

APRIL 1996

COMMISSION DECISIONS AND ORDERS

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04-08-96	Sec. Labor on behalf of Lonnie Bowling v. Mountain Top Trucking	KENT 95-604-D	Pg. 663
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APRIL 1996

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

Berwind Natural Resources, Kyber Coal Company, et al. v. Secretary of Labor, Docket Nos. KENT 94-574-R, etc. (Judge Barbour, February 28, 1996).

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 93-146-A, etc. (Judge Melick, March 7, 1996)

Secretary of Labor v. DeAtley Company, Inc., Docket No. WEST 95-512-M. (Unpublished Default issued February 7, 1996, Chief Judge Merlin).

Secretary of Labor on behalf of Lonnie Bowling et al. v. Mountain Top Trucking, etc., Docket Nos. KENT 95-604-D, etc. (Interlocutory Review of Judge Feldman's April 8, 1996 Order - published in this issue).

Secretary of Labor, MSHA v. Glenn's Trucking Company, Docket No. KENT 95-781. (Unpublished Default issued March 18, 1996, Chief Judge Merlin).

No cases were filed in which review was denied.



COMMISSION DECISIONS AND ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 2, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEST 94-710-M
	:	
WALLACE BROTHERS, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves the penalties proposed by the Secretary of Labor for two violations of 30 C.F.R. § 56.14107(a)<sup>1</sup> by Wallace Brothers, Inc. ("Wallace"). Wallace conceded the violations but contended that the proposed civil penalties were too high. After an evidentiary hearing, Administrative Law Judge Arthur J. Amchan assessed a \$1,300 penalty for each citation. *Wallace Brothers, Inc.*, 17 FMSHRC 1380, 1384 (August 1995) (ALJ). Wallace filed a petition for discretionary review challenging the judge's penalty assessments. For the reasons set forth below, we vacate and remand.

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<sup>1</sup> 30 C.F.R. § 56.14107(a) provides:

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

## I.

### Procedural and Factual Background

On May 11, 1994, inspector Rodney Ingram of the Mine Safety and Health Administration (“MSHA”) issued two citations to Wallace, alleging separate violations of 30 C.F.R. § 56.14197(a). Citation No. 4129345 alleged that the standard was violated because a 5 inch by 8 inch gap existed in the guard of a self-cleaning tail pulley on a portable crusher. Tr. 15-20. Citation No. 4129346 alleged that the back side of a v-belt drive was unguarded. Tr. 22-28. The inspector gave Wallace two days to abate the conditions. On June 8, the inspector returned and, upon discovering that the cited conditions had not been abated, issued two withdrawal orders pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b). On June 9, the violations were abated.

Following an evidentiary hearing, the judge assessed a \$1,300 penalty for each citation. 17 FMSHRC at 1384. The judge reached the \$1,300 figure by multiplying the most likely penalty (\$50) times the number of days (26) the conditions went unabated. *Id.* at 1383. The judge noted that the Secretary had proposed a penalty of \$1,500 for each citation and Wallace contended that the penalties should be \$210 and \$159. *Id.* at 1381-82. The judge rejected Wallace’s alternative penalties as too low, stating that such low penalties would “invite dilatory conduct[.]” *Id.* at 1383. He noted that “[a]lthough the proposed penalty assessment lists only the numbers of the section 104(a) citations, the document and attached narrative clearly indicate that the penalties are for the section 104(b) orders as well.” *Id.* 1381 n.1.

## II.

### Disposition

On review, Wallace challenges the judge’s decision on two grounds.<sup>2</sup> Wallace contends that the judge failed to address all six statutory criteria contained in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). W. Br. at 1-2. Wallace also states that the legislative history of the Act indicates that the six penalty criteria “are to be used as avenues for mitigating the penalties” not to “enhance the penalties[.]” as it asserts the judge did here. *Id.* at 3. The Secretary agrees with

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<sup>2</sup> In its petition, Wallace also raised the issue of whether the Commission is authorized to assess a penalty of up to \$5,000.00 per day under Section 110(b) of the Act, as it asserts the judge did in this case. Because Wallace did not refer to this issue in its brief, we need not address it. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

Wallace's first contention, i.e., that the judge failed to address all six statutory criteria contained in section 110(i) of the Mine Act, but he disagrees with Wallace's second contention, i.e., that the six penalty criteria serve only to mitigate proposed penalties and not to enhance them. S. Mot. at 1-3.<sup>3</sup>

#### A. Statutory Penalty Criteria

Section 110(i) requires the Commission to consider six specified criteria in assessing civil monetary penalties. See *Sellersburg Stone Co.* 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Section 110(i) states, in pertinent part:

[T]he Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Further, the Commission and the courts have held that section 110(i) requires a judge to make findings of fact on the statutory criteria. *Dolese Brothers Co.*, 16 FMSHRC 689, 695 (April 1994); *Pyro Mining Co. v. FMSHRC*, 3 MSHC (BNA) 2057, 2059, 785 F.2d 310 (Table) (6th Cir. 1986) (“[n]ot only must the Commission consider [the] criteria, it is our opinion that the Commission must provide in its order findings of fact on each of the statutory criteria.”); *Sellersburg*, 5 FMSHRC at 292.

Because the judge failed to consider the criteria set forth in section 110(i) of the Act or to make findings of fact with respect to them, we vacate the penalties assessed. We remand this proceeding to the judge for further analysis consistent with the foregoing principles.

#### B. Penalty Amounts

The Commission and its judges are not bound by the Secretary's proposed penalties. See, e.g., *Sellersburg*, 5 FMSHRC at 290-93 (there the Secretary originally proposed penalties of

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<sup>3</sup> The Secretary did not file a brief; however, on December 18, 1995, he filed a motion to remand the section 110(i) issue to the judge. In light of our disposition, the Secretary's motion is moot.

\$1,000, \$78 and \$78 for three violations and the judge assessed penalties of \$7,500, \$1,000 and \$1,000, respectively). When a civil penalty petition is filed and Commission jurisdiction attaches, the judge assesses a penalty *de novo*, based upon the statutory penalty criteria and the record evidence developed in the course of the adjudication. *Id.* at 291-92; *United States Steel Mining Co., Inc.*, 6 FMSHRC 1148, 1151 (May 1984).

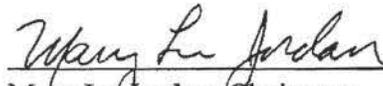
Nothing in the language of section 110(i) suggests that the six criteria may serve only to reduce penalties proposed by the Secretary. “[T]he penalties assessed *de novo* in a Commission proceeding appropriately can be greater than, less than, or the same as those proposed by the Secretary.” *Sellersburg*, 5 FMSHRC at 293.

We find no merit to Wallace’s contention that the penalty criteria can be used only to mitigate a proposed penalty. Accordingly, on remand, the judge may exercise his discretion in assessing penalties, guided by the penalty criteria.

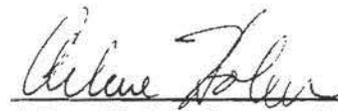
III.

Conclusion

For the foregoing reasons, we vacate the judge's civil penalty assessments and remand this case to the judge for consideration and application of the Section 110(i) civil penalty criteria to the facts of this case.

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

  
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Joyce A. Doyle, Commissioner

  
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Arlene Holen, Commissioner

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 17, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
On behalf of LONNIE BOWLING,	:	
EVERETT DARRELL BALL,	:	Docket Nos. KENT 95-604-D
WALTER JACKSON, AND	:	KENT 95-605-D
DAVID FAGAN	:	KENT 95-613-D
	:	KENT 95-615-D
	:	
v.	:	
	:	
MOUNTAIN TOP TRUCKING COMPANY,	:	
MAYES TRUCKING COMPANY, INC.,	:	
ELMO MAYES, WILLIAM DAVID RILEY,	:	
AND ANTHONY CURTIS MAYES	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

ORDER

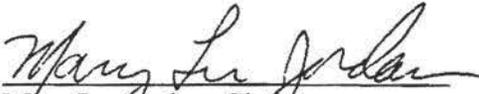
BY THE COMMISSION:

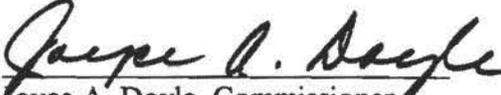
By order dated April 8, 1996, Administrative Law Judge Jerold Feldman certified for interlocutory review by the Commission, under Commission Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i) (1995), his denial of the entry of appearance by private counsel for the individual complainants in the instant proceeding. We conclude that the judge's ruling involves a controlling issue of law and that immediate review may materially advance the final disposition of the proceeding. Thus, we hereby grant review, pursuant to Commission Rule 76(a)(2), 29 C.F.R. § 2700.76(a)(2). We waive the filing of briefs from the parties otherwise required by the Commission's rules in interlocutory review proceedings. See Commission Rule 76(e), 29 C.F.R. § 2700.76(c).

The judge's Order Denying Notice of Appearance, also dated April 8, 1996, denied the entry of appearance by private counsel representing individual miner complainants in a discrimination proceeding brought by the Secretary of Labor, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (1994). Upon consideration of the judge's order, we reverse. The right of a miner complainant to participate in a discrimination proceeding brought by the Secretary is unequivocal. Section 105(c)(2) provides that a complaining miner may present evidence. Commission Rule 4(a) reiterates that statutory right and accords the complaining miner party status in a section 105(c)(2) proceeding. 29 C.F.R. § 2700.4(a). Commission Rule 3(c) further provides for entry of appearance by the representative of a party. 29 C.F.R. § 2700.3(c).

Moreover, the Commission and a United States court of appeals have approved the use of private attorneys in section 105(c)(2) actions. *Eastern Assoc. Coal v. FMSHRC*, 813 F.2d 639, 643 (4th Cir. 1987) ("The complainant has . . . chosen to retain private counsel."), *aff'g Secretary on behalf of Ribel v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015, 2021 (December 1985) (miner retained private counsel); *Secretary on behalf of Gilbert v. Sandy Fork Mining Co.*, 9 FMSHRC 1327, 1339 n.6 (August 1987) ("Individual complainants remain free to retain private counsel at any time.").

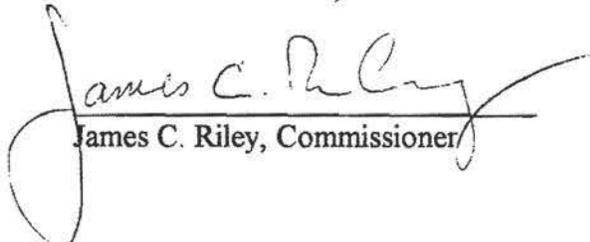
Accordingly, the judge's denial of the entry of appearance by the attorney representing the individual miners is reversed and the judge shall accept his entry of appearance.

  
Mary Lu Jordan, Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 17, 1996

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEST 95-512-M  
 :  
DE ATLEY COMPANY, INC. :

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994). On February 7, 1996, Chief Administrative Law Judge Paul Merlin issued an Order of Default to DeAtley Company, Inc. ("DeAtley") for its failure to answer the Secretary of Labor's petition for assessment of civil penalty or the judge's December 15, 1995, Order to Respondent to Show Cause. The judge assessed a civil penalty of \$1,019.

In a letter to the judge dated March 16, 1996, DeAtley's office engineer, Max Jensen, states that his predecessor contested the penalty and subsequently settled the case with the Secretary. He explains that, shortly after receiving the settlement papers his predecessor resigned without having the agreement signed. Jensen asserts that, when he discovered the unconsummated settlement agreement, he immediately had it signed and mailed to the Secretary along with payment in full of the stipulated amount. Jensen states that, on February 26, 1996, DeAtley received a letter from the Secretary acknowledging receipt of the settlement payment but demanding the balance (\$512) of the original penalty. Jensen states he telephoned Matthew Vadnal, the Secretary's counsel, to explain why the settlement agreement was returned late and Vadnal suggested he contact the Commission.

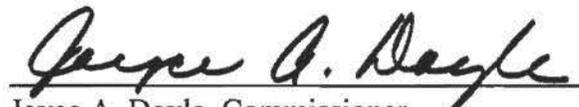
On April 1, 1996, the Commission received the Secretary's response to DeAtley's March 16 letter. The Secretary requests the letter be treated as a request for relief from final judgment.

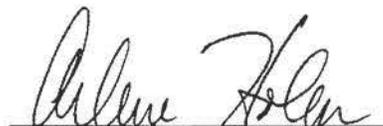
The judge's jurisdiction over this case terminated when his default order was issued on February 7, 1996. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by

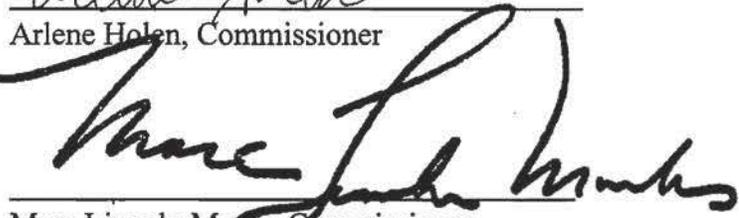
filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). DeAtley's letter was received by the Commission on March 21, after the judge's default order had become a final decision of the Commission.

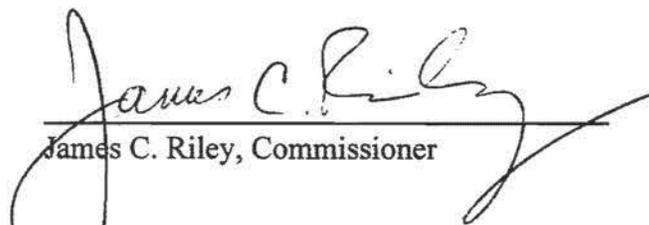
Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). On the basis of the present record, we are unable to evaluate the merits of DeAtley's position. In the interest of justice, we reopen the proceeding, treat DeAtley's letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See, e.g.*, *Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (December 1986). We remand the matter to the judge, who shall determine whether final relief from default is warranted. *See Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990).

  
Mary Lu Jordan, Chairman

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 19, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. KENT 93-318-R
	:	KENT 93-319-R
PEABODY COAL COMPANY	:	KENT 93-320-R
	:	KENT 93-437

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Doyle, Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), raises the issue of whether violations of 30 C.F.R. § 70.100(a) (1995)<sup>1</sup> by Peabody Coal Company (“Peabody”) were caused by its high negligence and unwarrantable failure<sup>2</sup> to comply with the standard. Administrative Law Judge Arthur Amchan determined that the violations were the result of Peabody’s high negligence and unwarrantable failure. 16 FMSHRC 42 (January 1994) (ALJ). For the reasons that follow, we reverse and remand.

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<sup>1</sup> 30 C.F.R. § 70.100(a) provides in part:

Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air . . . .

<sup>2</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . .”

## I.

### Factual and Procedural Background

Peabody operates the Camp No. 1 mine, an underground coal mine in Morganfield, Kentucky. On January 6, 1993, Arthur Ridley, an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued a citation and an order, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), alleging significant and substantial ("S&S") and unwarrantable violations of section 70.100(a) based on analysis of dust samples collected pursuant to 30 C.F.R. § 70.207 (1995).<sup>3</sup> 16 FMSHRC at 43; Tr. 17, 78, 104. Dust samples from the period November 1-December 31, 1992, revealed that the continuous miner operators for mechanized mining unit ("MMU") 044 and MMU 056 had been exposed to average dust concentrations of 2.4 milligrams of respirable dust per cubic meter of air ("mg/m<sup>3</sup>"). 16 FMSHRC at 43. On January 20, the inspector issued an order, pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), alleging an S&S and unwarrantable violation of the same standard based on analysis of samples collected during the period January 1-February 28, 1993, which showed that the continuous miner operator of MMU 047 had been exposed to an average dust level of 2.2 mg/m<sup>3</sup>. *Id.*

Inspector Ridley testified that he designated the violations as unwarrantable because Peabody had violated the standard numerous times in the past and he thought that sterner measures might induce compliance. Tr. 39, 42, 65, 101-02. In the two years preceding issuance of the subject citation and orders, Peabody had received a citation or an order alleging excessive dust exposure for the operator of MMU 044 during four of the nine bimonthly cycles in which coal had been produced, for the operator of MMU 056, during four of eleven cycles and, for the operator of MMU 047, during two of four cycles. 16 FMSHRC at 44; Gov't Exs. 1, 2, 3.

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<sup>3</sup> 30 C.F.R. § 70.207 is entitled, "Bimonthly sampling; mechanized mining units." Subsection (a) provides in part:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period beginning with the bimonthly period of November 1, 1980. Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days.

After collecting the samples, Peabody sent them to the Pittsburgh Health Technology Center ("PHTC") for evaluation. Tr. 17, 21, 77-78. The PHTC weighed the samples and sent reports of the results to Peabody and MSHA. Tr. 104.

Inspector Ridley testified that, at least twice during this period, he informed Peabody personnel that they needed to “do more than just take . . . samples.” Tr. 40, 68-69, 134-36.

In order to abate the citation and orders, Peabody was required by the inspector to designate additional personnel to supervise sampling. Tr. 55-56, 72-73, 96. The inspector believed that respirable dust could be maintained within required limits if Peabody complied with its plan. Tr. 54-56. His belief was based, in part, on the fact that, when MSHA had supervised sampling in 1991 and 1992, Peabody had achieved compliance with section 70.100(a).<sup>4</sup> Tr. 49, 69-70, 89. When samples of MMUs 044, 056, and 047 taken under supervised conditions showed respirable dust within acceptable limits, the citation and orders were terminated.<sup>5</sup> J. Exs. 4, 5, 6.

Peabody conceded that it had violated section 70.100(a) in all three instances and that the violations were S&S, but disputed that the violations had been caused by its unwarrantable failure to comply with the standard. Peabody presented evidence that in January 1992, approximately a year before the subject citation and orders were issued, it began taking extensive measures to increase water flow and improve dust control. Water flow gauges were installed to monitor the quantity of water going to the sprays and scrubbers on continuous miners. 16 FMSHRC at 45. Peabody also began working with the equipment manufacturer to reduce water and air restrictions within the continuous miners. *Id.* at 46. Over a period of six to seven months, beginning in February 1992, Peabody increased the size of fittings on several miles of water lines leading to the continuous miners and replaced plastic pipe with steel pipe, which could tolerate greater water pressures. *Id.* at 45. In March 1992, it increased the size of the water line leading to the continuous miners from one inch to one-and-a-half inches and increased water volumes on the continuous miners by 25% or 50%, depending upon the type of machine. *Id.* In July 1992, Peabody replaced existing water pumps with special pumps that would increase water pressure and volume. *Id.* To increase scrubber efficiency, commencing in November 1992, Peabody installed water sprays inside the ductwork of the continuous miners. *Id.*

The judge found that, given Peabody’s compliance history and the Mine Act’s emphasis on preventing respiratory disease, Peabody’s “failure to leave any stone unturned” in resolving its noncompliance with section 70.100(a) amounted to aggravated conduct, exceeding ordinary negligence. 16 FMSHRC at 48. He explained that a prudent employer would have undertaken a

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<sup>4</sup> MSHA had supervised sampling for MMU 044 on March 28, 1991, and for MMU 047 on September 10, 1992. Tr. 47-48, 89. Analysis of those samples revealed average dust levels of 1.1 mg/m<sup>3</sup> and 0.8 mg/m<sup>3</sup>, respectively. Tr. 48, 89.

<sup>5</sup> After the citations and orders had been terminated, Peabody continued to assign additional personnel to supervise sampling. Tr. 190. Supervisors observed that miners sometimes failed to correctly use line brattice and to position themselves in an area of least possible exposure to dust. Tr. 214-15.

comprehensive investigation, which would have revealed that employee work practices were deficient. *Id.* Relying on his finding that, in January 1993, Inspector Ridley found three of Peabody's six MMUs to be in violation of the dust standard, the judge concluded that Peabody's "compliance record during 1991 and 1992, create[d] a rebuttable presumption that the violations were due to an unwarrantable failure." *Id.* at 48-49. He stated that, had Peabody shown it had "taken every conceivable step to rectify the problem," he would have been inclined to find ordinary negligence. *Id.* at 49. The judge further determined that sampling by MSHA in 1991 and 1992 had put Peabody on notice that it could have achieved compliance without altering its equipment and that other efforts were necessary. *Id.* Accordingly, the judge concluded that the violations had resulted from Peabody's unwarrantable failure and high negligence. *Id.* at 48-49. The judge assessed civil penalties of \$15,000, noting, by analogy, that the Occupational Safety and Health Act ("OSHAct") provides for increased penalties for repeated violations. *Id.* at 46.

The Commission granted Peabody's petition for review and allowed amicus curiae participation by twelve organizations.

## II.

### Disposition

Peabody asserts that the judge erred in concluding that its violations were caused by high negligence or unwarrantable failure.<sup>6</sup> It argues that there was no evidence it had failed to comply with its dust control plan, it could not know whether it was in compliance until it was too late to avoid a violation, and it had taken extensive and reasonable remedial measures to improve dust control. PDR at 5-7. It contends further that the judge erred in creating a rebuttable presumption of unwarrantable failure based on its compliance history. *Id.* at 11-12. It also contends that the judge erred in relying on the OSHAct in assessing civil penalties. *Id.* at 16-17.

The Secretary asserts that the judge, in effect, applied the correct standard for unwarrantable failure. S. Br. at 17-18 n.15, 20-21 n.17. He further contends that substantial evidence supports the judge's findings of high negligence and unwarrantable failure because Peabody knew or had reason to know of a persistent compliance problem based on its past violations and warnings from MSHA. *Id.* at 10-14. The Secretary asserts Peabody had ample opportunity to take reasonable and effective remedial measures and failed to do so. *Id.* at 14-21.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2003-04. Unwarrantable failure is characterized by such conduct as "reckless disregard,"

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<sup>6</sup> The amici filed a joint brief generally supporting Peabody's position.

“intentional misconduct,” “indifference” or a “serious lack of reasonable care.”<sup>7</sup> *Id. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991). The Commission has required that an operator’s good faith efforts in trying to achieve compliance with a standard must be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). Where an operator reasonably believes in good faith that its conduct is the safest method of compliance, such conduct is not aggravated conduct constituting more than ordinary negligence. *Utah Power and Light Co.*, 12 FMSHRC 965, 972 (May 1990) (“*UP&L*”).

We conclude that the judge erred in finding unwarrantable failure based on the operator’s “failure to leave any stone unturned” and take “every conceivable step” in attempting to eliminate the violations. 16 FMSHRC at 48-49. The judge, after referring to the proper standard for unwarrantable failure set forth in Commission precedent, failed to apply it. In effect, he imposed a standard for unwarrantable failure close to one of strict liability.

The judge further erred by creating a rebuttable presumption, in effect, that the violations resulted from Peabody’s unwarrantable failure based on its compliance history and his finding that three of six MMUs were out of compliance during the inspector’s visits in January 1993. *Id.* Commission case law does not recognize a presumption of unwarrantable failure based on an operator’s history of noncompliance. Under Commission precedent, various factors are examined to determine whether a violation is unwarrantable. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992) (citations omitted). Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that “greater efforts are necessary for compliance” with a standard. *Id.* That an operator has received such notice, however, is not dispositive of whether a subsequent violation of the standard is unwarrantable. An operator’s good faith efforts in attempting to achieve compliance must be examined in making that determination. *UP&L*, 12 FMSHRC at 972 ; *see Westmoreland Coal Co.*, 7 FMSHRC 1338, 1342 (September 1985).

Further, contrary to the judge’s finding, the inspector did not find three of the six units out of compliance during any one sampling cycle. MMUs 044 and 056 had been in violation during the November-December 1992 cycle, while MMU 047 had been in violation during the January-February 1993 cycle. Gov’t Exs. 1, 2, 3.

The judge essentially found that Peabody’s remedial efforts were insufficient to overcome high negligence and unwarrantable failure findings because previous instances of supervised sampling should have indicated to Peabody that water flow alterations were unnecessary and that “something else, such as closer attention to proper work practices, was necessary.” 16 FMSHRC at 49. The judge erred in failing to recognize the relationship between

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<sup>7</sup> Contrary to the Secretary’s assertions (S. Br. at 10-14), a “had reason to know” standard is not determinative of unwarrantable failure. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993); *Cyprus Plateau*, 16 FMSHRC at 1614.

an increased water supply and dust control, testified to by witnesses of both parties.<sup>8</sup> Tr. 50, 202-03. Furthermore, the record shows that Peabody did, in fact, address work practices by reviewing provisions of its dust control plan with miners during safety meetings and annual refresher training. Tr. 213. In addition to its ordinary training measures, in May 1992, Peabody's superintendent, chief mine manager, and safety supervisor went to each working section of the mine and explained the dust control plan in great detail to miners, informing them that they were expected to comply with the plan at all times. Tr. 213-14.

The record also shows that Peabody's efforts to increase water flow were extensive, sustained, and intended to control dust at all times, not only during sampling. The judge seemed to construe Peabody's considerable investment of time and expense toward achieving a systematic engineering solution as the modern day equivalent to fiddling while Rome burned. Peabody's persistence in attempting to reduce respirable dust levels through engineering controls rather than relying on work practice reforms, which depend for success on individual worker compliance with the dust control plan at all times, was entirely reasonable. Moreover, the evidence indicates that Peabody had reason to believe that its remedial efforts were working. As to MMU 044, dust levels had been in compliance according to samples taken in the March-April 1992 and May-June 1992 sampling periods, the two most recent sampling periods during which MMU 044 was in production prior to the November-December 1992 reading that led to the January 6 citation.<sup>9</sup> J. Ex. 2. With respect to MMU 056, dust levels were also in compliance during the three sampling periods immediately preceding the November-December sampling that gave rise to the January 6 order. *Id.* As to MMU 047, it was either in compliance or out of production for every sampling period except one between May 1991 and the January-February 1993 sampling period that gave rise to the January 20 order. *Id.*

We conclude that Peabody's remedial measures clearly demonstrate a good faith, reasonable belief that it was taking the steps necessary to solve its dust problems and this record cannot support a finding of high negligence or unwarrantable failure.

We disagree with the dissenting Commissioners that an operator bears the burden of proving significant compliance efforts to avoid a determination that a violation is unwarrantable, slip op. at 10, or that the seriousness of a violation is relevant in a determination of unwarrantable failure. *Id.* at 10-11. Commission precedent has established that the Secretary bears the burden of proving that an operator's conduct, as it relates to a violation, is unwarrantable. *Virginia Crews*, 15 FMSHRC at 2107. Commission precedent has also established that various factors are considered in determining whether conduct by an operator is

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<sup>8</sup> The judge stated that "it is unclear what, if any, relationship exists between the measures taken by Respondent to increase water supply to its working sections and the numerous citations issued to it for respirable dust violations." 16 FMSHRC at 48.

<sup>9</sup> MMU 044 was idle from July through October 1992.

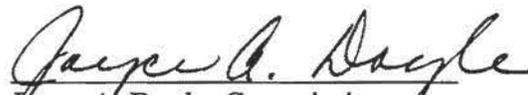
unwarrantable, irrespective of the seriousness of a violation. Further, the Mine Act, in setting forth the terminology of unwarrantability, establishes more severe sanctions for an unwarrantable violation, irrespective of its seriousness. Section 104(d)(1) provides that a withdrawal order is to be issued whenever “the Secretary finds another violation of *any* mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply . . . .” 30 U.S.C. § 814(d)(1) (emphasis added).

We also disagree that “the success or failure of an operator’s effort to achieve compliance is a factor that must be considered” in determining unwarrantable failure. Slip op. at 8. If the operator’s effort had been successful, there would have been no violation.

### III.

#### Conclusion

For the foregoing reasons, we reverse the judge’s high negligence and unwarrantable failure findings and remand for reassessment of civil penalties.<sup>10</sup>

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
James C. Riley, Commissioner

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<sup>10</sup> Given our disposition, we need not reach Peabody’s arguments that the judge erred in assessing penalties. We caution the judge, however, against relying on OSHA concepts in assessing penalties.

Chairman Jordan and Commissioner Marks, concurring in part and dissenting in part:

We agree with our colleagues that the judge's failure to appreciate the significance of water in controlling dust prevented him from evaluating the reasonableness of Peabody's remedial measures and that, therefore, his unwarrantability determination cannot be upheld. However, by deciding to reverse, rather than vacate, the judge's determination, our colleagues take the view that this record would not permit the conclusion that the respirable dust violations at issue resulted from more than ordinary negligence. We do not agree. Because we are not convinced that this record, viewed as a whole, cannot support a finding of unwarrantable failure under the standard enunciated in *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), and its progeny, we would vacate the judge's determination and remand that issue for further analysis.

In deciding that the instant violations were caused by the operator's unwarrantable failure to comply, the judge placed great weight on the operator's history of violations, attributing virtually no significance to the operator's efforts to come into compliance during the course of the two years in question. In deciding to reverse the judge's determination, however, we fear our colleagues have approached the record from an opposite but equally narrow focus. The majority accords controlling weight to the operator's unsuccessful engineering changes, but attaches little if any significance to this operator's dismal compliance record, or to the operator's continuing failure to come into compliance a full year after it had begun to implement the remedial measures upon which it relies. Regarding this aspect of the evidence, our colleagues opine that Peabody was not "fiddling while Rome burned." Slip op. at 6. We submit that the majority pays too little heed to the charred remains of the Eternal City. The majority ignores the fact that the success or failure of an operator's effort to achieve compliance is a factor that must be considered in deciding whether the operator acted reasonably and in good faith.

The data in the margin reveals the scope of Peabody's compliance problem and illuminates why, on January 6, 1993, Inspector Ridley resorted to the more severe sanctions associated with the unwarrantable failure provisions of the Act.<sup>11</sup> During nine of the thirteen sampling cycles that occurred between January 1991 and February 1993, respirable dust exceeded the mandatory limit for at least one of the three MMUs. Gov't Exs. 1-3. Over 48% of the samples taken at these MMUs during active mining were out of compliance. *Id.* During four test periods, the respirable dust exceeded permissible levels for two out of three MMUs. *Id.* The excessive dust levels resulted in Peabody receiving nine citations and one withdrawal order prior to the issuance of the instant citation and orders alleging unwarrantable failure. *Id.*

Peabody began implementing the environmental controls it relies on in this preceding during January 1992, approximately one year before the subject citation and orders were issued. 16 FMSHRC at 45. These efforts continued through mid-December 1992. *Id.*; Tr. 185-87. During this same time period, however, Peabody received four more citations for exceeding the respirable dust standard. Gov't Exs. 1-3.

A citation was issued on October 7, 1992, when Peabody's bimonthly sample for MMU 047 revealed an average dust level of 2.4 mg/m<sup>3</sup>. Gov't Ex. 3. A few weeks earlier, on September 10, 1992, the Department of Labor's Mine Safety and Health Administration

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<sup>11</sup> Gov't Exs. 1, 2 and 3 establish the following average dust concentrations. Sampling periods during which an MMU was not in compliance with the 2.0 mg/m<sup>3</sup> maximum permitted by section 70.100(a) are shown in bold.

