to coming to the mine was no longer being followed. Cumberland's failure to obtain approval before implementing the changes was a violation of a safety standard, for which a citation was issued by Guley.⁶ Stip. 24; ex. Jt-5.

⁵ The January 7 change was significant because, when the belt entry was on intake air, methane given off by the freshly cut coal on the belt and the adjoining coal block was swept inby and along the face. Consequently, fresh air intended to ventilate the face already had as much as 0.3% methane, which substantially reduced the amount of methane that could be generated by mining activity before production would be shut down.

⁶ Operators of underground coal mines are required to "develop and follow a ventilation plan, approved by the [MSHA] district manager," and material changes to the plan must be

That citation is not at issue in these proceedings.

Other conditions encountered in their travels concerned Guley and Light. A battery charging station near the #80 crosscut on the headgate was being ventilated by air from the #3 entry, which then flowed into the #2 entry, an intake entry. This violated a ventilation standard that required venting to a return entry.⁷ The air flow had been reversed because a ventilation curtain had been taken down. Guley became concerned that the wraparound bleeder ventilation system was not working correctly. In his experience, systems operated with a bleeder fan developed large enough pressure differentials that ventilation of a battery charging station would have been routine.⁸ He then traveled to the face, and found that the volume of air was considerably less than had been recorded on the preshift book that he had examined on the surface. He measured methane concentration near the third shield, i.e., at the beginning of the longwall face, and was surprised to find it was 0.3%. He was again surprised to find a higher than expected methane concentration, 0.9%, near the tailgate side of the longwall.

When the face ventilation air reached the tailgate entry, the #3 entry on the tailgate side, a portion of it was supposed to flow outby into the return, and a portion was supposed to flow inby. This was referred to as the "T-split." The flow into the gob along the #3 entry was very important, because it kept methane in the #3 entry from flowing out onto the face. It also played a significant roll in diluting methane within the bleeder system. The inby T-split flow proceeded along the #3 entry to the first crosscut, entered it and flowed into the #2 entry. At that point it split again. Part of it flowed outby through a regulator designated as bleeder evaluation point 30A ("BEP 30A"), into the travelable bleeder entry. The remainder of the T-split air flowed inby in the #2 entry, and mixed with air flowing out of the #3 entry and adjoining rubble zone through crosscuts inby the face. That air eventually passed through a bleeder evaluation point at the inby corner of the panel, BEP 30, into the travelable bleeder entry, crosscut #89.⁹ On the headgate side, some of the intake air was routed into the #1 and #2 entries, and eventually flowed into the travelable bleeder entry through BEP 31, located at the most inby corner of the panel.¹⁰

approved before being implemented. 30 C.F.R. § 75.370(a)(1), (d).

⁷ 30 C.F.R. § 75.340(a)(1)(i).

⁸ Cumberland contends that the charging station ventilation violation had little to do with the bleeder system, which may have been the case. The incident is related only for background purposes.

⁹ Another bleeder evaluation point, BEP 30B, was located immediately outby BEP 30. However, it was of comparatively little significance to the enforcement actions at issue.

¹⁰ This description of bleeder system air flows conforms with MSHA's expectations of the system. Cumberland disputes certain aspects of MSHA's position. Most significantly, Cumberland points out that the December 9 ventilation plan does not specify volumes of air

When Guley and Light reached the tailgate, they were unable to determine whether the T-split was working properly, because there was limited flow inby. Tr. 348. They proceeded to BEP 30A, then into the #1 tailgate entry, and discovered another of the ventilation changes that had been made, i.e., the air in the bleeder entry flowing in a direction opposite to that shown in the December 9 ventilation plan.

They proceeded inby to the back corner of the panel and entered the #2 entry at BEP 30. Just outby BEP 30 in the #2 entry, they used a smoke tube to determine the direction of air flow, and found that it was flowing outby, toward the face, the opposite direction that they felt it should have been flowing. They took methane readings and proceeded outby in the #2 entry to the area of the face, where they were able to determine that there was air flowing from the #3 entry into the #2 entry and then outby to BEP 30A, which demonstrated that the T-split was working.

Guley questioned the adequacy of the bleeder system. He did not feel that the pressures were sufficient to generate adequate air flow, and he sensed similarities between the LW49 system and ineffective bleeder systems that he had seen in the past, especially wraparound systems. Tr. 354. Bohach disagreed with his concerns, noting that there were no excessive methane concentrations at the face, and that the ventilation plan did not specify particular pressure differentials or volumes of air flow within the bleeder system or at BEPs.

On January 14, 2004, a meeting was held at the mine. Officials from Cumberland, MSHA and the UMWA participated. Stip. 25; ex. Jt-6. The meeting had been scheduled previously, but the agenda was expanded to include the LW49 ventilation system. MSHA decided to conduct a comprehensive ventilation survey of LW49. A ventilation survey involves a considerable amount of data collection. Three or four person teams, each comprised of at least one representative of MSHA, Cumberland and the union, took various instruments into the mine and measured altitude, pressure differentials, air flow and methane and oxygen content at numerous points. Despite the logistics involved, the survey was scheduled for January 16.

On January 15, Cumberland performed its own evaluation of the LW49 bleeder system, with the assistance of UMWA officials Hroblak and Mihalik. The results of that ventilation survey were recorded on a map of LW49. Ex. R-2. Cumberland contends that its survey showed that the LW49 bleeder system was working effectively on January 15, because there was an ample volume of face ventilation, 53,000 cubic feet per minute ("CFM"), methane concentrations at the face were low, 0.5%, there was air flow out the BEPs at the back of the panel, and methane concentrations in the walkable bleeder entries were less than 4.5%. Tr. 1350.

flow, or the direction of air flow in the #2 tailgate entry between crosscuts #84 and #87. MSHA counters that air flow volumes are not specified on ventilation plans because the quantities change as the panel is mined out. Tr. 1132-33.

The participants in the January 16 survey included MSHA inspectors and technical support personnel, Cumberland management officials and officials of the UMWA. Stip. 27; ex. Jt-7. Information collected by the various teams was noted on a map of the longwall panel. Ex. G-26. MSHA's representatives determined that the bleeder system was ineffective. Robert Penigar, an MSHA inspector who participated in the survey, issued Citation No. 7083200, pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a). It alleged that Cumberland was in violation of 30 C.F.R. § 75.334(b)(1), which requires that a bleeder system effectively and "continuously, dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings."

Cumberland agreed not to operate LW49 until the ventilation issues were resolved. Stip. 30. On January 18, Cumberland officials, MSHA personnel and UMWA personnel met at the MSHA field office to discuss changes to Cumberland's ventilation plan. Stip. 31; ex. Jt-8. On January 19, MSHA inspectors and technical support personnel again evaluated the LW49 ventilation and bleeder system. Stip. 32. The system was improved, with an increased pressure differential at the back tailgate corner and positive inby air flow in the #2 entry. Ex. G-28. However, MSHA believed that the bleeder system remained ineffective. Stip. 33. Additional changes were made, and another evaluation was performed on January 20. Air flows and pressure differentials were markedly improved. Ex. G-30. However, MSHA believed that the system was still fragile and had limited capacity. The results of the survey were discussed at a meeting that lasted until approximately 1:15 a.m., on January 21. Stip. 34, 35; ex. Jt-9.

Cumberland had not operated LW49 since the initial ventilation survey on January 16, and changes to the ventilation plan had to be approved to terminate outstanding citations. During the lengthy meeting on January 21, MSHA officials made clear that in order to secure approval, any ventilation plan would have to contain certain provisions. MSHA believed that the air flows measured in the ventilation surveys indicated that the BEPs on the tailgate did not provide accurate information on conditions in the #2 entry. Consequently, they insisted that additional monitoring points be established at crosscuts #82 and #85. MSHA wanted steel pipes installed through the stoppings between the #1 and #2 entries at those locations, extending into the middle of the #2 entry. Sampling of the air in the #2 entry could then be done by testing the methane content of the air flowing out of the pipes into the #1 entry. A methane limit of 4.5% was specified for those monitoring points. MSHA also sought to establish a monitoring point with a 2% methane limit in the #1 tailgate entry between the #73 and #74 crosscuts.

Cumberland objected strenuously to those provisions, and continues to maintain that they were unprecedented and unreasonable. It considered that the #2 tailgate entry was part of the gob where high methane concentrations are to be expected, and that the bleeder system performed effectively if methane in the gob was diluted by the time it passed through any of the previously established bleeder evaluation points into the travelable bleeder entries. As to the #73/74 monitoring point, it argues that that was an inappropriate location to apply a 2% methane limitation, because the air in that entry did not enter another split of air until it reached the mouth of the panel, over 10,000 feet further outby. The regulations do not impose any required methane

content for a bleeder split of air until it joins another split of air, at which point a maximum concentration of 2% methane is allowed. 30 C.F.R. § 75.323(e). Cumberland asserts that imposing a 2% limit some 10,000 feet further inby was overly restrictive, in that it failed to take into consideration that leakage would occur through stoppings along the route, resulting in considerable additional dilution of the air flow before it joined another split of air.¹¹

There is no question that the conditions MSHA insisted upon were highly unusual. Virtually all of Cumberland's witnesses, many with extensive mining experience, and most of MSHA's witnesses testified that they were not aware of any other ventilation plan that included a monitoring point in the #2 tailgate entry or anything similar to the 2% monitoring point at the #73/74 crosscuts. Tr. 296-97, 380-81, 1035-37. MSHA's inspectors also stated that they normally would not enter the #2 tailgate entry inby the face, but indicated that they would do so, if necessary to evaluate a bleeder system, and it were safe.¹² Tr. 192-93, 410-11, 679, 717-18, 897-98, 910, 1054, 1062-63. Several MSHA personnel also agreed that methane concentrations of 4.5% or higher could be expected in or near the #2 entry, particularly in the crosscuts from the #3 to the #2 entry. Tr. 211-12, 710, 1032-33, 1062-63.

MSHA's position remained firm, and on January 21, Cumberland reluctantly submitted a proposed ventilation plan incorporating the changes required by MSHA. It was approved that same date. The newly revised plan consisted of a narrative that included the various conditions and a map of the panel depicting the various monitoring points and directions of intended air flow. Stip. 36; ex. Jt-10, Jt-10A. The plan provided, in pertinent part:

Additional safeguards have been included to ensure approval of the plan per discussions taken place at Cumberland mine #6 Portal on 1-19-2004. They are as follows:

.....

B- Continuous monitoring will take place in the [tailgate] at BEP30, BEP30A,

¹¹ The 2% monitoring point was unique, and there was considerable discussion about its appropriateness. The UMWA, at one point, joined in suggesting that the methane limit be raised to 2.3%. MSHA considered lowering it to 1.8%. While that particular provision resulted in numerous interruptions to mining, it did not play a direct or substantial roll in any of the violations at issue in these cases, and will not be addressed at length. It should be noted, however, that MSHA has considerable discretion in imposing conditions in ventilation plans. See *RAG Cumberland Resources, LP*, 26 FMSHRC at 648 n.16.

¹² Normally there would be another, mined-out longwall panel on the other side of the tailgate entries, and deteriorating roof and other conditions would preclude safe travel in the #2 entry. Since LW49 was in a new district, there was no adjacent panel. In addition, Cumberland had spent a considerable amount of money to install pumpable concrete cribs to keep the bleeder entries open. Consequently, the LW49 #2 tailgate entry was in very good condition and presented no impediment to travel.

BEP30B, 85xcut #2 to #1 entry, 82xcut #2 to #1 entry. The monitoring will be on a "roving" basis and the quality, quantity and airflow direction will be recorded in a designated book at the end of each shift, until a history has been established. A (15 second or more) methane reading of 4.5% at the continuously monitored locations will cause power to be deenergized on the longwall face and immediate corrective action to be taken. MSHA will be notified if this condition occurs.

....
....

- E- Steel pipes will be installed, extending from rockdust ports in 82 and 85 crosscuts of No. 1 to the center of No. 2 entry of [the tailgate].
- F- A Bleeder Monitoring Point will be established in the No. 1 entry of [the tailgate] between the No. 73 & 74 crosscuts. A methane reading of 2.0% or greater will cause the longwall to cease production. Longwall mining will resume once the methane level at this Bleeder Monitoring Point reduces below 2.0%.

Ex. Jt-10.

MSHA assigned inspectors to monitor the LW49 bleeder system on rotating shifts, 24 hours per day. Inspectors took measurements at the established monitoring points approximately every two hours. Ronald Hixon, an MSHA inspector and ventilation specialist, was assigned to conduct the monitoring on the second shift. On January 24, he decided to enter the #2 tailgate entry in order to verify the accuracy of the readings that he had been getting at the #82 and #85 crosscut monitoring points. He measured methane concentrations in excess of 5% at the intersections of crosscuts #83 and #84 within the #2 entry, and issued an imminent danger order pursuant to section 107(a) of the Act. Tr. 752. He also issued a citation for an ineffective bleeder system, a violation of 30 C.F.R. § 75.334(b)(1). Tr. 760.

On January 25, MSHA technical support personnel and inspectors again evaluated the LW49 bleeder and ventilation systems. They were accompanied by Cumberland management and hourly personnel. Stip. 41. The results of that ventilation survey were recorded on a map of the panel, and were discussed with Cumberland officials. Ex. G-32.

MSHA inspector Ronald Tolliver began monitoring the LW49 bleeder system on January 31, 2004. On February 4, he detected 4.8% methane at the #85 crosscut monitoring point, and issued an imminent danger order and a citation alleging a violation of 30 C.F.R. § 75.334(b)(1). Stip. 45. Tolliver also issued an imminent danger order and citation on February 7, 2004, when he found a methane concentration of 5.0% at the #85 crosscut monitoring point. Stip. 50, 51.

MSHA inspector James Conrad, Jr., was monitoring the LW49 bleeder system on February 14, 2004. On his second tour of the monitoring points, he discovered 5.0% methane coming through the regulator at BEP 31, at the back corner of the headgate entries. Tr. 993. He issued an imminent danger order and a citation alleging a violation of 30 C.F.R. § 75.334(b)(1).

Stip. 54, 56. He spoke with the foreman, who explained that a temporary disruption to the headgate air flow had been caused by the erection of a check curtain, while a regulator was being moved. He then returned to BEP 31, measured a methane concentration of 2.3%, and terminated the order and citation. Tr. 1042-44.

Cumberland had become increasingly concerned about production interruptions mandated by provisions in the plan and caused by the issuance of imminent danger orders and citations. It continued to view the #73/74 2% monitoring point and the monitoring in the #2 tailgate entry at crosscuts #82 and #85 to be unprecedented and unjustified. It pressed for a meeting with the Assistant Secretary of Labor for Mine Safety and Health, David Lauriski. That meeting was held on January 29, 2004, but did not result in the resolution of any of Cumberland's concerns. Stip. 42. It then sought assurances from MSHA that monitoring in the #2 tailgate entry would no longer be required if the wraparound system was converted to a bleeder fan system. Tr. 1911-12. It developed a plan to mine back to, and make operational, the previously planned #4 bleeder shaft. That plan was approved by MSHA on February 7, 2004. Stip. 47, 48. On February 13, 2004, Cumberland announced that it would idle LW49, until mining to the #4 bleeder shaft was completed. Stip. 58. That process consumed over one month, after which production resumed, and no further unusual delays or problems were experienced.

At issue in these cases are the ineffective bleeder system citations issued on January 16 and 24, and February 4, 7 and 14, 2004, and the related imminent danger orders. Cumberland filed Notices of Contest as to those enforcement actions. The Secretary filed Petitions for Assessment of Civil Penalties for the citations, proposing that a total of \$3,874.00 in penalties be imposed.