<u>Sampling Period</u>	<u>MMU 044</u>	<u>MMU 056</u>	<u>MMU 047</u>	<u>Results</u>
Jan.-Feb. '91	<b>3.3</b>	<b>2.2</b>	Non producing	<b>104(a) cits. 2/6/91, 2/8/91</b>
Mar.-Apr. '91	<b>2.2</b>	2.0	<b>3.0</b>	<b>104(b) order 3/28/91; 104(a) cit. 5/2/91</b>
May-June '91	1.4	<b>2.7</b>	Non producing	<b>104(a) cit. 7/19/91</b>
July-Aug. '91	1.9	1.8	Non producing	
Sept.-Oct. '91	1.5	2.0	Non producing	
Nov. - Dec. '91	<b>2.7</b>	1.7	Non producing	<b>104(a) cit. 12/2/91</b>
Jan.- Feb. '92	<b>2.8</b>	<b>2.9</b>	Non producing	<b>104(a) cits. 2/3/92, 2/11/92</b>
Mar.-Apr. '92	1.8	<b>2.6</b>	Non producing	<b>104(a) cit. 4/29/92</b>
May-June '92	1.5	1.3	Non producing	
July - Aug. '92	Non producing	1.2	1.9	
Sept.- Oct. '92	Non producing	1.6	<b>2.4</b>	<b>104(a) cit. 10/7/92</b>
Nov.-Dec. '92	<b>2.4</b>	<b>2.4</b>	1.4	<b>104(d)(1) cit. 1/6/93; 104(d)(1) 1/6/93</b>
order				
Jan.-Feb. '93			<b>2.2</b>	<b>104(d)(2) order 1/20/93</b>

("MSHA") had taken a sample at the very same location and had obtained a dust level of only 0.8 mg/m<sup>3</sup>. Tr. 89.

The bimonthly sample taken during November - December 1992 showed MMU 047 to be in compliance, but revealed violative respirable dust levels for MMUs 044 and 056, thus prompting the issuance, on January 6, 1993, of the section 104(d)(1) citation and section 104(d)(1) order which are before us in this proceeding. Gov't Exs. 1-3. The next bimonthly sampling revealed MMU 047 to be back out of compliance, thereby precipitating the issuance of the third enforcement action under review, the section 104(d)(2) order issued on January 20, 1993.

Our colleagues agree that an operator's compliance history is a factor to be considered in the unwarrantable failure determination. Slip op. at 5. In this case, however, the majority concludes that the judge erred in concluding that Peabody's poor compliance record created a "rebuttable presumption" of unwarrantable failure. *Id.* The judge's reference to a rebuttable presumption should not obscure the importance of the compliance history, particularly in a case involving a respirable dust violation. The Commission has refused to restrict the use of evidence of compliance history in unwarrantable failure determinations. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1263 (August 1992). In light of the compliance record here, the judge did not need the assistance of a rebuttable presumption to accord it significant weight.<sup>12</sup> Once the Secretary presented evidence of this operator's repeated failure to comply with respirable dust levels, along with evidence of the extent and duration of the violation, it was up to Peabody to come forward with convincing evidence of its attempts to come into compliance or risk an adverse ruling on the issue of unwarrantability. As our colleagues point out, Peabody did come forward with evidence; however, while we agree that the evidence of Peabody's remedial efforts fairly detracts from the weight that might otherwise be accorded to the operator's poor compliance record, we are not prepared to say that such evidence *requires* the conclusion that the operator's conduct was not unwarrantable.

In determining the reasonableness of the operator's efforts, our colleagues fail to consider the significance of the judge's observation that "the record in this case suggests that Respondent's employees have been regularly exposed to respirable dust levels above those allowed by the standard [30 C.F.R. § 70.100(a)] for a two year period." 16 FMSHRC at 47. In evaluating that fact, we must bear in mind that each violation citing overexposure to respirable dust is deemed serious because of the cumulative nature of the risk posed. *See Consolidation Coal Co.*, 8 FMSHRC 890, 898-99 (June 1986). In contrast with a violation that may temporarily expose a miner to the risk of injury or death, but that leaves the miner no worse off once the violation is corrected and the hazard removed, the effects of a violation involving overexposure to respirable dust remain with the miner even after compliance with the standard is

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<sup>12</sup> Commissioner Marks agrees with the judge's recognition of a rebuttable presumption in light of Peabody's previous history of violations.

achieved, increasing his risk of contracting black lung and other respirable diseases. *Id.* at 893-94. As one commentator has observed: “The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater the actor is required to exercise caution commensurate with it.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984). In light of the cumulative effects posed by dust exposure, an operator’s repeated failure to maintain compliance with maximum allowable dust levels during a two year period poses a grave danger to its miners’ health and such operator should be expected to defend against an unwarrantable failure charge by demonstrating considerable efforts to come into compliance in order for its actions to be considered reasonable and undertaken in good faith.<sup>13</sup>

We find it notable, as do our colleagues, that the various engineering changes Peabody implemented are intended to control dust at *all* times. *See slip. op.* at 6. However, we also find it notable, as did the judge, that as early as March 1991, prior to Peabody’s implementation of any changes in dust suppression measures, MSHA was able to obtain a sample which revealed an average dust level of only 1.1 mg/m<sup>3</sup> for MMU 044. *Tr.* 47-48; *see* 16 FMSHRC at 49. MSHA’s sample was taken on the heels of operator samples showing excessive dust levels for two consecutive cycles. These violative samples had triggered a section 104(b) failure to abate order, issued the same day Inspector Ridley obtained his low reading. *Tr.* 47-48. Inspector Ridley made Peabody aware of his sampling results in a letter to Mr. Englehart, Peabody’s president, dated April 10, 1991. *Tr.* 48.

However reasonable it might have been for Peabody to conclude initially that engineering changes would correct the dust problem, that position became increasingly less defensible as MSHA continued to cite Peabody and confront it with MSHA’s own samples indicating that compliance with the standard was achievable with the equipment already on site. The low reading obtained by MSHA as early as March 1991, without engineering changes, and the continued exposure of employees to excessive dust levels for the next 18 months, prevent us

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<sup>13</sup> Our colleagues are correct that the violation of any safety or health standard may give rise to a determination of unwarrantable failure. *Slip op.* at 6-7. It does not follow, however, that the seriousness of a violation is never relevant in determining whether an operator unwarrantably failed to comply with a standard. Contrary to the assertion of our colleagues, neither Commission precedent nor section 104(d)(1) of the Act preclude a judge who is attempting to evaluate the reasonableness of an operator’s unsuccessful efforts to come into compliance with a standard from considering the nature of the hazard against which that standard is designed to protect. We are mindful of the judge’s observation below that “the record in this case suggests that Respondent’s employees have been regularly exposed to respirable dust levels above those allowed by the standard for a two year period.” 16 FMSHRC at 47. Unlike our colleagues, we consider the potential impact of these repeated exposures to be a relevant factor in evaluating the operator’s conduct.

from concluding that this record cannot, as a matter of law, support a determination of aggravated conduct constituting unwarrantable failure.

In light of the compliance history in this case, it is inescapable that Peabody was on notice that not only greater, but *different* efforts were necessary to attain compliance with the standard. Yet the record shows that Peabody hewed to its reliance on water sprays to correct the problem, and there is no indication that Peabody undertook to conduct any investigation to determine why “its sampling results exceeded the permissible exposure limit on a regular basis,” 16 FMSHRC at 48, or why MSHA was able to obtain such dramatically lower sampling results. Indeed, it does not appear that Peabody engaged in any discussion with MSHA about the discrepancy in sampling results, nor did Peabody even inform MSHA of its efforts to improve water flow until after MSHA issued the orders which are the subject of this proceeding. Tr. 193-95. In our view, Peabody’s failure to engage in any investigation or discussion detracts from its claim that it made reasonable and good faith efforts to come into compliance. Unlike our colleagues, therefore, we are unwilling to conclude that the remedial measures implemented by Peabody *must* defeat a finding of unwarrantable failure as a matter of law.

In concluding that Peabody’s remedial measures “[were] entirely reasonable,” slip op. at 6, our colleagues may have been influenced by the contrast between Peabody’s efforts, unsuccessful as they were, and the unreasonable approach urged by the MSHA inspector. To abate the section 104(d) order under review, Inspector Ridley required Peabody to assign additional personnel who could watch the employees while the dust samples were taken, to ensure that the employees were properly positioning themselves and using the line curtain or brattice to direct intake air to the working face. Tr. 55-57, 72-73. The problems with this form of “abatement” are obvious and were aptly pointed out by the judge in his opinion:

Section 70.100(a) requires that each operator shall *continuously* maintain the average concentration of respirable dust at or below 2.0 mg/m<sup>3</sup>. Pursuant to 30 C.F.R. § 70.207, sampling is to be taken during a normal production shift. This suggests that the sampling is to be representative of an employee’s regular daily exposure to respirable dust . . . .

Sampling that is artificially low because supervisory personnel are constantly watching and directing the sampled employees would appear to be violative of section 70.207.

16 FMSHRC at 47.

Admittedly, *any* approach to dust suppression may appear, at first blush, to be reasonable when compared to a procedure which may produce samples that are not representative of the mine atmosphere. But the fact that Peabody’s systemic, albeit unsuccessful, effort to control dust

is preferable to a method which appears to violate the Act, does not necessarily establish that Peabody has acted reasonably and in good faith.<sup>14</sup>

For the foregoing reasons, we would vacate the judge's unwarrantable failure holding and remand for reanalysis.

  
Mary Lu Jordan, Chairman

  
Marc Lincoln Marks, Commissioner

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<sup>14</sup> The record offers reason to believe that employees' work practices may still be creating a risk of overexposure at Camp No. 1 mine. Peabody safety supervisor Brent Roberts testified that the operator continues to conduct the supervised sampling required by MSHA to abate the orders under review. Tr. 214. He acknowledged that during such times he has had occasion to correct prohibited work practices that led to the problem in this case, including the failure to use curtain or line brattice to direct air to the continuous miner, and miners' positioning themselves on the dustier, exhaust side of the working place. Tr. 214-15. 30 C.F.R. § 75.330 (1995) requires the use of ventilation control devices such as brattice to direct air to the working face, and the dust control plan requires miners to position themselves so that they are exposed to the least amount of dust possible. Tr. 215. From this evidence, it is possible to conclude that employees may still be engaging in prohibited work practices that result in overexposure to respirable dust. Unfortunately, due to the supervised sampling technique insisted upon by MSHA, such overexposure is likely to go undetected.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 19, 1996

JIM WALTER RESOURCES, INC. :

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v. :

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Docket No. SE 94-244-R

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SECRETARY OF LABOR, :

:

MINE SAFETY AND HEALTH :

:

ADMINISTRATION (MSHA) :

:

:

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Doyle and Holen, Commissioners

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Jim Walter Resources, Inc. ("JWR") alleging a violation of 30 C.F.R. § 75.400.<sup>1</sup> The Commission granted the petition for discretionary review ("PDR") filed by the Secretary of Labor, which challenged Administrative Law Judge Gary Melick's decision that the Secretary had not met his burden of proving either that the violation was significant and substantial ("S&S")<sup>2</sup> or that it had

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<sup>1</sup> 30 C.F.R. § 75.400 states:

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

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

<sup>2</sup> The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ."

resulted from JWR's unwarrantable failure to comply with the standard.<sup>3</sup> 16 FMSHRC 1511 (July 1994) (ALJ). We affirm the judge's determinations.

I.

Procedural and Factual Background

On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR for a violation of section 75.400 because of trash accumulations in the No. 2 entry of JWR's No. 7 Mine. Tr. 29-30; Govt. Ex. 3. See 16 FMSHRC at 1514.

On January 31, 1994, the date of the citation at issue, Meredith conducted a follow-up inspection and confirmed that JWR had abated the conditions that led to the issuance of the January 24 citation. Tr. 31. During the inspection, he observed in the No. 3 entry an accumulation of trash at the check curtain, which directed ventilation across the longwall face and also separated the active outby area from the inactive inby area. Tr. 16; 64. The judge found that the trash in the outby area consisted of "[a] garbage bag, one box and one rock dust bag . . . ." 16 FMSHRC at 1513. Inby the curtain, there was a larger accumulation of trash that extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools. Tr. 21-24; Gov't Ex. 2. The materials on both sides of the curtain were combustible. Tr. 24. See 16 FMSHRC at 1512.

Inspector Meredith issued a citation, which charged a violation of section 75.400, and a withdrawal order, pursuant to section 104 (d)(2) of the Act, 30 U.S.C. § 814 (d)(2). The inspector designated the violation as S&S and alleged that it was due to the operator's unwarrantable failure to comply with the standard. 16 FMSHRC at 1511-13; Govt. Ex. 2.

JWR challenged the citation and, following hearing, Judge Melick affirmed the violation. Although he noted that the existence of accumulations inby and outby the check curtain was undisputed, the judge concluded that "the inactive inby area cited in the order was not within the 'active workings' and the accumulations located therein were therefore not in violation of the cited standard." *Id.* at 1512. He further concluded that the evidence concerning combustible material outby the line curtain was insufficient to establish that the violation was S&S. 16 FMSHRC at 1512-13. The judge also determined that the evidence was insufficient to establish that the violation was due to the operator's unwarrantable failure. *Id.* at 1513-14.

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<sup>3</sup> The unwarrantable failure terminology is taken from section 104 (d)(1) of the Act, 30 U.S.C. § 814 (d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards . . . ."

## II.

### Disposition

The central issue as to both the S&S and unwarrantability designations of the violation is the consideration to be given the trash accumulation inby the check curtain. The inspector cited this accumulation, along with the trash outby the curtain (*see* Govt. Ex. 2), and considered it in designating the violation S&S and unwarrantable. Tr. 51-52, 53-56. Before the judge, the Secretary argued that the area inby the check curtain was not “an inactive area.” Tr. 73. The judge, however, held that, because the area inby the check curtain was not within the “active workings of the mine,” the trash accumulation in that area was not violative of section 75.400. 16 FMSHRC at 1512. The Secretary contends on review that the judge erred in failing to consider accumulations on the inby side of the check curtain. PDR at 3.<sup>4</sup> The Secretary notes that miners traveled inby the curtain after the materials accumulated in the entry and that the judge’s interpretation of section 75.400 in ignoring the inby accumulations defeats the purpose of the regulation. *Id.* at 8-12. The Secretary has not appealed the judge’s determination as to the non-violative nature of the inby accumulation, however, and, thus, it is not in issue in this proceeding. 30 U.S.C. § 823(d)(2)(A)(iii). The Secretary nevertheless relies on the inby trash accumulation to substantiate his S&S and unwarrantability allegations. Thus, we must decide the effect, if any, of the non-violative trash accumulation.

#### A. Significant and Substantial

In challenging the judge’s S&S determination, the Secretary argues that he failed to address certain evidence relating to the reasonable likelihood of injury under the criteria of *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). PDR at 2-3. The Secretary also asserts that the judge did not address uncontradicted testimony that the check curtain was placed directly on top of combustible material, that the trash was highly combustible, that the mine had a history of methane ignitions and problems with spontaneous combustion, and that the accumulations in the No. 3 entry were close to the face, increasing the possibility of fires. *Id.* at 6-8.

JWR responds that an accumulation in the inactive area is not a violation, that the Secretary’s argument in support of S&S focuses on that non-violative accumulation, and that the limited amount of material in the active area was not reasonably likely to result in an injury. JWR Br. at 4. In response to the Secretary’s argument that the judge failed to address testimony regarding spontaneous combustion, methane emissions, and fires at the face, JWR states that the judge properly discounted such possibilities based on Inspector Meredith’s own testimony. *Id.* at 5.

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<sup>4</sup> The Secretary designated his PDR as his brief.

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

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

6 FMSHRC at 3-4. *See also Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In finding that the violation was not S&S, the judge concluded that the Secretary failed to meet his burden of proof as to the third element of *Mathies*. 16 FMSHRC at 1513. We agree. As the judge noted, the Secretary's evidence "referenced the massive accumulations in the inactive area and evidence was not elicited as to whether the few combustible items found in the active area at issue constituted a 'significant and substantial' violation." *Id.* The judge concluded that the inby accumulation was not violative (*id.* at 1512) and the Secretary failed to appeal the judge's determination on that issue. Thus, it is not before us on review. Because section 104(d)(1) expressly provides that an S&S determination arises from *the nature of a violation*, the inby, non-violative accumulation cannot support an S&S designation as to the outby, violative accumulation. *Cf. Consolidation Coal Company*, 17 FMSHRC 250, 254 (March 1995) (S&S determination depends upon validity of underlying citation). The dissenting Commissioners would impermissibly use the Secretary's evidence as to the seriousness of non-violative conduct to establish that the violative conduct was S&S. Slip op. at 9-10.

#### B. Unwarrantable Failure

In support of his position that the judge erred in not finding the citation to have resulted from the operator's unwarrantable failure, the Secretary argues that the judge failed to consider the inby accumulation and JWR's trash accumulation in the adjacent entry cited the previous week. PDR at 13-14. The Secretary further argues that the judge improperly discounted a statement from JWR's longwall coordinator that JWR had failed to clean up the accumulation because of a manpower shortage. *Id.* at 14-15.

JWR argues that the determination of whether an accumulation is unlawful turns on whether it is located in "active workings," i.e., a place where miners are normally required to

work or travel. JWR Br. at 3. It contends that an accumulation in the inactive inby area does not violate section 75.400 and cannot support a finding of unwarrantability. *Id.* at 4.

In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. This determination was derived, in part, from the plain meaning of “unwarrantable” (“not justifiable” or “inexcusable”), “failure” (“neglect of an assigned, expected or appropriate action”), and “negligence” (the failure to use such care as a reasonably prudent and careful person would use, characterized by “inadvertence,” “thoughtlessness,” and “inattention”). *Id.* Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Corp.*, 13 FMSHRC 189, 193-94 (February 1991).

We agree with the judge that the Secretary did not meet his burden of proving unwarrantable failure. 16 FMSHRC at 1514. The Secretary again primarily relies on the trash accumulation in the inby area. The operator’s conduct in permitting that non-violative accumulation cannot, however, support a finding of unwarrantable failure as to the violative accumulation. Section 104 (d)(1) expressly provides that it is the conduct of the operator *in causing the violation* that is to be considered in determining unwarrantable failure. The Commission has recognized a number of factors that are relevant to determining whether a violation is due to an operator’s unwarrantable failure. *See, e.g., Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994), *citing Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992) (extensiveness of the *violation*, length of time that the *violative* condition has existed, operator’s efforts to eliminate the *violative* condition, and whether operator has been placed on notice that greater efforts are necessary for compliance) (emphasis added). These factors are directly related to the violation. Here, the judge properly limited his consideration to the accumulation that was violative of section 75.400.

Further, we see no error in the judge’s conclusion that no inference as to gross negligence or unwarrantable failure could be drawn solely from one prior violation of section 75.400. 16 FMSHRC at 1514. We also find, as did the judge, that the remarks of JWR’s longwall coordinator, James Brooks, that he did not know why the material had not been cleaned up and that he had not had outby people for over a week, were ambiguous and do not support a finding of aggravated conduct. *Id.*

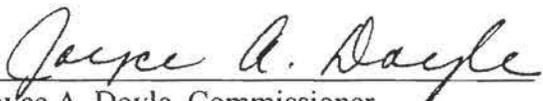
As in their S&S analysis, the dissenting Commissioners would impermissibly use the Secretary’s evidence as to non-violative conduct to establish that the violative conduct here was unwarrantable. Slip op. at 11. The rationale they set forth to explain their disagreement with this opinion would, in effect, change the law on unwarrantable failure. Although they acknowledge that the judge should consider “operator conduct *relevant to the violation* in determining if the violation resulted from unwarrantable failure,” *id.* (emphasis added), they ignore that statement as well as the language of section 104(d)(1) of the Mine Act and the factors relevant to a determination of unwarrantable failure set forth in *Mullins*, 16 FMSHRC at 195, in refusing to

confine consideration of JWR's conduct to the violation at issue. Moreover, *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1627-28 (September 1989), relied on by the dissent for support, is readily distinguishable. There, the Commission considered the operator's conduct in one part of its plant in taking steps to reduce asbestos hazards while ignoring asbestos hazards in other parts of the plant. The Commission held that, as to the violative conduct, disregard by the operator of its asbestos policy indicated aggravated conduct. *Id.* at 1628.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that JWR's violation of 30 C.F.R. § 75.400 was not significant and substantial and was not due to its unwarrantable failure.

  
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Joyce A. Doyle, Commissioner

  
\_\_\_\_\_  
Arlene Holen, Commissioner

Commissioner Riley, concurring:

I concur with the majority holding with respect to the limited issues before the Commission. Record evidence pertinent to the violation on appeal will not support reversal of the judge's determination. The small accumulation outby the check curtain in the No. 3 entry, found to be violative of 30 C.F.R. § 75.400, simply cannot, by itself, justify designation as "significant and substantial" or "unwarrantable failure."

As the majority notes, the larger accumulation inby the same check curtain is no longer at issue in these proceedings. The Secretary failed to appeal the judge's determination that the inby accumulation was non-violative. The Secretary now asks the Commission to cure both deficiencies in framing the appeal and the inadequacy of applicable regulations.

As the record indicates, the inspector originally cited a large inby accumulation together with a much smaller outby accumulation, separated only by a check curtain, which may have rested on some of the accumulated trash, and characterized the situation as a "significant and substantial" violation under section 104(d) of the Act. Suspecting that a large portion of the combustible debris inby the check curtain of the No. 3 entry was the same trash accumulation he had observed and cited the previous week in an active working area of the nearby No. 2 entry, the inspector designated the accumulation on both sides of the curtain as an "unwarrantable failure." Fortunately, as a consequence of the inspector's diligence, all trash accumulated on both sides of the check curtain was promptly removed from the mine.

We hope responsible operators would not resort to sweeping their problems behind a curtain separating "active workings" from inactive areas. While such a move may comply with the letter of applicable regulations, it falls short of the spirit of the law, which is intended to prohibit the accumulation of combustible materials that present an avoidable risk to miners. Whether such a scheme was at work in this case, as the inspector and the Secretary seem to believe, is no longer a compliance issue this Commission may reach on appeal.

The only question before the Commission is whether a situation determined not to be an offense under applicable law can be an aggravating circumstance with respect to characterization of a related violation. I am unable to make that leap. I find it difficult to understand how a situation allowed to go unchallenged as not offensive to worker health and safety law can nonetheless be construed to be so at odds with civil administrative order that it transforms another, somewhat ordinary violation into a grave and aggravated threat to workers.

Notwithstanding the regulatory language, the Secretary argues that certain accumulations outside of "active workings" should be prohibited because their proximity to areas where miners normally work or travel presents a collateral risk, similar to the one the regulation seeks to avoid. He asks the Commission to treat otherwise inactive areas the same as "active workings" if it can be demonstrated they were visited by anyone at anytime. The Secretary also suggests that a

barrier more substantial than a ventilation curtain is needed to segregate combustible accumulations from "active workings." The Commission appreciates that the regulation may not fully effectuate statutory purposes. However, if the Secretary sincerely believes the regulation is deficient, he should clarify its language through rulemaking, rather than ask the Commission to rewrite the regulation by adjudication.



James C. Riley, Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Our colleagues correctly state that the “central issue” regarding the S&S and unwarrantable designations of the violation is the “consideration to be given” to the accumulations observed by the inspector in by the check curtain. Slip op. at 3. However, they incorrectly resolve that issue by concluding that the judge properly ignored that evidence. *Id.* at 4-6. We disagree and, for the reasons set forth below, we dissent.

## I.

### Significant and Substantial

The Secretary asserts that the judge erred by failing to consider the accumulation in the inactive area in by the check curtain in connection with his analysis of the likelihood of an injury resulting from the violation. Contrary to our colleagues, we agree with the Secretary’s contention. We also think that the judge erred in failing to consider evidence relevant to the issue of whether the violation was significant and substantial (“S&S”).

#### A. Failure to consider the accumulation in by the check curtain.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1625 (August 1994). A violation is S&S if, “*based on the particular facts surrounding the violation*, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature.” *Id.*, citing *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825-26 (April 1981) (emphasis added). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

6 FMSHRC at 3-4 (footnote omitted). See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* formula criteria).

The judge refused to consider the accumulation in by the check curtain in his S&S analysis. 16 FMSHRC at 1513. In determining whether a violation is S&S, however, a judge is required to consider the particular facts surrounding the violation. *National Gypsum Co.*, 3

FMSHRC at 825; *Wyoming Fuel Co.*, 16 FMSHRC at 1625; *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988) (a determination of whether a violation is S&S must be based on the particular facts surrounding the violation). Our colleagues, while citing *National Gypsum* for this proposition, fail to give it full effect by concluding that “the inby, non-violative accumulation cannot support an S&S designation as to the outby, violative accumulation.” Slip op. at 4. Although the inby accumulation was not the basis of the violation -- because the judge concluded that it was not in an active working and the Secretary did not appeal that conclusion -- the inby accumulation abutted the violative outby accumulation and was separated from it by merely a check curtain made of “curtain or heavy blind” material. Tr. 18-20, 34. Uncontradicted testimony established that the accumulation on both sides of the check curtain was combustible, the materials outby the check curtain were “just [a] continuation of everything that was in by [sic] the curtain[,]” and the miners’ dinner hole area was immediately adjacent to the curtain. Tr. 18-22, 51-52; Gov’t Ex. 1. At the very least, the extensive 250 feet of accumulation inby could have fueled a fire in the adjacent active workings. Consideration of the environment within which the violative condition exists is always relevant to the seriousness of the cited violation. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984) (section 104(d)(1) specifies that a violation is to be designated S&S if it “significantly and substantially contribute[s]” to a mine hazard in light of the “relevant dynamics of the mining environment”). Accordingly, we conclude that the judge erred in failing to consider the accumulation inby the check curtain in his risk analysis.

B. Failure to address relevant evidence.

The Secretary contends that the judge failed to consider the operator’s history of methane ignitions at the working face of the mine, including recent ignitions. PDR at 7. We agree. Notwithstanding the record evidence regarding the operator’s history of methane ignitions at the face (Tr. 47, 67-68, 71), the judge’s decision contains no indication that he considered such evidence. This testimony is relevant to the S&S determination and should have been considered.

Further, there is merit to the Secretary’s contention that the judge failed to consider the proximity of the accumulation in the No. 3 entry to the working face and that the cited materials burned at a lower temperature than coal. PDR at 8; Tr. 51-52; Gov’t Ex. 1. The judge did not explicitly address this probative record evidence, nor is it apparent that he considered it. These facts are relevant to the S&S determination here and should have been considered.

Our case law is clear that a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Wyoming Fuel Co.*, 16 FMSHRC at 1627; *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Because the judge failed to consider the relevant evidence, we conclude that he erred.

## II.

### Unwarrantable Failure

The Secretary asserts that the judge erred when he disregarded the extent of the non-violative accumulation in the inactive area in by the check curtain in making his unwarrantable failure determination. Contrary to our colleagues, we agree with the Secretary's contention.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. *Wyoming Fuel Co.*, 16 FMSHRC at 1627. Unwarrantable failure is aggravated conduct constituting more than mere negligence, such as reckless disregard, intentional misconduct, indifference or serious lack of reasonable care. *Id.* Further, the Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *See, e.g., Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992).

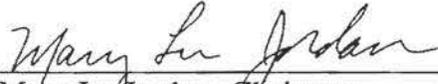
We disagree with our colleagues' conclusion that the operator's conduct in permitting the non-violative accumulation cannot support an unwarrantable finding in connection with the violative accumulation. *See slip op.* at 5-6. The Commission has stated that in resolving unwarrantable failure questions, the operator's total conduct in relation to a violation must be examined. *The Helen Mining Co.*, 10 FMSHRC 1672, 1676 n.4 (December 1988), *citing Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987); *see also FMC Wyoming Corp.*, 11 FMSHRC 1622, 1627-28 (September 1989) (evidence of *nonviolative conduct* in another area of a plant is relevant to an unwarrantable failure determination). Further, a judge may consider past violations in determining whether a current violation is the result of unwarrantable failure. *Peabody Coal Co.*, 14 FMSHRC at 1263-64. Thus, a judge should consider all operator conduct relevant to the violation in determining if the violation resulted from unwarrantable failure.

Accordingly, we conclude that the judge erred in failing to consider the adjacent, non-violative accumulation in making his unwarrantable failure determination.

III.

Conclusion

For the foregoing reasons, we would vacate the judge's holdings that the violative condition was not S&S and not a result of the operator's unwarrantable failure and remand those issues to the judge for reconsideration.

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1996

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

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Docket No. PENN 93-15

v.

L&J ENERGY COMPANY, INC.

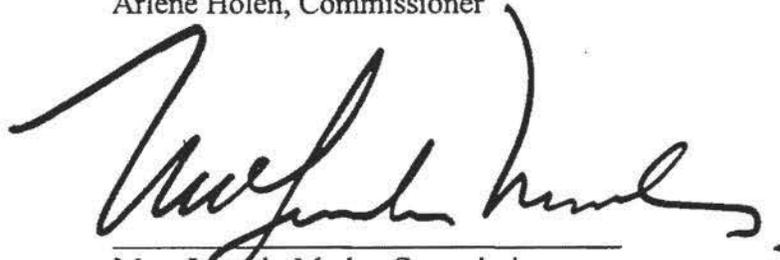
DIRECTION FOR REVIEW  
ORDER

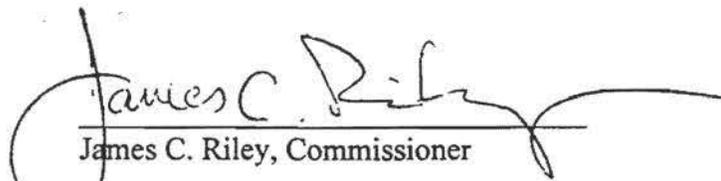
The petition for discretionary review, filed by L&J Energy Company, Inc. is granted on the issue of the operator's ability to continue in business. This matter is remanded to the judge for appropriate proceedings on this issue.

In all other respects the petition is denied.

  
\_\_\_\_\_  
Joyce A. Doyle, Commissioner

  
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Arlene Holen, Commissioner

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

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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. PENN 95-382-R
	:	PENN 95-383-R
RNS SERVICES, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

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

This consolidated contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves the validity of two citations issued to RNS Services, Inc. ("RNS") by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") alleging violations of 30 C.F.R. §§ 77.1713(c) and 77.1000 (1995)<sup>1</sup> at RNS's No. 15 coal refuse pile. The question before us is whether the No. 15 pile is a "mine" under the Mine Act. Administrative Law Judge Avram Weisberger vacated the citations. 17 FMSHRC 1284 (July 1995) (ALJ). He concluded that RNS was not engaged in "the work of preparing coal" and that consequently the Mine Act did not apply to the activities of RNS at the site. 17 FMSHRC at 1288, 1290. The Commission granted the Secretary's petition for discretionary review on the jurisdictional issue. For the reasons discussed below, we reverse.

I.