Citation No. 7083200

Citation No. 7083200 was issued by Penigar at the completion of the January 16, 2004, ventilation survey, and alleges that the LW49 bleeder system was ineffective, in violation of 30 C.F.R. § 75.334(b)(1).¹³ The violation was described in the "Condition or Practice" section of the citation as follows:

The bleeder system for the active LW49 longwall section, MMU 0011, was determined to be ineffective in controlling the flow of air through the bleeder system to continuously dilute and move methane-air mixtures from the gob and away from the active workings. A ventilation survey conducted by MSHA

¹³ 30 C.F.R. § 75.334(b)(1) provides:

(b)(1) During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from the active workings and into a return air course or to the surface of the mine.

inspectors and engineers from MSHA Technical Support on 01/16/2004 showed that the bleeder system was not adequate to move methane out of the gob and away from the face. The operator was cited on 01/13/2004 for not complying with the ventilation plan approved on December 9, 2003, when it was found the longwall was not being ventilated in a manner approved in the plan. Coal will not be mined with the longwall until ventilation changes are made to correct the bleeder system deficiencies and a plan submitted and approved by the District Manager showing the revised bleeder system.

Stip. 28, 29; ex. G-1.

MSHA determined that it was reasonably likely that the violation would result in a fatality, that it was significant and substantial, that seven persons were affected, and that Cumberland's negligence was moderate. A penalty of \$1,238.00 is proposed for this violation.

The Violation

The results of the January 16 ventilation survey were recorded on two maps of LW49. One showed air flow directions. Ex. G-25. Pressure differentials, methane readings, air flow quantities and other data were recorded on the second. Ex. G-26. The involved MSHA personnel collectively determined that the LW49 bleeder system was not functioning effectively. Tr. 713. Penigar was assigned to write the citation, which reflects his wording. Tr. 713. As Penigar explained the survey results, there were many significant concerns, including, air flow reversals, weak pressure differentials, and excessive methane in the #2 tailgate entry close to the face. Tr. 666-69. Methane at an explosive level, 5% - 15%, was found in the #2 tailgate entry near the #85 and #86 crosscuts, which was compounded by the fact that air flow at those locations was reversed, i.e., flowing outby toward the face. Air in that area should have been flowing inby, toward BEP 30 at the back corner of the panel, where it would pass into the travelable bleeder entries. There was no perceptible air movement in the #2 entry between crosscuts #87 and #88, and there was very limited flow in the opposite direction (outby) between crosscuts #87 and #86. There was limited, perceptible air movement from the #3 entry to the #2 entry in crosscuts #84 and #86. A methane concentration of 4.3% was detected between crosscuts #83 and #84, which was 300 - 400 feet from the face. Air at that location in the #2 entry was flowing outby, toward BEP 30A. Penigar felt that there was a substantial amount of methane too close to the face, where people were working, and would have issued an order shutting down the longwall if Cumberland had not agreed to cease production. Tr. 669, 673, 683-84.¹⁴

¹⁴ Penigar impressed me as a particularly credible witness. Cumberland contends that he indicated, during the survey, that he didn't see anything objectionable. Penigar did not recall making such a statement, and pointed out that he would not have had access to all of the survey data until it was recorded on the mine map. Tr. 719. I credit his testimony, and find that he was sincerely concerned about the performance of the bleeder ventilation system, and perceived that

Dennis Beiter, a supervisory mining engineer, chief of MSHA's mine emergency services branch, ventilation division, safety and health technology center, was in charge of the survey. Testifying as an expert in the field of mine ventilation and the conduct of surveys, he cited other concerns, including pressure differentials across temporary ventilation controls on the headgate side that were very large in comparison to the pressure differentials that created air flow in the primary internal air flow paths in the gob on the tailgate side, i.e., entries #3 and #2 inby the face. Tr. 504. The pressure differential in the #2 entry from the #87 crosscut to the #83 crosscut was only 0.02 inches of water, and it was in an outby direction. In comparison, the pressure differential across ventilation curtains in the #2 entry on the headgate side was .59 inches of water. Those curtains had to be moved as the face advanced, and Beiter was concerned that the moving process would produce changes in pressure that would have an adverse impact on the tailgate side. Tr. 519-23. Smoke tube indicators had shown changing air velocity in the #2 tailgate entry, possibly as a result of inadvertent changes to ventilation controls, e.g., a miner passing through a ventilation curtain. Methane concentrations in the #2 entry had risen considerably during the survey. Tr. 505, 507. Beiter was concerned that, with the air flowing outby in the #2 entry, the limited flow through BEP 30 was from the headgate side by way of the ladders, and did not provide any indication of conditions in the tailgate's #2 entry or the gob. Tr. 510-11. Because gas in the #3 entry and the adjoining rubble zone is subject to the same pressure differential as the air in the #2 entry, it flows in the same direction, and he believed that methane in the gob adjacent to crosscuts #85 to #83 was moving toward the face. Tr. 511-12.

John Urosek, chief of MSHA technical support's ventilation division, did not participate in the survey, but concurred in Beiter's analysis of the survey data and the conclusion that the bleeder system was ineffective. Urosek had unique qualifications to testify as a mine ventilation expert.¹⁵ In his capacity with MSHA he participated in over 50 investigations of various mine incidents involving ventilation issues. In the early 1990's he was selected as chairman of an educational project and charged with developing a course on bleeder and gob ventilation systems to ensure that MSHA personnel, operators, and other interested persons understood the requirements of MSHA's regulations on the subject. The project team performed ventilation surveys at a large number of mines throughout the country, examining different types of bleeder systems. That information was analyzed and a bleeder and gob ventilation course was developed. After development, the course was reviewed by industry leaders, academia and other MSHA personnel. Appropriate changes were made, and the course was administered to all MSHA inspectors during one-week sessions at MSHA's training academy. It was also administered at mining companies and at MSHA district offices where interested parties could

it posed a hazard to miners.

¹⁵ Four witnesses were accepted as experts. However, the parties were advised that little weight would be given purely to the "expert witness" label, and that the testimony of all witnesses would be considered in light of their education, experience and other qualifications, as well as pertinent indicators of reliability for their particular testimony. Tr. 1306, 1464-65, 1479-80.

attend. Urosek believes that the course book is accepted as authoritative in the industry. Tr. 1072. There were no other publications, or similar sources of authority on mine ventilation cited by any other witness.

Urosek explained that a wraparound bleeder system, like other bleeder systems, is designed to create a pressure differential from the front of a longwall panel to the back, or inby, end of the bleeder system. Wraparound systems can work well, but have some "inherent flaws." Tr. 1074. The pressure differential is created by exhaust fans that are located outby the mouth of the panel. Ventilation controls are used to transfer part of that pressure differential to the most inby corner of the tailgate entries, and the ability to create a sufficient pressure differential and air flow depends upon a number of factors. It is necessary to support the entries, and the supports create resistance to air flow. The distance from the ventilation fans to the mouth of the panel, as well as the length, number and size of entries can affect the ability of a wraparound system to generate a sufficient pressure differential at the back of the gob. Tr. 1074-75. In contrast, bleeder fan systems are not impacted at all by some of those considerations, and to a lesser extent by others, because the fans are typically located inby the panel, and the pressure differential is created at the back of the gob. Tr. 1074. As noted previously, Cumberland's LW49 was a very large panel. It had been developed with three, instead of four, entries, only one of which was available for the bleeder system. Moreover, the ventilation fans were located a considerable distance from the mouth of the panel. Urosek noted that other panels that Cumberland had successfully mined using a wraparound system typically were smaller, had multiple bleeder entries, and fans that were located closer to the panel. Tr. 1075. He believed that the wraparound system for LW49 was "weak to start with," because there was only one bleeder entry, which required movement of air through a single entry for over 10,000 feet, and that roof supports in the entry would increase resistance as the panel was mined out. Tr. 1089. In his opinion, it would have been very difficult to transfer enough of a pressure differential to produce sufficient air flow in the #2 entry toward the back corner, even if the ventilation fans had been located close to the mouth of the panel. Tr. 1089.

Urosek concurred with MSHA's determination that the LW49 bleeder system was ineffective on January 16, 2004. He believed that the system had virtually no additional capacity to improve air flow. The pressure differential across the regulator at the most inby corner, BEP 30, was "very small," only 0.015 inches of water. Tr. 1109. As the entries became longer, resistance to air flow would increase, and there would be more methane in the gob that had to be diluted. "To compensate for that, what the mine operator has to do is open [the BEP 30] regulator, so you need to have enough pressure at the regulator to compensate for the longwall as it goes out to carry that methane." Tr. 1110. However, the pressure differential at the BEP 30 regulator was so small that opening it would not provide any additional air flow. Tr. 1109-10. Another major problem, according to Urosek, was that the air flow in the #2 tailgate entry was outby, instead of back inby toward BEP 30. Tr. 1114. Methane liberated in the gob tends to flow in the direction of the pressure differential across the gob. The desirable direction is toward the back corner of the tailgate, i.e., toward BEP 30. Tr. 1114. But that was not happening in LW49. Urosek believed that the methane was going to the T-split point, one crosscut inby the

face. The highest concentrations of methane were about two crosscuts inby from the face, which meant that there was a very high concentration of methane from behind the longwall shields that extended one crosscut back, that was not being carried away effectively by the bleeder system. Tr. 1113-16. He explained that that was why it was so important to maintain methane levels below 4.5% in the tailgate entries, i.e., to minimize the zone of explosive mixtures of methane in the gob. Tr. 1116.

It is clear that on January 16, the BEPs on the tailgate side did not give an accurate picture of the conditions in the #2 entry. The most important evaluation point, BEP 30 located at the most inby corner of the tailgate entries, was receiving no air flow from the primary internal gob air flow paths on the tailgate side. The air flowing through that BEP was low methane content air from the headgate entries that had traveled up the ladders at the back of the panel, crosscuts #86 and #87. Tr. 1130-31. Consequently, BEP 30 did not indicate “anything of what was going on in the number 2 entry.” Tr. 1130-32. The evaluation point at the other end of the entry, BEP 30A, which was located outby the face, did receive some air flow from the primary internal air flow paths. However, roughly three-quarters of the air passing through that regulator was face ventilation air from the T-split, and the limited flow from further inby in the #2 entry was substantially diluted before it reached that evaluation point. As noted above, most of the methane in the #3 entry and the adjoining rubble zone was not being drawn into the #2 entry. Rather, it was being drawn outby, to an area behind the shields. Tr. 1248-49.

Cumberland called several witnesses who testified that the bleeder system was working effectively on January 16, 2004. Robert A. Kimutis, Cumberland’s senior mining engineer, and Robert A. Bohach, its manager of safety, have extensive experience in the design and operation of mine ventilation systems, as well as educational qualifications, and were accepted as expert witnesses. In their opinion, the bleeder system was operating effectively because there was good face ventilation, the T-split was functioning properly, there was air flow in the proper directions at the BEPs, and methane concentrations at the BEPs were well under 4.5%, MSHA’s historically applied standard for bleeder taps and travelable bleeder entries. Tr. 1355, 1425-32, 1490-92, 1627-30. Jack Trackmus, director of technical services for Foundation Coal Company, an affiliate of Cumberland, testified to the same effect. Tr. 1680-82. Cumberland’s witnesses uniformly expressed their opinion that the #2 tailgate entry, inby the face, is part of the gob and the dilution zone for methane emanating from the gob, and that high concentrations of methane have been found, and can be expected to be found, in the #2 entry. They did not believe that the outby flow in the #2 entry indicated that methane was moving toward the face. Rather, they believed that it was being moved out through BEP 30A, away from the face.

Cumberland asserts a number of arguments, both factual and legal, in defense of this citation. Factually, it contends that the bleeder system was functioning as it was designed to, i.e., as reflected in the ventilation plan that had been approved by MSHA.¹⁶ It disputes the

¹⁶ That plan did not specify required pressure differentials or flow quantities at BEPs, and the only flow direction indicated in the #2 entry on the tailgate side was inby flow between

Secretary's contention and evidence, that methane was accumulating in the #2 entry and in the gob, extending toward the face. It also contends that methane in the #2 entry posed no danger because it was moving away from the face and out of the system, and there were no ignition sources in proximity to methane in the explosive range. Legally, it contends that MSHA imposed new and unreasonable criteria for evaluating the bleeder system, and that it was not provided fair notice of the new interpretation. It also contends that the interrelationship between sections 75.334(b)(1), 75.334(c) and 75.370 precludes a finding that its bleeder system was ineffective while the citation issued by Guley on January 13 remained outstanding, and its ventilation plan was being evaluated to terminate that citation. In addition, Cumberland contends that the January 16 citation was legally duplicative of the January 13 citation.

Fact-based Defenses

On the issue of the effectiveness of the LW49 bleeder system on January 16, I find the testimony of the Secretary's witnesses, particularly, Urosek, to be more persuasive. There was virtually no pressure differential or air flow from the #3 entry and the adjacent rubble zone into the #2 entry. There was no measurable pressure differential between the #3 and #2 entries at the #84 crosscut, and there was only perceptible air movement into the #2 entry. Ex. G-26. There is no indication that there was any pressure differential or positive air flow from the #3 to the #2 entries in crosscuts #85 and #85 1/2, and only perceptible air flow in crosscut #87. Except for the localized effect of the T-split at crosscut #83, the bleeder system was producing almost no air flow from the #3 entry into the #2 entry. Moreover, the overall pressure differential in the #2 entry between crosscuts #87 and #83 was very small, 0.02 inches of water, which produced limited air flow in an outby direction. Ex. G-26. Explosive concentrations of methane were found in the #2 entry and in a crosscut leading into it from the #3 entry, indicating that methane was accumulating in the worked-out area. I accept Beiter's and Urosek's testimony, which is not directly refuted by Cumberland's witnesses, that the same pressure differential that generated the outby flow in the #2 entry would produce air flow in the #3 entry and adjoining rubble zone in the same direction, i.e., toward the face. Tr. 511-12, 1114. The bleeder system clearly was not moving any appreciable amount of methane out of the worked-out areas on the tailgate side of the panel. Moreover, the methane that was in the worked-out area was being moved toward, not away from, the active workings.¹⁷ The results of the January 16 ventilation survey indicated that the bleeder system was ineffective, and that methane was being allowed to accumulate in the gob near the tailgate side of the face.

crosscuts #87 and #88. The plan also did not specify any air quality or methane requirements within the #2 tailgate entry. Ex. Jt-1, Jt-1A.

¹⁷ It is true, as Cumberland contends, that methane in the #2 tailgate entry was not flowing such that it would actually reach the face. Rather, it was flowing to BEP 30A and into the travelable bleeder entry. However, the methane that was of concern was located in the #3 entry and adjoining rubble zone, which was moving toward the face.

I accept Cumberland's general contention that the presence of a high concentration of methane in the #2 entry is not necessarily unusual and does not, in itself, establish that the bleeder system was ineffective.¹⁸ See *ANR Coal Co.*, 21 FMSHRC 531, 537 (May 1999) (hazardous levels of methane do not necessarily represent violations of the Act or its standards). However, MSHA's decision regarding the effectiveness of the bleeder system was not based solely upon the fact that a high methane concentration was detected in the #2 entry. The violation was predicated upon the whole of the survey results, principally, the virtual absence of air flow out of the #3 entry and adjacent rubble zone, and the outby pressure differential that would move the methane in that area toward, rather than away from, the active workings.

Cumberland also argues that the ventilation survey did not disclose any overt deviations from the ventilation plan, except for the three, as yet unapproved, air changes. However, as noted below, the fact that the system may have been functioning in conformance with the plan is not a defense to the citation. The survey disclosed that the BEPs on the tailgate side, BEP 30 and BEP 30A, were not providing reliable information about conditions in the #2 entry and the adjacent primary gob air pathways between crosscuts #87 and #83. The survey results demonstrated that methane was not being moved away from the active workings, and it was clear that the December 9 ventilation plan could no longer be regarded as describing an adequate and effective bleeder system.

Other Defenses - Compliance with Ventilation Plan Precludes Violation of Section 75.334(b)(1)

The Secretary's regulations require that the bleeder system, as well as the means for determining its effectiveness, be specified in the operator's ventilation plan, including locations for the taking of measurements of methane and oxygen concentrations, air quantities and air flow directions. 30 C.F.R. §§ 75.334(c), 75.371(x)-(bb). Cumberland contends that any enforcement action with respect to an allegedly ineffective bleeder system must be accomplished through the ventilation plan approval process, not through the issuance of a citation alleging a violation of section 75.334(b)(1), requiring that bleeder systems be effective. That position was rejected in *Plateau Mining Corp.*, 25 FMSHRC 738, 746 (Dec. 2003) (ALJ). Judge Manning's decision in *Plateau* is currently on review by the Commission, and is not binding precedent. However, I agree with his analysis.

The ventilation plan for the LW49 panel represented Cumberland's best educated prediction of how the panel could be ventilated in conformance with applicable mandatory safety standards. Despite MSHA's approval of the plan, there was no guarantee that it would work effectively, or that it would continue to work effectively. As Judge Manning observed, "because an underground coal mine is a dynamic environment, a mine operator must be constantly vigilant when monitoring the conditions underground and must make changes to its ventilation system as

¹⁸ MSHA formally acknowledged as much when it approved the January 21 ventilation plan, which specified that production cease and corrective action be taken if a methane concentration of 4.5% was detected for 15 seconds or more in the #2 entry.

conditions warrant.” 25 FMSHRC at 746. Any number of conditions can impact the effectiveness of the bleeder system, including roof falls, water accumulation in critical air paths, increased resistance as air flow paths grow longer or, simply, the amount of methane liberated by mining activity. The Commission has held that section 75.334(b)(1) requires that an operator maintain an effective and adequate bleeder system. “A bleeder system must effectively ventilate the area within the bleeder system and protect active workings from the hazards of methane accumulations.” *RAG Cumberland Resources, LP*, 26 FMSHRC at 647. Cumberland was obligated to comply with section 75.344(b)(1) independent of the ventilation plan approval process, and could be charged with violating that provision even though it was fully complying with its approved ventilation plan. See *Utah Power & Light Co. v. Sec’y of Labor*, 951 F.2d 292 (10th Cir. 1991). Compliance with ventilation plan approval requirements does not permit an operator to shield itself from liability for violating other mandatory standards.¹⁹

Duplication

The January 16 citation, alleging an ineffective bleeder system, was not duplicative of the citation issued by Guley on January 13, which alleged a failure to comply with the approved ventilation plan. Citations and orders alleging violations of different standards arising out of the same, or related, conduct are not duplicative, as long as the standards involved impose separate and distinct legal duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1462-63 (Aug. 1982); and *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). In *Western Fuels-Utah*, the Commission held that a charge of violating a specific standard was duplicative of a charge of violating a more general standard. However, the Commission made clear that its decision was not based solely upon the premise that every violation of the more specific standard would also be a violation of the more general one. Rather, it looked to whether the operator had been cited for more than one specific act or omission. Had there been evidence of additional deficiencies that violated the general regulation, such that that allegation would not have been based upon the identical evidence used to support the violation of the more specific standard, the charges would not have been found duplicative. *Id.* at 1004, n.12.

¹⁹ Cumberland asserts a different version of its ventilation plan defense to citations issued following approval of the January 21 plan. It contends that the conditions imposed with respect to the monitoring points established “action levels,” for which citations could be written only if the specified action was not taken. Although two of MSHA’s witnesses agreed that the provisions were action levels, the argument is unavailing. Tr. 206-08, 406-07. As noted above, the effective bleeder system standard embodied in section 75.334(b)(1) can be enforced irrespective of ventilation plan requirements. In addition, the citations that are affirmed in this Decision were not issued solely for non-compliance with one of the ventilation plan requirements. The argument has no relevance to the validity of the imminent danger orders, which may be issued whether or not there is a violation of the Act or applicable regulations.

Here, the two citations allege non-compliance with different legal duties, and are not based on the same acts or omissions. As of January 13, Cumberland had implemented three changes to the ventilation system that had not been approved by the MSHA district manager, and a citation was issued for the violation of its duty under section 75.370(d) to secure MSHA approval before implementing changes to its ventilation plan. The January 16 citation was issued because, in the collective judgment of MSHA ventilation experts, Cumberland violated its duty under section 75.334(b)(1) to maintain an effective bleeder system. While approval of an amended ventilation plan eventually abated both of those violations, different aspects of the amendments were designed to address the specific deficiencies that gave rise to the respective violations.²⁰ Cumberland's argument that, by unilaterally implementing a change to the ventilation system, it was relieved of its obligation to maintain an effective bleeder system, must be rejected.

Due Process

An agency may not impose a fine based upon its interpretation of a statute or regulation unless the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). An agency's interpretation may be reasonable, but nevertheless fail to provide the notice required to support imposition of a civil sanction. *General Electric Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C.Cir. 1995). The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, it employs an objective test, i.e., "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998) (quoting from *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990)). In applying this test, the Commission has taken into account a wide variety of factors, including the agency's consistency of enforcement, whether MSHA has published notices informing the regulated community of its interpretation, whether the condition or practice at issue affected safety, and the circumstances at the operator's mine. See *Alan Lee Good*, 23 FMSHRC 995, 1005 (Sept. 2001).

Cumberland was on notice of the Secretary's interpretation that section 75.334(b)(1) required it to maintain an adequate and effective bleeder system, regardless of the state of its compliance with its approved ventilation plan. *RAG Cumberland Resources, LP*, 23 FMSHRC 1241 (Nov. 2001) (ALJ), *aff'd*, 26 FMSHRC 639 (Aug. 2004). The Commission has determined that the Secretary's interpretation of the regulation is reasonable. *Id.* For the reasons discussed above, MSHA's determination that the LW49 bleeder system was ineffective on January 16, 2004, its application of section 75.334(b)(1) to the particular facts, also was reasonable.

²⁰ In fact, Cumberland was not required to obtain approval of a ventilation plan amendment in order to abate the January 13 citation. It simply could have conformed its ventilation system to the approved plan.

The January 16 ventilation survey confirmed that neither BEP 30A, nor BEP 30, were providing reliable or useful information as to what was occurring in a substantial and important part of the LW49 bleeder system, the #2 entry, and the #3 entry and adjacent rubble zone, from crosscut #87 to the second crosscut inby the face. There was virtually no air flow from the #3 tailgate entry into the #2 entry inby the #83 crosscut. The pressure differential and air flow in the #2 entry and the adjacent #3 entry was outby from the #88 crosscut, and there were high methane concentrations in those areas. While the methane that was actually in the #2 entry would be moved outby through BEP 30A into the bleeder entry, the flow in the #3 entry and the adjacent rubble zone would have been toward the face, because the overall pressure differential from the #87 to the #83 crosscut was in that direction. The bleeder system was not moving methane in that substantial portion of the worked-out area away from the active workings.

While Cumberland argues that MSHA's enforcement methodology was unprecedented, there is no true claim that the standard has been enforced inconsistently, because there was no evidence presented that comparable conditions had actually been considered by MSHA in the past. Neither party points to any published notices addressing the particular types of conditions encountered here. The overriding considerations on the fair notice question are the conditions' effect on safety under the circumstances presented by LW49. For the reasons discussed above, the conditions relied upon by MSHA in determining that the LW49 bleeder system was ineffective had a substantial and critical effect on safety.

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the bleeder system was ineffective on January 16, 2004.

Cumberland appears to rely on its fair notice defense, not only to challenge the actual decision that the bleeder system was ineffective, but to challenge MSHA's methodology in making the determination. It contends that MSHA's decision to evaluate the effectiveness of the bleeder system based upon conditions in the #2 entry inby the face represented "new criteria" for evaluating bleeder systems and, because it was not put on notice of the new criteria at the time the LW49 ventilation system was being designed, the citations must be vacated.

Such a broad fair notice defense cannot succeed for a number of reasons. Taken to its logical conclusion, it would mean that an operator could continue mining in a longwall panel with an inadequate and ineffective bleeder system, because the specific type of data upon which MSHA relied to determine that the system was ineffective had not been previously used to evaluate such systems. Such a result could not be more contrary to the legislative and regulatory scheme, and is simply unacceptable. Moreover, Cumberland cannot reasonably assert that it could not have anticipated the possibility that data pertinent to LW49 bleeder system's performance, including conditions in the #2 entry, would not have been used to evaluate its effectiveness.

Each longwall panel is, in some sense, a unique undertaking. As Trackmus explained, every longwall panel is different, and no one can “predict how much methane [will be] in that gob [or] where it is going.” Tr. 1428. That is why the shaft within a shaft was incorporated into design, “because that was going to provide additional air flow at the back corner in case we needed that.” Tr. 1429. If each longwall panel is a unique undertaking, LW49 was more unique than others. It was extremely large, the largest panel Cumberland had mined, and it was to use a wraparound bleeder system, a system with “inherent weaknesses,” according to Urosek.

The UMWA had raised concerns about the use of a wraparound bleeder system when first advised of Cumberland’s decision to abandon its plan to use a bleeder shaft. Problems encountered during start-up also raised questions about the system. While Cumberland believed that the wraparound system would be effective, there was ample reason to anticipate that questions regarding its effectiveness would continue to be raised. It was also predictable that when such questions were called to MSHA’s attention, a ventilation survey would be performed. Cumberland’s managers did not believe that a ventilation survey was necessary, but there is no claim that they were surprised by the decision or that it was unprecedented. A proper survey would, of course, include collection of data pertinent to conditions in the #2 entry, and MSHA’s technical personnel would review and consider all of the data in order to evaluate the effectiveness of the system.

MSHA was required by its statutory mandate to consider all pertinent data in evaluating the system, and make its best judgment as to its effectiveness. It could not ignore data reflecting conditions in the #2 entry, i.e., methane concentrations, pressure differentials and air flow directions and quantities, even if Cumberland had no reason to anticipate that that particular type of data would be used to evaluate the system. Cumberland’s quarrel is, in reality, not so much with MSHA’s consideration of data pertinent to conditions in the #2 entry, as it is with the reasonableness of the conclusion MSHA ultimately reached based upon that data. Cumberland’s due process, fair notice defense to MSHA’s methodology is also rejected.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff’d*, *Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

I find that the Secretary has carried her burden of proof with respect to Citation No. 7083200, and that Cumberland committed the violation, as alleged. I also concur with the assessment that seven persons were affected, and that Cumberland’s negligence was moderate.

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); *see also U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985); *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g*, *Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

Accumulations of methane in the vicinity of the face, behind the shields, pose a risk of explosion and multiple fatalities for miners working in the area. Urosek explained that, due to the variable nature of the roof fall behind the shields, face ventilation air can flow behind the shields, and then be forced out onto the face area, carrying methane with it. While there are sensors on the face equipment and at the tailgate that can detect the presence of methane and automatically deenergize the equipment, those sensors are positioned such that they would most likely not detect the presence of methane in air flowing in from the shields. Tr. 1249. I find that there was a reasonable possibility that the violation would have resulted in an injury and that any injury would have been serious. Accordingly, the violation was S&S.

The January 24, February 4, and February 7, Citations and Orders

Following approval of the January 21, 2004, ventilation plan, which included monitoring points at crosscuts #82 and #85, mining of the LW49 panel commenced. The operation of the bleeder system was continuously monitored by MSHA and operator personnel. On the dates in question, high levels of methane were detected in the #2 entry, and citations and imminent danger orders were issued.

Citation No. 7067356 and Order No. 7067355 – January 24, 2004

Citation No. 7067356 and Order No. 7067355 were issued by Hixon on January 24, 2004. The citation alleged that the LW49 bleeder system was ineffective, in violation of 30 C.F.R. § 75.334(b)(1). The violation was described in the “Condition or Practice” section of the citation as follows:

The bleeder system for the No. 49 longwall panel failed to continuously dilute and move methane-air mixtures and dust from the worked-out area away from the active section. Methane was detected on the tailgate side, in the No. 2 entry, at the No. 83 crosscut at 5.6% and extended inby to the No. 84 crosscut. The methane was measured 1 foot from the mine roof, in the center of the entry.

The methane was layered and when measured closer to the roof it was as high as 6.9%.

Stip. 38; ex. G-3.

Hixon determined that it was reasonably likely that the violation would result in a fatality, that it was significant and substantial, that six persons were affected, and that Cumberland's negligence was low.²¹ A penalty of \$878.00 is proposed for this violation. The companion order contained virtually identical language. Ex. G-2.

Hixon, had been an MSHA inspector since 1987, and a ventilation specialist since 1993. Prior to joining MSHA, he worked as a miner for eight years, and had worked on one of Cumberland's longwall panels that had a wraparound bleeder system. He had participated in the ventilation surveys, and was assigned to monitor the LW49 bleeder system on the second shift as of January 21, 2004. As he started his shift on January 24, Bohach told him that the #73/74 monitoring point would probably shut down mining, i.e., that methane levels were approaching the 2% limitation established in the plan. Hixon was concerned about the rising methane. He proceeded inby in the #1 tailgate entry and measured 1.9% methane at the #73/74 monitoring point. He continued down the entry, measuring 1.6% methane at the sampling pipe at crosscut #82, and 2.6% at the sampling point at crosscut #85. When he got to the back corner, BEP 30, he decided to enter the #2 entry. He had some questions about the accuracy of the readings at the #82 and #85 crosscut sampling pipes, because a large amount of coal was being produced, but MSHA wasn't seeing anticipated increases in methane. Tr. 744. The company representative traveling with him, Ed Yesh, declined to go with Hixon, because Cumberland had issued instructions that personnel were not to enter the #2 entry. The union representative also declined.

Hixon proceeded out the #2 entry. He measured methane at 1.5% at crosscut #82, which corresponded with a 1.6% reading that he had obtained earlier for that location at the other end of the sampling pipe in the #1 entry. At crosscut #83, he discovered a methane concentration of 5.6%, took bottle samples, and continued to travel inby. Tr. 755. He measured a methane concentration of 4.5% between crosscuts #83 and #84, 5.1% at the intersection of the #84 crosscut, 4.0% between #84 and #85, and generally declining concentrations back to #87. He measured 3.8% methane at the #85 crosscut intersection, and had measured 2.6% for that location at the other end of the sampling pipe in the #1 entry, approximately 30 minutes earlier. Methane readings at the BEPs and the additional monitoring points established in the January 21 ventilation plan, were within acceptable limits. The location of the methane concentrations found by Hixon are depicted generally on a map of the panel. Ex. G-33.

²¹ Hixon determined that Cumberland's negligence with respect to the violation alleged in the citation was low because, as far as he knew, no one from Cumberland had been in the #2 entry since the approval of the January 21 plan, and the readings at the BEPs and other monitoring points were within acceptable limits. Tr. 765.