Factual and Procedural Background

The RNS No. 15 coal refuse pile, in Barr Township, Pennsylvania, occupies part of the site of the abandoned Lancashire No. 15 and No. 24-B underground coal mines and adjacent coal

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<sup>1</sup> Section 1713(c) requires recording the results of the daily inspection of a surface coal mine in an approved record book; section 77.1000 requires the operator of a surface mine to establish and follow a ground control plan. 30 C.F.R. §§ 77.1713(c) and 77.1000.

preparation plant. Tr. 17-21; 17 FMSHRC at 1285. RNS purchased the site in January 1995 from the Lancashire Coal Co. 17 FMSHRC at 1285. The No. 15 pile was created between 1914 and the mid 1940s and was abandoned in the 1960s. Tr. 25, 146-49; Resp't Ex. 5. When the mines were active, coal was cleaned, screened, washed and broken at an adjacent preparation plant. Tr. 21; 17 FMSHRC at 1285. The prepared product was marketed as metallurgical coal that generally had a value of 13,000 to 14,000 BTUs. *Id.* Refuse material from the preparation plant was deposited on several adjacent refuse piles, including the No. 15 pile. *Id.*<sup>2</sup>

Since May 1995, RNS has operated the site pursuant to a "No Cost Government Financed Reclamation Contract" between RNS and the Commonwealth of Pennsylvania. Resp't Ex. 6; Tr. 25-26. In exchange for receiving the coal refuse at no cost, RNS is required by the contract to remove the refuse and reclaim the site at no cost to the state. 17 FMSHRC at 1286; Resp't Ex. 6, p.5. The contract states that RNS is not authorized "to remove or mine coal" from the pile, and that "the material to be removed . . . is coal refuse as defined at 25 Pennsylvania Code § 90.1 and is not bituminous or anthracite coal." Resp't Ex. 6, p.4. Pursuant to a long-term contract with Cambria Co-Gen Co., RNS hauls the coal refuse to the Cambria co-generation facility in Ebensburg, Pennsylvania, which is operated by Air Products and Chemicals, Inc. 17 FMSHRC at 1285; Tr. 45, 155-56. The Cambria co-generation facility generates energy in the form of electricity and steam. 17 FMSHRC at 1285. The contract price for the coal refuse is a flat fee and is not based on the amount delivered to Cambria. *Id.*

The coal refuse pile is 1,200 feet long, 500 feet wide and 90 feet high. 17 FMSHRC at 1285; Tr. 177. Large rocks are removed from the pile by a hydraulic excavator, Tr. 182, which also scoops the refuse and loads it into haul trucks. Tr. 70, 153. Prior to loading, RNS also uses a water truck and, occasionally, a bulldozer and backhoe. 17 FMSHRC at 1286; Tr. 153. Haul trucks from the No. 15 site transport coal refuse to a hopper at the Cambria plant, where it is first blended with refuse from other RNS piles in order to achieve a product with the appropriate sulphur content for burning at Cambria, and then is broken, screened and sized. Tr. 46-51; 169-71.<sup>3</sup> Unsuitable material is stockpiled and ultimately transported to the RNS Lancashire No. 25 dump site, while usable material is stored and ultimately burned at Cambria. 17 FMSHRC at 1285. Tr. 46-51. The average content of the material in the refuse pile as tested by RNS is about 7000 BTUs after processing. Tr. 165-66. MSHA has jurisdiction over operations at the Cambria facility. *Air Products & Chemicals, Inc.*, 15 FMSHRC 2428 (December 1993), *aff'd mem.*, 37 F.3d 1485 (3d Cir. 1994).

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<sup>2</sup> The preparation plant ceased operation prior to 1968 and was probably dismantled between 1971 and 1973. 17 FMSHRC at 1285; Resp't Ex. 5.

<sup>3</sup> Cambria uses only coal refuse from RNS sites. Tr. 51-54.

MSHA had material from the pile tested; the results indicated that the refuse has the characteristics of coal. 17 FMSHRC at 1286; Tr. 122-25; Gov't Ex. 19. Neil Hedrick, the president of RNS, testified that the refuse contains "particles of coal." Tr. 172.

On June 16, 1995, upon an inspection of the No. 15 coal refuse pile, MSHA Inspector Gerry L. Boring issued Citations Nos. 3713378 and 3713379 alleging violations of sections 77.1713(c) and 77.100, respectively. Gov't Exs. 17, 18; 17 FMSHRC at 1286. RNS did not dispute the factual assertions contained in the citations and agreed that it violated the cited standards, but challenged MSHA's jurisdiction over the No. 15 site. 17 FMSHRC at 1286. The judge held that the No. 15 site does not fall under the definition of "coal or other mine" contained in section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1),<sup>4</sup> because "the work of preparing coal" as defined in section 3(i), 30 U.S.C. § 802(i),<sup>5</sup> did not take place at that location. 17 FMSHRC at 1288, 1290. The judge stated:

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<sup>4</sup> Section 3(h)(1) of the Mine Act states in part:

"coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

<sup>5</sup> Section 3(i) of the Mine Act states:

"work of preparing the coal" means [1] the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine[.]

30 U.S.C. § 802(i).

[W]ith the exception of the removal of coal, none of the activities set forth in Section 3(h)(2)(i) [sic] of the Act are performed at the site. The sole activities performed at the site, those of the removal of material by a hydraulic excavator, the loading of the material on trucks, and the transporting of material to the Cambria facility are not activities set for [sic] in section 3(h)(2)(i) [sic].

*Id.* at 1288. The judge sustained the contests and dismissed the citations. 17 FMSHRC at 1290.<sup>6</sup>

## II.

### Disposition

The Secretary contends that the judge erred in concluding that RNS was not engaged in the work of preparing coal. S. Br. at 4-9. He asserts that the judge erred in determining that “loading” was not an activity covered by the definition of “work of preparing the coal” contained in section 3(i). *Id.* at 6-7. The Secretary further argues that the separation of large rocks from the coal refuse before loading constitutes “sizing” and “cleaning,” activities also listed in section 3(i). S. Br. at 7. He contends that the judge’s decision is at variance with Commission and court precedent holding that the transportation and loading of coal and coal refuse constitute the type of work usually performed by a mine operators, and therefore satisfy the definition of “work of preparing the coal.” S. Br. at 7-9.

RNS argues that a two-part test applies to the jurisdictional question: whether the operator performs any of the coal preparation activities listed in section 3(i), and whether such preparation work is usually performed by a coal mine operator. R. Br. at 9-10. RNS contends

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<sup>6</sup> The judge also concluded that the No. 15 refuse pile does not constitute a “coal or other mine” because it is not “lands . . . structures, facilities . . . or other property . . . used in or resulting from the work of extracting such minerals from their natural deposits in non-liquid form.” *Id.* at 1288-90, quoting 30 U.S.C. § 802(h)(1). Relying on *Lancashire Coal Co. v. Secretary of Labor*, 968 F.2d 388 (3d Cir. 1992), the judge noted that the definition of “coal or other mine” in the context of coal extraction from its natural deposit encompasses lands “resulting from” such activity, and is therefore broader than the definition of “coal or other mine” in the context of coal preparation, which does not contain the “resulting from” language. 17 FMSHRC at 1289. The Secretary challenged this conclusion in his Petition for Discretionary Review (PDR at 9-11), but did not argue the point in his brief. The Commission need not address this argument because the Secretary has abandoned it. *See Asarco Mining Co.*, 15 FMSHRC 1303, 1304 n.3 (July 1993).

that it is not engaged in the “work of preparing the coal” at the No. 15 site because the pile contains “coal waste” rather than “coal.” R. Br. at 10-11. RNS further asserts that, because it engages only in “loading” and transporting, this case is distinguishable from cases where the Commission has upheld Mine Act jurisdiction over coal refuse processing. R. Br. at 11-14. RNS maintains that the use of the hydraulic excavator to remove large rocks from the coal waste does not constitute “sizing” or “cleaning,” that transporting material is not one of the elements of coal preparation listed in section 3(i), and that “loading” by itself is not adequate to justify MSHA jurisdiction. *Id.*

Section 4 of the Mine Act provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, “coal or other mine” includes “lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, . . . the work of preparing coal . . . .” 30 U.S.C. § 802(h)(1). Section 3(i) of the Mine Act defines “work of preparing the coal” to include “[1] sizing, cleaning . . . and loading of bituminous coal, lignite, or anthracite, and [2] such other work of preparing such coal as is usually done by the operator of the coal mine.” 30 U.S.C. § 802(i).

The definitions of coal mine and coal preparation in sections 3(h) and 3(i) are “broad[,]” “sweeping” and “expansive[,]” *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). Congress intended that “doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

In finding that “none of the activities set forth in Section 3(h)(2)(i) [sic] of the Act are performed at the site,” the judge concluded that “sizing” and “cleaning” of coal within the meaning of section 3(i) are not being done at the No. 15 site. Substantial evidence supports the judge’s conclusion.<sup>7</sup> “Sizing” consists of “[t]he process of separating mixed particles into groups of particles all of the same size, or into groups in which all particles range between definite maximum and minimum sizes.” U.S. Dep’t of the Interior, *Dictionary of Mining*,

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<sup>7</sup> The Commission is bound by the substantial evidence test when reviewing an administrative law judge’s factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

*Mineral and Related Terms* 1020 (1968). “Cleaning, dry” is defined as “[t]he mechanical separation of impurities from coal by methods which avoid the use of a liquid.” *Id.* at 216. The limited activities of the excavator in excluding large rocks from the haul trucks support the judge’s conclusion that RNS is not engaged in “sizing” or “cleaning” at the No. 15 site.<sup>8</sup>

We turn next to the question of whether the few activities that do take place at the No. 15 pile are sufficient to bring that site under the jurisdiction of the Mine Act. In *Pennsylvania Electric Co. v. FMSHRC*, 969 F.2d 1501 (3d Cir. 1992) (“*Penelec*”), *aff’g* 11 FMSHRC 1875 (October 1989), the sole issue was whether Mine Act jurisdiction attached to the head drives of conveyors transporting coal to an electric power plant for processing. The court held that “[u]nder the functional analysis we are to employ when giving the ‘broadest possible’ scope to Mine Act coverage, . . . the delivery of coal from a mine to a processing station via a conveyor constitutes coal preparation ‘usually done by the operator of a coal mine.’” *Id.* at 1503 (citations omitted).

The functional analysis of *Penelec* was adopted by the court in *United Energy Services v. MSHA*, 35 F.3d 971 (4th Cir. 1994). In *United Energy*, coal waste from a refuse pile at a working mine was transported via conveyors to an adjacent electric power plant where it was sized, crushed, and ultimately burned for fuel. 35 F.3d at 973. As in *Penelec*, the court in *United Energy* dealt with the issue of whether the coal transportation equipment fell under MSHA jurisdiction. The Fourth Circuit stated that the operator’s activities “involve the transportation of coal to the preparation facility and thus are part of the ‘work of preparing coal.’” *Id.* at 975. Citing *Penelec*, the court upheld the Commission judge’s decision sustaining MSHA’s jurisdiction. *Id.*

Because we decline RNS’s urging that *Penelec* be “rejected,” *see* R. Br. at 10 n.9, we reverse the judge’s determination that MSHA lacks jurisdiction over the No. 15 site. The judge erred in concluding that loading is not one of the coal preparation activities listed in section 3(i). Further, in both *Penelec* and *United Energy*, the courts of appeals held that the transportation of coal or coal waste, by itself, is sufficient to trigger Mine Act jurisdiction, despite the fact that “transporting” is not one of the activities listed in the first clause of section 3(i). Under the

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<sup>8</sup> The Secretary also argues that the use of a 4 inch grizzly to separate timbers from coal refuse constitutes “‘sizing,’ ‘cleaning,’ or ‘other work of preparing . . . coal’ . . . .” S. Br. at 7 (footnote omitted). As RNS points out, however, the judge’s finding that a 4 inch grizzly was used at the No. 15 site, 17 FMSHRC at 1286, is not supported by substantial evidence. R. Br. at 13. The only record evidence on this point is the testimony of MSHA supervisory inspector Biesinger that the contract between RNS and the Commonwealth of Pennsylvania permits the use of a grizzly. Tr. 36-37. The contract does not address use of a grizzly, the photographic evidence does not show the presence of a grizzly at the No. 15 site, and the testimony describing RNS’s activities at the No. 15 site does not include use of a grizzly. Resp’t Ex. 6; Gov’t Exs. 5-14; Tr. 40-45.

functional analysis of *Penelec*, “each of the activities listed in section 3(i) . . . subjects anyone performing that activity to the jurisdiction of the Mine Act, if MSHA has promulgated a regulation governing the working conditions at issue.” *Air Products*, 15 FMSHRC at 2435 (Commissioner Doyle, concurring) (citation omitted) (emphasis supplied). We therefore conclude that the judge erred in determining that transportation of coal is not included in the definition of the “work of preparing coal.”

We also reject RNS’s argument that section 3(i) has not been satisfied because the No. 15 pile contains only “coal refuse” and not “bituminous coal, lignite or anthracite” specified in section 3(i). *See* R. Br. at 10-11. RNS concedes that the pile contains “coal ‘particles’” but contends that under the contract between RNS and the Commonwealth of Pennsylvania, the material is not considered “coal.” R. Br. at 11. The judge, however, did not rely on this distinction and specifically found that the coal refuse has “the characteristics of coal.” 17 FMSHRC at 1286. Moreover, the Commission and courts have not read into section 3(i) a requirement that the processed material consist only of run-of-mine coal. The processing of refuse and other material containing small amounts of coal has been held to constitute the “work of preparing coal.” *E.g.*, *United Energy*, 35 F.3d at 975 (transportation of coal waste constitutes “work of preparing coal”); *Marshall v. Stoudt’s Ferry*, 602 F.2d at 592 (“process of separating from the dredged refuse a burnable product ‘akin’ to coal, which is then sold as a low-grade fuel, brings the company within the Act’s coverage . . .”); *see also Alexander Bros.*, 4 FMSHRC 541, 544-45 (April 1982) (rejecting argument that “work of preparing coal” under Coal Act did not include processing “refuse ‘which happens to contain a small amount of coal’”).

We note that the loading and hauling of coal waste as performed at the No. 15 site are de minimis activities for purposes of determining MSHA jurisdiction. Contrary to the statement of the Secretary at oral argument (Oral Arg. Tr. at 39 (March 14, 1996)), if MSHA has jurisdiction over coal refuse piles, it may not waive it. “Under the Mine Act, enforcement is not left to MSHA’s discretion. Section 103(a) *requires* the agency to inspect all surface mines in their entirety at least twice each year.” *Air Products*, 15 FMSHRC at 2435 n.2 (Commissioner Doyle, concurring) (emphasis added); *see also id.* at 2438 (Commissioner Holen, dissenting). To the extent the Secretary has discretion in his exercise of Mine Act jurisdiction, that discretion applies to mineral milling (30 U.S.C. § 802(h)(1)), not to coal preparation activities.<sup>9</sup>

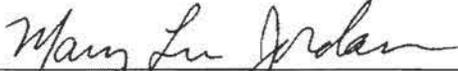
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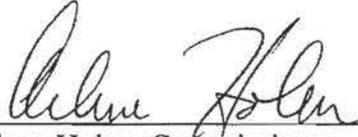
<sup>9</sup> Commissioner Holen questions the wisdom of MSHA’s expenditure of scarce government resources to inspect a pile of coal waste that has lain dormant for decades where the only activities are loading and hauling to a power plant for further processing.

III.

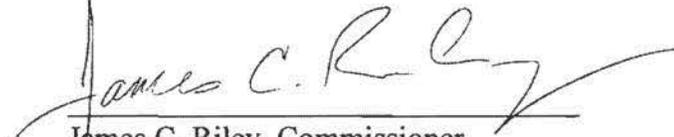
Conclusion

For the foregoing reasons, pursuant to *Penelec*, we reverse the judge's determination as to jurisdiction. Accordingly, the citations are affirmed.

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

  
\_\_\_\_\_  
Arlene Holen, Commissioner

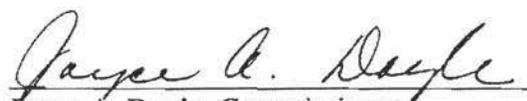
  
\_\_\_\_\_  
Marc Lincoln Marks, Commissioner

  
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James C. Riley, Commissioner

Commissioner Doyle, concurring:

I concur with my colleagues in finding that the work performed by RNS Services, Inc. in loading and transporting material from its No. 15 refuse pile falls within the jurisdiction of the Mine Act solely because I am constrained to so find by the opinion of the United States Court of Appeals for the Third Circuit in *Pennsylvania Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1503-04 (3d Cir. 1992), *aff'g* 11 FMSHRC 1875 (October 1989).

I also agree with my colleagues that, if MSHA has jurisdiction over coal refuse piles, it may not waive it. It is required by section 103(a) of the Mine Act, 30 U.S.C. § 813(a), to inspect those coal refuse piles at least twice each year. Slip op. at 8.

  
Joyce A. Doyle, Commissioner

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

April 24, 1996

MORTON INTERNATIONAL, INC.,	:	
MORTON SALT	:	
	:	
v.	:	Docket Nos. CENT 93-237-RM
	:	CENT 93-259-M
SECRETARY OF LABOR,	:	CENT 94-49-RM
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Doyle, Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), presents the issue of whether 30 C.F.R. §§ 57.22232 and 57.22235(a) (1995) apply to abandoned areas. Administrative Law Judge Gary Melick determined that they do not and vacated two citations that alleged violations of the standards, issued to Morton International, Inc., Morton Salt ("Morton"). 16 FMSHRC 417 (February 1994) (ALJ). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Morton operates the Weeks Island Mine, a domal salt mine in Weeks Island, Louisiana, which has been classified by the Department of Labor's Mine Safety and Health Administration ("MSHA") as a Subcategory II-A mine, i.e., a "domal salt [mine] where an outburst . . . has occurred."<sup>1</sup> J. Ex. 1, Stips. 1, 7; 30 C.F.R. § 57.22003(a)(2)(i).

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<sup>1</sup> An outburst is a "sudden, violent release of solids and high-pressure occluded gases, including methane." 30 C.F.R. § 57.22002. Methane outburst cavities "can range in size from small baseball sized roof cavities, to large roof cavities shaped like inverted cones." J. Ex. 1, Stip. 19.

On August 12, 1989, the mine experienced a methane outburst in the 10 EWN heading. J. Ex. 1, Stip. 18. Approximately three months later, after the outburst materials had been removed and the area had been ventilated, Morton abandoned the 10 EWN heading and constructed a berm across the entrance to prohibit entry. J. Ex. 1, Stip. 18; Tr. 69, 78-80. The berm extended from rib to rib and was approximately 8-9 feet in height and 12 feet in width at its base. Tr. 78; Lara depo. at 52.

On June 15, 1993, during an inspection, MSHA Inspector Benny Lara climbed to the top of the berm and took a methane reading that indicated the presence of 1% methane. J. Ex. 1, Stip. 8. An extension pole was then used to obtain methane readings at approximately 24 feet. Lara depo. at 20, 22-23, 43-44; Citation No. 3897764. As the pole was extended, the methane readings increased to 3.25%, at which time the methane detector was turned off. J. Ex. 1, Stip. 8. There were no ignition sources, personnel, or equipment in the area. J. Ex. 1, Stips. 26, 27, 47. The inspector issued a citation alleging a violation of section 57.22235(a).<sup>2</sup>

On June 22, 1993, after the area was ventilated and MSHA Inspector Joseph Olivier obtained a methane reading of 0.1% at the top of the berm, the citation was terminated. J. Ex. 1, Stip. 10. To abate the citation, miners had entered the abandoned area, conducted scaling, and installed a diesel generator to ventilate the area. J. Ex. 1, Stip. 11.

Morton challenged the citation and the matter was heard by Judge Melick. During the hearing, the parties agreed that, based upon the same facts, an additional citation, alleging a violation of section 57.22232,<sup>3</sup> would be issued to Morton in order to avoid repetition in a subsequent proceeding to determine the requirements of section 57.22232. Tr. 18-19; M. Br. at

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<sup>2</sup> 30 C.F.R. § 57.22235 is entitled “Actions at 1.0 percent methane (I-C, II-A, II-B, and IV mines)” and subsection (a) provides:

If methane reaches 1.0 percent in the mine atmosphere, all persons other than competent persons necessary to make ventilation changes shall be withdrawn from affected areas until methane is reduced to less than 0.5 percent.

<sup>3</sup> 30 C.F.R. § 57.22232, entitled “Actions at 0.5 percent methane (I-B, II-A, II-B, IV, V-B, and VI mines),” provides:

If methane reaches 0.5 percent in the mine atmosphere, ventilation changes shall be made to reduce the level of methane. Until methane is reduced to less than 0.5 percent, electrical power shall be deenergized in affected areas, except power to monitoring equipment determined by MSHA to be intrinsically safe under 30 C.F.R. Part 18. Diesel equipment shall be shut off or immediately removed from the area and no other work shall be permitted in affected areas.

2-3. On November 23, 1993, MSHA issued that citation, which Morton contested, and the cases were consolidated. M. Br. at 3.

Before the judge, Morton argued that the cited standards were not intended to apply to abandoned areas of mines and that the Secretary's interpretation is inconsistent with the language of the regulations and plainly erroneous. 16 FMSHRC at 419. The Secretary argued that the term "mine atmosphere" referenced in the standards does not distinguish between active and abandoned areas in setting forth the locations where methane readings are to be taken. *Id.*

The judge determined that the Secretary's interpretation as to applicability of sections 57.22232 and 57.22235(a), requiring operators to take action if excessive methane were detected in any part of the "mine atmosphere" including abandoned areas, was not of controlling weight because it was inconsistent with the standards and plainly erroneous. *Id.* The judge concluded that the definition of "mine atmosphere" refers only to active areas. *Id.* at 420. He noted that all the corrective actions required by sections 57.22232 and 57.22235(a), except ventilation changes, are relevant only to active areas and "are meaningless in abandoned areas where work and travel have already been prohibited." *Id.* He also noted that the regulations in fact permit unsealed abandoned areas to exist in Subcategory II-A mines, do not specifically require that such areas be tested for methane or ventilated, and that the regulations require ventilation of unsealed abandoned areas only in Subcategory III mines. *Id.* The judge concluded that, because other regulations set forth specific locations for methane testing and ventilation that do not include unsealed, abandoned areas in Subcategory II-A mines, such requirements were intentionally omitted as to these locations. *Id.* at 420-21. The judge also found that the Secretary's interpretation was inconsistent with pertinent regulatory history and prior enforcement history. *Id.* at 421-22. Accordingly, the judge concluded that the standards do not apply to abandoned areas and vacated the citations. *Id.* at 423.

The Commission granted the Secretary's petition for review of the judge's decision and heard oral argument.

## II.

### Disposition

The Secretary argues that sections 57.22232 and 57.22235(a) are clear on their face to the effect that they apply to all unsealed parts of a mine and that the existence of excessive methane gives rise to violation of these regulations. S. Br. at 4-7; Oral Arg. Tr. at 7, 14-15. He asserts, in the alternative, that, if the standards are ambiguous, his interpretation is reasonable and entitled to deference. S. Br. at 8-9. Morton argues that the standards do not apply to abandoned areas

and that the judge correctly rejected the Secretary's interpretation.<sup>4</sup> M. Br. at 1-2. It also argues that the standards give no notice of applicability to abandoned areas. Oral Arg. Tr. at 44-45.

Section 57.22232 is entitled "Actions at 0.5 percent methane (I-B, II-A, II-B, IV, V-B, and VI mines)" and provides that, if methane in the mine atmosphere reaches that level, ventilation changes shall be made and, until methane is reduced below that level, electrical power shall be deenergized in the affected areas, diesel equipment shall be shut off or removed, and no other work shall be permitted in the area. Section 57.22235 is entitled "Actions at 1.0 percent methane (I-C, II-A, II-B, and IV mines)" and section (a) provides that, if methane in the mine atmosphere reaches that level, all persons except those necessary to make ventilation changes shall be removed from the affected area until methane is reduced below 0.5%.

We conclude that the language of both standards is clear as to the actions that must be taken if methane reaches specified levels. We do not, however, find that the standards clearly apply to abandoned areas or clearly provide that the existence of methane at the stated levels, in itself, gives rise to a violation. Consequently, we must determine whether the Secretary's interpretation of the regulations is a reasonable one and whether the operator had notice of that interpretation.

The judge found that the Secretary's construction of the standards' applicability to abandoned areas is inconsistent with the scheme of Mine Act regulations pertaining to gassy metal and nonmetal mines. 16 FMSHRC at 420. The Secretary argues that the judge erred in comparing the standards in issue with other regulations because these standards are performance standards. S. Br. at 14.<sup>5</sup> We reject the Secretary's argument. It is well established that regulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions. *See* 2 Am. Jur. 2d "Administrative Law" § 239 (2d ed. 1994); *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161, 168 (1st Cir. 1987). The judge appropriately considered other regulations relating to methane testing and ventilation in determining whether the Secretary's interpretation was reasonable.

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<sup>4</sup> Morton argues that the Secretary, by excluding sealed areas from his interpretation of "mine atmosphere," has improperly departed from his position before the judge that the term encompassed "any point in any mine [more than a foot away from the roof, face, back or floor]." M. Br. at 21. The Secretary's definition excluding sealed areas is implicit in his position before the judge; thus, it may properly be considered by the Commission. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (August 1992) (citations omitted).

<sup>5</sup> Morton argues that the Commission may not consider the Secretary's argument because it was raised for the first time on review. M. Br. at 14. The Secretary could not have raised this argument before the judge because it pertains to the legal analysis set forth in the judge's decision; thus, we may address it.

The Secretary's interpretation of the standards to the effect that an operator is required to test for methane in unsealed abandoned areas of Subcategory II-A mines and also to ventilate such areas is inconsistent with the regulatory scheme the Secretary has promulgated under the Mine Act. *See Local Union 1261 v. Federal Mine Safety and Health Review Comm'n*, 917 F.2d 42, 45 (D.C. Cir. 1990). The standards applicable to Subcategory II-A mines, which set forth specific and extensive testing and ventilation requirements such as testing in active workings in the event of a main ventilation failure (30 C.F.R. § 57.22206) and maintaining air flow across working faces sufficient to carry away methane accumulations (30 C.F.R. § 57.22212), do not require the testing of abandoned areas or their ventilation. In contrast, *Subcategory III mines* are specifically required to ventilate unsealed abandoned areas (30 C.F.R. § 57.22223). Further, 30 C.F.R. § 57.22220 requires the testing of air *after* it has passed by or through unsealed abandoned areas of Subcategory II-A mines and, if it contains 0.25% or more methane, it must be tested daily and coursed directly to a return airway. The preshift examination standard for Subcategory II-A mines requires that the *mine atmosphere* be tested for methane at "all work places," at "each active working face," and at "each face blasted" (30 C.F.R. § 57.22228(b), (c), & (d)), but makes no mention of abandoned areas. Likewise, the weekly testing standard for Subcategory II-A mines requires that the *mine atmosphere* be tested for methane at specific locations: active mining faces, main returns, returns from idle workings, returns from abandoned workings, and at seals (30 C.F.R. § 57.22230(a)); that standard as well contains no requirement that abandoned areas themselves be tested.

Immediately following these testing standards are those setting forth the actions to be taken if methane in the mine atmosphere reaches certain levels. "Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). Giving comprehensive, harmonious meaning to these provisions, we cannot conclude that the Secretary's interpretations of sections 57.22232 and 57.22235(a) to apply to abandoned areas, which are not required to be tested, is a reasonable one. Further, as the judge recognized, in abandoned areas, there are no miners to be withdrawn, no electrical power to be deenergized, no diesel equipment to be turned off or removed, and there is no "other work" being done.<sup>6</sup> 16 FMSHRC at 420. We conclude that, when read in this context, the standards cannot reasonably be interpreted to include abandoned areas of the mine.

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<sup>6</sup> The Secretary argues that, because the "affected areas" requiring corrective action may be working sections adjacent to an abandoned area, the judge erred in concluding that the standards could apply only to active workings. S. Br. at 17-18. We reject the Secretary's argument. Clearly, the cited standards apply in the event excessive methane is found in an active area. There is no evidence that this was the case here; rather, the evidence is to the contrary. Inspector Lara took numerous methane readings along the perimeter roadway directly adjacent to the berm, which was an active area and was ventilated. J. Ex. 1, Stip. 17, 23. He obtained readings below 0.5% at all locations along the perimeter roadway and at all other locations where measurements were taken. J. Ex. 1, Stips. 22, 24.

In addition, the Secretary's interpretation of the standards in this litigation is, as the judge found, inconsistent with regulatory history. It is also inconsistent with statements published by the Secretary in rulemaking. For nearly 20 years, 30 C.F.R. Part 57 contained a requirement that "[a]bandoned areas shall be sealed or ventilated." 30 C.F.R. § 57.21-43 (1969) (*See* 34 Fed. Reg. 12517, 12527 (July 31, 1969)).<sup>7</sup> MSHA's 1985 proposed rules revising standards for gassy metal and nonmetal mines repeated this requirement in proposed section 57.34214, applicable to Subcategory II-A mines. 50 Fed. Reg. 23612, 23644 (June 4, 1985). In publishing the final rules, however, MSHA deleted this section, explaining: "This standard, which provided safety protection from potential methane emissions in abandoned areas, is duplicative of the requirements and protection afforded by existing § 57.8528." 52 Fed. Reg. 24924, 24926 (July 1, 1987). Thus, MSHA expressly declined to promulgate as to Subcategory II-A mines the proposed standard, which would have continued a longstanding requirement that operators ventilate unsealed abandoned areas. As the judge noted, the Secretary is now essentially attempting to enforce a provision that he proposed but rejected. 14 FMSHRC at 422. At oral argument, counsel for the Secretary argued that the deletion of proposed section 57.34214 had been in error because the requirements of section 57.8528 and proposed section 57.34214 were not, in fact, duplicative. Oral Arg. Tr. at 15. It is generally recognized, however, that the consideration and rejection of a proposed provision demonstrates an intent to exclude the requirement. 2A Norman J. Singer, *Sutherland Stat. Constr.* §§ 48.04, 48.18 (5th ed. 1992).

Nor are we persuaded by the Secretary's assertion that the interpretation of the standards he proffers is the only interpretation that promotes safety. Oral Arg. Tr. at 18. As the judge found, the Secretary's interpretation would require miners "to enter the dangerous environment of abandoned areas" in order to ventilate them. 16 FMSHRC at 420. Further, as a result of the Secretary's interpretation, an ignition source, a diesel generator, was required in an area where previously there had been no ignition sources. J. Ex. 1, Stips. 27, 43(i), 43(j). Thus, it is not evident that the Secretary's interpretation did, in fact, result in increased safety. We note, moreover, that the Secretary designated the alleged violations as non-S&S and stipulated that the hazard resulting from the original cited violation was "quite low." J. Ex. 1, Stips. 9, 45.

We agree with the judge that the Secretary's interpretation as to the applicability of sections 57.22232 and 57.22235(a) to unsealed abandoned areas is not reasonable because it is not in harmony with other regulations the Secretary has promulgated under the Mine Act and is inconsistent with the regulatory history.

As to the Secretary's assertion that the existence of methane above certain levels is itself violative, we have noted that the standards do not expressly provide that methane at the

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<sup>7</sup> Section 57.21-43 was later recodified as section 57.21043. *See* 50 Fed. Reg. 4032, 4124 (January 29, 1985).

referenced levels gives rise to a violation.<sup>8</sup> Nor do they even suggest that to be the case. Rather, the language of the standards contemplates that methane may reach the referenced levels by specifying actions to be taken *if* that occurs. We conclude that the Secretary's interpretation of the standards to the effect that they are violated by the presence of methane itself is unreasonable because the standards cannot bear the meaning that the Secretary assigns to them. *See Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 324 (D.C. Cir. 1990) (Edwards, J., dissenting).

Moreover, due process requires that a regulation give "fair warning of the conduct it prohibits or requires." *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (August 1995), quoting *Gates & Fox Co. v. Occupational Safety and Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986). A regulation cannot be construed "to mean what an agency intended but did not adequately express."<sup>9</sup> *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1193 (9th Cir. 1982), quoting *Diamond Roofing Co. v. Occupational Safety and Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976). *Accord General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995); *Western Fuels*, 900 F.2d at 326 (Edwards, J., dissenting). The Secretary maintains that the industry was placed on notice by the regulatory history that the deleted rule was intended to remain in effect and that the cited standards apply to all areas of a mine. Oral Arg. Tr. at 15-16.