After reaching crosscut #88, Hixon decided to issue the subject imminent danger order and citation. He felt that the methane posed an imminent danger because it was in the explosive range and he had “no idea . . . where [it] starts and stops.” Tr. 757. His primary concern was that the methane that he found was two crosscuts, about 280 feet, from the face, where there were “plenty of ignition sources.” Tr. 756. He didn’t know if the pocket of methane extended to the shields of the longwall panel, and was concerned that the pocket would grow. Tr. 805, 812-14. He was aware of the ventilation surveys that had been performed, and believed that they showed that the bleeder system was fragile and had limited capacity, and that changes at one location, e.g., a regulator door opening, might cause the air flow to reverse and push the methane back onto the face. Tr. 816-19. He testified that he would have issued the order even if the face had been further outby. Tr. 818.

The Imminent Danger Order

Section 3(j) of the Act defines “imminent danger” as the “existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.” 30 U.S.C. § 802(j). Section 107(a) of the Act provides, in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

“Imminent danger orders permit an inspector to remove miners immediately from a dangerous situation, without affording the operator the right of prior review, even where the mine operator did not create the danger and where the danger does not violate the Mine Act or the Secretary’s regulations. This is an extraordinary power that is available only when the ‘seriousness of the situation demands such immediate action.’” *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991) (quoting from the legislative history of the Coal Act). An imminent danger exists “when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting from *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)). Inspectors must determine whether a hazard presents an imminent danger quickly and without delay, and a finding of an imminent danger must be

supported “unless there is evidence that [the inspector] had abused his discretion or authority.” 11 FMSHRC at 2164. An inspector must make a reasonable investigation of the facts, under the circumstances, and must make his determination on the basis of the facts known, or reasonably available to him. An inspector may abuse his discretion if he issues a section 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. 13 FMSHRC at 1622-23.

While an inspector has considerable discretion in determining whether an imminent danger exists, that discretion is not without limits. As the Commission explained in *Island Creek Coal Co.*, 15 FMSHRC 339 (March 1993):

While the crucial question in imminent danger cases is whether the inspector abused his discretion or authority, the judge is not required to accept an inspector’s subjective “perception” that an imminent danger existed. Rather, the judge must evaluate whether, given the particular circumstances, it was reasonable for the inspector to conclude that an imminent danger existed. The Secretary still bears the burden of proving [her] case by a preponderance of the evidence. Although an inspector is granted wide discretion because he must act quickly to remove miners from a situation that he believes to be hazardous, the reasonableness of an inspector’s imminent danger finding is subject to subsequent examination at the evidentiary hearing.

15 FMSHRC at 347-48.

The Secretary argues that Hixon, who was a ventilation specialist, reasonably determined that an imminent danger existed based on the fact that explosive concentrations of methane were found within an estimated 280 feet of the face where numerous ignition sources existed. The Secretary also asserts that Hixon had participated in the surveys on January 16, 19 and 20, and had “knowledge of the ineffectiveness of the longwall 49 bleeder system between January 16, 2004 and January 24, 2004.” Sec’y Br. at 33.

Cumberland counters that there was no ignition source in the area where explosive levels of methane were found, that the methane found in the #2 entry was not part of an accumulation that extended to the face, that pressure differentials and air flows precluded the methane from moving toward the face, that high methane levels found at other times did not result in imminent danger orders, and that issuance of an imminent danger order because of methane in the #2 entry is unprecedented and contrary to the actions required by the January 21 plan. Resp. Br. at 52-58.

The impending danger that could justify the issuance of the order was the possibility of methane at explosive levels reaching ignition sources on the face. While an explosion ignited by a roof fall in the area where the methane was found was considered a possibility by Hixon, virtually all of the witnesses, including Hixon, testified, consistent with Urosek’s authoritative MSHA training materials, that a roof fall is an “unlikely” source of ignition. The Secretary does

not argue the possibility of an ignition caused by a roof fall in support of the order. Cumberland argues that the equipment on the longwall face is permissible and that there are monitors that automatically deenergize the equipment in the presence of methane concentrations of 2%. However, the monitoring devices on the face are positioned in the high volume face ventilation air flow, and they would not likely detect methane infiltrating the face from the gob area behind the shields. Tr. 805, 1249. The working face presented sufficient ignition sources to constitute an impending hazard if explosive levels of methane were to reach it.

There is no question that Hixon, an experienced inspector and ventilation specialist, sincerely believed that an imminent danger existed. Whether the Secretary has sustained her burden of proving that his belief was reasonable is a close question. However, after carefully reviewing all of the pertinent evidence, I find that the Secretary has not carried her burden with respect to Order No. 7067355. The most significant considerations in reaching that conclusion are that Hixon appears to have been misinformed about the effect of ventilation changes made following the January 16 ventilation survey, and it appears that the methane accumulation was not extensive and that the bleeder system was diluting it and moving it away from the active workings.

Hixon had participated in the ventilation surveys on January 16, 19 and 20, and was present for at least portions of the meetings that followed. His understanding, as of January 24, was that “no significant changes” to the bleeder ventilation system had been made following the January 16 survey. Tr. 735-36. Consequently, his primary concern was that he didn’t know exactly where the methane he detected in the #2 entry extended to, and he feared that a reversal of air flow, as occurred on January 16, could cause methane to back up onto the face. Tr. 816-18. He testified that the determination that no significant changes had been made to the system had been “made by someone else,” and that he didn’t personally know how the pertinent pressure differentials had changed. Tr. 796.

Contrary to Hixon’s belief, marked improvements had been made to the bleeder system after the January 16 survey. Surveys on January 19 and 20 demonstrated that a significant positive pressure differential had been established at the back corner of the panel, which produced substantial air flows in the proper direction, inby, in the #2 tailgate entry. Changes to the system prior to the January 19 survey produced an inby air flow in the #2 entry ranging from 4,500 to 6,000 CFM between crosscuts #83 and #86, and a pressure differential across the BEP 30 regulator of 0.14 inches of water. Ex. G-28. Despite this improvement, Beiter believed that the system was still too fragile, did not have enough capacity, and presented a potential for unintended changes. Tr. 542-43. Additional changes were then made to the system that resulted in significant improvements.

The results of the January 20 survey showed that the #2 entry air flow increased to 10,331 – 13,812 CFM and the BEP 30 pressure differential increased to 0.29 inches of water. Ex. G-30. Beiter described the system following the January 20 survey, while “still fragile” and subject to unintended changes, as “markedly improved” and effective for limited production. Tr. 553, 560-

61, 603, 622. Of course, the January 20 survey results led, in part, to the approval of the January 21 ventilation plan and the resumption of production under the monitoring system. Urosek agreed that the January 20 survey showed that the bleeder system was effective for limited production. Tr. 1134-35. While Beiter remained of the opinion that actions on the headgate side could have unintended consequences on the tailgate side, the nature and degree of such unintended consequences were not explained. It was not claimed, for example, that such changes might result in a complete reversal of the air flow in the #2 entry, as had occurred with the considerably weaker system on January 16.

While Hixon was concerned that the methane he detected might extend back to the face, he admittedly did not know its extent. He did not discuss the fact that he found a methane content of only 1.5% at the #82 crosscut, the second crosscut inby the face. The various ventilation surveys show that the second crosscut inby, like the rest of the crosscuts back to #86, carry low volume air flow from the #3 entry and the adjoining rubble zone into the #2 entry.²² Ex. G-26, G-28, G-30, G-32. The low methane reading at the #82 crosscut appears to indicate that more significant concentrations of methane in the #3 entry and rubble zone near the #83 and #84 crosscuts did not extend outby to the #82 crosscut. Moreover, the methane Hixon found was being moved in the proper direction, i.e., inby, into the #2 entry and toward BEP 30. Hixon confirmed that the air flow he observed was in the proper direction, and agreed that the air flow in the #3 entry and adjoining rubble zone would have been in the same direction, i.e., away from the face, inby toward the back corner. Tr. 797-98, 870-08, 813.

Thomas E. Light, Jr., MSHA's assistant district manager for District 2, had "no problem" with Hixon's issuance of the imminent danger order based upon the conditions in the #2 entry, because Hixon "made the determination that's where he needed to take a measurement to check the effectiveness of the system." Tr. 184. However, he noted that inspectors monitoring the system had to consider not only the concentration of methane and the fragility of the system, but how extensive the methane accumulation was and where it was located. Tr. 182-83. In Urosek's opinion, the methane found by Hixon extended to the face, because it was the outer fringes of a methane accumulation generated by the mining that had just occurred. Tr. 1147. However, he also noted that it was difficult to tell whether methane was coming from the cutting action at the face or from within the system. Tr. 1148.

Neither Light, nor Urosek, directly addressed the significance of the low methane reading at the #82 crosscut. Urosek acknowledged that in an effective system, air from the T-split traveling inby will dilute methane coming off the rubble zone as it enters the gob's primary internal air flow paths, the #3 and #2 entries on the tailgate side. Tr. 1232, 1245. He also acknowledged that there could be "high spots," methane concentrations of 5% or more, in "very

²² Crosscut #81, which was just inby the face, was also open. However, the surveys show that *virtually all of the T-split air flows through that first crosscut into the #2 entry.* Ex. G-26, G-28, G-30, G-32. That high volume flow from the face would not reflect methane accumulations in the gob.

small areas” of the #2 entry and the crosscuts between the #2 and #3 entries. Tr. 1228-30. A small pocket could exist, and the system could be “just fine.” Tr. 1260. However, “if you find it too much or in too many places, it starts telling you that the system is not functioning correctly.” Tr. 1260. Hixon agreed that high methane concentrations could be expected in air flowing from the #3 tailgate entry to the #2 entry. Tr. 776-77.

Kimutis and Bohach disagreed with Hixon’s conclusions. Kimutis believed that Hixon was in the gob and that the methane he found did not extend to the face. The methane Hixon found in the #2 entry could not migrate to the face because the pressure differentials and air flows were into the #2 entry from the #3 entry and were also inby, away from the face toward the back corner and BEP 30. Tr. 1378. Bohach also noted that the pressure differentials and air flows were inby and from the #3 entry to the #2 entry, and that the methane was traveling inby and was being diluted exactly as it was “supposed to do.” Tr. 1519-20, 1642.

I find that the conditions observed by Hixon on January 24 did not justify issuance of an imminent danger order. There was a pocket of methane in the #3 entry and adjacent rubble zone near the #83 and #84 crosscuts. However, it was not extensive, and did not appear to exist further outby to the #82 crosscut, or further inby to the #85 crosscut. It was being drawn up into the #2 entry, where it was immediately diluted to non-explosive levels. Methane concentrations of 5% or more existed only in portions of the intersections of the #83 and #84 crosscuts with the #2 entry. The methane was being further diluted as it traveled inby in the #2 entry, until it passed through BEP 30 into the travelable bleeder entry.

Limited areas of explosive concentrations of methane can be expected in such areas. Notably, air with a methane content at or above 5% was found flowing into the #2 entry from crosscut #83 during the January 25 survey. Ex. G-32. That apparently was not viewed as a remarkable situation, and it did not generate any enforcement action. Conrad, who assisted in taking the readings in the #2 tailgate entry during that survey, and who issued an imminent danger order and citation on February 14, testified that methane in concentrations at or above 5% could be expected in crosscuts like #83 in LW49 and other longwalls. Tr. 1031-32.

There were no precipitous increases in methane readings within the bleeder system as a whole. A chart of monitoring point methane readings for January 21-25, 2004, shows that methane concentrations in the bleeder system on January 24 were relatively stable and within allowable limits, information that Hixon should have been aware of. Ex. G-17. That chart shows that system-wide methane readings were decreasing at the time Hixon issued his order, with the exception of an increase at BEP 30, which would be consistent with a moderate concentration of methane, localized in the area of the #83 and #84 crosscuts, being diluted and moved out of the system.

Considering the location and limited extent of the methane accumulation, the absence of ignition sources in that area, the fact that the methane was being diluted and moved away from the face, and that there were no other indications of a build-up of methane within the bleeder

system, I cannot find that Hixon's determination that an imminent danger existed was reasonable. Moreover, Hixon testified that a "lot of [my] concern" was that the gob was not that large yet, and that continued mining would cause the pocket of methane to grow. Tr. 762-64, 814. This would not appear to be a relevant consideration for determining the existence of an imminent danger, or the effectiveness of the bleeder system on January 24.

As noted above, given the wide discretion accorded to an inspector's decision to issue an imminent danger order, this a difficult decision. However, I find that the Secretary has not carried her burden of proving that the decision to issue Order No. 7067355 was reasonable. She has not established that there was an imminent danger, as defined in Commission cases, and I find that issuance of the order, on the particular facts of this case, was an abuse of discretion.

Citation No. 7067356

For the reasons stated above, I find that the Secretary has failed to carry her burden of proof with respect to Citation No. 7067356, which alleged that the bleeder system was ineffective on January 24, in violation of 30 C.F.R. § 75.334(b)(1). It appears that the bleeder system was functioning effectively, and was diluting methane and rendering it harmless within the bleeder system's internal air flow paths. There was no significant system-wide build-up of methane levels within the bleeder system, and the methane content of air exiting the BEPs into the travelable bleeder entries was well below MSHA's operational limit of 4.5%.

Citation No. 7067000 and Order No. 7069999 – February 4, 2004; and
Citation No. 7067003 and Order No. 7067001 – February 7, 2004

Citation No. 7067000 and Order No. 7069999 were issued by Tolliver on February 4, 2004. The citation alleged that the LW49 bleeder system was ineffective, in violation of 30 C.F.R. § 75.334(b)(1). The violation was described in the "Condition or Practice" section of the citation as follows:

The bleeder system for the active LW49 longwall section, MMU 0011, was determined to be ineffective in controlling the flow of air through the bleeder system to continuously dilute and move methane-air mixtures from the gob and away from the active workings. This was due to an adjustment to the ventilation controls in the No. 2 entry of the headgate side.

Stip. 46; ex. G-4.

Tolliver determined that it was reasonably likely that the violation would result in an injury that would require lost work days or restricted duty, that it was significant and substantial, that seven persons were affected, and that Cumberland's negligence was moderate. A penalty of \$629.00 is proposed for this violation. The companion order contained similar language, but added that methane had been detected on the tailgate side, in the #2 entry, at the #85 crosscut at

4.8%. Stip. 44; ex. G-5.

Citation No. 7067003 and Order No. 7067001 were issued by Tolliver on February 7, 2004. The citation alleged that the LW49 bleeder system was ineffective, in violation of 30 C.F.R. § 75.334(b)(1). The violation was described in the "Condition or Practice" section of the order as follows:

The bleeder system used in the No. 49 longwall panel failed to continuously dilute and move methane-air mixtures and dust from the worked-out area away from the active section. Methane was detected on the tailgate side, in the No. 2 entry, at the No. 85 crosscut at 5.0%.

Stip. 50; ex. G-6.

Tolliver determined that it was reasonably likely that the violation would result in an injury that would require lost work days or restricted duty, that it was significant and substantial, that seven persons were affected, and that Cumberland's negligence was moderate.²³ A penalty of \$629.00 is proposed for this violation.

Tolliver, who had been an MSHA inspector for twelve years, was assigned to monitor LW49's bleeder system on January 31, 2004. Guley and another inspector advised him that there were instructions that a citation and imminent danger order were to be issued if methane in excess of the allowable limits was found at the monitoring/evaluation points specified in the January 21 ventilation plan. Tr. 829-34, 406. On February 4, he traveled the tailgate bleeder entry, entry #1, with union representative Mihalik and a Cumberland management representative. On the fourth monitoring pass, he detected 4.8% methane at the #85 crosscut monitoring point. After 15-20 seconds, he repeated the sampling and got the same result. The other members of the party had similar readings on their hand-held detectors.²⁴ Tr. 547-48, 943. He took two bottle samples, and issued the subject citation and imminent danger order.