Even if we were to conclude that the Secretary's interpretation of the standards in issue is reasonable and, thus, that the standards apply to abandoned areas, we disagree that operators have received adequate notice of it. The Secretary has published no information bulletin or interpretive memorandum setting forth his interpretation of the standards. Oral Arg. Tr. at 18-19. We reject the Secretary's suggestion that the confused regulatory history and admittedly erroneous preamble provided notice of the Secretary's current interpretation. Moreover, operators should not be held to examining regulatory history to learn the meaning of a standard that appears to be clear on its face. *See generally Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1337 & n.13 (6th Cir. 1978).

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<sup>8</sup> *Cf. VP-5 Mining Co.*, 15 FMSHRC 1531, 1538-39 (August 1993) (no requirement that methane be diluted to a specific level before air in gob enters the connectors); *Island Creek Coal Co.*, 15 FMSHRC 339, 349 (March 1993) (citation vacated where excessive methane was present in the gob but was being ventilated in accordance with mine's ventilation plan).

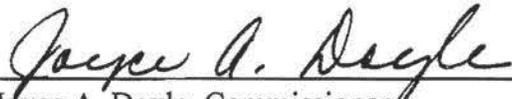
<sup>9</sup> The Secretary argues that the judge erred in precluding Claude Narramore, the chairman of the MSHA gassy mines committee, from testifying about the intended scope of the standards. We disagree. Testimony as to the intended meaning of rules is generally not considered in construing a standard. 2A Norman J. Singer, *Sutherland Stat. Constr.* § 48.16 (5th ed. 1992); 2 Am. Jur. 2d "Administrative Law" § 239 (2d ed. 1994) (construction of regulations is generally governed by the same rules of construction that apply to statutes). *See generally Northern Colo. Water Conservancy Dist. v. F.E.R.C.*, 730 F.2d 1509, 1518 (D.C. Cir. 1984).

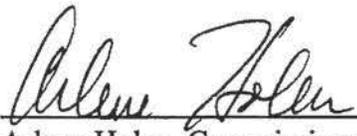
We note that, subsequent to the commencement of this action, MSHA published a regulatory agenda "proposing to revise the existing safety standards for metal and nonmetal mines. The proposal would address excessive methane in outburst cavities in abandoned, idle, and worked out areas of Category II-A mines. . . ." 59 Fed. Reg. 57823 (November 14, 1994).<sup>10</sup> Rulemaking is the appropriate means by which to impose the requirement that unsealed abandoned areas must be ventilated. *See generally Southern Ohio Coal Co.*, 14 FMSHRC 978, 985 (June 1992).

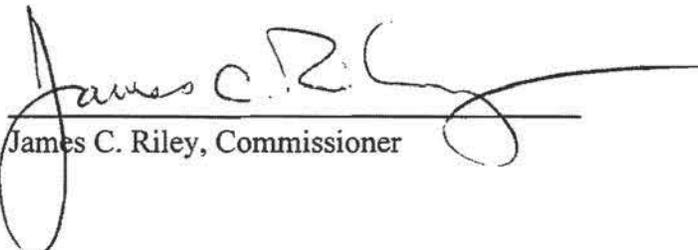
III.

Conclusion

For the foregoing reasons, we affirm the judge's vacation of the citations alleging violations of sections 57.22232 and 57.22235(a).

  
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Joyce A. Doyle, Commissioner

  
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Arlene Holen, Commissioner

  
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James C. Riley, Commissioner

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<sup>10</sup> On January 25, 1995, Morton filed a motion requesting the Commission to take judicial notice of this agenda. We have done so.

Chairman Jordan and Commissioner Marks, concurring in the result:

Although we agree that the citations at issue in this case must be vacated, and would therefore affirm the judge in result, we respectfully disagree with our colleagues' determination that the requirements of 30 C.F.R. §§ 57.22232 and 57.22235(a) (1995) do not apply to unsealed abandoned areas of "domal salt mines where an outburst . . . has occurred."<sup>1</sup> These standards specify protective actions an operator must take if methane reaches a certain amount in the "mine atmosphere." Our colleagues have concluded erroneously that the Secretary of Labor cannot reasonably interpret the phrase "mine atmosphere" to include unsealed abandoned areas within a mine.

## I.

### Whether the Secretary May Apply Sections 57.22232 and 57.22235(a) to Unsealed Abandoned Areas

The principles requiring the Commission to defer to the Secretary's interpretations of his own standards are well-settled. An agency's interpretation of its own regulations must be given "a high level of deference . . . unless it is plainly wrong." *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995), quoting *General Carbon Co. v. Occupational Safety and Health Review Comm'n*, 860 F.2d 479, 483 (D.C. Cir. 1988). *Accord, Udall v. Tallman*, 380 U.S. 1, 15 L. Ed. 2d 616, 85 S.Ct. 792 (1965); *Secretary of Labor v. Western Fuels - Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990). Courts defer to agency interpretations of their regulations so long as they are "logically consistent with the language of the regulation[s] and . . . serve[] a permissible regulatory function." *General Electric*, 53 F.3d at 1327, quoting *Rollins Envtl. Servs., Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). As the court noted in *General Electric*:

The policy favoring deference is particularly important where, as here, a technically complex statutory scheme is backed by an even more complex and comprehensive set of regulations. In such circumstances, 'the arguments for deference to administrative expertise are at their strongest.'

*Id.*, quoting *Psychiatric Inst. of Washington, D.C. v. Schweiker*, 669 F.2d 812, 813-14 (D.C. Cir. 1981).

The Commission, no less than the courts, owes such deference to the Secretary's interpretations of his regulations. *Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989). We defer to the Secretary's interpretation even if it is not the one we

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<sup>1</sup> Such mines are otherwise known as "Subcategory II - A" mines. 30 C.F.R. § 57.22003(a)(2)(i).

would have adopted in deciding the question as a matter of first impression. *Energy West Mining Co. v. Federal Mine Safety & Health Review Comm'n*, 40 F.3d 457, 462 (D.C. Cir. 1994), *aff'g* 15 FMSHRC 587 (April 1993). Deferral is appropriate because “it is the agencies . . . that have the technical expertise and political authority to carry out statutory mandates.” *General Electric*, 53 F.3d at 1327 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 864-66 (1984)). See also *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, Nos. 95-1130 & 95-1212, slip op. at 7 (4th Cir. April 3, 1996) (Secretary’s promulgation and enforcement of standards brings him into “constant contact with the daily operations of the mines[,]” endowing him with the “‘historical familiarity and policymaking expertise’ . . . that are the basis for judicial deference to agencies.”) (quoting *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 152 (1991)).

In our view, the Secretary’s interpretation of “mine atmosphere” in sections 57.22232 and 57.22235(a) to include unsealed, abandoned areas is emphatically entitled to deference. Section 57.22232, entitled “Actions at 0.5 percent methane (I B, II-A, II-B, IV, V-B and VI mines),” provides:

If methane reaches 0.5 percent *in the mine atmosphere*, ventilation changes shall be made to reduce the level of methane. Until methane is reduced to less than 0.5 percent, electrical power shall be deenergized in affected areas, except power to monitoring equipment determined by MSHA to be intrinsically safe under 30 C.F.R. Part 18. Diesel equipment shall be shut off or immediately removed from the area and no other work shall be permitted in affected areas.

30 C.F.R. § 57.22232 (emphasis supplied). Section 57.22235 is entitled “Actions at 1.0 percent methane (I-C, II-A, II-B, and IV mines),” and subsection (a) provides:

If methane reaches 1.0 percent *in the mine atmosphere*, all persons other than competent persons necessary to make ventilation changes shall be withdrawn from affected areas until methane is reduced to less than 0.5 percent.

30 C.F.R. § 57.22235(a) (emphasis supplied). The judge refused to defer to the Secretary’s interpretation of “mine atmosphere” to include unsealed, abandoned areas. 16 FMSHRC at 417, 419 (February 1994) (ALJ). He concluded instead that “mine atmosphere” only encompasses active areas. *Id.* at 420.

The appropriate starting place for determining the scope of sections 57.22232 and 57.22235(a) is the definition of “mine atmosphere” contained in 30 C.F.R. § 57.22002. That provision defines “mine atmosphere” in relevant part as “*any point* at least 12 inches from the back, face, rib and floor in any mine.” *Id.* (emphasis added). The definition does not exclude any

area of the mine. Therefore, unless an abandoned unsealed area cannot be said to contain a back, face, rib or floor, the Secretary's decision to include that area within the scope of the term "mine atmosphere" is an interpretation consistent with a straightforward reading of section 57.22002.

Only one of the terms contained in the definition of mine atmosphere is itself the subject of a regulatory definition. 30 C.F.R. § 57.2 describes "face" as "that part of any mine where excavating is progressing or *was last done*." *Id.* (emphasis supplied). Rather than indicating that "face" and "abandoned areas" are mutually exclusive terms, the definition in section 57.2 leads to the opposite conclusion: because a "face" includes an area where excavating "was last done," it may therefore exist in an abandoned area.<sup>2</sup>

The Secretary's refusal to exclude unsealed abandoned areas from requirements pertaining to methane accumulations in the "mine atmosphere" is thus a decision fully consistent with the regulatory definitions pertaining to that term. Accordingly, the judge erred in refusing to defer to the Secretary's interpretation of sections 57.22232 and 57.22235(a).

In considering whether it is permissible for the Secretary to include an unsealed abandoned area within the scope of the term "mine atmosphere," our colleagues ignore the definition of that term contained in section 57.22002. They turn instead to regulations which require methane testing in areas of the mine designated as "active workings," "working faces," "all work places," "each active working face," "each face blasted," "active mining faces," "main returns," "returns from idle workings," and "returns from abandoned workings." *See* 30 C.F.R. §§ 57.22206, 57.22212 and 57.22228(b), (c), and (d). That there is no standard which similarly requires an unsealed abandoned area of a mine to be tested for methane leads our colleagues to conclude that the Secretary cannot reasonably require such an area to be subject to the requirements of sections 57.22232 and 57.22235(a). But the qualification of the term "face" in some of these standards (e.g., the reference in section 57.22228(c) to "active working face"), in the context of active mine operations, further supports the view that an *unqualified* reference to "face" can reasonably be interpreted to include an abandoned unsealed area.

Our colleagues redefine the term "mine atmosphere" and limit it to only those areas of the mine which are regularly required to be tested for methane. Such an approach, in their view, gives a "comprehensive, harmonious meaning to these provisions" and therefore they "cannot conclude that the Secretary's interpretations of sections 57.22232 and 57.22235(a) to apply to abandoned areas, which are not required to be tested, is a reasonable one." Slip op. at 5. As our colleagues' interpretation of "mine atmosphere" is inconsistent with the regulatory definition of

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<sup>2</sup> In reaching his determination, the judge ignored the regulatory definition in section 57.2 and referred instead to the definition of face contained in U.S. Department of the Interior, *Dictionary of Mining, Mineral and Related Terms* 289 (1968). It is only in the absence of an applicable regulatory definition that a regulatory term may be defined in accordance with its dictionary meaning. *See Pyramid Mining Inc.*, 16 FMSHRC 2037, 2039 (October 1994).

that term contained in section 57.22002, and also restricts the areas of the mine in which the Secretary can require the removal of methane, we are puzzled by their claim of providing a more “comprehensive” and “harmonious” interpretation to the provisions under review. In any event, even if we were willing to concede that our colleagues’ interpretation of “mine atmosphere” is more “comprehensive” and “harmonious” than the Secretary’s, the principles of Commission deference preclude us from rejecting the Secretary’s interpretation of his own standard. Our colleagues’ preference for their own alternative interpretation does not entitle them to reject the Secretary’s construction since “we are not positioned to choose from plausible readings the interpretation we think best.” *General Electric*, 53 F.3d at 1327, quoting *American Fed. of Gov’t Employees v. FLRA*, 778 F.2d 850, 856 (D.C. Cir. 1985).

Our colleagues claim that to apply the requirements of sections 57.22232 and 57.22235(a) to abandoned areas is to require those areas to be ventilated, a requirement the Secretary “expressly declined to promulgate as to Subcategory II-A mines.” Slip op. 6. They argue further that the Secretary’s failure to promulgate a standard that would have required unsealed abandoned areas to be ventilated “demonstrates an intent to exclude the requirement.” *Id.*

Our colleagues’ position is without merit. Relying on a 1985 regulatory change, they infer an intent to not require ventilation of abandoned areas which is contrary to the explanation offered by the Secretary in the preamble to those rules. They then compound the error by interpreting the separately promulgated requirements contained in sections 57.22232 and 57.22235 (a) in accordance with this mythical “intent.”

As the majority points out, for nearly 20 years, 30 C.F.R. Part 57 contained the requirement that “abandoned areas shall be sealed or ventilated: areas that are not sealed shall be barricaded and posted against unauthorized entry.” 30 C.F.R. § 57.21-43 (1969) (*see* 34 Fed. Reg. 12517 (July 31, 1969)). Under this provision, the operator could either seal or ventilate an abandoned area. An operator that chose to ventilate, however, was also required to barricade and post the area against unauthorized entry. In short, it was not possible for an operator to comply with former section 57.21-43 by following the course of action that Morton International, Inc., Morton Salt (“Morton”) followed here, i.e., by simply barricading an unsealed abandoned area.

When the Department of Labor’s Mine Safety and Health Administration (“MSHA”) later published proposed rules revising the former system of categorizing mines, proposed section 57.34214 (applicable to Subcategory II-A mines) repeated the requirement that an unsealed abandoned area had to be both ventilated and barricaded. See 50 Fed. Reg. 23612, 23644 (June 4, 1985). MSHA omitted this section, however, when publishing the final rules, explaining that “this standard, which provided safety protection from potential methane in abandoned areas, is duplicative of the requirements and protection afforded by existing § 57.8528.” 52 Fed. Reg. 24924, 24926 (July 1, 1987).

A comparison of section 57.8528 with proposed section 57.34214 reveals that the drafters were mistaken. Section 57.8528 did not duplicate the requirements of proposed section

57.34214. Section 57.8528 required: “Unventilated areas shall be sealed, or barricaded and posted against entry.” Under this remaining regulation (which the Secretary had mistakenly believed provided the identical protection as the eliminated ventilation requirement), an operator could merely barricade an unsealed abandoned area without ventilating it. Thus, although the Secretary reaffirmed the need for “safety protection from potential methane in abandoned areas,” 52 Fed Reg. 24926, he unwittingly eliminated a requirement to ventilate abandoned areas that remained unsealed.

The regulatory history relied on by our colleagues demonstrates that the only reason the specific requirement to ventilate abandoned areas was eliminated was the drafters’ erroneous view that the identical protection was already provided under a separate standard. Choosing to ignore this specific evidence of the Secretary’s intent, however, our colleagues echo the judge’s erroneous reliance on a general rule of statutory construction, contending that “the consideration and rejection of a proposed provision demonstrates an intent to exclude the requirement.” Slip op. at 6 (citing 2A Norman J. Singer, Sutherland Stat. Constr. §§ 48.04, 48.18 (5th ed. 1992) (“Sutherland”). See 16 FMSHRC at 422.

We cannot agree with our colleagues’ conclusion that the Secretary’s withdrawal of proposed section 57.34214 establishes his intent to exclude the requirement to ventilate unsealed abandoned areas. That such requirement was removed is not disputed. That such removal was inadvertent is also clear. In the sentence immediately following the one quoted by the majority, the authority cited by them recognized the possibility that the withdrawal of a proposed provision does not always signify the drafters’ intent to reject the substance of the rejected provision:

Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment. *However, such rejection may occur because the bill already includes those provisions. Other interpretive aids may indicate that this is the case.*

2A Sutherland § 48.18 (emphasis supplied).

Our colleagues, however, conclude that the removal of a provision which expressly required the ventilation of unsealed abandoned areas also prevents the Secretary from interpreting the *separate* standards in a manner that could lead to the ventilation of those areas. Hence, they claim that an interpretation of sections 57.22232 and 57.22235(a) that results in an operator ventilating an abandoned area to reduce the level of methane is unreasonable. By restricting the scope of sections 57.22232 or 57.22235(a) in accordance with what they have erroneously determined to be an overriding Secretarial intent to eliminate any requirement of ventilation of abandoned unsealed areas, instead of interpreting those standards in accordance with their ordinary meaning, our colleagues are allowing the tail to wag the dog. The standards clearly provide that the protective actions specified therein are triggered whenever methane reaches certain levels in the “mine atmosphere.” Since the abandoned area in question can

reasonably be considered part of the “mine atmosphere,” the Secretary can apply sections 57.22232 and 57.22235(a) to such an area, notwithstanding the Secretary’s prior removal of a *separate* requirement pertaining to the ventilation of abandoned areas in a Subcategory II - A mine.

## II.

### Whether the Secretary Carried His Burden Of Proving That Morton Violated Sections 57.22232 and 57.22235(a)

Having concluded that the Secretary can apply the requirements of sections 57.22232 and 57.22235(a) to an unsealed abandoned area, we must next determine whether Morton violated those requirements in the instant case. There is no dispute that, at a minimum, the standards require an operator to take certain precautionary steps once methane reaches specified levels in the mine atmosphere. Section 57.22232 requires ventilation changes, deenergization of electrical power, shutoff or removal of diesel equipment and cessation of work in affected areas once methane reaches 0.5% in the mine atmosphere. Section 57.22235(a) requires withdrawal of all persons from affected areas if methane reaches 1.0% in the mine atmosphere.

Although Morton was cited under section 57.22235, the Secretary concedes that Morton did not fail to withdraw anyone from “affected areas.” As to the stipulated citation under section 57.22232, we agree with the majority that there was no electrical power to deenergize and no diesel equipment to shut off or remove when Inspector Lara detected 3.25% methane. After learning of the presence of methane, Morton took steps to reduce the level of the gas. Miners conducted scaling and installed a diesel generator to ventilate the abandoned area. J. Ex. 1, Stip. 11. In our view, the Secretary has not demonstrated that Morton failed to properly respond once it learned of the presence of methane in excess of allowable levels.

At oral argument, however, the Secretary asserted, for the first time, that sections 57.22232 and 57.22235(a) were clear on their face that the existence of methane in excess of the specified levels, in and of itself, gave rise to a violation.<sup>3</sup> Oral Arg. Tr. 13-14. The

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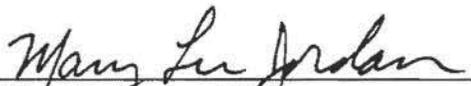
<sup>3</sup> The Secretary’s Petition for Discretionary Review assigned error only to:

the administrative law judge[’s] . . . finding that Morton Salt did not violate 30 C.F.R. 57.22235 and 57.22232 *when it failed to remove persons* when methane reached 1.0 percent and *failed to make ventilation changes* when methane reached 0.5 percent in its mine atmosphere.

PDR at 1-2 (emphasis supplied). In his brief, the Secretary described the issue presented as:

Commission need not consider arguments raised for the first time at oral argument. *See Tarpley v. Greene*, 684 F.2d 1 (D.C. Cir. 1982) (“It is not the task of this court to consider all of the implications of a theory vaguely raised for the first time at oral argument on appeal . . . .” 684 F.2d at 7, n.17; *see also Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (August 1992); *cf. Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10-11, n.7 (January 1994). We therefore do not address the Secretary’s contention that the presence of methane above the specified levels gives rise to a violation of sections 57.22235(a) and 57.22232.<sup>4</sup>

Because the Secretary is unable to demonstrate that Morton failed to take any of the protective actions required by the standards for which it was cited, we agree that the judge’s vacation of the citations alleging violations of sections 57.22232 and 57.22235(a) should be affirmed.

  
Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner

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Whether the administrative law judge erred in finding that Morton Salt did not violate 30 C.F.R. 57.22232 and 57.22235(a) *when it failed to make ventilation changes* when methane reached 0.5 percent in its mine atmosphere and *failed to remove persons* when methane reached 1.0 percent in its mine atmosphere.

S. Br. at 1 (emphasis supplied).

<sup>4</sup> We note, however, that the Secretary has recently rejected such an interpretation in connection with the corresponding requirements for underground coal mines. In discussing the provisions of 30 C.F.R. § 75.323, entitled “Actions for Excessive Methane,” the drafters of the recently revised ventilation standards explain: “[o]nly the failure to properly respond once being made aware of the presence of methane in excess of allowable levels is a violation.” 61 Fed. Reg. 9778 (March 11, 1996).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 24, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. KENT 95-781
	:	
GLENN'S TRUCKING COMPANY, INC.	:	
	:	

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

ORDER

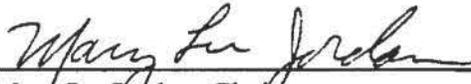
BY THE COMMISSION:

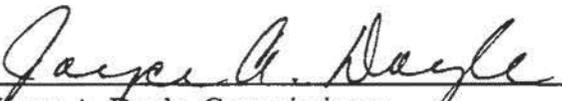
This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 18, 1996, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Glenn's Trucking Company, Inc. ("Glenn's Trucking") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on October 26, 1995, or the judge's Order to Respondent to Show Cause issued on January 25, 1996. The judge assessed the civil penalty of \$2,000 proposed by the Secretary.

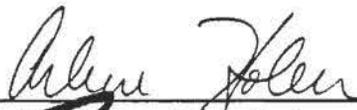
On April 1, 1996, the Commission received a letter from Glenn's Trucking asserting that, on February 13, 1996, it had sent the Commission its answer and a copy of a "letter of protest" that it had sent to the Secretary on August 17, 1995. Glenn's Trucking enclosed copies of its answer and letter. It requests that the default order be set aside and the case reassessed.

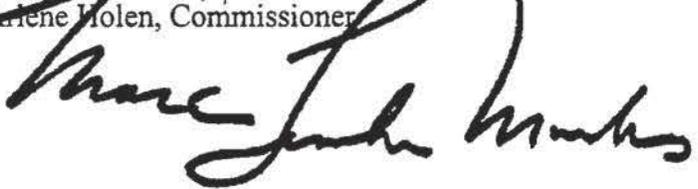
The judge's jurisdiction in this matter terminated when his decision was issued on March 18, 1996. 29 C.F.R. § 2700.69(b) (1995). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Glenn's Trucking's letter to be a timely filed petition for discretionary review, which we grant. See, e.g., *Middle States Resources, Inc.*, 10 FMSHRC 1130 (September 1988).

On the basis of the present record, we are unable to evaluate the merits of Glenn's Trucking's position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (February 1989).

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

  
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Joyce A. Doyle, Commissioner

  
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Arlene Holen, Commissioner

  
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Marc Lincoln Marks, Commissioner

  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 24, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of CARROLL JOHNSON	:	
	:	
and	:	Docket Nos. SE 93-182-D
	:	SE 93-104
UNITED MINE WORKERS OF	:	
AMERICA	:	
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.	:	

BEFORE: Doyle, Holen, Marks and Riley, Commissioners<sup>1</sup>

DECISION

BY: Doyle, Holen and Riley, Commissioners

These discrimination and civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), raise the issue of whether Administrative Law Judge Avram Weisberger properly considered and applied the penalty criteria in section 110(i) of the Mine Act<sup>2</sup> in assessing civil penalties of \$1,000 and

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<sup>1</sup> Chairman Jordan has recused herself in this matter. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), we have designated ourselves a panel of four Commissioners to exercise the powers of the Commission.

<sup>2</sup> Section 110(i) sets forth six criteria for assessment of penalties under the Act.

The Commission shall have authority to assess all civil penalties provided in [the Act]. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in

\$2,000 against Jim Walter Resources, Inc. (“JWR”) for violations of sections 103(f) and 105(c) of the Mine Act, 30 U.S.C. §§ 813(f) & 815(c). 15 FMSHRC 2588 (December 1993) (ALJ).

The Commission granted the Secretary of Labor’s petition for discretionary review, which challenges the judge’s penalty assessment for the violation of section 105(c). A petition for discretionary review filed by the United Mine Workers of America (“UMWA”), intervenor, was also granted. The UMWA challenged penalty assessments for both violations as well as the judge’s failure to address its request that the complainant be reimbursed for expenses incurred as a result of pursuing his discrimination action. The Commission heard oral argument. For the reasons that follow, we vacate and remand.

I.

Factual and Procedural Background

On Saturday, November 23, 1991, Carroll Johnson, chairman of the UMWA safety committee and authorized miners’ representative, accompanied Terry Gaither and Milton Zimmerman, inspectors from the Department of Labor’s Mine Safety and Health Administration (“MSHA”), during a follow-up inspection to evaluate measures implemented by JWR to reduce respirable dust levels on the No. 1 longwall section of its No. 7 underground coal mine.<sup>3</sup> 15 FMSHRC at 2589-90. During the inspection, Johnson traveled 250 to 300 feet ahead of the inspectors to observe the water sprays on the longwall shearer. *Id.* at 2590-91. Johnson informed longwall coordinator Thom Parrott that the sprays might not be operating properly. *Id.* Parrott shrugged his shoulders and did not respond. *Id.* at 2591. Johnson then informed Inspector Gaither, who told Parrott that the sprays might have to be cleaned. *Id.* Parrott shut down the shearer for cleaning and telephoned Richard Donnelly, the deputy mine manager, to inquire whether Johnson was permitted to separate himself from the inspection party. *Id.* Donnelly responded that he was not and instructed Parrott to tell Johnson to stay with the inspectors and not to conduct his own inspection. *Id.* at 2591-92; Tr. 458. Parrott so directed Johnson. 15 FMSHRC at 2592.

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business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i)

<sup>3</sup> A withdrawal order had been previously issued, pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), because JWR failed to reduce the level of respirable dust as directed by MSHA as a result of a citation issued during a section 103(g) inspection. 15 FMSHRC at 2589.

Later during the inspection, Johnson traveled 15 to 40 feet from the inspectors to view the shearer. 15 FMSHRC at 2591-92. Seeing Johnson apart from the inspectors, Parrott told Johnson that he was relieved of his duties. *Id.* Parrott telephoned Donnelly, who affirmed Johnson's discharge. Tr. 466-67. Upon learning of Johnson's discharge, Inspector Zimmerman issued a citation for violation of section 103(f) of the Mine Act<sup>4</sup> and told Donnelly that he would issue a section 104(b) withdrawal order if miner representation were not permitted. 15 FMSHRC at 2599; Gov't Ex. 17. Johnson was then reinstated as the miners' representative for the remainder of his shift. 15 FMSHRC at 2601; Tr. 72-73; Gov't Ex. 17.

Upon reporting to work on Monday, November 25, 1991, Johnson received a 5-day suspension with intent to discharge. 15 FMSHRC at 2599. The following day, prior to a union grievance meeting, Johnson was reinstated and compensated for wages lost as a result of the suspension. *Id.* at 2599; Tr. 273-77.

Based on the foregoing events, the Secretary determined that, in addition to the cited section 103(f) violation, Johnson had been discriminated against in violation of section 105(c) of the Mine Act<sup>5</sup> and filed a complaint of discrimination with the Commission.

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<sup>4</sup> Section 103(f) provides, in part:

[A] representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection . . . .

30 U.S.C. § 813(f).

<sup>5</sup> Section 105(c) provides, in relevant part:

(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this [Act] . . . because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c).

Following hearing, the judge determined that JWR violated section 103(f) by interfering with Johnson's walkaround rights as the miners' representative. 15 FMSHRC at 2601. He also determined that JWR violated section 105(c) by discharging Johnson because he was engaged in protected activity while accompanying the inspectors and that JWR's decision to discipline Johnson was motivated in part by Johnson's refusal to obey JWR's order to stay with the inspectors. *Id.* at 2597.

The judge assessed civil penalties of \$1,000 for the section 103(f) violation and \$2,000 for the 105(c) violation. 15 FMSHRC at 2600-01. The judge evaluated JWR's history of violations by determining whether similar violations had previously occurred. *Id.* at 2597-99. In evaluating the gravity of the violations, the judge found that the evidence of a chilling effect on miners was "too speculative." *Id.* at 2600 n.10. Regarding good faith in abating the violations, the judge found that Johnson was reinstated on November 23 as walkaround representative after the inspector threatened to issue a 104(b) withdrawal order. *Id.* at 2601. He also found that Johnson was reinstated on November 26 and subsequently compensated for all lost wages. *Id.* at 2600.

## II.

### Disposition

#### A. General Principles

The Mine Act requires that, in contested civil penalty cases, the Commission make an independent penalty assessment based solely on the statutory criteria of section 110(i) of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are supported by substantial evidence.<sup>6</sup> The Commission has stated that findings of fact must be made that "not only provide the operator

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<sup>6</sup> The Commission is bound by the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). While we do not lightly overturn a judge's factual findings and credibility resolutions, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. *See, e.g., Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980). We are guided by the settled principle that, in reviewing the whole record, an appellate tribunal must also consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.” *Id.* at 292-93. The Commission explained that “[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact . . . bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act’s penalty assessment scheme.” *Id.* at 294 (citation omitted).

While “a judge’s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . .” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In the instant case, the petitioners take issue with the judge’s treatment of three of the penalty criteria: the operator’s history of previous violations; the gravity of the violation; and whether the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

## B. Penalty for the Section 105(c) Violation

### 1. History of Previous Violations

In analyzing the history criterion, the judge cited the following legislative history of the Mine Act:

In evaluating the history of the operator’s violations in assessing penalties, it is the intent of the Committee that repeated violations of the *same standard*, particularly within a matter of a few inspections, should result in the substantial increase in the amount of the penalty to be assessed.

15 FMSHRC at 2598 (quoting S. Rep. No. 181, 95th Cong., 1st Sess. 43 (1977) (“S. Rep.”), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 631 (1978) (“*Legis. Hist.*”) (emphasis supplied by judge)). The judge then concluded that evidence of previous violations, including cases resolved through settlement, was insufficient to warrant increasing the civil penalty because none of the parties presented “any ‘history of previous violations’ similar to the one at issue, i.e., interference with the right of a walkaround who was not in the immediate vicinity of the inspectors.” 15 FMSHRC at 2598-99; *see also id.* at 2597-98 n.6.

The Secretary and the UMWA claim the judge erroneously limited his consideration of JWR’s history of previous violations to cases involving “interference with the right of a walkaround who was not in the immediate vicinity of the inspectors.” S. Br. at 7-13; UMWA Br. at 8-12. They take exception to the judge’s refusal to consider JWR’s general history of violations or previous section 105(c) violations, including those resolved through settlement. S.

Br. at 13-17; UMWA Br. at 8-9. JWR contends the judge properly gave limited weight to past incidents of alleged discrimination. JWR Br. at 7. It also argues that section 105(c) cases involving safety-related complaints are not particularly relevant to this case and that the judge properly attributed little weight to settled cases involving dissimilar conduct. *Id.* at 8-9.

Section 110(i) provides in part that, in assessing civil penalties, “the Commission shall consider the operator’s history of previous violations . . . .” 30 U.S.C. § 820(i). Thus, the language of section 110(i) does not limit the scope of history of previous violations to similar cases. The Commission has explained that “section 110(i) requires the judge to consider the operator’s general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component.” *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (August 1992) (emphasis added). The appropriate weight, if any, to be attached by the judge to older violations should be based on relevancy.

The judge failed to consider the operator’s general history of previous violations submitted into evidence by the Secretary as the Assessed Violation History Report. Gov’t Ex. 13. That exhibit, which relates exclusively to JWR’s No. 7 mine, lists a history of 679 paid violations that occurred within 24-months of the subject violation.<sup>7</sup> *Id.*

Thus, we conclude that the judge erroneously limited the scope of the history criterion. We therefore remand the matter to the judge to evaluate the operator’s history of violations.