He testified that he issued the order because of concern for the safety of miners. On the first three passes, methane readings had been "pretty steady." Tr. 852. The reading at crosscut #85 had been 3% at 12:37 p.m., but had increased to 4.8% at 1:25 p.m. He "knew something had

²³ Tolliver determined that the violations were S&S because of the potential for an explosion, and evaluated Cumberland's negligence as moderate because it was continuously monitoring the system, along with MSHA and union officials.

²⁴ Cumberland emphasizes that the bottle samples taken on February 4 showed methane concentrations below 4.5%, and that there were discrepancies of up to 0.4% in the readings of the other persons' hand-held monitors. I find those facts of little significance because everyone traveling with Tolliver had readings very close to his on both occasions, and Tolliver testified that there may have been some error in the collection of the bottle samples. Tr. 891, 915.

happened,” and was “afraid that gob air might be coming onto the longwall face.” Tr. 851. John Dzurino, Cumberland’s superintendent, confirmed that a ventilation curtain on the headgate side had been adjusted, which caused a temporary increase in methane flow into the #2 entry on the tailgate side, eventually reaching BEP 30. Tr. 1741-45. Dzurino did not regard that as an unusual occurrence. He testified that no additional actions were required to abate the citation and terminate the order, and that the same thing would have occurred with a bleeder fan system. Tr. 1741-45.

On February 7, Tolliver detected 5% methane at the #85 crosscut, a reading which was confirmed by a second measurement after 15-20 seconds, and by the hand-held detectors of those accompanying him. Tr. 871. He took bottle samples and issued the citation and imminent danger order. Bohach confirmed that ventilation curtains on the headgate side had been moved in order to achieve a better pressure balance. Tr. 1536. Those changes caused a temporary increase in air flow on the headgate side of the bleeder system that continued up the set-up ladder at the back of the panel to the tailgate side at crosscuts #86 and #87. Tolliver’s evaluations of the danger and the effectiveness of the bleeder system on February 4 and 7 were virtually the same, i.e., he was concerned that explosive levels of methane might be coming out onto the face where a number of ignition sources were present.²⁵ He did not know, on either occasion, whether there were high methane concentrations in the face area. Tr. 882, 896, 908.

The parties’ respective views on the significance of Tolliver’s findings and the validity of these citations and orders closely parallel their respective positions with respect to Hixon’s citation and order. Urosek believed that the instances of sudden methane build-ups detected by Tolliver on February 4 and 7, in conjunction with incidents at the headgate, showed that methane was “sitting in the internal air flow paths” of the gob, extending “all the way to the face.” Tr. 1155-56.

Cumberland’s witnesses, Kimutis, Bohach and Dzurino, reiterated that the #2 entry is part of the gob where high concentrations of methane are to be expected, that there are no ignition sources in that area, that there was no methane backed-up to the face because there were no high methane readings at the face, and the pressure differentials and air flows were away from the face toward the back of the gob. Tr. 1380-81, 1522-23, 1581-85, 1621-24, 1642-43, 1744-48.

The Imminent Danger Orders

As noted above, Commission precedent places considerable weight in the discretion of an inspector who issues an imminent danger order, because he must act quickly in what may, literally, be life and death situations. Cumberland suggests that the deferential standard should not apply to Tolliver’s decisions, because he simply followed instructions and issued the orders

²⁵ Tolliver initially cited the presence of sandstone as a potential source of sparks, but later conceded that he did not know whether sandstone was present in the face area. Tr. 861, 900, 916.

solely on the basis of methane levels exceeding the limitations specified in the ventilation plan. However, as noted in the following discussion, I find that his determinations to issue the imminent danger orders were grounded more on his bona-fide concerns for, and evaluation of, the safety of miners, than on a mechanical application of instructions related by other inspectors. Consequently, they are entitled to the same degree of deference as that accorded similar decisions by inspectors in more typical situations.

Tolliver's safety concerns arose from a number of factors. He had made three monitoring passes on the morning of February 4, and found relatively steady methane concentrations at most of the monitoring points, with some increases at the #82 and #85 crosscut sampling points. Just before going to crosscut #85 for the fourth time, he found a significant increase in the methane concentration of air exiting the BEP 30 regulator.²⁶ Ex. G-34. Three minutes later, at 1:25 p.m., he reached crosscut #85, and found that the methane concentration of air flowing out of the sampling tube had risen from 3.0% at 12:37 p.m. to 4.8%, a reading that was confirmed by the others present. Tr. 847-48. He believed that when he "hit this spike here or this slug [of methane] at 85 crosscut, [he] knew that something had happened." Tr. 852. As he proceeded out of the mine, he took measurements at additional points and found that methane at the #82 crosscut sampling point had risen from 3.3% at 12:35 p.m. to 4.4% at 1:30 p.m., and the reading at the #73/74 monitoring point had increased from 1.8% at 12:20 p.m., to 2.1% at 1:40 p.m. Ex. G-18, G-34. The latter reading would have required shutting down production under the plan. Shortly after he issued the order, methane levels at all monitoring points declined to acceptable levels, and production resumed that evening. Ex. G-18.

On February 7, a similar pattern presented itself. Methane levels at the various monitoring points were relatively steady and within acceptable limits, with the exception of the #73/74 point, which was fluctuating in the 2% range and causing interruptions to production. Ex. G-20. Around 10:00 a.m., however, methane levels began to rise significantly. At 12:20 p.m., Tolliver measured methane at 5% at the #85 crosscut monitoring point, a substantial increase over the previous reading of under 3%, less than two hours earlier. Ex. G-20, G-35. Methane at the #82 crosscut monitoring point was over 4%, and the #73/74 point was well above 2%. Ex. G-20. Again, the rapid rise in methane concentrations caused him concern. He didn't have any idea what was going on. Tr. 881.

On both dates, there was a sudden and substantial rise in methane concentrations, not just at the #85 crosscut monitoring point, but virtually throughout the tailgate side of the bleeder system. Cumberland argues that Tolliver issued the orders and citations solely because of the readings at the #85 crosscut monitoring point. While he testified to that effect, Cumberland reads too much into his responses to specific leading questions on cross-examination. Tr. 891. I find that the better interpretation of his responses was that the crosscut #85 readings were the precipitating factors for issuance of the orders and citations. His testimony, as a whole,

²⁶ In less than an hour, the concentration had changed from 2.0% to 3.0% methane. Ex. G-34.

evidences that he was concerned as much about the sudden rise in methane readings within the system, and the absence of any immediate explanation for them, as he was about the crosscut #85 readings themselves. He also considered the unfolding events with an understanding that the bleeder system was fragile. Tr. 868.

Cumberland argues that Tolliver did not determine whether there were excessive methane readings on the face, which was the focus of his concerns. However, as noted previously, the methane monitors on the face are positioned in the relatively high volume flow of face air, and will not detect buildups of methane immediately behind the shields, which might get swept out onto the face in explosive concentrations. Cumberland also notes that air flows and pressure differentials at BEP 30 were appropriate, and that the system was functioning as it was when the January 20 and January 25 ventilation surveys were performed. However, there were no sudden substantial, system-wide increases in methane concentrations on those occasions. In any event, an inspector would be obligated to issue an order if he found an imminent danger, regardless of the state of compliance with a ventilation plan.

I find that the Secretary has carried her burden of proof with respect to Order Nos. 706999 and 7067001. Tolliver did not act solely on the basis of a single excessive methane reading, either on February 4 or 7. He considered the presence of excessive methane and unexplained sudden rises in methane in the system as a whole, and reasonably determined that the conditions he encountered on February 4 and 7 presented imminent dangers to miners. He did not abuse his discretion in issuing the orders.

The Citations

For the reasons stated above, I find that the bleeder system was ineffective on February 4 and 7, as alleged in Citation Nos. 7067000 and 7067003. It was not effectively ventilating the area within the bleeder system and protecting the active workings from hazardous methane accumulations. I concur with Tolliver's assessment of the gravity of the violations and Cumberland's negligence. I also find, for the reasons stated with respect to Citation No. 7083200, that the violations were S&S.

Citation No. 7069907 and Order No. 7069906 – February 14, 2004

Citation No. 7069907 and Order No. 7069906 were issued by Conrad on February 14, 2004. The citation alleged that the LW49 bleeder system was ineffective, in violation of 30 C.F.R. § 75.334(b)(1). The violation was described in the "Condition or Practice" section of the citation as follows:

Adjustments were being performed in the No. 2 entry inby the [headgate]. Management was attempting to relocate a regulator and installed a canvas check across the No. 2 entry just inby the No. 80 crosscut of the No. 2 entry and air was forced from the No. 2 entry over into the longwall gob and inadvertently flushed

an excessive amount of methane gas back out into the No. 2 entry inby 80 crosscut which reported to the No. 31 bleeder evaluation point. Five point one percent of methane was detected at the No. 31 bleeder evaluation point with two different hand held methane detectors. The bleeder system was determined to be ineffective in controlling the flow of air to continuously dilute and render harmless methane gas away from the active workings. This was a contributing factor to the 107-(a) order. Therefore, there was no abatement time.

Stip. 57; ex. G-8.

Conrad determined that it was reasonably likely that the violation would result in an injury requiring lost work days or restricted duty, that it was significant and substantial, that five persons were affected, and that Cumberland's negligence was moderate. A penalty of \$500.00 is proposed for this violation. The companion order contained similar language. Ex. G-9.

Conrad had inspected Cumberland's mine in the fall of 2003, when the entries for LW49 were being developed. He also participated in the January 25, 2004, ventilation survey. On February 14, he was monitoring the LW49 bleeder system's compliance with the January 21 ventilation plan. He had not been instructed to issue an imminent danger order and citation if he found non-compliance with the plan. Tr. 987, 1024, 1059. He traveled the walkable bleeder entries around the entire panel and, on the second pass, found 5% methane coming out of the regulator at BEP 31, located at the back, most inby, corner of the panel on the headgate side. He decided to issue an imminent danger order, collected a bottle sample, and proceeded toward the face to advise Cumberland officials. Tr. 993. The methane content of the air in the travelable bleeder outside of BEP 31 was less than 1%. Tr. 1039.

Conrad proceeded outby in the #3 headgate entry in an effort to find a management official to whom he could issue the order. Tr. 996-98. He traveled to crosscut #76 and asked a miner where the foreman was. He was told that the foreman was inby in the #2 entry, which surprised him because he thought everyone was working outby the face. Tr. 998-1000. As he passed through a canvass check curtain near crosscut #78, he saw the foreman, Matthew Boback, coming out. He did not encounter any excessive methane as he traveled the #3 and #2 entries. His methane detector was set to alarm at a methane concentration of 1%, and it did not do so as he looked for and found Boback. Tr. 1050. The longwall was not operating at the time, and there was no power on the face. Conrad verbally advised Boback that he was issuing an imminent danger order. Tr. 1003. Conrad had miners removed from the area and power removed from a load center near the #72 crosscut. He then went to the dinner hole with Boback and talked with him about what he had been doing.

Boback and a crew of miners had been moving a regulator in the #2 entry from just inby crosscut #78 to just inby crosscut #80. There were some concrete blocks that had been knocked out of a stopping in the #79 crosscut between the #1 and #2 entries, and the #80 crosscut between the #2 and #1 entries was open. Ex. G-36. A curtain had been erected in the #2 entry just inby

crosscut #80, to serve as a temporary ventilation control while the regulator was being constructed. Tr. 1882. That curtain changed the pressure in the #2 entry, increasing it outby and decreasing it inby. The result was that more air passed into the #1 entry through the missing blocks in the #79 crosscut stopping and the open #80 crosscut. It swept methane from the #1 entry into the #2 entry further inby. Boback had found 4.4% methane in the #2 entry between the #82 and #83 crosscuts, and became concerned. Tr. 1869, 1877. He instructed his men to remove the temporary curtain a little at a time, and the methane decreased and stabilized. Tr. 1869. He then proceeded outby, where he encountered Conrad. Tr. 1870.

After talking with Boback, Conrad believed that Boback may have already corrected the problem. He proceeded back to BEP-31, found that the methane levels had fallen to 2.3%, and terminated the citation and order. Tr. 1044.

Urosek testified that, in his opinion, Conrad's findings showed that there was a large accumulation of methane in the #1 entry, a primary internal gob air flow path on the headgate side, that extended from the back of the panel up to crosscut #80. Tr. 1159. That amount of methane would have been capable of generating a very large explosion that would have killed or seriously injured men working outby the face. Tr. 1160. He also interpreted a chart of methane readings at various monitoring points on February 14, as showing that a significant amount of methane had been put into the bleeder system about the time of Conrad's findings, and that only the detector at the #73/74 tailgate monitoring point showed it, because its reading went up to 2.2% or 2.3%. Tr. 1168-69; ex. G-21. He felt that the chart showed that the system was "barely effective." Tr. 1169. However, he then stated that it showed that the system was ineffective when there was more than 2% methane detected at the #73/74 monitoring point. Tr. 1170.

Bohach testified that, in his opinion, there should have been no imminent danger order issued, because there was no power on the face and no power or any other ignition source inby the face in the #2 and #3 headgate entries. Tr. 1551. The other evaluation points were within acceptable limits, and the BEP 31 reading was an isolated event, the cause of which had been corrected by the time Conrad found Boback. Tr. 1151. He agreed, however, that there was methane in an explosive concentration, that miners were working in the nearby area, and that they would have been affected if there had been an ignition. Tr. 1573.

The Imminent Danger Order

Conrad was very concerned when he found the high methane concentration at BEP 31. He had never found a high methane concentration at that location, and thought that something must have happened. Tr. 1001-02. He didn't know how far it extended up the #2 entry, and feared that it "might have been all the way back to the #75 crosscut," all the way to the face. Tr. 1000. He understood that there were men and equipment working outby the face, and he "wasn't taking any chances." Tr. 1024-25. He knew that there was power on the load centers, and he didn't know whether other equipment was operating with power in the area of concern. Tr. 1001. His decision to issue the order was made at the time he found the excessive methane at

BEP 31. Tr. 995-96, 998-99. However, he was unable to issue the order until he encountered Boback near crosscut #78 in the #2 entry. He issued and implemented the order when he found Boback, and made sure that power to the load center was turned off and that men were removed from the area before he sat down with Boback to discuss what had happened. Tr. 1004.

Conrad had decided that he was going to issue an imminent danger order when he found the excessive methane at BEP 31. That decision was reasonable. It was very unusual to find such a concentration at that location, and he legitimately feared that explosive methane may have extended outby in the #2 headgate entry to places where power was present and men were working. However, he could not issue the order at that time, because there was no management official present and no ready mechanism for communicating the order. By the time he found Boback, and actually issued the order, he had acquired additional important information. He knew that methane levels were below 1% in the #2 entry from the face inby to crosscut #78. Also reasonably available to him, within a matter of seconds, was information from Boback that methane in excessive concentrations had not been detected by Boback's methane detector, or the detector in the possession of a crew member, except for methane at 4.4% that had been found inby crosscut #82, and steps had been taken that reduced that concentration. Before actually issuing the order, Conrad knew or should have known that the methane he found at BEP 31 did not extend nearly as far as he had feared, and the potential ignition sources that he was concerned about were far removed from it. He, nevertheless, issued and enforced the order, and did not terminate it until he had returned to BEP 31 and found that the methane concentration had been reduced to an acceptable level.

The validity of the order must be determined as of the time it was verbally issued to Boback.²⁷ See *Wyoming Fuel Co.*, 14 FMSHRC at 1292 (appropriate focus is whether the inspector abused his discretion when he issued the imminent danger order). At that time, the facts known to Conrad or reasonably available to him, did not support the issuance of an imminent danger order. The explosive concentration of methane that he had detected at BEP 31 did not extend outby in the #2 headgate entry for any appreciable distance, and there were no ignition sources in the area. A methane concentration of 4.4% had been detected inby the #82 crosscut, but the temporary ventilation curtain had been adjusted and that concentration had been reduced. Any methane concentration of concern was confined to the most inby end of the #2 entry and was being drawn by the bleeder system through BEP 31 into the bleeder entry, where

²⁷ Cumberland also argues that the order is invalid because, by the time it was reduced to writing as required by the Act, any hazardous condition had ceased to exist. I reject that argument. While section 107(d) of the Act requires that imminent danger orders be reduced to writing, the legislative history of the Federal Coal Mine Health and Safety Act of 1969, the forerunner of the 1977 Act, makes clear that an inspector who finds an impending danger must eliminate miners' exposure to that danger "without waiting for any formal proceedings or notice." S. Rep. No. 91-411, at 89 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 215 (1975).

the concentration was below 1%. While Conrad's original decision regarding the an imminent danger order was reasonable, his decision to issue the order when he encountered Boback was not.

The Citation

Conrad was "pretty sure" that he was going to issue a citation for an ineffective bleeder system when he found the methane at BEP 31. Tr. 1006. He eventually decided to issue the citation because of the excessive methane that he found at BEP 31, and because he felt that a solid curtain should never have been put across the #2 entry forcing air out of the gob. Tr. 1011. The S&S finding was based upon the explosive concentration of methane, which presented a danger if it encountered an ignition source. Tr. 1012. He rated Cumberland's negligence as moderate because he didn't believe that Boback understood the effect that the temporary curtain would have on the rest of the system, and hadn't been told exactly, step-by-step, how to move the regulator. Tr. 1013, 1023.

I agree with Cumberland that the temporary elevation of methane concentration in the most inby portion of the #2 headgate entry was an isolated occurrence and did not demonstrate that the bleeder system was ineffective on February 14. The chart of methane measurements on February 14 shows that, with the exception of the #73/74 monitoring point, all of the other evaluation and monitoring points were operating well within allowable limits. Ex. G-21. Those readings evidence that there was no build-up of methane in the bleeder system, as there had been on February 4 and 7. I find unpersuasive Urosek's opinion that the relatively brief elevation of methane content to the 2.2% - 2.3% range at the #73/74 point showed that the system was ineffective. Methane concentrations had been running very close to the 2% limit at that monitoring point for the whole day, and had caused termination of mining activities for a considerable portion of the time. Ex. G-21. Methane at or above 2% at the #73/74 point had also caused cessation of mining on other days. Ex. G-17, G-20. The system was not determined to be ineffective on those occasions, and no enforcement action was taken with respect to them.

There obviously was some methane in and near the #1 entry on the headgate side and the adjoining rubble zone. However, high methane concentrations can be expected in those areas, and it does not appear that the methane was as wide-spread and prevalent as Urosek believed. If a large accumulation of methane existed from the back corner of the gob all the way to crosscut #80, it would seem that the air being forced into the #1 entry at crosscuts #79 and #80 would have produced high methane readings in the #2 entry beginning at crosscut #81. However, there is no evidence of high methane readings closer to the face than the 4.4% Boback found inby crosscut #82.

I find that the Secretary has failed to carry her burden of proof with respect to the violation alleged in Citation No. 7069907.

The Appropriate Civil Penalties

The parties stipulated that Cumberland is a large operator, and that the proposed penalties will not affect its ability to continue in business. A printout from an MSHA computer database shows that Cumberland had paid 234 violations, two of which were specially assessed, over the period January 13, 2002, to January 12, 2004. Ex. G-38. The gravity and negligence associated with the alleged violations are discussed above.

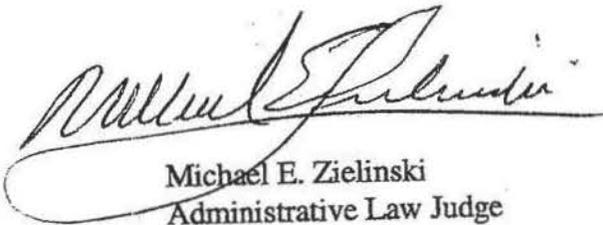
Citation No. 7083200 is affirmed in all respects. A civil penalty of \$1,238.00 was proposed by the Secretary. I impose a penalty in the amount of \$1,238.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 7067000 is affirmed in all respects. A civil penalty of \$629.00 was proposed by the Secretary. I impose a penalty in the amount of \$629.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 7067003 is affirmed in all respects. A civil penalty of \$629.00 was proposed by the Secretary. I impose a penalty in the amount of \$629.00 upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation Nos. 7067356 and 7069907, and Order Nos. 7067355 and 7069906, are **VACATED**. Citation Nos. 7083200, 7067000 and 7067003, and Order Nos. 7069999 and 7067001, are **AFFIRMED** in all respects. Respondent is directed to pay a civil penalty of \$2,496.00 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 28, 2005

JOSEPH M. ONDREA KO,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2004-141-DM
	:	RM MD 2003-11
v.	:	
	:	Mine I.D. 42-00149
	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP.,	:	
Respondent	:	

DECISION

Appearances: Joseph M. Ondreako, West Jordan, Utah, pro se;
James M. Elegante, Esq., and Martha J. Amundsen, Esq.,
Kennecott Utah Copper Corporation, Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Joseph M. Ondreako against Kennecott Utah Copper Corporation (“Kennecott”), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). Mr. Ondreako alleges that he was demoted and laid off because he complained about safety issues at the mine. An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Kennecott is the operator of the Bingham Canyon Mine, a large open pit copper mine in Salt Lake County, Utah. On or about July 9, 2003, Mr. Ondreako filed a discrimination complaint with the local office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On September 2, 2003, the Secretary filed an application for temporary reinstatement on Ondreako’s behalf. A hearing on the application was held before me on October 2, 2003. I granted the application for temporary reinstatement. *Sec’y of Labor on behalf of Ondreako v. Kennecott Utah Copper Corp.*, 25 FMSHRC 612 (Oct. 2003). Upon appeal, the Commission affirmed my decision. 25 FMSHRC at 585 (Oct. 2003).

On December 17, 2003, the Secretary determined that the facts disclosed during her investigation into Ondreako’s discrimination complaint do not constitute a violation of section

105(c) of the Mine Act. On that basis, counsel for the Secretary advised me that he would not be filing a complaint of discrimination on Ondreako's behalf. By order dated December 22, 2003, I dissolved the order of temporary reinstatement pursuant to 29 C.F.R. § 2700.45(g).¹

On January 16, 2004, Ondreako filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. Mr. Ondreako started working at Kennecott in November 1999 as a haul truck driver. (TR Tr. 14).² About six months later he transferred to the roads and dumps department operating dozers, graders, and track hoes. After receiving the requisite training, Ondreako also operated electric shovels whenever an extra operator was needed.

Prior to his employment with Kennecott, Ondreako worked for Newmont Mining Company. He operated hydraulic shovels for Newmont. In 2002, Kennecott bought a hydraulic shovel and Ondreako transferred to the shovel department to operate this shovel. He eventually was given the title "Advanced Operator." (TR Tr. 19). Ondreako operated both electric shovels and the hydraulic shovel during this time.

On April 26, 2003, Ondreako was assigned to operate the No. 52 electric shovel on the 4940 bench. When he arrived at the shovel he walked around it to perform a preshift examination of the equipment and his surroundings. (TR Tr. 28). Everything looked fine. When he got into the operator's compartment of the shovel and looked at the dig face, he noticed that there was rock containing ore and waste rock in the area. He called Alan Pearson, the dispatch supervisor, on the radio and was told to continue digging the ore that the previous shovel operator had been producing. The ore-bearing rock that other shovel operators in the pit were loading was soft, which tended to plug up the crusher. (TR Tr. 29). The ore that was in the area of Ondreako's shovel was hard and management wanted to mix that material with the other material at the crusher so that the crusher could continue to operate.

Ondreako testified that he advanced the shovel into the dig face and the face looked secure. As Ondreako dug further into the face, he became concerned that he was becoming rat-holed. The dig face was taking on the shape of a tight horseshoe. He testified that it is more difficult to see the face around him when he is inside a rat hole and that it is more difficult to load the haul trucks. (TR Tr. 30-32). He called Pearson and asked if he could "square the dig face," which involves repositioning his shovel so that the front of the shovel would be parallel to the line of rock he was loading. Pearson told him to keep working because the rock he was loading was needed at the crusher. Ondreako kept on working but he was concerned that he would soon be working in a narrow slot. Ondreako heard Pearson ask Anthony Hoffman on the

¹ Ondreako remained employed at Kennecott after I dissolved this order because the miners who were laid off were subsequently recalled by Kennecott and offered employment.

² References to the transcript and exhibits in the temporary reinstatement case, WEST 2003-403-DM, are indicated as (TR Tr. ____; TR Ex. ____). References to the transcript and exhibits at the hearing in this docket are indicated as (Tr. ____; Ex. ____).

radio, "Did you copy that? Joe needs to move." (TR Tr. 32). To which Hoffman replied, "Joe, go ahead and stay there. I'll be right down and I'll get with you." *Id.* Ondreako kept working without repositioning. Hoffman was the operations supervisor over shovels and Ondreako's immediate supervisor at that time.

When Hoffman arrived at the shovel, he told Ondreako to keep loading, at least until after the 11:30 a.m. production meeting. (TR Tr. 33). Hoffman testified that Ondreako did not raise any safety issues with him at this time. (TR Tr. 156-57). Ondreako testified that the material he was loading was sitting higher than normal. (TR Tr. 34-35). The rock was similar to aggregate, but some large boulders were also present. At one point he noticed a large boulder sitting up on top of the material above the shovel. (TR Tr. 35). Kennecott requires shovel operators to manage large boulders in their work area so that they do not fall and damage the shovel or cause injury to the shovel operator. Ondreako testified that he was keeping an eye on the boulder when he saw it start to move as he was swinging the shovel toward the haul truck. (TR Tr. 36). He dumped the load on the ground and started to swing back toward the boulder to block it with the shovel's bucket. Because the shovel is large, changing directions takes time and the boulder hit the right side boarding ladder on the shovel before he could block it with the bucket. *Id.* Ondreako testified that the boulder gave the shovel a jolt and caused about \$1,700 in damage. (TR Tr. 37).

Ondreako called Hoffman to tell him about the accident. Ondreako was tested for drugs and alcohol, the results of which were negative. Ondreako returned to work operating the same shovel. When Ondreako returned to work the following work day, he was sent home pending an investigation. (TR Tr. 39; Ex. C-1). The written notice of his suspension was sent to the local United Steelworkers union, rather than to the local Operating Engineers, which was Ondreako's union. Ondreako testified that whenever there is an accident, a team is formed to investigate and the employees involved in the accident participate in the investigation. *Id.* Ondreako testified that he was told by Hoffman on May 8, 2003, that the investigation had been completed and that he was being demoted to an Operator B position. (TR Tr. 39; Ex. C-2). In this position he would no longer be a shovel operator, but would be operating other equipment in the roads and dumps department. The written notice of his demotion, dated May 3, 2003, was also sent to the Steelworkers Union rather than the Operating Engineers. Ondreako was surprised that the investigation had been completed without any input from him. The Operating Engineers did not participate in the accident investigation because it was not given notice of the suspension. (Tr. 39-41). The Operating Engineers filed a grievance on Ondreako's behalf, but the grievance did not raise the notice issue.

Kennecott prepared an accident investigation report following Ondreako's accident. (Ex. C-7). It is not clear when the report was prepared. Ben Stacy, the Operations Superintendent, signed the report on May 20, 2003, and Ted Himebaugh, the Operations Manager, signed it on May 22, 2003. As described below, Ondreako believes that this report inaccurately reflects what happened on April 26 and fails to indicate that he was not at fault.

On May 12, 2003, Ondreako called the local MSHA office to describe the events that took place. Inspector Dwayne Humphries suggested he file a discrimination complaint. Ondreako also discussed the condition of the benches above the Carr Fork Road at the mine. Ondreako had complained to management in late March and early April about operating the hydraulic shovel along a particular section of the road. On one occasion, Ondreako warned others over the radio that, because of the wet conditions, "the highwalls would be moving." (TR Tr. 24). Hoffman testified that on one occasion, in response to Ondreako's safety concerns, he permitted Ondreako to move the shovel further down the road. (TR Tr. 161-62). Inspector Humphries told Ondreako to call MSHA if the hydraulic shovel were to operate in that location again.

On May 23, 2003, when Ondreako observed that the hydraulic shovel was again operating along the section of Carr Fork Road that concerned him, he called MSHA. MSHA inspected the area following this call. (TR Tr. 44). MSHA issued two citations, one alleging a violation of section 56.3130 for allowing the benches to overfill with rock, creating a hazard to those working below, and another alleging a violation of 56.3200 for failing to install a barricade or berm in the affected area. (TR Ex. R-33).

Casey Kalipetsis testified that when the MSHA inspector arrived on May 23, David Lanham, the operations supervisor over the roads and dumps department, drove him to the Carr Fork Road because he was a Steelworkers Union representative. Lanham kept asking him who called MSHA. When Kalipetsis did not answer, Lanham stated the he already knew "it was that fucking Ondreako." (Tr. 126-28; Ex. C-14). Kalipetsis testified that as they were leaving the inspection site, Lanham said, "I know Ondreako is out to fuck Anthony Hoffman over getting him washed out of the shovels dept., but now he's fucking me." (Tr. 128; Ex. C-14). As discussed below, Lanham denied that he ever said those words to Casey Kalipetsis and denied even discussing Ondreako with him.

The step two grievance hearing on the shovel accident was held on June 24, 2003. A Kennecott human resources representative took notes at the meeting. (Ex. C-18). Among those present at the hearing was Steve Kalipetsis, who was Ondreako's union representative and Casey's father. Steve and Ondreako presented their case that the accident occurred because Ondreako was not permitted to square the dig face. In addition, it was their position that Ondreako was not at fault because the boulder was hidden in the bank and, as a consequence, he could not have taken any precautions against it. (Tr. 69-70). Ondreako stated that as soon as he saw the boulder start to move, he did everything he could to protect the shovel. Hoffman stated that when he was in the area moments before, he did not see anything of concern in the area that Ondreako was loading. (Ex. C-18 at 2). He also stated that Ondreako told him that he could safely operate the shovel in the area. Ondreako admitted that the conditions he was working under did not present a "horrendous safety issue" at the time Hoffman was there. *Id.* at 3. Ondreako complained that the company's accident report did not reflect what actually happened.

John Simonson, a team leader, gave his version of what he thought happened. He thinks that Ondreako hit the rock with the body of the shovel. Ondreako contends that Simonson was just speculating because he not present during the physical investigation of the accident. (Ondreako Br. 6-7). Ondreako believes that Simonson's participation demonstrates that Kennecott was trying to frame him for the accident. At the grievance hearing, Hoffman, who was at the accident scene, said that during his initial investigation, he did not see anything that Ondreako was doing wrong. (Ex. C-18, p. 4). Himebaugh kept stressing that Ondreako, as operator of the shovel, was responsible for the accident. (Ex. C-18 3-4). Ondreako denied responsibility saying that management took control of his work environment when he was denied the opportunity to square the face. He also stressed that other employees have damaged ladders on shovels without receiving any discipline. Steve Kalipetsis stated that Ondreako exposed a large rock as he was shoveling and that he did all that he could to protect the equipment. Byron Timothy, an advanced operator and re-rate supervisor, stated that a face can shift as the area is shoveled and the shovel operator does not "know what's behind the material." *Id.* at 5. Himebaugh was concerned that Ondreako was not accepting any responsibility for the accident.