## 2. Gravity

The Secretary’s argument that the judge incorrectly applied the gravity criterion is supported by the UMWA. S. Br. at 17-24; UMWA Br. at 10-11. The Secretary also contends that the Mine Act’s legislative history indicates every violation of section 105(c) is presumed to have a chilling effect on miners’ protected safety activities. S. Br. at 18-19. The Secretary and the UMWA further assert that a chilling effect occurred in this case.<sup>8</sup> S. Br. at 17-24; UMWA Br. at 10-11. JWR responds that Johnson’s suspension would not deter other miners from reporting safety problems because a case involving proximity to MSHA inspectors is unlikely to arise again. JWR Br. at 6. It also asserts that Johnson has not been intimidated from exercising his right to complain to MSHA. *Id.* at 6-7.

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<sup>7</sup> The Secretary, by regulation, has limited the length and content of violation history for purposes of his penalty proposal to “the number of assessed violations in a preceding 24-month period.” 30 C.F.R. § 100.3(c).

<sup>8</sup> The Secretary and the UMWA’s challenge regarding the gravity criterion is limited to the judge’s rejection of their “chilling effect” argument. No other argument regarding the seriousness of the violation is advanced.

We reject the Secretary's argument that a chilling effect should be presumed in every discrimination case. The Mine Act does not provide for such a presumption. References to chilling effect in the legislative history are made in connection with the temporary reinstatement provision "to protect miners from the adverse and chilling effect of loss of employment." Conf. Rep., *reprinted in Legis. Hist.* at 1362; Floor Debate, *reprinted in Legis. Hist.* at 1088-89 (statement of Senator Church). Contrary to the Secretary's assertions, this legislative history does not suggest that a chilling effect should be presumed to result from every section 105(c) violation. In our view, Congress intended that section 105(c) would protect miners against the chilling effect of employment loss they might suffer as a result of an illegal discharge. We therefore hold that the Mine Act does not support such a presumption and that a determination of whether a chilling effect resulted from a section 105(c) violation is to be made on a case-by-case basis.

The Secretary has urged that, in evaluating whether there is evidence of a chilling effect, the Commission adopt an objective standard, which does not require proof that adverse action actually discouraged miners from engaging in protected activities, but rather requires consideration of whether the adverse action "reasonably tended to discourage miners from engaging in protected activities."<sup>9</sup> Although the authority cited by the Secretary relates to the enforcement of section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) (1994),<sup>10</sup> we conclude that the Congressional objectives reflected in that section and in the Mine Act's section 105(c) are essentially the same, i.e., to provide legal protection against adverse action to employees who exercise rights afforded by law.<sup>11</sup> We also conclude, however, that

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<sup>9</sup> S. Post Oral Arg. Letter (January 22, 1996) (citing *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 954 (D.C. Cir. 1988), *cert. denied sub nom. A.G. Boone Co. v. NLRB*, 490 U.S. 1065 (1989); *Southwest Regional Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 743-44 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951); *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 145 (1st Cir. 1981)).

<sup>10</sup> Section 8(a)(1) states:

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or  
coerce employees in the exercise of  
the rights guaranteed in section 157  
of this title[.]

<sup>11</sup> The Commission has recognized that case law interpreting the National Labor Relations Act, upon which the Mine Act's antidiscrimination provisions are modeled, provides guidance on resolution of discrimination issues. *See, e.g., Swift v. Consolidation Coal Co.*, 16

subjective evidence of a chilling effect, e.g., testimony of the complainant or other miners, is relevant to consideration of the gravity of a section 105(c) violation. Accordingly, we hold that both subjective and objective evidence should be considered in evaluating whether a chilling effect resulted from adverse action. We agree with the Secretary that, in the event that a chilling effect is found, such a determination does not *a fortiori* mean the gravity of the violation is high. That is a fact-specific conclusion. See Oral Arg. Tr. 19-22, 56.

In evaluating whether Johnson's suspension had a chilling effect on other miners, the judge concluded the evidence was "too speculative."<sup>12</sup> 15 FMSHRC at 2600 n.10. In so doing, the judge appears to have applied only a subjective standard. There is no indication that the judge evaluated the gravity of the violation within its factual context, i.e., whether JWR's removal of a miners' representative who was accompanying MSHA during an inspection would reasonably tend to discourage other miners from engaging in protected activities. Because the judge did not evaluate any objective factors in determining whether a chilling effect resulted from the violation, we remand the matter to the judge for reconsideration of the violation's gravity.

### 3. Good Faith

The UMWA argues that substantial evidence does not support the judge's determination that JWR demonstrated good faith in abating the section 105(c) violation. UMWA Br. at 12-13. Intervenor also asserts that Johnson was reinstated only after the inspectors threatened to issue a section 104(b) withdrawal order, that he was fired again two days later when he reported for work on Monday, and that he was reinstated the following day only after UMWA officials interceded. *Id.* JWR responds that it engaged in good faith abatement by allowing Johnson to complete the walkaround, resuming the dispute after the inspection, and by promptly reinstating him. JWR Br. at 7-8 n.3.

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FMSHRC 201, 206 (February 1994) (showing of facial discrimination); *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616 (April 1993) (deduction of unemployment compensation from backpay award); *Metric Constructors, Inc.*, 6 FMSHRC 226, 231-32 (February 1984), *aff'd sub nom. Brock ex rel. Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985) (mitigation defense to backpay award).

<sup>12</sup> Johnson testified "I feel like they're out to get me as a result of this." Tr. 180. On cross examination, however, he agreed that he has "never been intimidated or chilled or afraid to the point that [he] declined to exercise the right to go to MSHA . . ." Tr. 201-02. Daryl Dewberry, UMWA District No. 20 executive board member, testified that at least 70 percent of miners who have reported violations requested that they not be identified, due to fear of retaliation. Tr. 299-300. Recalling the incident with Johnson, Dewberry stated that irreparable harm occurred in the minds of Johnson and other miners. Tr. 304.

The judge found that the section 105(c) violation initially occurred on Saturday when Johnson was ordered to leave the work area, and recurred on Monday when he was suspended with intent to discharge. 15 FMSHRC at 2599-2600. With respect to Saturday's action, the judge noted that Johnson was reinstated after the inspector informed JWR of its violative conduct and warned the company that a section 104(b) withdrawal order would be issued. *Id.* at 2599 & n.9. With respect to adverse action on Monday, the judge found that, since Johnson was reinstated on Tuesday and compensated for all lost wages, he did not suffer any damages. *Id.* at 2600.

Although the foregoing findings are relevant to the good faith criterion, the judge did not set forth his conclusions as to whether JWR's conduct demonstrated good faith in abating the violation. *See* 15 FMSHRC at 2600. Thus, there is no basis for our review of this issue. We therefore remand the matter to the judge to determine whether the operator's actions demonstrated good faith.

Thus, we vacate the penalty assessed by the judge for the section 105(c) violation and remand for consideration of the operator's history of violations, the gravity of the current violation, and the operator's good faith. The judge shall enter findings for each criterion and, based on his conclusions, assess an appropriate civil penalty.

C. Penalty for the Section 103(f) Violation

The UMWA argues that substantial evidence does not support the judge's determination that JWR demonstrated good faith in abating the section 103(f) violation. UMWA PDR at 3-4; UMWA Br. at 12. The UMWA asserts that, as in the case of the section 105(c) violation, Johnson was reinstated only after the inspectors threatened to issue a section 104(b) withdrawal order unless Johnson was allowed to continue to assist them. *Id.* JWR responds that it engaged in good faith abatement by allowing Johnson to complete the walkaround on Saturday before resuming the dispute. JWR Br. at 7-8 n.3.

Although the judge found it important that Johnson was reinstated after the inspector threatened JWR with the issuance of a section 104(b) order, he did not set forth his reasoning as to whether such action demonstrated good faith. *See* 15 FMSHRC at 2601. Because there is no basis for our review of this issue, we vacate the penalty assessed for the section 103(f) violation and remand for determination of whether the operator demonstrated good faith. The judge shall enter his findings and, based on his conclusion, assess an appropriate civil penalty.

D. Expenses

The UMWA argues that the judge failed to address its request that Johnson be reimbursed for expenses incurred as a result of pursuing his discrimination action, including lost wages due to his attendance at deposition and hearing. UMWA PDR at 4; UMWA Br. at 13. JWR responds that it is not required to compensate Johnson for such lost wages. JWR Br. at 9.

Section 105(c)(2) of the Mine Act authorizes the Commission to remedy discrimination by “such affirmative action to abate the violation *as the Commission deems appropriate*, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest.” 30 U.S.C. § 815(c)(2) (emphasis added). The Senate Report on the Mine Act explains:

It is the Committee’s intention that . . . the Commission require[] all relief that is necessary *to make the complaining party whole* . . . including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. . . .

S. Rep. 37, *reprinted in Legis. Hist.* at 625 (emphasis added).

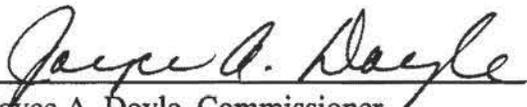
The Commission has observed that “[t]he remedial goal of section 105(c) is to ‘restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination.’ . . . ‘Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.’” *Secretary of Labor ex rel. Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2049 (December 1983) (citations omitted). The Commission has awarded expenses incurred by miners in pursuing successful discrimination cases. *See, e.g., Metric Constructors*, 6 FMSHRC at 234 (“[r]ecovery of expenses incurred in bringing a successful claim may be part of the relief necessary to make a discriminatee whole”) (citing *Secretary of Labor ex rel. Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 143-44 (February 1982) (reimbursement of incidental, personal expenses incurred due to attendance at discrimination hearing appropriate)).

We hold that reimbursement to Johnson of all such reasonably incurred costs and expenses, including wages lost as a result of pursuing his discrimination action, is appropriate. Review of the record, however, indicates no evidence was offered regarding Johnson’s expenses or lost wages. Accordingly, we remand to afford all parties the opportunity to submit evidence concerning the appropriate amount, if any, of expenses, including lost wages, to be awarded.

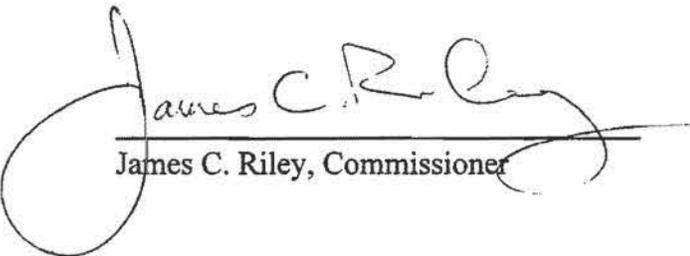
III.

Conclusion

For the foregoing reasons, we vacate the judge's assessment of civil penalties for both violations and remand for reconsideration consistent with this opinion. We also remand for determination of the amount of expenses to be awarded.

  
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Joyce A. Doyle, Commissioner

  
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Arlene Holen, Commissioner

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

Commissioner Marks, concurring in part and dissenting in part:

With the exception of the disposition regarding the gravity criterion of the section 105(c) violation, I am in agreement with my colleagues' opinion.

In deciding the gravity issue, the majority rejects the Secretary's call for the Commission to recognize that when an operator violates section 105(c), either by firing or by taking some other adverse action against a miner who has merely acted as the Mine Act encourages (such as reporting an unsafe condition, as was done in this case), such action has the effect of intimidating or "chilling" future protected activities of the complainant and/or his co-workers. The majority is unwilling to presume that such a natural reaction will occur. They require evidence of those feelings. I do not. It is precisely for this type of circumstance, where it is not possible to gauge the true effect upon all who are impacted, that a presumption is necessary and appropriate.

Contrary to my colleagues, I view the cited legislative history on this issue (*see slip op. at 7*) to clearly support such a presumption. The deep concern reflected by the Congress "to protect miners from the adverse and chilling effect of loss of employment," was not intended to be read narrowly. Rather, that powerful statement of Congressional intent reflects their recognition of the obvious, which is that firing or demoting or any other reprisal taken against an employee because he or she has acted within the protection of the law will send a message to the other employees: if you act in the same way, you will be similarly treated!

Accordingly, I agree with the Secretary that a presumption of a chilling effect should be made in every instance of a section 105(c) violation.

A handwritten signature in black ink, appearing to read "Marc Lincoln Marks". The signature is fluid and cursive, with a large initial "M" and "L".

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Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 1996

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 :  
v. : Docket No. WEST 93-169  
 :  
ENERGY WEST MINING COMPANY :

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

DECISION

BY: Jordan, Chairman and Doyle, Commissioner<sup>2</sup>

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). The issue is whether an inspector from the Department of Labor's Mine Safety and Health Administration ("MSHA") abused his discretion when he issued an order, pursuant to section 104(b) of the Mine Act, 30 U.S.C. § 814(b), to Energy West Mining Company ("Energy West") based on his determination that an extension in abatement time for a previously cited violation of 30 C.F.R. § 70.100(a) (1995) was not warranted.<sup>3</sup> Administrative Law Judge John J. Morris affirmed the order and assessed a civil

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<sup>1</sup> Commissioner Riley assumed office after this case had been considered and decided at a Commission decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Riley has elected not to participate in this matter.

<sup>2</sup> Chairman Jordan and Commissioner Doyle are the only Commissioners in the majority on all issues presented.

<sup>3</sup> 30 C.F.R. § 70.100(a) provides in part:

Each operator shall continuously maintain the average dust concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of

penalty of \$3,000 for the violation. 16 FMSHRC 835 (April 1994) (ALJ). For the reasons set forth below, we affirm the judge's determination that the inspector did not abuse his discretion, vacate the penalty, and remand for reassessment.<sup>4</sup>

I.

Factual and Procedural Background

Energy West operates the Cottonwood Mine, an underground coal mine in central Utah. During mid-June 1992, Energy West took five respirable dust samples, pursuant to 30 C.F.R. § 70.207, for the designated occupation of longwall operator on mechanized mining unit ("MMU") 015-0 in the 4th West Longwall section of the mine.<sup>5</sup> 16 FMSHRC at 839; Ex. M-3; Ex. R-2. The results from those samples showed an average concentration of 2.2 milligrams of respirable dust per cubic meter of air ("mg/m<sup>3</sup>"), which exceeded the 2.0 mg/m<sup>3</sup> standard applicable at the mine. 16 FMSHRC at 836-37. On June 25, 1992, MSHA issued Energy West a citation alleging a significant and substantial ("S&S") violation of section 70.100(a). *Id.* at 836; Citation No. 9996761. Energy West was given approximately three weeks, until July 14, to take corrective action to lower dust and to submit five valid respirable dust samples to MSHA's Pittsburgh Respirable Dust Processing Laboratory. 16 FMSHRC at 837; Citation No. 9996761.

Mine management met to develop a corrective action strategy. 16 FMSHRC at 841. Energy West's chief safety engineer, Randy Tatton, and mine superintendent, Garth Nielsen, unsuccessfully attempted to divert more air to the 4th West section by moving curtains. *Id.*; Tr. 329-35. Safety Engineer Steve Radmall conducted a dust survey in the area using a real-time

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respirable dust per cubic meter of air . . . .

<sup>4</sup> Chairman Jordan, Commissioner Doyle, and Commissioner Marks affirm the judge's determination that the inspector did not abuse his discretion in issuing the order. Commissioner Holen would vacate the order and reverse the judge. Chairman Jordan, Commissioner Doyle, and Commissioner Holen vacate the penalty and remand for reassessment. Commissioner Marks would affirm the penalty.

<sup>5</sup> Section 70.207(a) provides in part:

Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period . . . . Designated occupation samples shall be collected on consecutive normal production shifts or normal production shifts each of which is worked on consecutive days . . . .

30 C.F.R. § 70.207(a).

aerosol monitor, or “RAM,” which takes instantaneous dust readings, to determine whether dust control measures were functioning properly. 16 FMSHRC at 841; Tr. 133-34, 213. Based on the survey results, Radmall believed that there may have been a problem with the stage loader and a dust generation source, such as dry roadways, in the intake air course. 16 FMSHRC at 842; Tr. 217-26, 230-31. He informed Tatton of the results and the efficiency of the stage loader was evaluated and the roadways were watered. Tr. 145-46, 230-31. Roadways were routinely watered in accordance with the ventilation plan. Tr. 360-61; Ex. R-4.

In addition, the equipment overhaul coordinator, Bud Warrington, informed the longwall foreman, Ed Hickman, by notation in a daily maintenance list, that the dust samples had been out of compliance and that resampling would occur the following week. 16 FMSHRC at 842; Tr. 186-87; Ex. R-5, at 2. He listed various maintenance measures that needed to be taken and, as was his daily practice, attached a list of dust control measures that were to be performed. Tr. 186-88, 197; Exs. R-4, R-5. On June 29, Warrington instructed Hickman to “check everything out that has to do with dust” and “[m]ake it shine.” 16 FMSHRC at 842. The longwall crew then engaged in various routine maintenance and repair measures, including the maintenance and repair of the stage loader baffle, and changing bits on the longwall shearer. *Id.* at 842-43; Tr. 193-94, 242-51, 260-61, 268-69, 286. On July 1, 2, and 3, Energy West took samples in the 4th West section during five consecutive shifts and submitted them to MSHA. 16 FMSHRC at 839; Ex. M-4; Tr. 164. On July 10, MMU 015-0 was moved to the 11th Right section of the mine. 16 FMSHRC at 839, 843, 844.

On July 15, during a regular inspection, MSHA Inspector Fred Marietti was called from the mine to his field office to examine the results of the abatement samples. *Id.* at 837-38. They showed an increase in dust concentration to 2.3 mg/m<sup>3</sup>. *Id.* at 838.

Inspector Marietti returned to the mine and issued a section 104(b) failure to abate order to Energy West. He determined that an extension in abatement time was not warranted because of the increase in dust levels, the frequency of the cited type of MMU going out of compliance, and the operator’s failure to incorporate into its ventilation plan actions it previously had taken to bring such equipment into compliance. *Id.* at 840, 847-48; Tr. 36-37.

Energy West increased air velocity and water pressure and added a spray bar to MMU 015-0. Tr. 378. The order was terminated after three samples taken by MSHA showed an average dust concentration for MMU 015-0 of 1.8 mg/m<sup>3</sup>. Order No. 3850746-02; Tr. 50-52.

At the hearing, Energy West conceded that it had violated section 70.100(a) as alleged in the citation but disputed that the violation was S&S and challenged the failure to abate order. The judge granted the Secretary’s motion to amend the citation to delete the S&S allegation based on affidavits submitted by Energy West that the miners exposed to the violative condition had been wearing RACAL airstream helmets, a type of personal protective equipment that the judge found “provide[s] a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels.” 16 FMSHRC at 837, 843.

The judge concluded that the inspector had not abused his discretion in issuing the failure to abate order. *Id.* at 844. The judge agreed that an extension was not warranted given the results of the most recent sampling, the operator's history of excessive dust, a lack of diligence in the operator's efforts to control dust, and the fact that the operator failed to incorporate into its ventilation plan dust control measures previously taken to achieve compliance. *Id.* at 844-45, 847-49. Accordingly, the judge affirmed the citation and order and assessed a civil penalty of \$3,000, finding that the violation involved high gravity due to the risk of pneumoconiosis. *Id.* at 849-50.

Energy West filed a petition for discretionary review, which challenged the judge's affirmance of the failure to abate order and his penalty assessment.

## II.

### Disposition

#### A. Failure to Abate Order

Energy West argues that the judge erred in finding that the order was valid because Inspector Marietti failed to consider whether any circumstances warranted an extension in abatement time. E.W. Br. at 12-16. It contends that it took extensive abatement measures to achieve compliance and refers to various maintenance and repair measures that were made with respect to the longwall, the RAM survey, attempts to increase air on 4th West, meetings relating to the excessive dust levels, repositioning miners, and the longwall move from 4th West to 11th Right. *Id.* at 17-18. The Secretary argues that substantial evidence supports the judge's determination that the inspector did not abuse his discretion in determining that the time for abatement should not be extended. S. Br. at 4-17 & n.5. He asserts that many abatement measures relied upon by the operator to show its diligence consisted of routine maintenance that the operator would have performed even if its sample results had been in compliance. *Id.* at 10-12. In reply, Energy West asserts that the Secretary failed to recognize that the dispositive issue is the adequacy of the inspector's efforts to determine whether an extension was warranted. E.W. Reply Br. at 1-6.

In contesting a section 104(b) order, the operator may challenge the reasonableness of the time set for abatement or, as here, the Secretary's failure to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989), *citing Old Ben Coal Co.*, 6 IBMA 294, 306-07 (1976); *U.S. Steel Corp.*, 7 IBMA 109, 116 (1976); *Youghioghney & Ohio Coal Co.*, 8 FMSHRC 330, 338-39 (March 1986) (ALJ). Section 104(b) of the Mine Act provides:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently

extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring . . . all persons . . . to be withdrawn from . . . such area . . . .

30 U.S.C. § 814(b). The Act does not address the extent of an inspector's inquiry in making the determination of whether abatement time should be extended. Nor is the extent of inquiry addressed in legislative history. See S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977), *reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 618 (1978); H.R. Rep. No. 563, 91st Cong., 1st Sess. 8, 31 (1969), *reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I Legislative History of the Coal Mine Health Safety Act of 1969*, at 1038, 1061 (1975) ("*Coal Act Legis. Hist.*"); S. Rep. No. 411, 91st Cong., 1st Sess. 37, 89, *reprinted in Coal Act Legis. Hist.* at 163, 215.

The Commission has recognized that the "Secretary . . . possesses enforcement discretion to extend the time for abatement if [he] believes it reasonable . . . ." *Clinchfield*, 11 FMSHRC at 2132. Therefore, in reviewing an operator's challenge to the Secretary's failure to extend abatement time, the Commission considers whether the inspector abused his discretion in issuing the order. The Commission has noted that "abuse of discretion" has been found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (October 1991), *quoting Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985).

We conclude that substantial evidence supports the judge's determination that Inspector Marietti did not abuse his discretion when he issued the order.<sup>6</sup> The judge found, and substantial evidence supports his finding that, prior to determining "that the period of time for the abatement should not be further extended," Inspector Marietti considered the fact that, during the three week abatement period, excessive dust concentrations had not diminished but had, in fact, increased; that the number of individual samples out of compliance had increased from two out of five to three out of five; and that Energy West had been cited frequently for failure to comply

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<sup>6</sup> The Commission is bound by the terms of the Mine Act to apply the substantial evidence test when reviewing an administrative law judge's factual determinations. 30 U.S.C. § 823(d)(2)(A)(ii)(I). The term "substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989), *quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). While we do not lightly overturn a judge's factual findings, neither are we bound to affirm such determinations if only slight or dubious evidence is present to support them. See, e.g., *Krispy Kreme Doughnut Corp. v. NLRB*, 732 F.2d 1288, 1293 (6th Cir. 1984); *Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1263 (7th Cir. 1980).

with section 70.100(a).<sup>7</sup> 16 FMSHRC at 840, 845, 848, 849; Exs. M-3, M-4, M-6; Tr. 35-36.

In addition, substantial evidence supports the judge's finding that Energy West "made only a minimal and inadequate effort to control dust." 16 FMSHRC at 847. Many of the actions cited by Energy West as evidence of diligence consisted of maintenance that the operator would have performed in any event. Warrington attached a list of dust control measures to his maintenance report every night, and those measures were routinely performed. Tr. 186-87, 197. Those measures included adjusting air controls and volumes, checking scrubber filters at the stage loader, and checking sprays. Ex. R-4. In addition, Energy West witnesses testified that other measures that had been taken were considered routine, including the maintenance and repair of the baffle (Tr. 193), watering the roadways (Tr. 360), changing bits on the longwall shearer (Tr. 260), and changing scrubber filters (Tr. 309). Although the operator was aware that conditions were becoming more difficult in 4th West as mining progressed, it chose to rely on existing dust controls without making changes to engineering controls. Tr. 195, 236, 362, 368.

We also reject Energy West's argument that the judge erred in failing to consider its move of the MMU as part of its abatement efforts.<sup>8</sup> PDR at 14. Apparently the inspector was unaware of the movement of MMU 015-0 at the time he issued the order. 16 FMSHRC at 844; Tr. 47. If the MMU was moved as a further abatement measure, that fact could have been brought to MSHA's attention at the time of the move. We perceive no obligation on the

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<sup>7</sup> Chairman Jordan observes that in her dissent, Commissioner Holen contends that "the Commission's requirement of an investigation into conditions at the mine before issuance of an imminent danger order applies with greater force to an inspector's exercise of discretion in issuing a failure to abate order." Slip op at 14-15. Unlike section 104(b), however, section 107 requires the inspector to "determine the extent of the area of such mine throughout which the danger exists" and to include in the order "a detailed description of the conditions or practices which cause and constitute an imminent danger and a description of the area of the coal or other mine from which persons must be withdrawn and prohibited from entering." 30 U.S.C. § 817(a), (c). Therefore, she does not agree with her dissenting colleague's contention that section 104(b) imposed an obligation on Inspector Marietti to "ascertain Energy West's efforts to abate the citation or the facts and circumstances surrounding the operation of the MMU" before issuing an order under that provision. Slip op. at 15.

<sup>8</sup> The citation and order arose from samples taken pursuant to 30 C.F.R. § 70.207, which requires the sampling of MMUs, rather than 30 C.F.R. § 70.208, which requires sampling of designated areas. Under section 70.207, MSHA tracks the MMU itself, rather than its location, to evaluate the cutting characteristics and dust controlling capabilities of the equipment. Tr. 65. Thus, the subject of the sampling was MMU 015-0, rather than its location.

inspector's part to ascertain, before issuing the order, that the MMU had not been moved.<sup>9</sup>

Thus, we conclude that substantial evidence supports the judge's determination that Energy West failed to act diligently.

In sum, we conclude that the judge's determination that the inspector did not abuse his discretion in issuing the failure to abate order is supported by substantial evidence. Accordingly, we affirm the judge's determination upholding the order.

#### B. Assessment of Civil Penalty

The judge assessed a civil penalty of \$3,000, finding that the gravity of the violation of section 70.100(a) was high, given the risk of pneumoconiosis and that such violations are generally considered to be S&S. 16 FMSHRC at 850. Energy West argues that the judge erred because he ignored evidence demonstrating a decreased exposure to respirable dust. E.W. Br. at 23.

In considering the gravity of a violation, the Commission has generally considered the likelihood of an occurrence of the hazard against which a standard is directed and the severity of the resulting injury. See *Penn Allegh Coal Co.*, 4 FMSHRC 1224, 1227 (July 1982); *Pyro Mining Co.*, 6 FMSHRC 2089, 2092 (September 1984). Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (September 1987).

Here, the longwall crew members affected by the violative conditions had been wearing personal protective equipment, the Secretary withdrew his S&S allegation because of this fact, and the judge found that those helmets "provide a virtually dust-free air supply to miners, reducing respirable dust exposure to insignificant levels." 16 FMSHRC at 837, 843. There is no indication in the judge's analysis that he considered this evidence in determining that the violation was of high gravity or in assessing the civil penalty.<sup>10</sup> Accordingly, we vacate the penalty and remand for consideration of that evidence in the assessment of an appropriate civil

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<sup>9</sup> Chairman Jordan notes that, in any event, Energy West's abatement sampling on July 1-3, before it moved the longwall, along with the evidence describing the severe conditions the operator was experiencing in 4th West (Tr. 143-44) suggests that the move was not part of an attempt to abate the dust violation.

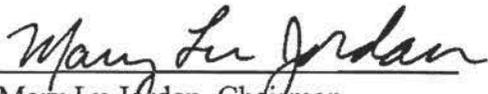
<sup>10</sup> Chairman Jordan notes that there is also no indication that, in making his gravity finding, the judge considered the evidence relied upon by her dissenting colleague, Commissioner Marks.

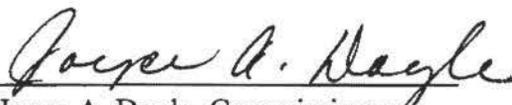
penalty.<sup>11</sup>

III.

Conclusion

For the reasons discussed above, we affirm the judge's determination that the inspector did not abuse his discretion in issuing the section 104(b) order. We vacate the penalty and remand for reassessment.

  
Mary Lu Jordan, Chairman

  
Joyce A. Doyle, Commissioner

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<sup>11</sup> The judge stated that the Secretary had proposed a civil penalty of \$500. 16 FMSHRC at 836. In fact, the Secretary had proposed a civil penalty of \$3,105 and it appears that the penalty proposal was not reduced after the Secretary withdrew the S&S allegation. S. Proposal for Penalty at 2; S. Post-Hrg. Br. at 1; PDR at 7; E.W. Br. at 11.

Commissioner Marks, concurring in part and dissenting in part:

The majority has voted to affirm the judge's determination to uphold the subject section 104(b) order. I concur.

The majority has voted to vacate the judge's civil penalty assessment of \$3,000, concluding that the judge failed to properly analyze the gravity criterion of section 110(i), 30 U.S.C. § 820(i). I disagree and therefore dissent. The judge's determination that the gravity of the violation was high is correct and supported by substantial evidence. I therefore affirm his high gravity conclusion.

In concluding that the gravity of the violation was high, the judge stated:

The gravity of the violation is high since respirable coal dust can cause pneumoconiosis over a period of time. Generally, such a violation is considered to be S&S.

16 FMSHRC at 850. The judge's determination is correct and entirely consistent with Commission case law recognizing that any violation of section 70.100(a) is serious and presumptively S&S. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir. 1987).

However, the majority bases their vacation of the judge's high gravity conclusion on their determination that the judge failed to consider the following *evidence*: that affected longwall crew members had been wearing helmets; that the Secretary withdrew his S&S allegation because of the helmet use; and that the judge found that the helmets provided a dust-free air supply to miners that reduced the dust exposure to insignificant levels.

The majority's reliance upon the foregoing is misplaced, and its conclusion that affected miners wore helmets is in error.

My review of the record precludes me from determining that no miner was exposed to the dangerous respirable dust levels that gave rise to the subject violation. Energy West's expert, Thomas Hall, admitted that during a relevant visit to the mine he observed maintenance workers on the subject section who were not wearing a helmet. Tr. 416-17. Garth Nielsen, Energy West's Superintendent at the subject Cottonwood Mine, conceded that a significant number of miners, 10%, do not wear the helmets. Tr. 140. This was also confirmed by construction foreman Dennis Ardohnin who conceded that some of his mechanics do not wear the helmets. Tr. 252.

The majority's reliance on the fact that the Secretary withdrew his S&S allegation is misplaced. My review of the record causes me to conclude that the Secretary has failed to adequately explain the basis for its withdrawal of the S&S allegation, and therefore, I certainly

see no reason why the Commission should further compound the error by relying on that action to support its vacation of the judge's independent determination.

In support of his motion to withdraw the S&S allegation, the Secretary relied on two affidavits executed by two longwall foremen employed by Energy West. Ex. M-2. The affidavits purport to assure the Secretary that no miners were exposed to the violative high levels of respirable dust *during the time of the sampling*. See Tr. 13. The affidavits are significant only because of what they do not state. There is no indication that *all* miners who may have worked in the vicinity of the cited MMU, *during the time that the violative condition existed* (almost four weeks) wore helmets. Rather, the affiants merely state that “[d]uring June 1992 . . . all members of [their] crew . . . on the 4th West longwall section wore RACAL airstream helmets at all times.” Ex. M-2, at 1 & 2. There is no indication that the members of the two crews, supervised by affiants, were the only miners who worked in the vicinity of the cited MMU. Moreover, the vague reference to June 1992, does not cover the relevant time period, that is the time that elapsed from June 25, 1992, the day the citation was issued, to the day the subject order was terminated, July 22, 1992.