When Ondreako asked, "What separates me from the other guys [who damaged ladders on shovels]? *Id.* at 6. Himebaugh replied "possibly your past discipline." At that point, Ondreako said "I will take this to MSHA and request a full investigation of the entire safety program because this investigation is not accurate." *Id.* Timothy stated "we need to have these incidents stop and we need to keep our faces square and not tunnel in." *Id.* Hoffman agreed with this assessment but then stated, "but if people will not accept any responsibility it concerns me." *Id.* Hoffman also said that he had concerns about how the accident was investigated.

Because Ondreako had previously been suspended, Stacy indicated that demotion was an appropriate level of discipline in this case and that termination would result following further incidents. *Id.* at 7. Ondreako continued to maintain that he was not at fault for the accident. Richard Brewster, a heavy equipment operator, asked Hoffman how he came to the conclusion that Ondreako was at fault. *Id.* at 8. Hoffman said the each employee is responsible for his work environment and when he asked Ondreako at the site if he could safely work without squaring the face, Ondreako replied "yes."

Ondreako believes that he was suspended and demoted because of his past safety complaints. He points to the fact that Hoffman told him on April 26 that he was not at fault for the accident. He also relies on a computer summary of the accident which he obtained from Kennecott during discovery. There is a summary of the accident in a computer-generated database of 2003 accidents and incidents. (Ex. C-11). Under the column entitled "Accident/Incident Description" it states "ES #52 (J. Ondreako) damaged boarding ladder, 10' rock broke from bank, struck ES." *Id.* Under the column entitled "Corrective Action" it states "Reminded operator to report large boulders that are visible, in this case it was not apparent." *Id.*

Ondreako contrasts this account of the accident with the report that was presented to Himebaugh. In that report, it states:

A 10 ft. rock rolled out from the bank landing in front of the shovel. When Joe swung around to put another dipper of muck in the truck, the right side of the ladder came in contact with the rock bending the ladder. Joe said that he had no idea that the rock was in front of him. He thinks that as he was loading the truck the rock may have sloughed from the bank as he swung back into the face to get another dipper. Upon inspection of the site there was a large section of the bank that had sloughed off.

(Ex. C-7). In the section of the report entitled "What additional corrective actions should be taken to control the immediate or basic (root) cause," it states:

Operator has be[en] reminded to report large boulders that he can see that could unexpectedly slough off. In some cases, these can be brought down safely with the shovel and/or crawler dozer. In this case.

Ondreako contends that the description of the accident is inaccurate because it states that he hit the rock with the body of the shovel. He also believes that the final sentence of the corrective action section was deliberately chopped off. The sentence is obviously incomplete and it should have said, "In this case it was not apparent," as it did in the computer database. (Ex. C-11). Ondreako believes that the company altered the accident report to justify disciplining him for this accident in retaliation for his safety activities.³

The day after the grievance hearing on June 25, 2003, Stacy notified Ondreako that he was being laid off. Ondreako was ordered to leave the mine. (TR Tr. 51). Ondreako received a letter dated June 26, 2003, notifying him that his layoff was effective July 5, 2003. (TR Tr. Ex. G-2). Kennecott laid off about 119 employees effective July 5, 2005.⁴ These employees were laid off, not on the basis of seniority, but based on the average rating each employee received on Qualifications Assessment worksheets filled out by supervisors. Ondreako was rated by Simonson, Pearson, and Lanham on May 23, 2003, the same day as MSHA's inspection of the Carr Fork Road. (TR Ex. R-28). When the scores were tabulated, Ondreako was ranked 404 out of 410 at the mine. (TR Ex. R-30). When Kennecott determined that it needed only 371 employees at the mine, every employee ranked 372 and below was laid off effective July 5, 2003. Thus, 39 employees out of 410 were laid off at the mine based on the ranking they achieved following the tabulation of the scores from the Qualification Assessment worksheets.

³ Ondreako took the grievance to the third step under the collective bargaining agreement. On September 3, 2003, Ondreako settled the grievance for a monetary sum. (TR Ex. R-21).

⁴ This layoff included employees in the Bingham Canyon Mine, the smelter, the refinery, and other facilities operated by Kennecott.

Kennecott used the Qualifications Assessment worksheets as the basis for determining who would be laid off based on a study performed by a consultant and changes in the collective bargaining agreement.⁵ A committee of Kennecott's upper-level supervisors and managers was given the task of developing a "fair and objective method of ranking employee qualifications to meet the requirements of the organization." (TR Tr. 103-06; Tr. 276-81; TR Ex. R-23). Although seniority was considered in the rankings, it was only one of many factors that the committee decided to include. After the committee determined what factors are important to Kennecott, the committee developed the Qualifications Assessment worksheet to be used when ranking employees. (TR Tr. 109-15; TR Ex. R-24). This worksheet has seven qualification categories, as follows: (1) Safety-Personal Safety Plan and Participation; (2) Safety-Incident Rate; (3) Work Output-Effectiveness; (4) Performance Effectiveness-Working with Others (Team Skills); (5) Performance Effectiveness-Adaptability; (6) Work Experience-Number of and Quality of Industrial Experiences; and (7) Technical Skills-Demonstration of Skills Needed to Complete Job Assignments. *Id.* Within each category there are five short statements, each with a box next to it that can be checked.

These worksheets were given to front line supervisors with instructions to rate employees. (TR Tr. 125). They rated each employee by checking the box next to the statement in each category that most closely matched the employee being rated. These front line supervisors did not participate in the development of the worksheets; they were not told that the information provided would be used in future layoffs, and they were not given the scoring formula. In addition, these supervisors were told not to discuss the ratings or employees with other supervisors but that they were to complete the worksheets independently. Kennecott began requiring supervisors to rate employees using these worksheets on a regular basis but this was the first time they had been used. Each employee was rated by at least three supervisors who were familiar with the employee's work. An average score for each employee was calculated using a computer spreadsheet. (TR Exs. R-25 & R-30). Ondreako received a score of 2.1271, which ranked him at number 404 out of 410 mine operations employees. Each laid off employee has recall rights under the collective bargaining agreement. (TR Tr. 130-31). When market conditions improved in late 2003 and early 2004, all 39 employees who had been laid off at the mine were recalled and offered employment at Kennecott. (Tr. 294-95). Ondreako was reinstated by my order on or about October 23, 2003, and continues to be employed at Kennecott as a result of this recall, even after I dissolved the order of reinstatement on December 22, 2003. At the time of the hearing, Ondreako was employed at the mine as an Operator B. (Tr. 302-03).

Kennecott contends that Ondreako's safety complaints were not taken into consideration when Ondreako was included in the mine-wide layoff. It argues that Ondreako failed to establish a *prima facie* case of discrimination. Kennecott also argues that the testimony and exhibits presented by Casey Kalipetsis should not be considered because they are not credible.

⁵ This process is described in more detail in my decision granting temporary reinstatement. 25 FMSHRC at 615-16.

David Lanham testified that when he filled out the Qualifications Assessment worksheet for Ondreako on May 23, he did not know that it was Ondreako's call to MSHA that prompted the MSHA inspection that day. (TR Tr. 188). He filled out the worksheet independently. He became Ondreako's supervisor only after Ondreako was demoted to an Operator B in the roads and dumps department following the shovel accident. (Tr. 193). Lanham denied having a discussion with Casey Kalipetsis about Ondreako when he drove him to Carr Fork Road to meet up with the MSHA inspectors on May 23, 2003. (Tr. 190-92). Lanham testified that if he had uttered the words that Casey Kalipetsis attributed to him, everyone at the mine would have heard about it and upper management would have "come down" on him. (Tr. 191).

Anthony Hoffman testified that Stacy and Himebaugh made the decision to suspend and demote Ondreako following his April accident, with input from Hoffman. (Tr. 206). It was all part of the progressive discipline system at the mine. Ondreako was suspended and demoted because he had been involved in previous accidents and had been previously suspended. Hoffman testified that many miners have been disciplined for accidents in the same manner as Ondreako. Hoffman stated that he prepared the accident investigation report for this accident and that the words in the section describing corrective actions are his. (Ex. C-7). He denied that the sentence "In this case" in that document was incomplete. (Tr. 216). He did not draft the words "in this case it was not apparent" in the 2003 summary of accidents on the computer spreadsheet. (Tr. 217; Ex. C-11). Although Hoffman had been Ondreako's immediate supervisor until the shovel accident, he did not fill out a Qualifications Assessment worksheet for him because he was on leave at that time. (TR Tr. 156). Hoffman testified that Ondreako did not raise any safety issues when Hoffman talked to Ondreako after he asked to square the face on April 26.

Ben Stacy testified that under Kennecott's progressive discipline system, Ondreako could have been terminated for the April 26 accident because he had been suspended for a previous incident. (Tr. 226-28). When front line supervisors were given the Qualification Assessment worksheets, they were not told that it would be scored. (TR Tr. 165). At that time, he was not aware that Ondreako was responsible for the May 23rd MSHA inspection. (TR Tr. 171).

Ted Himebaugh testified that Kennecott employees have been suspended and terminated for damaging equipment. (Tr. 234). Degree of damage is not as important as the employee's negligence, operating skills, past discipline, and accident history when determining appropriate discipline. (Tr. 236). He testified that the decision to suspend and demote Ondreako was made before May 3, 2003. Himebaugh stated that, at the grievance hearing, he wanted to make sure that Ondreako was not forced to work under conditions that he believed created a hazard. When Ondreako stated that there was no significant safety hazard, Himebaugh wanted Ondreako to accept at least some responsibility for the accident. (Tr. 248). Himebaugh testified that Ray Hanson, a Kennecott safety engineer, put the information in the database of 2003 accidents. (Tr. 269; Ex. C-11). The information in that database is from the preliminary investigation, which is not necessarily updated. This database is used to make sure that all accidents are investigated; it is not used to keep track of an employee's accident history. (Tr. 273).

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

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

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

There is no dispute that Ondreako engaged in protected activity when he complained to management about safety conditions at the mine and made safety complaints to MSHA.

B. Adverse Action

Ondreako contends that he suffered adverse action as a result of his protected activities. The adverse action is (1) his suspension and demotion following the April shovel accident; and (2) his inclusion in the layoff effective July 5, 2003, through his re-employment at the mine on October 23, 2003. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of

discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

1. Suspension and Demotion to Equipment Operator

Although the exact sequence of events that led up to the shovel accident are in dispute, there is no question that the ladder on the shovel was damaged while Ondreako was operating it. Ondreako contends that, at first, Kennecott did not attribute any negligence to him but that Stacy and Himebaugh subsequently charged him with causing the accident. He relies on testimony of his witnesses, Hoffman's statements at the grievance hearing, and the discrepancy between Exhibits C-7 and C-11. He believes that his suspension and demotion were unfair and that this discipline was in retaliation for his safety activities.

I agree that there are some inconsistencies in the evidence. It appears that initially Hoffman did not think that Ondreako was responsible for the accident. When the accident was recorded in the database, the safety engineer wrote that the boulder that struck the shovel "was not apparent." (Ex. C-11). By May 3, 2003, however, management had concluded that Ondreako was responsible for the accident. The suspension letter signed by Hoffman states, "Your failure to recognize and take action against the hazard of a boulder falling from the bank and striking your equipment is unacceptable and is a crucial part of your everyday duties concerning ground control inspections." (Ex. C-2). The letter goes on to state:

In reviewing your employee file, I found that you have active discipline in the form of a one-day suspension for equipment damage. In fact, this is the third event of equipment damage within a three year time frame documented in your file. This is an unacceptable pattern of behavior that you have been asked to correct before by your supervisor.

Id. The letter goes on to state that, "You have demonstrated you can work safely and productively as a dozer/grader/truck operator and you are being given the opportunity to return to this level of work instead of having your employment terminated." *Id.*

Ondreako contends that the company's stated reason for the discipline is pretext to hide its discriminatory motive because other employees have damaged equipment without being suspended. (Ondreako Br. 26-27). Ondreako's witnesses testified that Ondreako was a very safe shovel operator. (Tr. 18, 101-02, 107-08, 112-15, 158-59). These witnesses also gave examples of employees who have damaged equipment with only a written warning or no discipline at all. Kennecott's witnesses cited examples of employees who have been suspended or terminated for damaging equipment. When Ondreako asked Himebaugh at the grievance hearing, "What separates me from [these] other guys," Himebaugh responded "Possibly your past discipline." (Ex. C-18, p. 6).

Ondreako maintains that the accident would not have occurred if he had been allowed to square the face as he had asked. He argues that it was unsafe for him to continue operating his shovel without squaring the face because his visibility was reduced. Although everyone agrees that squaring the face has a safety component, I find that Ondreako did not advise management that he was concerned about safety when he made his request. Hoffman came to his work area after he made the request. Hoffman asked Ondreako if he could work a little longer before repositioning his shovel. The evidence establishes that Ondreako agreed to keep working and that he did not tell Hoffman that he had any particular safety concerns. At the grievance hearing in June, Ondreako admitted that he did not indicate to Pearson or Hoffman that there were significant safety issues when he asked them about repositioning the shovel. (Ex. C-18, pp. 2-3). Ondreako also stated that at the time he asked to move his shovel "there was no safety issue." (TR Tr. 148-49; Ex. C-18, p. 5). From the time of the accident through the grievance hearing Ondreako was adamant that his discipline was unfair. I agree with Ondreako that there are some inaccuracies in the accident report, but those inaccuracies are not significant to this case. Ondreako did not communicate to management that he needed to square the face to ensure his safety or to protect the shovel.

Ondreako made several safety complaints in the month before the accident. He complained about conditions along the Carr Fork Road in late March and early April 2003. Although his concerns were not directly addressed, he was told by Hoffman on one occasion that he could move his shovel down the road so he would not have to work in that area. Ondreako believes that he was disciplined following the shovel accident because he had raised these safety issues.

These complaints were known to management and were proximate in time to the adverse action. Kennecott management did not display any overt hostility to the complaints, but it does not appear that the benches were cleaned in response to the complaints. Ondreako believed that the condition presented a significant safety hazard. The evidence does not establish that Kennecott management was hostile to Ondreako's concerns or hostile to his warning given over the mine radio that the material above the road could be moving.

In his brief, Ondreako contends that his complaints about the benches above the Carr Fork Road had significant operational implications for Kennecott. (Br. 13-15). He states that because the road had to be narrowed, production was affected because haul trucks use the road to transport waste rock to the dumps. *Id.* There was no testimony on this issue at the hearing.

I also find that Ondreako did not establish disparate treatment. Kennecott presented credible evidence that Ondreako's suspension and demotion were consistent with its system of progressive discipline. The record reveals that in October 2001, Ondreako ran over the trailing cable of the shovel he was operating; in September 2001 he failed to follow his supervisor's order to leave a dozer at a particular location at the end of his shift; and in May 2001 he damaged a trailing cable. (TR Exs. R-6 through 14). He received a verbal warning for the first event, a

written warning for the second, and a one-day suspension for the third. Ondreako also received counseling in December 2002, as a result of these incidents, in which he agreed to improve his safety performance. (TR Ex. R-14). Anecdotal evidence of miners who were not suspended for other accidents does not negate these facts.