The logic justifying the Secretary's acquiescence on S&S is further obscured when one considers his counsel's statement to the judge made contemporaneously with the motion to withdraw the S&S designation:

[T]here may be some testimony later today with regard to the wearing of air stream helmets (sic) at this mine, and that's going to go to the seriousness of the violation with regard to the penalty and the B order . . . [b]y changing this designation to a non S and S, the Secretary in no way gives up MSHA's position that even a small exposure to respirable dust is a serious violation, and that particular issue is presently on appeal before the Commission in a Consolidation Coal case, and *I don't wish to address that issue in this particular case.*

Tr. 13-14. (emphasis supplied). In response to a question from the judge, the Secretary's counsel further stated:

[T]he issue I believe that's before the Commission . . . is how much of an exposure (sic). We now have a case in front of the Commission where the exposure was just brief. Someone on the section may have taken their respirator off or come on the section to do maintenance work for a short time, and that's the issue that's been raised by Consolidation Coal and that's the issue on appeal, and *that may have been an issue here but I don't want to address it in this case.*

Tr. 14-15 (emphasis supplied).

Based on the foregoing, it is certainly clear why the judge would not have placed any reliance, as I don't, upon the Secretary's withdrawal of the S&S designation. As described above, the evidence does indicate that not all miners availed themselves of the helmets.

Moreover, there is no reliable evidence establishing the efficacy of the helmets. Energy West's own expert, Hall, provided testimony that failed to establish the precise effect use of the helmet would have on the miner's respirable dust exposure. He cited "workplace protection factor[s]" ranging from 250 to 10. Tr. 403, 426. However, the record does not contain any meaningful explanation of the significance of those numbers or their relationship to respirable dust exposure. Further, the evidence does indicate that the helmets' benefit, whatever that may be, could be nullified, if a miner wearing a helmet had temporarily raised the shield during a dust "face burst." Tr. 408. Also, Hall conceded that the effectiveness of the helmet is conditioned upon a variety of factors, including the batteries, gaskets, flow rate, and the type of work the miner is performing. Tr. 412-13. No evidence regarding those factors was offered.

For the foregoing reasons I conclude that substantial evidence supports the judge's gravity conclusion, and I therefore affirm it.

A handwritten signature in black ink, appearing to read "Marc Lincoln Marks". The signature is written in a cursive, flowing style with a large initial "M".

Marc Lincoln Marks, Commissioner

Commissioner Holen, concurring in part and dissenting in part:

I agree that, given the disposition of the majority, the penalty assessed<sup>1</sup> by the judge should be vacated and that, on remand, he should consider evidence in the record that he ignored regarding the gravity of the violation.<sup>2</sup> Slip op. at 7-8. I respectfully dissent, however, from their opinion that the judge's decision upholding the order should be affirmed. Slip op. at 7. I would reverse.

### Factual Background

The facts surrounding the instant section 104(b) order, 30 U.S.C. § 814(b), are largely undisputed. On June 25, 1992, the Mine Safety and Health Administration ("MSHA") issued a section 104(a) citation, 30 U.S.C. § 814(a), to Energy West, as a result of air sampling that revealed an average respirable dust concentration of 2.2 milligrams of dust per cubic meter of air ("mg/m<sup>3</sup>") for the designated occupation of longwall operator on mechanized mining unit ("MMU") 015-0, which was then located in the 4th West Longwall section of the Cottonwood mine. Ex. M-3; Ex. R-2.

Following the citation, Energy West took numerous actions to lower respirable dust in the 4th West section. 16 FMSHRC at 841. On June 26, Energy West's chief safety engineer, Randy Tatton, immediately met with mine managers to develop a corrective action strategy. *Id.*; Tr. 328. On June 29, Tatton directed one of his safety engineers to evaluate existing controls with a real time aerosol monitor ("RAM") to ensure that all dust controls were in place and functioning properly. 16 FMSHRC at 841; Tr. 329. Based on the evaluation, it was recommended that the intake air course and stage loader be checked for dust generation problems. 16 FMSHRC at 842; Tr. 230-31. The RAM survey also revealed that dust levels rose significantly when the longwall shearer cut through rock in the mine roof. 16 FMSHRC at 842; Tr. 227-28. Tatton and Mine Superintendent Garth Nielsen attempted to divert more air into the 4th West section but were unsuccessful. 16 FMSHRC at 841; Tr. 329-35.

Also on June 26, Energy West's equipment overhaul coordinator, Bud Warrington, put miners in the section on a dust control alert. 16 FMSHRC at 842. He included special instructions on his maintenance list to repair the baffle on the stageloader in addition to a list of maintenance measures designed to control dust that had been previously prepared for the maintenance foreman, Ed Hickman. 16 FMSHRC at 842; Tr. 178-84, 186-88; Exs. R-4 and -5.

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<sup>1</sup> The penalty is for the underlying violation, not the failure to abate order.

<sup>2</sup> Commissioner Marks, dissenting on the penalty issue, concludes that the Secretary failed to adequately explain the basis for withdrawing his S&S allegation. Slip op. at 9-10. Commission precedent, however, establishes that the Secretary has unreviewable discretion to vacate citations. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101 (October 1993).

On June 29, Warrington repeated the baffle repair instructions, stated that sampling would occur on Monday (July 1), and instructed that everything with regard to dust be checked. 16 FMSHRC at 842; Ex. R-5 at 2. The longwall maintenance crew changed the bits on the longwall shearer, checked and repaired sprays, cleaned and washed shields, and changed dust filters. 16 FMSHRC at 842-43; Tr. 242-51, 287-90, 299-305. Hickman assumed personal responsibility to see that corrective actions were carried out thoroughly. 16 FMSHRC at 842; Tr. 287.

On July 1, 2, and 3, Energy West took abatement samples for MMU 015-0 and submitted them to MSHA's Pittsburgh laboratory. 16 FMSHRC at 839; Tr. 164; Ex. M-4. On July 10, because of the presence of sandstone in the coal seam and the attendant dust when the miner cut into it, Energy West removed the MMU from the 4th West section with a hundred feet of coal remaining and moved it two miles away, to the 11th Right section. 16 FMSHRC at 839, 843, 844; Tr. 131-33, 144, 147, 164. Conditions in that section were significantly different--the area was wetter, thus generating less dust. 16 FMSHRC at 843; Tr. 147-49, 293-94.

On July 15, MSHA Inspector Fred Marietti, while conducting a regular inspection of the mine, was called by his supervisor to return to the MSHA field office to review the laboratory report of Energy West's abatement samples. 16 FMSHRC at 837-38; Tr. 28-29. The sampling yielded an average dust concentration of 2.3 mg/m<sup>3</sup>. 16 FMSHRC at 838; Tr. 32; Ex. M-4. After reviewing the results, the inspector returned to the mine and immediately issued a section 104(b) failure to abate order, Tr. 33-34. The order stated that the time for abatement should not be extended because of "an obvious lack of effort by the operator to control the respirable dust." Order No. 3850746. The language was taken from the Coal Mine Inspector's Manual. 16 FMSHRC at 841; Tr. 53-55. Marietti based his determination not to extend the abatement time on the fact that dust levels had increased relative to the prior cited sample results, on previous conversations with other inspectors to the effect that the type of mining unit involved had been out of compliance before, and on Energy West's failure to incorporate into its ventilation plan actions that it had taken to bring mining units into compliance. 16 FMSHRC at 840; Tr. 34-37. Marietti did not inspect the longwall or enter the mine before he issued the order. 16 FMSHRC at 841. Nor did he make any inquiries concerning why the sample readings may have increased or concerning the operator's efforts to abate the citation. *Id.*; Tr. 47-48. When he wrote the 104(b) order, Marietti had no specific knowledge of sampling results from the MMU 015-0 prior to the June 1992 citation. Tr. 48. The inspector entered the mine, observed the MMU, and spoke with miners regarding compliance measures only *after* he had decided to issue the order. Tr. 40.

In order to lift the order, Energy West increased air velocity and water pressure and added sprayers to the MMU. Tr. 377-78. Inspector Marietti then allowed Energy West to resume production. Tr. 378; Ex. M-5. The order was terminated on July 22, after three samples taken by MSHA showed an average concentration of 1.8 mg/m<sup>3</sup>. Tr. 44, 51-52; Ex. M-5.

## Analysis

Section 104(b) provides that an inspector shall issue an order requiring all persons to be withdrawn from an area affected by a violation, if, during a follow-up inspection, he finds:

- (1) that a violation described in a citation . . . has not been totally abated within the period of time originally fixed therein or as subsequently extended, and
- (2) that the period of time for the abatement should not be further extended . . . .

30 U.S.C. § 814(b). Thus, the statute expressly requires an inspector to make a determination that a violation has not been timely abated *and* that an extension is not warranted before issuing an order.

In contesting a section 104(b) order, an operator may challenge the reasonableness of the time set for abatement or the Secretary's refusal to extend that time. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989) (citations omitted). The Commission's focus in such a proceeding is on whether the inspector acted reasonably in determining that the abatement time should not be extended. *See Martinka Coal Co.*, 15 FMSHRC 2452, 2456 (December 1993) (having determined a hazard existed, inspector acted reasonably in not extending abatement time). The Commission has set forth its test for whether an inspector acted reasonably or abused his discretion in issuing a withdrawal order in cases addressing imminent danger withdrawal orders. *See, e.g., VP-5 Mining Co.*, 15 FMSHRC 1531, 1537 (August 1993) (Secretary met his burden of proving that inspector reasonably concluded hazard was imminent); *Island Creek Coal Company*, 15 FMSHRC 339 (March 1993). *Island Creek* involved an inspector's issuance of an imminent danger order under section 107(a) of the Mine Act, 30 U.S.C. § 817(a), which provides that an inspector may require the removal of miners from areas in which conditions exist that could cause death or serious physical harm before abatement (*see* 30 U.S.C. § 802(j)). 15 FMSHRC at 339-40, 345.

Commission precedent has emphasized that, because an inspector must decide quickly and without delay whether a hazard presents an imminent danger, *Island Creek*, 15 FMSHRC at 346-47, he "must have considerable discretion in issuing imminent danger orders," *id.* at 348, *citing Rochester & Pittsburgh*, 11 FMSHRC 2159, 2164 (November 1989). The Commission has also held, however, that such discretion, even in imminent danger situations, is not without limit. An inspector must make a reasonable investigation of the surrounding facts. "[A] judge 'should make factual findings as to whether the inspector made a reasonable investigation of the facts . . . and whether the facts known to him, or reasonably available to him, supported issuance of the . . . order.'" *Island Creek*, 15 FMSHRC at 346, *quoting Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (August 1992). Clearly, conditions raising the possibility of an imminent danger pose more compelling circumstances for immediate inspector action. Thus, the Commission's requirement of an investigation into conditions at the mine before issuance of an imminent

danger order applies with greater force to an inspector's exercise of discretion in issuing a failure to abate order.

Further, MSHA's *Program Policy Manual* ("*Manual*") states that an inspector, in determining whether an extension of abatement time is justified, is to engage in a review process that involves factual considerations other than the existence of a continuing violation. It provides in part:

Upon expiration of the time fixed for abatement, *the inspector should review the circumstances*, and if circumstances so justify, extend the abatement period. If no extension of time is justified, and the violation is unabated, the inspector shall issue a withdrawal order under section 104(b).

Volume I, at 15 (July 1, 1988) (emphasis added). Although the *Manual* is not considered binding, the Commission has referred to it as evidence of MSHA's policies and practices. See *Dolese Bros. Co.*, 16 FMSHRC 689, 693 n.4 (April 1994) (citations omitted).

The judge determined that Inspector Marietti had not erred in issuing the failure to abate order. 16 FMSHRC at 848-49. He found that the increase in dust concentrations indicated the operator had not made an "effective" effort to correct the violation. *Id.* at 849. As to Energy West's argument that the inspector had abused his discretion by failing to consider whether circumstances warranted an extension of the abatement period, the judge held that, in light of the "continuing dust violation from mid-June until early July 1992 . . . no circumstances existed that would cause the inspector to conclude" an extension was warranted. *Id.* at 844.

The judge erred, in my opinion, in finding that a continuing violation alone is sufficient to support a determination that an extension of abatement time is not warranted and in failing to address the reasonableness of the inspector's inquiry. See 30 U.S.C. § 814(b)(2); *Island Creek*, 15 FMSHRC at 346-47. The judge's post hoc rationalization, based on the trial record, that "no extension of the abatement period would have been justified," 16 FMSHRC at 844, cannot correct the inspector's failure to inquire into current mining conditions prior to issuing the section 104(b) order.<sup>3</sup>

The inspector looked only at the laboratory results for the abatement dust samples and the June samples that were cited. He did nothing to ascertain Energy West's efforts to abate the citation or the facts and circumstances surrounding the operation of the MMU, but copied form language from a manual to charge Energy West with "an obvious lack of effort" to control respirable dust. Energy West responded to the citation by taking general dust control measures

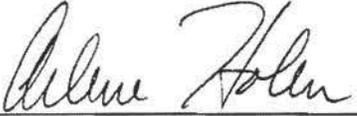
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<sup>3</sup> Much of the Secretary's brief addresses whether substantial evidence supports the judge's determination that the abatement time should not be extended. See S. Br. 6-17.

and it took steps to address particular problems with its equipment. The inspector did not go to the mine, other than to deliver the completed order, or talk to anyone at the mine prior to issuing the order. He did nothing to ascertain whether miners were subjected to a hazard (they were wearing personal protective equipment), *see* Tr. 52; Ex. M-2,<sup>4</sup> or that the MMU was no longer located in the 4th West section, but had been moved to a less dusty area two miles away. All this information was pertinent to the matter of whether the abatement time should have been extended. *See Rochester & Pittsburgh Coal Co.*, 11 FMSHRC at 2163 (inquiry in issuing imminent danger order is whether the condition would pose a hazard, given continued normal mining operations).<sup>5</sup>

The majority opinion affirms the judge on substantial evidence grounds, rather than focusing on whether the inspector abused his discretion and whether he made a reasonable investigation of the facts. Slip op. at 5-7. In simply reviewing the judge's factual determinations, that opinion implicitly approves his erroneous analysis.

On this record, I cannot say Inspector Marietti acted reasonably. Accordingly, I would vacate the order and reverse the judge.

  
Arlene Holen, Commissioner

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<sup>4</sup> The Secretary amended the citation to delete the "S&S" designation because all miners exposed to the cited respirable dust levels were wearing personal protective equipment. 16 FMSHRC at 837.

<sup>5</sup> As to the inspector's awareness that Energy West had not incorporated into its ventilation plan steps it had taken in addressing respirable dust citations, the appropriate response would have been through the ventilation plan approval process. *See* 30 C.F.R. § 75.370. While the contents of a plan are the result of consultation between the Secretary and the operator (*see, e.g., Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770-73 & n.8 (December 1981)), "the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong. 1st Sess. 25 (1977), *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978). 30 C.F.R. § 75.370(f) provides for review by the Secretary of ventilation plans every six months to assure their suitability to current mining conditions.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 24, 1996

SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) :  
 : Docket Nos. WEST 94-148-R  
v. : WEST 94-303  
 :  
THUNDER BASIN COAL COMPANY :

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY: Jordan, Chairman; Doyle, Holen and Riley, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (1994) ("Mine Act or Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Thunder Basin Coal Company ("Thunder Basin") alleging a violation of section 109(a) of the Act, 30 U.S.C. § 819(a), because Thunder Basin failed to post an order of temporary reinstatement on the mine bulletin board.<sup>1</sup> After receiving cross-motions for summary decision,

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<sup>1</sup> Section 109(a) provides:

At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine. There shall be a bulletin board at such office or located at a conspicuous place near an entrance of such mine, in such manner that orders, citations, notices and decisions required by law or regulation to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal. A copy of any order, citation, notice or decision required by this [Act] to be given to an operator shall be delivered to the office of the affected mine,

Administrative Law Judge Arthur J. Amchan issued a Summary Decision in favor of Thunder Basin and vacated the subject citation. 16 FMSHRC 1142 (May 1994) (ALJ). For the reasons that follow, we affirm, in result, the judge's determination that section 109(a) of the Act was not violated.

I.

Factual and Procedural Background

On November 2, 1993, Judge Amchan issued an order of temporary reinstatement requiring Thunder Basin to temporarily reinstate three discharged miners at its Black Thunder Mine, located in Campbell County, Wyoming. On November 22, 1993, in response to a complaint written pursuant to section 103(g), 30 U.S.C. § 813(g), MSHA Inspector James Beam conducted an inspection of the mine to determine whether the November 2 temporary reinstatement order had been posted on the mine bulletin board. 16 FMSHRC at 1142-43. When he found that the order had not been posted, the inspector issued a citation alleging a violation of section 109(a) of the Act. *Id.* at 1143. Thunder Basin concedes that the order had not been posted but claims the Act does not require posting of such orders.

The judge determined that no violation occurred. He concluded that the language of section 109(a) is not clear on its face. *Id.* In analyzing the statutory language, the judge determined that the last sentence of section 109(a) must be read in context with the rest of the section: . . . “[h]ad Congress intended that all decisions . . . be posted, it would not have modified the second sentence . . . with the phrase ‘required by law or regulation to be posted.’” *Id.* at 1143-44, quoting 30 U.S.C. § 819(a). The judge therefore concluded “that what must be posted under the last sentence of section 109(a) are documents, that are required to be posted pursuant to another statutory provision or by a regulation . . .” *Id.* at 1144. The judge reasoned that the documents referred to in section 109(a) do not include temporary reinstatement orders from the Commission. *Id.*

The judge declined to accord deference to the Secretary's interpretation of section 109(a) that the requirement to post Commission decisions is implicit. *Id.* at 1146. He found no written agency policy or interpretation regarding posting of Commission decisions. *Id.* at 1145. Thus, he concluded, “[a] subjective understanding of what the statute requires, which is not obvious and has never been communicated to the public, is not an agency interpretation entitled to deference under *Chevron*.” *Id.* at 1146, citing *Chevron U.S.A. Inc. v. Natural Resources Defense*

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and a copy shall be immediately posted on the bulletin board of such mine by the operator or his agent.

30 U.S.C. § 819(a).

*Council, Inc.*, 467 U.S. 837, 842-43 (1984). The judge also determined that, even if section 109(a) requires posting of Commission decisions, a temporary reinstatement order, which “is in the nature of an interim order” need not be posted. *Id.*

## II.

### Disposition

On review, the Secretary maintains that the second and third sentences of section 109(a) have separate and distinct meanings, and that the decisions of the Commission are implicitly included among the documents referred to in the third sentence of section 109(a). S. Br. at 5-6. The Secretary argues that his interpretation of section 109(a) is consistent with the language and purpose of the Act, and should be accorded deference. *Id.* at 4. The Secretary assigns error to the judge’s determination that posting was not required because the subject temporary reinstatement order was only an “interim order,” asserting that the subject order is a conclusive, substantive, appealable order. *Id.* at 12. Finally, the Secretary states that, unless section 109(a) is interpreted to include decisions issued by the Commission, the word “decision” in the third sentence is rendered meaningless. *Id.* at 5-6 n.1. Thunder Basin argues that the only orders, citations, notices or decisions that are required to be given to an operator under the Act are those issued by the Secretary. T.B. Br. at 7-8, 12.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute’s text and legislative history, may be employed to determine whether “Congress had an intention on the precise question at issue,” which must be given effect. *Coal Employment Project v. Dole*, 889 F. 2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). “In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart*, 486 U.S. at 291. (citations omitted). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a “*Chevron I*” analysis. *Coal Employment Project*, 889 F. 2d at 1131.<sup>2</sup>

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<sup>2</sup> If the statute is ambiguous or silent on a point in question, a second inquiry, a “*Chevron II*” analysis, is required to determine whether an agency’s interpretation of the statute is a reasonable one. *Coal Employment Project*, 889 F. 2d at 1131.

Section 109(a), together with the three other sub-sections<sup>3</sup> of section 109, entitled

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<sup>3</sup> Section 109(b) provides:

The Secretary shall (1) cause a copy of any order, citation, notice, or decision required by this [Act] to be given to an operator to be mailed immediately to a representative of the miners in the affected coal or other mine, and (2) cause a copy thereof to be mailed to the public official or agency of the State charged with administering State laws, if any, relating to health or safety in such mine. Such notice, order, citation, or decision shall be available for public inspection.

30 U.S.C. § 819(b).

Section 109(c) provides:

In order to insure prompt compliance with any notice, order, citation, or decision issued under this [Act], the authorized representative of the Secretary may deliver such notice, order, citation, or decision to an agent of the operator, and such agent shall immediately take appropriate measures to insure compliance with such notice, order, citation, or decision.

30 U.S.C. § 819(c).

Section 109(d) provides:

Each operator of a coal or other mine subject to this [Act] shall file with the Secretary the name and address of such mine and the name and address of the person who controls or operates the mine. Any revisions in such names or addresses shall be promptly filed with the Secretary. Each operator of a coal or other mine subject to this [Act] shall designate a responsible official at such mine as the principal officer in charge of health and safety at such mine, and such official shall receive a copy of any notice, order, citation, or decision issued under this [Act] affecting such mine. In any case where the mine is subject to the control of any person not directly involved in the daily operations of the coal or other mine, there shall be filed with the Secretary the name and address of such person and the name and address of a principal official of such person who shall have overall responsibility for the conduct of an effective health and safety program at any coal or other mine subject to the control of such person, and such official shall receive a copy of any notice, order, citation, or decision issued affecting any

“Posting of Orders and Decisions,” sets forth specific requirements as to where, how, and to whom documents are to be conveyed and how they are to be posted at mines. In section 109(a), Congress required operators to post “any order, citation, notice or decision required by this Act to be given to an operator.” The question to be answered is whether Congress intended to include documents issued by the Commission when it referred to “order[s] . . . or decision[s] required by this Act to be given to an operator.” No provision in the Mine Act specifically requires Commission decisions or orders to be given to an operator. The orders, citations, notices and decisions issued by the Secretary, however, are subject to this explicit requirement. See sections 101(c), 104(a), (b), (d) and (e), 105(d) and 107(d) of the Mine Act, 30 U.S.C. §§ 811(c), 814(a), (b), (d) and (e), 815(d) and 817(d). This distinction in itself would appear to provide a sufficiently compelling indication that the decisions and orders referenced in section 109(a) were intended by Congress to include only those issued by the Secretary, and not the rulings issued by the independent adjudicative body Congress established in section 113 of the Act, 30 U.S.C. § 823.<sup>4</sup>

Any remaining doubt on this issue, however, is removed by reference to the service requirement contained in section 109(b). That provision states: “*The Secretary shall* (1) cause a copy of any order, citation, notice or decision required by this Act to be given to an operator to be mailed immediately to a representative of the miners in the affected coal or other mine, and (2) cause a copy thereof to be mailed to the public official or agency of the State charged with administering State laws, if any, relating to health or safety in such mine.” (emphasis added).

The Secretary did not attempt to distinguish the application of section 109(a) from the application of section 109(b). If, as the Secretary urges, the phrase “any order, citation, notice or decision required by this Act to be given to an operator” includes orders and decisions issued by the Commission, not only would the operator be required to post those documents on the bulletin board, as required by the last sentence of section 109(a), but the Secretary would be required, in accordance with section 109(b), to “immediately” mail those same documents to the representative of the miners, and appropriate state officials.<sup>5</sup> That Congress did not intend such

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such mine. The mere designation of a health and safety official under this subsection shall not be construed as making such official subject to any penalty under this [Act].

30 U.S.C. § 819(d).

<sup>4</sup> Contrary to the Secretary’s assertion, decisions under the Mine Act are not limited to those issued by the Commission. In certain instances, the Secretary is required to issue decisions. 30 U.S.C. § 811(c).

<sup>5</sup> We are reminded of the maxim, “be careful what you wish for.” During FY 1995, the Commission’s Administrative Law Judges issued 4,837 final dispositions.

result is clear and the statute must be construed to effectuate that intent. The reference to decisions and orders in the last sentence of section 109(a) unambiguously includes only those decisions and orders “*required* by this *Act* to be given to an operator.” (emphasis added). The only provisions of the Act that require decisions and orders to be given to the operator pertain to the decisions and orders issued by the Secretary.<sup>6</sup> The second sentence of section 109(a), which refers to “orders, citations, notices and decisions,” does not impose a posting requirement but specifies the *manner* in which posting is to be effectuated (i.e., “There shall be a bulletin board . . . located at a conspicuous place . . . protected against damage by weather . . .”). *Id.* (emphasis added). Accordingly, we conclude that section 109(a) is clear on its face and does not require the posting of temporary reinstatement orders on mine bulletin boards.

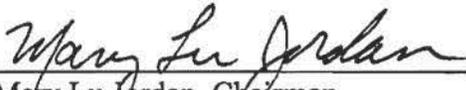
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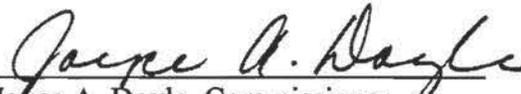
<sup>6</sup> This is not to say that an operator will never be required to post a Commission temporary reinstatement order. As Thunder Basin points out in its brief, the Secretary can seek to incorporate the posting of the order as part of the relief to be granted under 30 U.S.C. § 815(c). T. B. Br. at 8-9 n.14.

III.

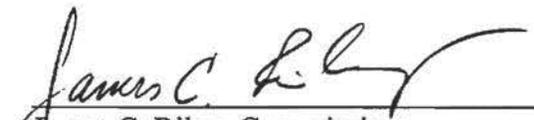
Conclusion

For the foregoing reasons, the judge's summary decision is affirmed in result.<sup>7</sup>

  
Mary Lu Jordan, Chairman

  
Joyce A. Doyle, Commissioner

  
Arlene Holen, Commissioner

  
James C. Riley, Commissioner

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<sup>7</sup> In light of our conclusion that the statutory provision is clear, we do not reach the question of whether the Secretary's interpretation of section 109(a) of the Act is reasonable.

Commissioner Marks, dissenting:

The majority has concluded that the meaning of section 109(a) of the Act, 30 U.S.C. § 819(a) is clear and that the Secretary's interpretation is wrong. I disagree and therefore dissent.

I agree with the Secretary's view, that section 109(a) is ambiguous. I also agree with the Secretary's view, that the Commission should defer to the Secretary's interpretation if the Commission concludes that his interpretation is reasonable. Accordingly, for the reasons that follow, I conclude that section 109(a) requires the posting of Commission issued temporary reinstatement orders. However, for reasons to be discussed, I believe the Secretary's failure to provide Thunder Basin with sufficient notice of his interpretation requires that the citation be vacated.

#### Section 109(a) is ambiguous

In determining that no violation occurred, my colleagues conclude that section 109(a) is clear, and that it does not require posting of Commission temporary reinstatement orders. In so doing, they do not address the question of deference to the Secretary.

In parsing the terms of section 109(a), the Secretary contends that the second sentence reference to documents that are specifically "required by law or regulation to be posted," relates to: notices of proposed rulemaking under section 101(e) of the Act, 30 U.S.C. § 811(e); the designation of miners' representatives specified under 30 C.F.R. § 40.4 (1995); or petitions for modification filed pursuant to 30 C.F.R. § 44.9. S. Br. at 5. Whereas, sentence three refers to different documents, ie., the Act "explicitly requires that documents referred to[,] be posted if they are 'required by this Act to be given to the operator.'" *Id.* The Secretary suggest that this third sentence reference includes all citations and orders issued by the Secretary and given to the operator pursuant to 30 U.S.C. §§ 814(a), (b), (d), (e), and 817(a). Significantly, the Secretary also contends that, by implication, the provisions of the Act relating to the issuance of decisions by the Commission are also included, (30 U.S.C. §§ 815(c)(2) and (c)(3), 823(d)(1), 823(d)(2)(B), and (d)(2)(C), and 823(e)). *Id.*

After rejecting the Secretary's interpretation of section 109(a) the judge offered his own interpretation of that section and in doing so effectively provided no independent meaning or purpose to the third sentence. 16 FMSHRC at 1143-44; *see* S. Br. at 3, 6-7. He failed to distinguish the limitation contained in sentence two, requiring the posting of documents . . . *required by law or regulation to be posted*, from the condition set forth in sentence three, requiring the posting of documents . . . *required by this Act to be given to an operator*. In analyzing section 109(a) as a whole, he effectively *combined* the two sentences and determined that the third sentence is limited in the same way as the second sentence. "Thus, I conclude that what must be posted under the last sentence [third] of section 109(a) are documents, that are required to be posted pursuant to another statutory provision or by a regulation." 16 FMSHRC at 1144.

Contrary to the judge and my colleagues (*see slip op.* at 5-6), *both parties* seem to agree that the second and third sentences have distinct and separate scopes. S. Br. at 3, 5-7; T.B. Br. at 11-12. However, the principle distinction between their respective positions is that the Secretary construes the third sentence, i.e., documents *required to be given to the operator*, to include, by implication, Commission decisions. Because the Act does not expressly provide that such decisions be given to the operator, Thunder Basin rejects the Secretary's interpretation and urges a strict construction of the terms in section 109(a).

In my opinion, the Secretary's interpretation is reasonable. It gives effect to each sentence in disputed paragraph (a), and is consistent with the overall purpose of section 109 to ensure that miners, as well as operators, are informed about the health and safety conditions of their work environment, and to ensure that the miners' participation in that process is facilitated by informing them of the rights and protections provided to them under the law. *See* S. Br. at 8; T.B. Br. at 12.

When distilled to its essence, Thunder Basin's assertions that the Secretary's interpretation is ambiguous and unreasonable fall into two arguments. First, Thunder Basin asserts that adoption of the Secretary's interpretation that Commission decisions are among the documents "required . . . to be given to an operator," would impose an affirmative duty upon the Commission to "give" and to "deliver" those documents, and that such duty is a usurpation of the Commission's power to fashion "appropriate relief." T.B. Br. at 8-9.

In my opinion, adoption of a construction of section 109(a) consistent with the Secretary's interpretation would in no way diminish or "usurp" the independence of the Commission or its judges. *Id.* at 8. In fact, all decisions and orders presently issued by the Commission and its judges are routinely "given" and "delivered" to the operator either directly, or to its legal representative. *See* 16 FMSHRC at 1144. This is the established practice of the Commission, notwithstanding the absence of express statutory authority, or the existence of a procedural rule requiring such practice.<sup>8</sup> Thus, one could conclude that the statutory authority for such practice is *implicit*.<sup>9</sup> Moreover, a recognition that such documents are to be routinely posted would not affect the content of the document, or in any way limit the Commission's authority under section 113, 30 U.S.C. § 823, to direct "other appropriate relief," including an order that a

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<sup>8</sup> The Commission's procedural rules do, however, contain specific service requirements regarding a judge's issuance of: an order on application for temporary reinstatement (Rule 45(e)); a subpoena (Rule 60(a)); and a summary disposition of proceedings (Rule 66(a)).

<sup>9</sup> Beyond the legal arguments asserted, it is inconceivable to not draw that implication. The Act is replete with narrowly drawn time frames for filing actions and appeals which could not be effected unless the Commission, like any other adjudicatory body in this country, promptly issued and conveyed its determinations to the affected parties.

notice be posted. *See* T.B. Br. at 8-9 n.14. It merely would ensure that whatever the judge or Commission decide, will be posted and made available to the miners.

Secondly, Thunder Basin argues that adoption of such an interpretation requiring the posting of the temporary reinstatement order would not satisfy the two objectives underlying the statutory posting requirements, which it asserts are to “notify miners . . . of proceedings . . . in which they have a right to intervene and participate; and . . . to provide immediate notice . . . of present mining conditions that may pose a risk of danger or harm through exposure.” T.B. Br. at 12; *see also* S. Br. at 8. In asserting that the posting of the temporary reinstatement order is “unnecessary and superfluous” to satisfying the statutory objectives noted above, Thunder Basin argues that those objectives are secured “where there is a miners’ representative, whose duty it is to provide miners with such notice.” T.B. Br. at 13, 15.

Given Thunder Basin’s unrelenting resistance to the miner representative rights mandated by the Act, its attempt to draw support for its position by describing the benefit of having a miners’ representative is an astonishing display of cynicism. It also is unpersuasive. The argument makes no provision for miners who work in mines where there is no representative. Obviously, any “reasonable” statutory construction must apply to all miners. Furthermore, the posting of a temporary reinstatement order may also serve to alert miners to an existing safety or health risk. As we have observed over the years, the garden variety discharge occurs after a miner has reported the existence of an unsafe/unhealthy condition, or has refused to work in such conditions. Because of the brief statutory time requirements, temporary reinstatement orders ordinarily will be issued fairly close in time to the discharge. Thus, it is possible that at the time temporary reinstatement is ordered, the conditions giving rise to the discharge will have continued to exist and pose a risk to other miners. Moreover, there can be no question that the posting of such an order vividly demonstrates the reach of the law, and reaffirms to the miners the government’s commitment to provide representation and relief to those who may have suffered retaliation or discrimination because they have engaged in a protected activity.

Thus, Thunder Basin’s arguments fail to demonstrate that the Secretarial interpretation of section 109(a) is unreasonable, or inconsistent with Congressional intent.

The Secretary’s reasonable interpretation is entitled to deference

In declining to accord deference to the Secretary’s interpretation of section 109(a), the judge found that there was no written agency policy or interpretation regarding the posting of Commission decisions. Indeed he concluded that “there is no agency ‘interpretation’ to which deference must be paid.” 16 FMSHRC at 1146. Thus, he concluded that a “subjective understanding of what the statute requires, which is not obvious and has never been communicated to the public, is not an agency interpretation entitled to deference under *Chevron*.” *Id.* at 1146, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Notwithstanding the record evidence indicating no prior enforcement of this interpretation, the Secretary contends that in citing Thunder Basin it was permissibly exercising its delegated rulemaking powers as sanctioned by the Supreme Court and therefore its interpretation is entitled to deference. S. Br. at 9-10, citing *Martin v. OSHRC*, 499 U.S. 144, 156-58 (1991) (“As we have indicated, the Secretary’s interpretation is not undeserving of deference merely because the Secretary advances it for the first time in an administrative adjudication”). I find that the Secretary is correct in that position, and I therefore conclude that deference should not be withheld. Deference should be accorded to a reasonable Secretarial interpretation, i.e., “a permissible construction of the statute,” even one the Commission might not choose.<sup>10</sup> *Chevron*, 467 U.S. at 843. “When the Secretary and the Commission disagree on the interpretation of ambiguous provisions of the Mine Act, and both present plausible readings of the legislative text, [the] court owes deference to the Secretary’s interpretation.” *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, Nos. 95-1130 & 95-1212, slip op. at 7 (4th Cir. April 3, 1996), quoting *Secretary of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1433 (D.C. Cir. 1989). Thus, my colleagues should have determined that the Secretary’s interpretation is reasonable and entitled to deference.

#### Thunder Basin did not receive adequate notice of the Secretary’s interpretation

Notwithstanding the deference that I accord to the Secretary’s interpretation of section 109(a), the issue of whether the operator was accorded adequate notice remains. “[T]he decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice, to regulated parties.” *Martin*, 499 U.S. at 158. In *Gates & Fox Co. v. OSHRC*, 790 F.2d 154 (D.C. Cir. 1986), the court, citing to no less than five other circuits, indicated its agreement that agency interpretations, to which deference is owed, and for which a penal sanction is at issue, must still pass constitutional due process muster in providing “fair warning of the conduct it prohibits or requires.” *Id.* at 156.

Given the absence of any rule, regulation, or written policy articulating the Secretary’s interpretation, as well as, the lack of any evidence that prior enforcement of the asserted “unwritten policy” ever occurred, and in consideration of the precise wording of the statutory provision, I conclude that Thunder Basin was not afforded fair notice of the Secretary’s interpretation of section 109(a).

Accordingly, I would decide this case as the court recently did in the matter of *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). There the court determined that the agency’s interpretation of its regulations was entitled to deference, even “where the agency’s

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<sup>10</sup> “The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 n.11 (citations omitted).

reading of the statute would not be obvious to ‘the most astute reader.’” *Id.* at 1327, quoting *Rollins Env’tl. Servs. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). However, because “the interpretation is so far from a reasonable person’s understanding of the regulations that they could not have fairly informed [the regulated] of the agency’s perspective,” the finding of liability was reversed. *Id.* at 1330.

A handwritten signature in black ink, reading "Marc Lincoln Marks". The signature is written in a cursive, flowing style with a large initial "M".

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Marc Lincoln Marks, Commissioner

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Denver, CO 80202

Administrative Law Judge Arthur Amchan  
Federal Mine Safety & Health Review Commission  
5203 Leesburg Pike, Suite 1000  
Falls Church, VA 22041

**ADMINISTRATIVE LAW JUDGE DECISIONS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 3, 1996

UNITED MINE WORKERS OF : COMPENSATION PROCEEDING  
AMERICA, LOCAL 1058, :  
DIST. 31 : Docket No. WEVA 95-262-C  
Complainant :  
v. : Humphrey No. 7  
:   
CONSOLIDATION COAL COMPANY, :  
Respondent :

DECISION

Appearances: Judith Rivlin, Esq., United Mine Workers of  
America, Washington, DC, for Complainant;  
Elizabeth Chamberlin, Esq., Consolidation Coal  
Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Fauver

This proceeding concerns a complaint for compensation pursuant to the first sentence of § 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., which provides:

If a coal or other mine or area of such mine is closed by an order issued under §§ 103, 104, or 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled ... to full compensation by the operator at their regular rates of pay for the period they are idled, but not more than the balance of such shift.

The United Mine Workers of America on behalf of Local Union 1058, District 31, seeks compensation from Consolidation Coal Company for miners it alleges were idled by a withdrawal order issued by the Secretary of Labor under § 103(k) of the Act during the dayshift on May 5, 1995. Respondent contends that § 111 does not apply because the miners were idled by a management decision for economic reasons, not because of the withdrawal order.

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

#### FINDINGS OF FACT

1. Respondent's Humphrey No. 7 Mine produces coal for sales in or substantially affecting interstate commerce. The mine has an elevator at each of its three portals, i.e., Bowers Portal, Mt. Morris Portal, and Sansone Portal. It also has a rail entry at Maidsville Pit Mouth, where coal is transported out of the mine. Miners may enter or exit the mine at any of the four locations. However, each miner is assigned to a portal where he or she keeps clothing and regularly enters and exits the mine.

2. On May 5, 1995, about 8 a.m., the day shift miners assigned to the Bowers Portal began entering the mine. The first group used the elevator without incident. When the next group was descending, the elevator malfunctioned by speeding up, slowing down, and creating a "falling" or "floating" effect. A miner pushed the emergency button, and the elevator stopped and then returned to the surface.

3. Primo Zini, master mechanic, examined the elevator while officials for Respondent contacted Millar Elevator Company, a service company that has a monthly maintenance agreement with Respondent. Two Millar servicemen arrived at the mine about 9 a.m. and began trouble shooting the elevator. About 35 day shift miners were at the Bowers Portal. Respondent directed them to stand by to await repair of the elevator. Some of the miners may have been given odd jobs to perform while waiting for the repair of the elevator, but all of them remained on duty while waiting.

4. Based on Millar's belief that the problem would be corrected shortly, Respondent decided to have the miners stand by at Bowers Portal, rather than send them to another portal for entry into the mine.

5. Around 10:25 a.m., believing the elevator was repaired, Respondent directed the miners to get back on the elevator. They did so. However, the elevator started down very slowly and then

would stop suddenly and speed up again, creating the same "floating" or "falling" effect that occurred earlier in the morning. A miner pushed the emergency button and the elevator came to a stop and returned to the surface. The miners were very concerned for their personal safety, and complained to the chairman of their safety committee, David Laurie. About 10:30 a.m., Mr. Laurie called Gary Asher, international safety representative for UMWA, and informed him of the problems with the elevator.

6. About 10:40 a.m., Mr. Asher called Raymond Ashe, field supervisor with MSHA, and informed him of the problems with the elevator. Mr. Asher stated that he would be filing a safety complaint, and requested MSHA to issue a § 103(k) order to prevent use of the elevator pending MSHA's investigation. About 10:45 a.m., Mr. Asher called Respondent and issued an oral § 103(k) order preventing anyone from entering the elevator at the Bowers Portal until MSHA conducted an investigation. Between 10:25 and 10:45 a.m., when the § 103(k) order was issued, Respondent and Millar tested the elevator and on one test run brought out miners from the midnight shift who were waiting underground.

7. Before the § 103(k) order was issued, none of the union officials, including the safety committee, and none of the day shift miners had been informed by Respondent that the elevator was being taken out of service. The day shift miners were not informed by Respondent of the status of the elevator until shortly before noon, when Respondent decided to send the day shift miners home. It paid the miners 4 hours reporting pay, pursuant to collective bargaining agreement.

8. Under the collective bargaining agreement, Respondent could send miners home early, but had to pay them a minimum of 4 hours reporting time or pay them for their actual hours on duty if greater than 4 hours.

9. The day shift miners who entered the mine before the elevator's malfunction traveled to their assigned sites underground and worked the entire shift.

10. While the day shift miners at the portal waited for repair of the elevator, Respondent had the option of transporting

them to another portal for travel to their job sites. However, using another portal would have required a significant amount of travel time and coordination of forces. A commercial bus company would be contacted to transport the miners to the other portal. To get the miners back to their underground work sites on the Bowers side of the mine, several track-mounted personnel carriers from the Bowers Portal would be transported underground to the other portal. As a general rule, based on past experience, it would take 2½ hours from the time the decision was made to transport the miners to an alternative portal until they arrived at their work sites underground. Another 2 hours would be required to take them outside and back to their home portal by the end of their shift.

11. MSHA Inspectors Ron Wyatt and Rocky Sperry arrived at the mine around 12:50 p.m. Following their investigation, MSHA issued § 104(a) Citation No. 3317958 charging Respondent with a violation of 30 C.F.R. § 50.10 for failure to immediately report an accident to hoisting equipment. It also issued other citations charging Respondent with violations of several safety standards regarding the condition of the elevator.

#### DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

The UMWA contends that the day shift miners who were sent home at noon on May 5 were idled by the § 103(k) order, which prohibited any personnel to enter the Bowers Portal elevator until MSHA investigated the elevator malfunction.

Respondent contends that its decision to send the miners home at noon was for business reasons and not caused by MSHA's withdrawal order. It contends that around 11:45 a.m. it decided that there would not be enough time to send the miners to another portal or to wait for repair of the elevator, and therefore sent them home by noon. It also contends that it had removed the elevator from service around 10:35 a.m., before MSHA's withdrawal order at 10:45 a.m.

The Commission has held that the application of § 111 should not hinge on "the chance timing of an inspection and the order's issuance rather than on the complainant's actual deprivation of work." Consolidation Coal Co., 11 FMSHRC 1609, 1616 (1989), aff'd sub nom. Local Union 1261 v. FMSHRC, 917 F.2d 42

(D.C. Cir 1990). Nor does it hinge on technical distinctions between performing active work and waiting for a repair of equipment to perform active work. If miners are directed to stand by pending repair of an elevator, they are on duty and "working" within the meaning of § 111.

The controlling issue is whether there is a nexus between the withdrawal order and the miners' deprivation of work and pay. Local 701, District 17 UMWA v. Eastern Associated Coal Co., 3 FMSHRC 1175, 1178 (1981). This requires an examination of the relationship between the withdrawal order issued at 10:45 a.m. and the underlying reasons for the operator's decision to send the miners home at noon.

Respondent had a number of options when the elevator malfunctioned, including: (1) to send the day shift miners home; (2) to transport them to another portal for travel to their underground jobs; and (3) to have them stand by at the Bowers Portal awaiting repair of the elevator.

Respondent chose to keep the miners at the Bowers Portal to await the repair of the elevator. This option ran the risk that MSHA would be called by the union and would issue a withdrawal order. This was a serious risk, because the regulations required Respondent to report any interruption of elevator service that lasted more than 30 minutes, and Respondent had failed to report the elevator malfunction, which exceeded 30 minutes. The union had the right, under § 103(g) of the Act, to report the safety problem to MSHA and to request an immediate investigation and withdrawal order.

MSHA's withdrawal order, issued at 10:45 a.m., excluded all personnel from the elevator, including repair workers, until MSHA investigated the matter. This meant that Respondent no longer had an economically sound option to have the miners perform their assigned underground jobs. Instead, Respondent now had a strong economic incentive to send them home by noon. The reasons for this are plain. First, it would take time for MSHA inspectors to come to the mine and investigate the matter to see whether they would modify the withdrawal order to permit resumption of troubleshooting and repair work on the elevator. If they modified the order, the troubleshooting and repair work would require some indefinite period that could easily go beyond the

day shift on May 5.<sup>1</sup>

Secondly, it was not economically sound to transport the miners to another portal for travel to their underground jobs, because this would require 4½ hours travel time.

The net result was that the withdrawal order, by stopping troubleshooting and repair work on the elevator, had a clear nexus with the reasons for the operator's decision to send the miners home at noon. Accordingly, the miners were "idled" by the withdrawal order within the meaning of § 111 and are entitled to compensation for the remainder of their shift on May 5, 1995.

#### CONCLUSIONS OF LAW

1. The judge has jurisdiction.

2. The day shift miners who were sent home by Respondent on May 5, 1995, were idled by MSHA's withdrawal order within the meaning of § 111 of the Act and are therefore entitled to compensation for the remainder of their shift.

#### ORDER

1. The parties shall confer (by telephone or otherwise) within 15 days of the date of this Decision in an effort to stipulate the names of the idled day shift miners and the amount of compensation due each for the remainder of their shift on May 5, 1995, plus interest accrued since May 5, 1995. The applicable rate of interest may be determined by consulting the rates published by the Executive Secretary of the Commission. Stipulation of compensation and interest will not prejudice the operator's right to seek review of this Decision.

2. If the parties are able to stipulate the amounts of compensation and interest, they shall file their stipulation with the judge within 20 days of the date of this Decision. If they are unable to stipulate, Complainant shall file a proposed Order for Relief within 20 days of this Decision, setting forth the

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<sup>1</sup> In fact, the repair work was not completed until the next day

names of the affected miners and the amount of compensation and interest claimed to be due each miner under this Decision. Respondent shall have 10 days to reply to the proposed order. If issues of fact are raised, a hearing on damages shall be scheduled.

*William Fauver*  
William Fauver  
Administrative Law Judge

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/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
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FALLS CHURCH, VIRGINIA 22041

APR 5 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEVA 93-129  
v. : A.C. No. 46-07751-03542  
: Seminole Mine  
DOSS FORK COAL COMPANY, INC., :  
Respondent :

**DECISION**

Appearances: Pamela Silverman, Esq., Office of the Solicitor,  
U.S. Dept. of Labor, Arlington, Virginia for  
Petitioner;  
David Hardy, Esq., Jackson & Kelly, Charleston,  
West Virginia for Respondent.

Before: Judge Melick

This case is before me upon remand by the Commission,  
18 FMSHRC 122, (February 1996) to determine whether the  
violations charged in Order Nos. 3554292 and 3554293 were the  
result of unwarrantable failure, and whether Order No. 3554294  
should be sustained.

Order No. 3554292

The evidence established that on October 26, 1992, MSHA  
Inspector James Graham, accompanied by MSHA Supervisor Clyde  
Ratcliff, observed that loose coal, mixed with pieces of rock,  
had been pushed into ten crosscuts in the right return air course  
of the Doss Fork Seminole Mine. Inspector Graham issued this  
order alleging a "significant and substantial" violation of 30  
C.F.R. § 75.400.<sup>1</sup> He also charged that the violation was the  
result of Doss Fork's "unwarrantable failure".

In the initial decision it was concluded that the cited  
material constituted a violation but that the Secretary had not  
proven the violation was "significant and substantial".

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<sup>1</sup> 30 C.F.R. § 75.400 provides that "coal dust, including  
float coal dust deposited on rock-dusted surfaces, loose coal,  
and other combustible materials, shall be cleaned up and not be  
permitted to accumulate in active workings, or on electric  
equipment therein."

It was also found that section foreman Carl Dalton entertained a good faith belief that the material was not a violative accumulation. Primarily for this reason the violation was not found to be the result of "unwarrantable failure".

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emory Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "lack of reasonable care." *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-194 (February 1991). The Commission has identified several factors to be considered in analyzing whether a violation resulted from unwarrantable failure. Among these are "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994). The Commission has also noted that in order to serve as a defense to a finding of unwarrantable failure an operator's good faith belief that the cited conditions were not violative must also be reasonable. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1615 (August 1994). The Commission seeks on remand a determination of whether this operator's belief that the cited conditions were not violative were reasonable.

Upon examination of the record I must conclude that the belief of the operator's agent in this regard was not, in fact, reasonable. The violation was extensive in that there were accumulations of up to 26 inches in depth in 10 crosscuts. Section Foreman Dalton also testified that the material was pushed into the crosscuts during the last week of September or the first week of October, thereby acknowledging that the accumulations had existed for at least three weeks. In addition, the record indicates that the operator was on notice that the storing of coal, even when mixed with rock and mud, was violative. Prior to issuance of the subject order, the operator was cited on June 3 and October 21, 1992, for three violations of the same standard. The record also shows that MSHA had warned the operator on October 15 about similar accumulations. Under the circumstances I conclude that it was not reasonable to believe that the cited conditions were not violative. Since the operator has failed to sustain his burden of proving this affirmative defense, I conclude that the violation indeed resulted from "unwarrantable failure" and high negligence.

In light of these findings, the previous determination that the violation was not "significant and substantial" (and accordingly of lessened gravity) and the other criteria under Section 110(i), I find that a civil penalty of \$800 is appropriate.

Order No. 3554293

The record shows that on October 26, 1992, Inspector Graham, accompanied by MSHA Supervisor Ratcliff, issued a Section 104(d)(1) order<sup>2</sup> alleging a "significant and substantial" violation of 30 C.F.R. § 75.202(a).<sup>3</sup> Based on his observation of inadequate roof support in the left return air course of the mine, Inspector Graham charged that the violation was the result of Doss Fork's unwarrantable failure. The violation was found to be significant and substantial.

The Commission has remanded for evaluation of the unwarrantability issue in light of appropriate testimony. In this regard Inspector Graham testified that, during his inspection of the left return air course, several places existed where roof bolts were hanging down and exposing 24 inches between the roof and the plate. Graham also described three particular areas where groups of six, 10, and 12 adjacent defective bolts were observed. Additionally, Graham testified that there were many other damaged bolts throughout the area with cracked and loose rock in the roof with much of the loose roof left hanging. Graham concluded that the condition had existed for at least several weeks because of the state of deterioration. He disputed that the deterioration could have occurred within the five days since the last weekly examination. MSHA Supervisor Ratcliff testified that the conditions he observed were similar to an earthquake, with fallen material in any direction you looked. He observed areas of major roof falls that he believed had existed for weeks because "roof transition that excessive doesn't occur in a matter of days."

On the other hand Section Foreman Webb testified that he made the last weekly examination on October 21, only five days before the conditions were observed and cited by MSHA, and that he did not observe any violative conditions at that time. Based

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<sup>2</sup> Order No. 3554293 stated in part:

The mine roof in the left return air course is not adequately supported at spot locations starting at crosscuts outby survey station number 65 and extended outby this point to within three crosscuts of the surface portal. There were several roof bolts at each location that were damaged to a point they no longer adequately supported the roof.

<sup>3</sup> 30 C.F.R. § 75.202(a) provides:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

on the expert testimony of Graham and Ratcliff and the significant factor that only five days had actually elapsed between the date of the last weekly examination reportedly conducted by Foreman Webb and the date the conditions were discovered by MSHA, it is clear that at least some of the violative conditions must have existed at the time of the previous weekly examination on October 21. In view of the circumstances, it may reasonably be inferred that Webb must have known of these conditions at the time of that weekly examination. With such notice to an agent of the operator, the failure to have corrected those conditions during the interim five days is clearly sufficient to find the high degree of negligence necessary for a finding of "unwarrantable failure." Accordingly, Order No. 3554293 is affirmed with an appropriate civil penalty of \$2,300.

Order No. 3554294

Order No. 3554294 alleged in part as follows:

Adequate weekly examinations for hazardous conditions in the return air courses of this coal mine are not being conducted. There were obvious violations that were observed and there was no report made of these violations in the weekly examination book.

The cited standard, 30 C.F.R. § 75.305 (1991) provided, in part as follows:

Examinations for hazardous conditions . . . shall be made at least once each week . . . . If any hazardous condition is found, such condition shall be reported . . . promptly . . . . A record of these examinations . . . shall be recorded . . . in a book . . . and the record shall be open for inspection . . . .

The underlying basis for this violation was the failure to report in the weekly examination books roof conditions in both the right and left return air courses and loose coal stored in the right return as charged in Order No. 3554291, discussed in the initial decision (16 FMSHRC 797 (April 1994)), and Orders No. 3554292, and No. 3554293, previously discussed in that decision and herein. Inspector Graham reviewed the weekly examination books for the right and left return air courses after he arrived on the surface of the mine on October 26, 1992. Significantly, when Inspector Graham asked Foremen Webb and Dalton, the weekly examiners, why these conditions had not been reported in the weekly examination books, they gave no answer. As discussed in the original decision issued in this case, supplemented by the discussion herein of the violations cited in Orders No. 3554292 and No. 3554293, the operator was clearly in a

position from which it may reasonably have been inferred that he knew of the violative conditions.

The failure to have reported these conditions in the weekly examination books constitutes a violation as charged. The violation was also "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (1984), the Commission explained:

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1473, 1574 (1984); see also *Halfway, Inc.*, 8 FMSHRC 8, 12 (1986) and *Southern Oil Coal Co.*, 13 FMSHRC 912, 916-17 (1991).

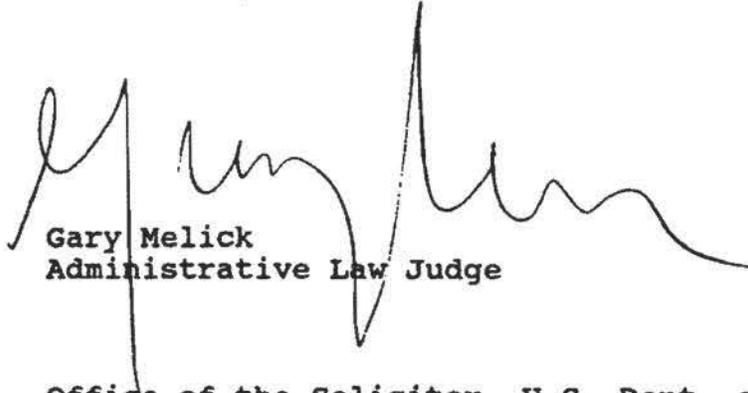
The failure to have reported in the weekly examination books the serious conditions cited in the noted orders clearly constituted a "significant and substantial" and serious violation. Without the warning provided by such reports, unsuspecting persons would likely be placed in hazardous and potentially life-threatening situations -- particularly in regard to the hazardous roof conditions.

The violation was also the result of "unwarrantable failure". The failure to have reported these conditions, and, in particular, the serious roof conditions, in the weekly examination books was clearly inexcusable and the result of an aggravated omission constituting high negligence. Considering

the criteria under Section 110(i) of the Act, a civil penalty for this violation of \$1,000 is appropriate.

**ORDER**

Order Nos. 3554292, 3554293 and 3554294 are affirmed. Doss Fork Coal Company is hereby directed to pay within 30 days of the date of this decision civil penalties of \$800, \$2,300 and \$1,000, respectively, for the violations charged in the above orders.



Gary Melick  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 11 1996

LANCE A. PAUL, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 95-228-DM  
: MSHA Case No. WE MD 95-04  
NEWMONT GOLD COMPANY, :  
Respondent : Gold Quarry  
: Mine ID 26-00500

SUPPLEMENTAL DECISION

Appearances: Lance A. Paul, pro se, Elko, Nevada, for the  
Complainant;  
Charles W. Newcom, Esq., Sherman & Howard L.L.C.,  
Denver, Colorado, for the Respondent.

Before: Judge Feldman

This case was heard on November 28 and 29, 1995, in Elko, Nevada. This matter is before me based upon a discrimination complaint filed on March 1, 1995, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3) by the complainant, Lance A. Paul, against the respondent, Newmont Gold Company (Newmont).

On February 22, 1996, a decision on liability was released wherein it was determined that Newmont's November 10, 1994, discharge of Lance Paul was discriminatorily motivated and in violation of section 105(c) of the Mine Act. 18 FMSHRC 181. Consequently, the parties were ordered to confer for the purpose of stipulating to the appropriate incidental damages and back pay, plus interest, less deductions for unemployment and earnings from other employment. The parties were also ordered to stipulate to economic reinstatement if Newmont declined to reinstate Paul to his former, or an equivalent, position.

The Parties filed a joint Stipulation for Settlement on April 8, 1996. The terms of the settlement are as follows:

1. Newmont Gold Company will pay Lance Paul a total of \$147,253.58 for which Lance Paul waives reinstatement with Newmont Gold Company. This settlement will be paid in two checks. One check will be issued in the amount of \$62,933.30 representing back wages, and one lump sum amount of \$84,320.28 to cover interest, COBRA reimbursement, accounting fees, and payment in lieu of reinstatement and in fulfillment of all obligations. The check representing back wages will be adjusted to account for mandated payroll taxes.
  
2. Newmont Gold Company agrees that it will not appeal the decision of February 22, 1996, of Administrative Law Judge Feldman, if Judge Feldman's final decision and order approves this agreement to settle this matter. Newmont Gold Company agrees that any potential appeal of the civil penalty will be independent of this agreement. Payment will be made immediately upon receiving Judge Feldman's final decision and order.

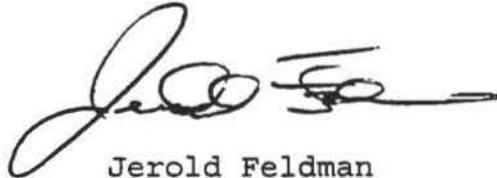
#### ORDER

In view of the parties agreement, the terms of the proposed stipulation establishing a total payment of \$147,253.58 to Lance Paul, representing back pay and economic reinstatement, as the appropriate relief under section 105(c) of the Mine Act **IS APPROVED**. Payment shall be made to Paul within 30 days of the date of this decision. **IT IS ORDERED** that Newmont expunge all disciplinary records related to Paul's November 10, 1994, discharge from Paul's employment file. Consistent with the terms of the parties' stipulation, nothing herein shall prejudice Newmont's right to contest the civil penalty proposed by the Secretary in this matter.<sup>1</sup>

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<sup>1</sup>On March 18, 1996, the Secretary filed a Petition for Assessment of Civil Penalty seeking the imposition of a \$9,000.00 civil penalty as a consequence of Paul's discharge.

Upon timely payment to Paul of the agreed upon relief, and, upon Newmont's excision of all pertinent references to Paul's discharge in his employment records, this matter **IS DISMISSED**. This decision and the February 22, 1996, decision on liability constitute the final disposition in this proceeding.



Jerold Feldman  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 12 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-710-M  
Petitioner : A.C. No. 45-03085-05512  
v. :  
: Wallace Portable Crusher #1  
WALLACE BROTHERS, INC., :  
Respondent :

DECISION ON REMAND

Before: Judge Amchan

Commission Remand

On August 9, 1995, I assessed civil penalties of \$1,300 each for Respondent's failure to timely abate two non-significant and substantial (S&S) violations. One involved the guarding of a self-cleaning tail pulley and the other the guarding of a v-belt drive. I calculated the penalty by multiplying a \$50 penalty for the original citations by the 26 days that Respondent failed to abate within the time specified in the citations. I concluded that this was an appropriate penalty considering the criteria set forth in section 110(i) of the Act, 17 FMSHRC 1380, 1383.

On April 2, 1996, the Commission remanded this case to me with instructions to (re)consider the section 110(i) criteria and make findings of fact with respect to each of them.

Findings of Facts

On May 11, 1994, MSHA representative Rodney Ingram issued two non-S&S citations to Respondent alleging violations of 30 C.F.R. §56.14107(a), which requires the guarding of moving machine parts. Citation No. 4129345 alleged that the standard was violated in that a 5-inch x 8-inch gap existed in the guard of the self-cleaning tail pulley on Respondent's portable crusher (Tr. 15-20). Citation No. 4129346 alleged that the back side of a v-belt drive on the same crusher was unguarded (Tr. 22-28, Exhs. R1-R5).

Ingram asked Respondent's foreman, Dan Fisher, if two days would be sufficient to abate these violations. Fisher indicated that it would be sufficient. The inspector therefore set May 13, 1994, as the date by which abatement or termination of the violations was required (Tr. 20, 28).

On June 8, 1994, Ingram returned to the Respondent's work-site. Four citations issued the month before had not been timely abated. With regard to two citations, Ingram extended the abatement or termination date. For one, an electrical grounding violation, Ingram accepted Respondent's explanation that it had contacted an electrician, but that the electrician had not been able to come out to the crusher (Tr. 37). Ingram also extended the abatement period for a citation issued for a supervisor's lack of first-aid training. He accepted Fisher's representation that he was having trouble scheduling the class (Tr. 42).

Fisher told Inspector Ingram that he forgot about the guarding citations (Tr. 38-40). Ingram issued Respondent two section 104(b) withdrawal orders (Nos. 4129356 and 4129357) for its failure to timely correct these violations. When Ingram returned to the crusher on June 9, these violations were abated (Tr. 43-47). MSHA subsequently proposed a \$1,500 civil penalty for each of the citations/section 104(b) orders<sup>1</sup>.

A civil penalty of \$1,300 is assessed for each  
of the citations/section 104(b) orders

Respondent does not contest that the standards were violated on May 11, 1994, nor that these violations were not corrected. Rather, it contends that the proposed civil penalties are too high, considering the penalty criteria in the Act and MSHA's regulations regarding penalty calculations at 30 C.F.R. Part 100.

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<sup>1</sup>Although the proposed penalty assessment lists only the numbers of the section 104(a) citations, the document and attached narrative clearly indicate that the penalties are for the section 104(b) orders as well. Any confusion in this regard was eliminated by the Secretary's May 5, 1995 prehearing exchange.