In a discrimination case, a judge may conclude that the justification offered by the employer for taking an adverse action “is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.” *Chacon*, at 3 FMSHRC 2516. The Commission explained the proper criteria for analyzing an operator’s business justification for an adverse action:

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator’s business judgment our views on “good” business practice or on whether a particular adverse action was “just or “wise.” The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner’s protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge’s or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

[T]he reference in *Chacon* to a “limited” and “restrained” examination of an operator’s business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of “industrial justice” for that of the operator. As we recently explained, “Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so,

whether they would have motivated the particular operator as claimed.”

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

I find that Kennecott’s alleged business justification for suspending and demoting Ondreako is credible. The discipline may seem harsh since the boulder was apparently concealed in the rock at the time Ondreako performed his preshift examination, but his past history of accidents and discipline was the key factor in the level of discipline. I find that Ondreako’s safety complaints and safety concerns were not considered by Kennecott management when they decided to demote him to an Operator B position. His suspension was removed from his record and he was paid for the lost time prior to the second step grievance hearing. (TR Ex. R-20 p. 2).

2. Layoff Effective July 5, 2003

Ondreako contends that he was selected for layoff because he called MSHA to investigate conditions along the Carr Fork Road, he was disciplined for the shovel accident, and he complained about safety. He believes that when Lanham, Pearson, and Simonson evaluated him in the Qualifications Assessment worksheet, they downgraded him because of his safety activities.

It is important to understand that Kennecott’s employment practices changed considerably in the year or so leading up to the layoff. In the past, those employees with the least seniority were subject to layoff in the event of a reduction in force. (TR Tr. 105). The layoff that occurred in mid-2003 was based on the employee rankings obtained through the Qualifications Assessment worksheets rather than on seniority. The content of these worksheets was developed by Himebaugh, Stacy, and other managers at the mine. When front line supervisors were asked to rate hourly employees using these forms, they did not know how the results would be scored or what the scores would be used for. (Tr. 278). This was the first time that supervisors had been asked to fill out the Qualifications Assessment worksheets. (TR Tr. 110). The supervisors were not told that the worksheets would be used to determine who would be laid off in the event of a reduction in force. (TR Tr. 127, Tr. 278).

All three supervisors who filled out a worksheet for Ondreako rated him rather poorly. (TR Ex. R-28). In filling out that part of the worksheet for safety-incident rate, the supervisors relied on the summary of Ondreako’s accidents and discipline. (TR Ex. R-6). Kim Moulton, Director of Employee Relations, testified that Ondreako’s disciplinary record demonstrated “high risk behavior.” (TR Tr. 90). Ondreako had three incidents within a short period of time. All of these incidents occurred after he had been trained to operate shovels. A major reason for Ondreako’s low ratings was his history of accidents and discipline.

All three of the supervisors who rated Ondreako testified that they did not know that MSHA inspected the conditions along the Carr Fork Road on May 23, 2003, because of a

complaint by Ondreako. Ondreako contends that he brought up the issue shortly after the preshift safety meeting that day. (Tr. 138-40). As stated above, Casey Kalipetsis testified that Lanham told him that he knew that Ondreako had called MSHA and cursed at Ondreako for doing so. Kennecott believes that this evidence should be stricken from the record as being “completely without credibility.” (Kennecott Br. 8).

Evidence concerning the alleged conversations between Lanham and Casey Kalipetsis was first presented by Ondreako in response to Kennecott’s motion for summary decision. As part of Attachment 2 to Ondreako’s response is a statement dated March 4, 2004, from Casey Kalipetsis. In the statement, Kalipetsis says that Lanham told him he knew that Ondreako had called MSHA. I denied Kennecott’s motion for summary decision in this case based, in part, on this written statement.

At the hearing, Casey Kalipetsis testified that Lanham made the statements to him as they were driving to meet up with the MSHA inspectors on May 23. (Tr. 126-28). Ondreako introduced as an exhibit a typed statement of Mr. Kalipetsis that details this conversation. (Tr. 130-32; Ex. C-14). Kalipetsis first testified that he wrote up this statement within a day or two after the inspection and that he gave a copy to Ondreako. (Tr. 131). Kalipetsis testified that he made his original notes on a pad of paper. (Tr. 133). He stated that he frequently takes notes at the mine. He was a union steward for the Steelworkers Union. Kalipetsis next testified that he typed up his notes at Ondreako’s request within a couple of weeks after May 23, in June 2003. (Tr. 136). Kalipetsis testified that his statement dated March 4, 2004, attached to Ondreako’s response to the motion for summary decision, is another copy of the notes he made. (Tr. 140).

Later, Kalipetsis testified that Ondreako did not know about his conversation with Lanham in the truck until after the temporary reinstatement hearing held on October 8, 2003. (Tr. 141-42). Kalipetsis testified that he was in the office used by the foremen, where Kennecott posts MSHA documents, when he saw the transcript of the temporary reinstatement hearing. (Tr. 142-3, 146-49). It was in question and answer format. (Tr. 146). Kalipetsis testified that he read Lanham’s testimony that he did not know who called MSHA on the morning of May 23, 2003. *Id.* Kalipetsis also testified that the transcript was mounted on the wall where everyone could see it. (Tr. 148). Kalipetsis said that it was only after he read the transcript that he told Ondreako about his conversation with Lanham in the truck. (Tr. 143).

For the reasons set forth below, I do not credit the testimony of Casey Kalipetsis concerning the alleged conversations with Lanham in the truck. Kalipetsis changed his testimony several times during the hearing as to when he wrote up the notes that Ondreako introduced as an exhibit at the hearing, as described above. (Ex. C-14). He also changed his testimony concerning Ondreako’s knowledge of his conversation with Lanham. At first he stated that he typed up the exhibit within a week after the MSHA inspection at Ondreako’s request. Then he indicated that he probably gave the statement to Ondreako in June 2003. Finally, he testified that Ondreako did not know about his conversation with Lanham until after my hearing in the

temporary reinstatement case. It defies logic that Kalipetsis would have kept this conversation a secret, especially from Ondreako.

In addition, I do not credit the testimony of Casey Kalipetsis that he saw the transcript of the temporary reinstatement hearing in the office used by the foremen. Transcripts are not required to be posted and it is highly unlikely that a mine operator would post such a document. Each of the foremen who used the office testified that they had never seen the transcript to the temporary reinstatement hearing and that they did not see it lying around the office. (Tr. 175-76, 204-06). Stacy and Himebaugh also testified that they had not seen the transcript. (Tr. 222, 233-34). Casey Kalipetsis may well have seen a copy of the transcript, but he did not see it in the office. Ondreako had a copy. The only document Kennecott was required to post was a copy of my October 9, 2003, decision and order granting temporary reinstatement. Kalipetsis testified that the document he saw in the office was not my temporary reinstatement decision. (Tr. 146). Kalipetsis was not laid off in the reduction in force.

It is clear that Ondreako and Casey Kalipetsis knew each other. (Tr. 143). For example, they talked about safety issues including the conditions along the Carr Fork Road on the morning of May 23 before the MSHA inspector arrived. (Tr. 138-39; Ex. C-14). If Lanham had made such inflammatory statements to Casey Kalipetsis in the truck, Kalipetsis would have told Ondreako because he knew Ondreako had called MSHA as a result of his concerns about the conditions along the road and, a few days later, he also knew that Ondreako was selected for layoff. All of the unions filed grievances against Kennecott for the manner in which the reduction in force was conducted. Because the method used to reduce the workforce was controversial, it is hard to believe that Casey Kalipetsis, who was a union steward for the Steelworkers local, would have forgotten about his conversations with Lanham or would have failed to mention the conversations to Ondreako or others at the mine. Lanham's alleged statements were not mentioned at the temporary reinstatement hearing.⁶

Lanham denied talking about Ondreako with Kalipetsis in the truck that day. (Tr. 191-92). He testified that on May 23, 2003, he was asked by his supervisor if he would like to be involved in an MSHA inspection as a learning experience. (Tr. 184). Lanham testified that he did not recall anyone raising issues about the placement of the shovels or conditions along Carr Fork Road earlier that day. Lanham picked up Casey Kalipetsis in his truck, because he was the

⁶ There were many legal challenges to the process Kennecott used in the 2003 layoff. Kennecott states that there were 46 discrimination complaints filed based on race, age, sex, religion, and union activity. (Tr. 283-284; Kennecott Br. 21). At least two discrimination cases were filed under the Mine Act. In this environment, it is likely union representatives were aware of these legal challenges including Ondreako's temporary reinstatement case. The mining community is small, even at a large mine like Kennecott's. Although I make no finding of fact in this regard, it is likely that Casey Kalipetsis was aware of Ondreako's discrimination case. If Lanham had made the statements that Kalipetsis attributes to him, Kalipetsis surely would have told Ondreako and the Secretary would have used that information at the temporary reinstatement hearing.

Operating Engineers representative, on the way to the inspection site. (Tr. 186). Lanham agrees that they talked about safety during the ride. Lanham testified that he asked Kalipetsis why anyone would call MSHA if there is a safety issue because it takes an MSHA inspector several hours to arrive at the site while union and management representatives can address the safety issue immediately. (Tr. 187). Lanham stated that he has no recollection of discussing Ondreako with Kalipetsis in his truck that day. (Tr. 192). He testified that if he had used profanity when referring to Ondreako with Kalipetsis, news of that conversation would likely have quickly spread around the mine. (Tr. 191). I credit that testimony.

Each employee at Kennecott is required to develop a personal safety plan. One of the sections on the Qualifications Assessment worksheet asks the supervisor to rate the employee's personal safety plan and safety participation. Casey Kalipetsis testified that his own personal safety plan was rejected because it mentioned MSHA. (Tr. 151-52). Ondreako cites this rejection as proof of the company's attitude toward MSHA and employee safety. Lanham testified that he required Kalipetsis to rewrite his personal safety plan because it was inadequate. (Tr. 176-78). In part of the plan, employees must describe actions they will start taking and actions they will stop taking to improve personal safety. (See TR Ex. R-2). Kalipetsis wrote that he was going to start calling MSHA more and stop letting the company get away with unsafe acts. (Tr. 178). Lanham treated this response as a joke and testified that Kalipetsis readily changed his personal safety plan upon request. *Id.* It is quite obvious that the initial response of Kalipetsis in his plan was not a personal commitment to improve his safety practices. Lanham's rejection of his personal safety plan was not out of line and does not reflect any animosity by Lanham toward employee safety or MSHA.

Although Ondreako believes that all of the supervisors who rated him were biased against his safety activities, he focuses primarily on Lanham, his immediate supervisor at the time of the layoff. The evidence shows that Pearson rated Ondreako lower than Lanham and that if Lanham's Qualifications Assessment worksheet were excluded, Ondreako would still have been included in the reduction in force. (Exs. R-1 through R-15). It also appears that his relatively low seniority had a small negative effect on his rating. (Tr. 288).

Kennecott contends that the process it developed "to determine who would remain in the workforce . . . was essentially a mechanical one, designed and executed with specific safeguards insulating the process against discriminatory animus or other improper motive." (Kennecott Br. 21). Although I do not believe that it is as foolproof as Kennecott maintains, I conclude that Ondreako did not establish that he was chosen for layoff as a result of his safety complaints or that his safety complaints influenced his ratings in the Qualifications Assessment worksheets.

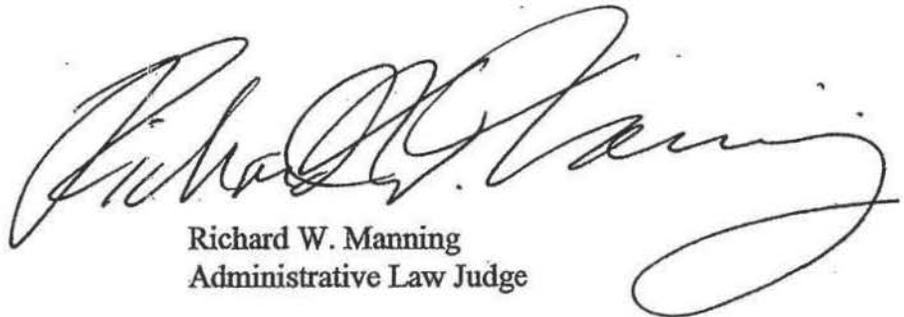
There was certainly a coincidence in time between the protected activities and his layoff. Although mine management may not have known that he called MSHA with respect to the May 23rd inspection, it was known that he was not shy about raising safety issues. For the reasons discussed above, I find that Ondreako did not establish disparate treatment. Although Kennecott, like all mine operators, prefers to handle safety matters in house, there has been no showing that

it was hostile to miners who call MSHA or interact with MSHA inspectors. The citations issued following the May 2003 inspection were both designated as not being of a significant and substantial nature. (TR Ex. R-33). The citations were abated by berming off the affected area. Kennecott paid the Secretary's proposed total \$120 penalty for the two citations. (TR Ex. R-34 & R-35). Although Ondreako raised an issue in his brief about the impact of the citations on mine operations, Citation No. 6274591 states that the affected area was "not a normal travel area for access/transportation equipment." (TR Ex. R-33). Thus, it does not appear that abatement had a negative effect on production or Kennecott's operation of the mine.

In conclusion, I find that Ondreako was included in the 2003 layoff for reasons that are not protected under the Mine Act. He was selected based on the ratings he received as a result of the Qualifications Assessment worksheets. He would have received the same or substantially similar ratings if he had not raised the safety issues outlined above. I do not credit the testimony of Casey Kalipetsis that Lanham described Ondreako in disparaging terms before and after the MSHA inspection of May 23, 2003.

III. ORDER

For the reasons set forth above the discrimination complaint filed by Joseph M. Ondreako against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED.**



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

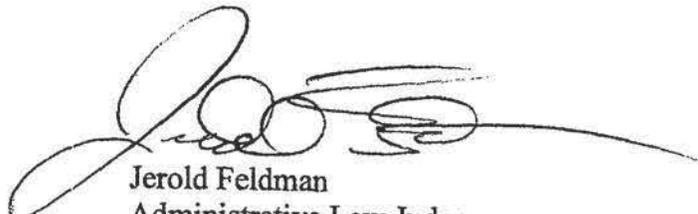
March 4, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2004-147
Petitioner	:	A.C. No. 11-00877-34581
	:	
v.	:	
	:	
WABASH MINE HOLDING CO.,	:	Wabash Mine
Respondent	:	

ORDER MODIFYING CAPTION
AND
DEFERRING ON RULING ON MOTION
TO VACATE CIVIL PENALTIES

The respondent has moved to modify the captioned proceeding to reflect the correct mine operator name is Wabash Mine Holding Company (Wabash). Foundation Midwest Holding Company, the previously named respondent in this matter, is an affiliate of Wabash. The Secretary does not oppose Wabash's motion. Accordingly, **IT IS ORDERED** that the captioned proceeding **IS MODIFIED** to reflect Wabash Mine Holding Company as the named respondent.

This matter is scheduled for hearing on May 18, 2005. Relying on the Commission's decision in *Twentymile Coal Co.*, 26 FMSHRC 666 (Aug. 2004), *appeal docketed*, No. 04-1292 (D.C. Cir. Aug. 30, 2004), Wabash filed a motion to vacate the proposed penalties asserting they were not proposed by the Secretary "within a reasonable time" as specified in Section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(a). The Secretary opposes Wabash's motion. During a March 3, 2005, telephone conference I advised counsel for the parties that I considered the motion to be premature because liability has not been established. Counsel were advised that I would defer ruling on the motion until after the hearing and that they would be afforded with the opportunity to further address the "reasonable time" issue in their post-hearing briefs.



Jerold Feldman
Administrative Law Judge
(202) 434-9967

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