Wallace Brothers points to the fact that it purchased the crusher on which the two violations occurred in 1966 (Tr. 84). The crusher had been inspected by MSHA many times prior to May 1994, and none of the inspectors had previously indicated that the inside of the v-belt drive needed to be guarded. Respondent does not know how long the gap in the tail pulley guard existed prior to the citation (Tr. 84-85).

Utilizing MSHA's regulations for proposing civil penalties, Respondent argues that penalties of \$210 and \$159 should be assessed, rather than those proposed by the Secretary. However, in a contested civil penalty assessment case, the Commission is not bound by MSHA's penalty assessment regulations or practices. The Commission assesses penalties de novo by applying the statutory criteria set forth in section 110(i) of the Act to the evidence of record, Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

Moreover, an operator's failure to timely correct a citation warrants a substantially greater penalty than the citation itself. This is reflected in section 110(b) of the Act, which authorizes the Secretary to propose and the Commission to assess a penalty of up to \$5,000 a day for each day during which failure to correct a violation continues<sup>2</sup>.

The daily penalty for failure to abate orders provides a powerful disincentive for ignoring the abatement requirement of a citation or order. An unabated violation constitutes a potential threat to the health and safety of miners, Legislative History of the Mine Safety and Health Act of 1977, at page 618.

It is one thing to overlook an MSHA violation before a citation or order is issued and another to ignore it after a citation has been issued. Given the number of inspectors, the Act relies, to a great extent, on the mine operator to discover and correct safety and health hazards and to timely correct cited violations. Particularly, in instances in which abatement is not required immediately, it is critical that the operator abate

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<sup>2</sup>The maximum daily penalty for a section 104(b) violation was increased from \$1,000 to \$5,000 by Public Law 101-508, Title III, §3102, (November 1990).

within the reasonable time period set forth in the citation. This is so because the inspector is unlikely to be present on the day on which abatement is required.

Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement date, Martinka Coal Co., 15 FMSHRC 2452 (December 1993). In the instant case, Inspector Ingram gave Respondent the benefit of any reasonable doubt by extending the abatement period for two citations. He accepted at face value the excuses of Respondent's foreman. It certainly was reasonable for him not to extend the abatement period for the other two citations for which Respondent had no excuse.

To assess a civil penalty of the magnitude suggested by Respondent is to invite dilatory conduct by some operators in timely abating citations and orders. A daily penalty, on the other hand, serves as a warning that such conduct will not be tolerated either by MSHA or the Commission. I therefore assess a \$1,300 penalty for each of the guarding citations/section 104(b) orders in accordance with the following factual findings regarding the section 110(i) criteria:

Operator's history of previous violations: The record indicates that Respondent had not been cited for any violations within the 24 months prior to the instant citations. It apparently had received MSHA citations prior to this. I conclude that Respondent's prior history provides no reason to assess a penalty either higher or lower than should otherwise be assessed given the other statutory criteria.

The appropriateness of the penalty to the size of the business of the operator charged: Respondent is a small mine operator, which worked slightly more than 10,000 hours in 1993. This factor leads me to assess a smaller penalty than I would if Respondent was a much larger operator.

The Respondent's negligence: Inspector Ingram deemed Respondent to be moderately negligent with regard to the original violations. He concluded that they should have been detected by Respondent during Wallace's daily workplace exam.

I credit the testimony of Respondent's President that his crusher had been inspected prior to June 1994 and that none of the MSHA inspectors who looked at the crusher before Inspector Ingram had suggested the inside of the v-belt had to be guarded (Tr. 84). The self-cleaning tail pulley had been provided with a guard as the result of an inspection several years prior to June 1994 (Tr. 86). Respondent's President did not know how long the gap in the guard cited by inspector Ingram had been present (Tr. 85).

I would characterize Respondent's negligence with regard to the initial citations as low to moderate. Wallace's negligence with regard to the initial citations would warrant a relatively low civil penalty assuming other penalty criteria would not warrant a higher penalty. On the other hand, Respondent's negligence with regard to the failure to abate orders is very high and warrants a much higher penalty than the initial citations.

The demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation.

On May 11, 1994 two citations were issued to Respondent with a termination date of May 13, 1994. When inspector Ingram saw the crusher again on June 8, 1994, these violations had not been corrected.

Foreman Dan Fisher's explanation that he forgot about the violations demonstrates a lack of good faith in attempting to achieve compliance with the Act. Mr. Fisher was a supervisory employee, therefore his acts and omissions are imputable to Respondent for purposes of assessing a civil penalty, Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982).

The manner in which Respondent's lack of good faith in timely abating the original citations should be addressed in assessing penalties is set forth in section 110(b) of the Act. This section provides for a penalty for each day during which a violation continues unabated. Therefore, I multiply the penalty I would have assessed for the original citation by the number of days that Respondent failed to abate.

The effect on the operator's ability to stay in business.

There is no evidence in the record that would indicate that a penalty of \$2,600 for the two failure to abate orders would compromise Respondent's ability to continue in business. Therefore, it is presumed that these penalties would have no such effect, Sellersburg Stone Co., 5 FMSHRC 287 at 294 (March 1993).

The gravity of the violations. Injury from the gap in the guard on the self-cleaning tail pulley was unlikely because miners would rarely be near it (Tr. 15-18). However, injury was possible and could be very serious, possibly resulting in the loss of a limb (Tr. 18, 72, 82).

Similarly, it was possible but unlikely that a miner would be injured due to the lack of guarding of the inside of the v-belt drive (Tr. 22-27, 72, 82). Injuries if they were to occur were likely to be in the nature of broken fingers and cuts (Tr. 24).

The appropriate civil penalty

Based on consideration of the above-mentioned statutory criteria, I find that \$50 is an appropriate penalty for each of the original citations in this case. However, taking into account Respondent's negligence and lack of good faith in rapidly abating these violations, I find that a daily penalty of \$50 is appropriate for each day that they remained unabated after the termination date. Thus, I assess a civil penalty of \$1,300 for each of the section 104(b) orders.

ORDER

Citation No. 4129345 and section 104(b) Order No. 4129356 are affirmed and a \$1,300 civil penalty is assessed.

Citation No. 4129346 and section 104(b) Order No. 4129357 are affirmed and a \$1,300 civil penalty is assessed.

The \$2,600 in assessed civil penalties shall be paid within 30 days of this decision.

  
Arthur J. Amchan  
Administrative Law Judge

Distribution:

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

APR 12 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. WEVA 95-112  
Petitioner : A.C. No. 46-03335-03501 K13  
v. :  
: Wylo Mine  
NELSON BROTHERS INC., :  
Respondent :

## DECISION

Appearances: Tina C. Mullins, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
Petitioner;  
Hilary K. Johnson, Esq., Boucher, Hutton & Kelly,  
Abingdon, Virginia, for Respondent.

Before: Judge Fauver

This is a civil penalty proceeding under § 105(d) of the  
Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801  
et seq.

Two citations were included in the petition. The operator  
has withdrawn its contest of Citation No. 3973749 and has agreed  
to pay the proposed penalty of \$63.00. The case went to hearing  
on Citation No. 3973746. Evidence was also heard as to an  
imminent danger withdrawal order (No. 3973745, dated October 5,  
1994) although there is a dispute whether Respondent waived its  
right to contest the order by failing to file an application for  
review with the Commission within 30 days of its issuance.

Citation No. 3973746 was issued in conjunction with the  
imminent danger order. I find that Respondent's efforts to  
contest the citation in its meetings with MSHA officials was also  
in conjunction with its efforts to contest the order. There  
appears to have been some confusion based on MSHA's statements to  
the operator about the time requirements for contesting the  
citation and order. I conclude that for the purpose of defending

against a petition for civil penalties, the operator should be permitted to contest the imminent danger order in conjunction with its contest of the citation. Accordingly, I conclude that the judge has jurisdiction to decide the merits of both the citation and the order.

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

#### FINDINGS OF FACT

1. Respondent is an independent contractor that supplies blasting agents and technical assistance to mining companies and other businesses. MSHA's records of registered contractors show that Respondent performed contract services at 11 coal mines for 29,132 hours in 1994 and for 10,584 hours from January 1 through August 8, 1995. The 11 coal mines are subject to that Act.

2. Respondent has a number of tractor-trailer tanker trucks that transport emulsion to the mines.

3. On October 5, 1994, MSHA Inspector Douglas M. Smith inspected the Wylo Mine in West Virginia, operated by Arch Minerals Company, which produces coal for sales in or substantially affecting interstate commerce.

4. Inspector Smith observed one of Respondent's tanker trucks unloading emulsion. The driver was standing on top of the emulsion tank without wearing a safety belt and line. There was an anchor line to which a safety belt could be attached. There were no guard rails on top of the tank.

5. The emulsion tank was an oval-shaped cylinder made of aluminum or stainless steel, approximately 9 feet high. On top of the tank were several portholes centered along the length of the tank. Sections of grated metal platform ran between the portholes. The parties are in dispute as to the number of portholes. This issue is addressed in the Discussion, below. I find here that the truck in question had three or five portholes. The grated metal sections were about 28 inches wide.

6. The grated metal sections did not cross over the portholes, but ended at the edge of a rectangular area around each porthole. The oval-shaped tank surface was bare around each porthole within the rectangular area. The rectangular area around each porthole was about 26 inches long. Each hatch lid contained a number of latches and hinges higher than the hatch surface. When the hatch was open, it swung out to rest horizontally. Within each rectangular area, there was sufficient ungrated tank surface for a person to step.

7. As part of his normal duties, the truck driver climbed a ladder on the side of the tank. Once the driver was on the grated surface, he opened one or more portholes to release pressure of the emulsion so that it would discharge through the outlet hose. The driver then climbed down from the tank and waited for the emulsion to pump out. Once all the material that could be pumped out was removed from the tank, the driver again climbed to the top of the tank and opened all portholes to "squeegee" out emulsion that remained on the inner lining of the tank. The rubber squeegee was about one foot wide and attached to a pole about 10 feet long. One driver might perform the squeegee operation or two drivers might perform it. It would take about 10 to 15 minutes for two drivers, twice that for one driver.

8. To move from one porthole to another to open or close portholes or to squeegee through the portholes, the driver would step over portholes a number of times. This required him to either step on the oval-shaped tank surface to step over a porthole or to take a larger step of about two and half feet to clear the rectangular area around the porthole. In either case, the portholes and the latches attached to the hatch lids presented tripping hazards.

9. While squeegeeing, the driver would position himself at different angles to the porthole and might be bending, stooping, squatting or kneeling to reach the material inside.

10. The metal platform sections were grated to provide an anti-skid surface.

## DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

Before discussing the controlling issues, this part will discuss the number of portholes.

The inspector testified that the truck he observed had three portholes. The driver testified that there were five portholes. Other witnesses were similarly in conflict as to the number.

Respondent's Exhibits 1 through 5, which are attached to its Answer and incorporated in the evidentiary record, are photographs of at least two tanker trucks. The Secretary's witnesses indicate that photographs R-4 and R-5 most accurately represent the truck in question, while Respondent's witnesses indicate that the truck is shown in R-1, R-2 and R-3. I do not find it necessary to resolve this conflict. I find, instead, that both trucks represent the kind of configuration of grated walking platforms and portholes that was involved in the imminent danger order and the related citation on October 5, 1994, and that it is not critical to determine whether there were three or five portholes on that date. I find that Respondent operates emulsion tanker trucks that have either three or five portholes on top of the tank. The tank dimensions in the Findings of Fact apply whether a truck has three portholes or five portholes.

Turning now to the key issues, the Secretary charges a violation of 30 C.F.R. § 77.1710(g), which provides in pertinent part:

Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

\* \* \*

(g) Safety belts and lines where there is a danger of falling . . . .

The basic issue is whether the truck driver's activities on top of Respondent's tanker truck presented a "danger of falling" within the meaning of § 77.7710(g).

The phrase "danger of falling" reasonably means a risk of falling from a height sufficient to cause a reasonably serious injury. It does not mean that it is probable that one will fall.

The driver's activities involved a number of risks of falling, including the following:

1. On a windy day, a sudden strong wind could cause the driver to lose his footing and fall from the truck.
2. Ice or snow could cause the driver to slip and fall.
3. When the driver steps over a porthole, he could have a misstep and fall or could trip on the latches or on the edge of the porthole and fall.
4. When maneuvering the 10-foot squeegee pole, the driver could lose his balance and fall.
5. If the driver steps on the oval surface of smooth metal around a porthole he could slip and fall.

Respondent contends that its drivers do not work on tank tops during inclement weather. However, no records or other data were presented to support this position. There are many variations between weather forecasts and actual weather developments during the day as well as sudden changes in the wind. A policy that eliminates safety belts and lines on the basis that weather and wind risks will be accurately predicted and avoided fails to meet the safety protection intended by § 77.1710(g). The controlling question is whether walking, stooping, squatting, standing, squeegeeing, and stepping over tripping hazards on top of a tanker truck involve "dangers of falling" within the meaning of the safety standard. I find that they do.

Respondent also contends that the safety line installed at Wylo Mine presents a greater hazard than the hazard of working without a line. This position is contrary to the evidence. The driver testified that he would prefer to work on top of the tank without a safety belt and line because the hook "catches" at times and might cause him to lose his balance. This may suggest

that Respondent check the sliding mechanism on the safety line, but it does justify the notion that adapting to a safety belt and line is a hazard greater than the hazard of a 9-foot fall from a truck top.

Finally, Respondent contends that its record of having no fall from a tank top in its five years experience is proof that there is no "danger of falling." This position is not persuasive. Falls from trucks do occur and cause death or serious injuries. The fact that Respondent's drivers have been fortunate thus far does not mean that working near the edge of a 9-foot drop from a tank top does not involve a danger of falling.

I find that § 77.1710(g) applies to Respondent's tanker truck and requires that the driver wear a safety belt and line when on top of the tank unless there are guard rails. Respondent was therefore in violation of § 77.1710(g).

The violation was due to moderate negligence. Respondent did not make a reasonable effort to require the driver to wear a safety belt and line at the Wylo Mine.

The § 104(a) citation alleges a "significant and substantial" violation, which the Commission defines as one presenting a "reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." National Gypsum Co., 3 FMSHRC 822, 825(1981); Mathies Coal Company, 6 FMSHRC 1, 3-4 (1984). I find that the facts sustain a finding that working on top of the tanker truck without a safety belt and line or guard rails was reasonably likely to result in serious injury.

I now turn to the imminent danger order. "Imminent danger" is defined by the Act as "the existence of any condition or practice . . . 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).

The inspector observed a driver standing on top of an emulsion tanker truck without guard rails or a safety belt and line, about 9 feet above the ground. The driver indicated that his normal activities involved climbing a ladder on the side of the tank, opening portholes, climbing down and waiting for the

emulsion to drain, climbing up again and squeegeeing the remains through the portholes, closing the portholes and climbing down the ladder.

The Commission has held that an inspector must be given considerable discretion because he or she must act quickly to eliminate conditions that create an imminent danger. Wyoming Fuel Co., 14 FMSHRC 1282, 1291 (1992). The focus on review is whether the inspector made a reasonable investigation of the facts under the circumstances and whether the facts known to him or reasonably available to him support the issuance of an imminent danger order. Id. at 1292. The findings of the inspector should be upheld unless the evidence shows an abuse of discretion. Id.; Old Ben Coal Corp. v. Interior Board of Mine Operations Appeals, 523 F. 2d 25, 31 (7th Cir. 1975).

I find that the facts support the inspector's finding of imminent danger based upon the facts known to him or reasonably available to him. Observing a driver near the edge of a 9-foot drop on top of a tanker truck, without guard rails or a safety belt and line, and determining the miner's activities as found above, the inspector exercised reasonable discretion in issuing an imminent danger order.

#### CIVIL PENALTY

After the citation and order were issued, Respondent promptly complied with the safety standard at the Wylo Mine. However, it made no effort to comply at other coal mines. Its overall approach to the safety standard appears to be that it will not comply with MSHA's interpretation at any other mine unless the mine operator insists that Respondent provide a safety belt and line and require its drivers to use them or unless Respondent is caught by MSHA at another mine.

Considering all of the criteria for civil penalties in § 110(i) of the Act, I find that the penalty of \$147.00 proposed by the Secretary for the violation of § 77.1710(g) is reasonable.

#### CONCLUSION OF LAW

1. The judge has jurisdiction.

2. Respondent's contract work at mines producing coal for sales in or substantially affecting interstate is subject to the requirements of the Act. The Act applies to Respondent's trucks on mine property whether or not the Department of Transportation or any other agency also has jurisdiction over the condition or operation of Respondent's trucks.

ORDER

WHEREFORE IT IS ORDERED that:

1. Order No. 3973745 and Citation Nos. 3973746 and 3973749 are AFFIRMED.

2. Within 30 days from the date of this Decision, Respondent shall pay civil penalties of \$210.00 (\$63.00 of which is the settlement of Citation No. 3973749).

  
William Fauver  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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APR 15 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-248-M
Petitioner	:	A.C. No. 04-05257-05502
	:	
v.	:	
	:	Portable Crusher
DCL CONSTRUCTION, INC.,	:	
Respondent	:	

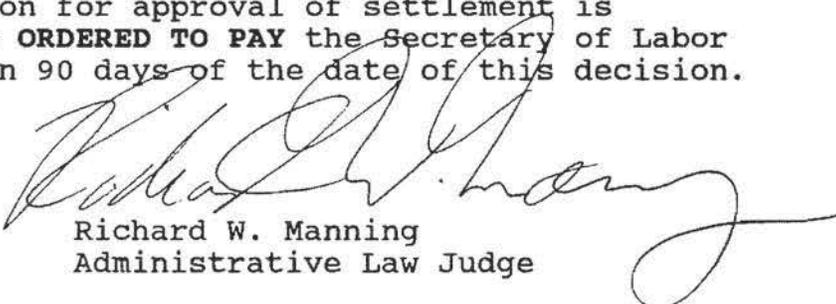
**DECISION APPROVING SETTLEMENT**

**Before: Judge Manning**

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). Petitioner filed a motion to approve settlement and order payment of an amended penalty. A reduction in penalty from \$6,700.00 to \$4,690.00 for one section 104(d)(1) citation and seven section 104(d)(1) orders is proposed. The motion states that the original proposed penalty was specially assessed under 30 C.F.R. § 100.5 and that Respondent has a history of no violations during the previous 24 months.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

Accordingly, the motion for approval of settlement is **GRANTED**, and Respondent is **ORDERED TO PAY** the Secretary of Labor the sum of \$4,690.00 within 90 days of the date of this decision.

  
Richard W. Manning  
Administrative Law Judge

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RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 18 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-126-M
Petitioner	:	A. C. No. 14-00164-05522
v.	:	
	:	Kansas Falls Quarry & Mill
WALKER STONE COMPANY, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-213-M
Petitioner	:	A. C. No. 14-00164-05526 A
v.	:	
	:	Kansas Falls Quarry & Mill
CLIFF MOENNING, Employed by	:	
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

## DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor,  
U. S. Department of Labor, Denver, Colorado,  
for the Secretary;  
Keith R. Henry, Esq., Weary, Davis, Henry,  
Struebing & Troup, Junction City, Kansas, for  
Respondents.

Before: Judge Maurer

## STATEMENT OF THE CASE

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (Secretary) against the Walker Stone Company, Inc., (Walker Stone) and Mr. Cliff Moenning pursuant to section 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that Walker Stone violated the mandatory standard found at 30 C.F.R. § 56.12016 and that

Mr. Moenning, as an agent of the corporate operator, knowingly authorized, ordered or carried out that violation. The Secretary seeks civil penalties of \$1500 against Walker Stone and \$700 from Mr. Moenning.

Pursuant to notice, these cases were heard at Fort Riley, Kansas, on November 8 and 29-30, 1995.<sup>1</sup>

On November 16, 1993, MSHA Inspector Eldon E. Ramage issued section 104(d)(1) Citation No. 4332602 to Walker Stone alleging that:

Three (3) employees were observed performing (sic) repair work on the electrical powered log washer. The electrical power was not deenergized and locked out to prevent an accidental starting of the log washer without (sic) the knowledge of the persons performing (sic) the repairs. One person was working on and in the gear drive system. There was (sic) two employees working on the ground.

The standard cited, 30 C.F.R. § 56.12016, provides:

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

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<sup>1</sup>/ There was also a deposition taken by telephone on December 5, 1995, of Albert Boisclair which the parties have stipulated was for trial purposes, and which has been incorporated into the transcript of this hearing.

### STIPULATIONS

At the commencement of the hearing, the parties proffered a signed set of 17 stipulations, dated November 8, 1995, which I accepted into the record (Tr. 10) as follows:

1. Walker Stone, Inc. is engaged in mining and selling construction aggregates and road building materials.

2. Walker Stone, Inc. is the owner and operator of Kansas Falls Quarry and Mill, MSHA I.D. No. 14-00164.

3. Walker Stone, Inc. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 et seq. ("the Act").

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citation was properly served by a duly authorized representative of the Secretary upon an agent of respondent corporation on the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by respondents and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. The proposed penalties will not affect respondent's ability to continue in business.

8. The operator demonstrated good faith in abating the violations.

9. Walker Stone, Inc. had 54,977 hours of work in 1992.

10. The certified copy of the MSHA Assessed Violations History (dated April 8, 1993) accurately reflects the history of this mine for the two years prior to the date of the citation. Respondents object to the portion of the certified copy of the MSHA Assessed Violations History which depicts a history in excess of the two years prior to the issuance of the citation.

11. The inspection giving rise to the subject proceedings occurred on November 16, 1993, at Walker Stone's Kansas Falls Quarry and Mill.

12. Cliff Moenning is employed by Walker Stone Company, Inc., as the Plant Supervisor and Crusher Foreman.

13. The log washer was not in operation at the time the citation was issued.

14. The log washer was not reassembled until after the citation was issued.

15. At the time the subject citation was issued, the log washer was disassembled as follows: The gear drive shaft had been removed from the gear box; and the log washer V-belts had been removed between the motor and the gear box.

16. The paddles and the drive gear would not turn without the V-belts in place and the motor energized.

17. The V-belts were not reinstalled until after the citation was issued.

#### FINDINGS, CONCLUSIONS, AND DISCUSSION

The so-called log washer is not used to wash logs. Rather, it is an electrically-powered piece of machinery used to clean the rock aggregate. Very basically, aggregate comes in one end and a system of gears and paddles moves it to the other end through a water trough.

For a couple of days prior to the MSHA inspection, the log washer had been down with a broken counter shaft, which is described as a shaft between two gear boxes. To remedy this

situation, Roger Beecham, the maintenance supervisor, testified that 2 days or so before the citation at bar was issued, he deenergized and locked out the circuit breaker for the log washer while he removed the broken shaft. He also removed the V-belts from the motor, thereby mechanically disconnecting the electrical motor from the drive gear. When he departed the job site, he removed his lock from the circuit breaker box because he might need it if he had an electrical problem somewhere else. The broken shaft was then taken to a machine shop for repair. Mr. Beecham, for personal reasons, was not available for work when the shaft was returned and therefore, Mr. Sayers was called at home on the evening of November 15, 1993, by Mr. Moenning and told to replace the shaft and get the log washer reassembled the following day, the date the citation was issued.

Mr. Sayers, a mechanic, assisted by Mr. Frederick, began the job of reassembling the log washer early on the morning of the 16th. They did not lock out the equipment before starting to work on it because they both assumed it was locked out already. It was not, as discovered by the inspector at 9:15 a.m., after they had already been working on it for about an hour. Presumably, if the inspector had not intervened at that time, they would have continued to reassemble the machinery on through to completion, without locking it out.

Walker Stone disputes the violation of the standard on the basis that the log washer was not completely reassembled until after the citation was issued. More particularly, they point out that basically, nothing would move until such time as the V-belts were back in place and the motor energized with the on-off switch. However, because the regulatory scheme employed by MSHA assumes continued normal mining operations, I conclude that their defense more properly goes to the issue of gravity (i.e., "S&S") than to the basic underlying violation of the cited mandatory standard.

The respondents themselves admit that the power source for the log washer was controlled by a circuit breaker and that this circuit breaker was in the "on" position at the time of the subject inspection and citation (Respondent's Proposed Finding of Fact No. 10).

It is also undisputed by all that the log washer was in fact not locked out at the time the inspector cited it, and at least two individuals (Sayers and Frederick) were in fact working on it.

Accordingly, I find that a violation of 30 C.F.R. § 56.12016 occurred as charged. It is simply indisputable that the log washer should have been positively deenergized at the circuit breaker and locked out by Sayers or Frederick before they started working on it, just as Beecham did 2 days earlier when he worked on the machinery. Their failure to do so amounted to a violation of the cited standard.

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

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

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

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

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

Applying the Mathies test, I conclude that there is not a reasonable likelihood that the hazard contributed to by the violation here would have resulted in a serious injury. This is so because as is generally acknowledged, there is no danger if the mechanism cannot move, and in this case the log washer ultimately was controlled by an on-off switch, found in the "off" position, which was located on the second floor of the control house, a mere 30 feet from the log washer and no one was in the control house during the reassembly of the log washer, until the arrival of the inspection party.

Even presuming, as is reasonable to do in this case, that the circuit breaker would not have been turned to the "off" position or locked out at any time during the reassembly process without the inspector's intervention, the fact remains as the respondents' repeatedly emphasized, that neither the paddles nor any of the drive gears could turn until the V-belts had been reinstalled and the off-on switch moved to the "on" position. In point of fact, the V-belts were the very last item replaced on the log washer during reassembly and the off-on switch was never activated and remained in the "off" position until such time as the reassembly was complete and the equipment was ready to be test run.

Accordingly, I find that it has not been established that an injury producing event was reasonably likely to have occurred and therefore, it is concluded that the violation found herein, was not significant and substantial ("S&S").

Inasmuch as Citation No. 4332602 does not recite an "S&S" violation, it must be modified to a citation issued under section 104(a) of the Act.

I also disagree with the negligence factor contained in the citation. The Commission has long held that the conduct of a rank-and-file miner is not imputable to the mine operator in determining negligence for penalty purposes. Southern Ohio Coal Co., 4 FMSHRC 1459, 1464 (August 1982). In this case, the direct negligence contributing to the violation is attributable to Messrs. Sayers and Frederick, particularly Mr. Sayers, who was nominally in charge of the reassembly project. Sayers and Frederick both neglected to check the status of the circuit breaker and lock it out in the "off" position as they acknowledged they were both trained to do. They both testified that they "assumed" someone else had performed that function and they admitted they simply did not check it. It is noteworthy that both are rank-and-file miners, with no management responsibilities.

I attribute "moderate" negligence to the quarry foreman personally and Walker Stone generally for the inattention to detail and lack of supervision over these maintenance personnel that permitted this violation to occur.

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that a civil penalty of \$300 is a reasonable and appropriate civil penalty that will serve to satisfy the public interest in this matter.

## THE SECTION 110(c) CASE

The Commission has defined the term "knowingly" that appears in section 110(c) of the Act<sup>2</sup> in Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd, 689 F.2d 623 (6th Cir. 1982) as follows:

"Knowingly", as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

It is true that Moenning is the quarry foreman and, as such, is an agent of the corporation. It is also true that Moenning did not instruct Sayers to lock out the log washer's circuit breaker after deenergizing the circuit. However, he credibly testified that he assumed Sayers would do so on his own. I find that to be not an unreasonable assumption, even though it turned out to be erroneous in this instance. Nor had Moenning either during his telephone conversation with Sayers the previous evening, or the two or three times that he passed by the vicinity of the log washer that morning, directed Sayers or Frederick to deenergize and lock out the equipment. Neither did he personally ever check that it was deenergized and locked out.

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<sup>2/</sup> Section 110(c) of the Mine Act provides, in pertinent part, that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties. . . ."

Still, Sayers, Frederick, and even Boisclair, who was also generally in the area and was the "operator" of the log washer, had all been trained to deenergize and lock out the equipment prior to working on it. The fact that they did not do it cannot be laid off onto Moenning. Moenning had no actual knowledge that the log washer was not locked out, nor did he have any particular reason to know or even suspect that to be the case. Furthermore, he credibly testified that he had neither approved of, authorized, or directed the failure of Sayers, et al, to comply with the standard. Rather, he testified that there were indeed lock out procedures in effect at the quarry and management, including himself, expected the miners to utilize them.

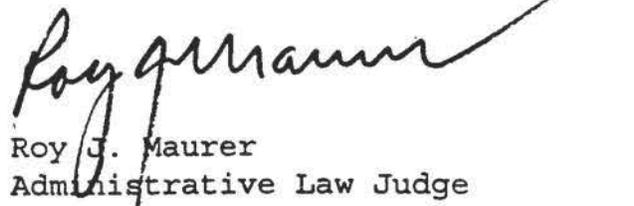
In sum, there is no evidence that Moenning's conduct was reckless, intentional or involved aggravated conduct beyond ordinary negligence. Accordingly, I conclude that Mr. Moenning did not knowingly carry out the violation found herein and is therefore not personally liable pursuant to section 110(c) of the Mine Act.

**ORDER**

1. Citation No. 4332602 **IS MODIFIED** to delete the "S&S" finding and, as modified to a section 104(a) citation, **IS AFFIRMED**.

2. The Walker Stone Company, Inc. **IS ORDERED TO PAY** the Secretary of Labor a civil penalty of \$300 within 30 days of the date of this decision.

3. The civil penalty petition against Clifford Moenning **IS DISMISSED**.

  
Roy J. Maurer  
Administrative Law Judge

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APR 25 1996

THOMAS L. CROWDER, : DISCRIMINATION PROCEEDING  
Complainant :  
 : Docket No. CENT 95-150-DM  
v. :  
 : Annie Creek Mine  
WHARF RESOURCES (USA), INC., :  
Respondent : Mine ID No. 39-01282

ORDER OF DISMISSAL

Before: Judge Cetti

This case is before me on the Complaint of Discrimination against Wharf Resources (USA), Inc. (Wharf) filed by Thomas L. Crowder under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, "Mine Act."

On December 12, 1994, Mr. Crowder filed with MSHA the discrimination complaint against his former employer, Wharf. Mr. Crowder in his complaint filed with MSHA and later with the Commission alleges the following under the heading Summary of Discriminatory Action:

Was removed from a supervisory position after a chemical release from faulty equipment. The equipment was new but improperly fitted to the application and failed to operate as designed.

Many parts of this facility was improperly sized or installed, that resulted in several component needing upgraded to allow the facility to function properly.

The chemical release was due to an effort to install a test gauge on a pump to determine if the pump was in fact working.

This incident happened on 2-3-93

Review of incident and demotion 2-5-93  
(Demotion at same rate)

Demotion effective 2-17-93 (after Thralls  
golf vacation)

Salary cut to demotion level 3-8-93

Salary cut effective date 3-1-93

Demotion position eliminated 4-21-93

Mr. Crowder's discrimination claim was investigated by a special investigator of the Mine Safety and Health Administration (MSHA). Mr. Crowder was advised on February 17, 1995, by James E. Belcher, Chief, Technical Compliance and Investigation Division, that his claim had been thoroughly investigated and after a careful review of the information gathered during the investigation, MSHA determined that the facts disclosed during the investigation did not constitute a violation of § 105(c) of the Mine Act. Chief Belcher's letter concludes with the statement that "discrimination, within the confines of the Act, did not occur."

Thereafter on March 22, 1995, Mr. Crowder, on his own, filed his complaint against Wharf with the Commission pursuant to § 105(c)(3) of the "Mine Act." The complaint filed with the Commission is identical to the above quoted complaint Crowder filed with MSHA.

It is undisputed that Crowder was involved in the supervision and start-up of Wharf's CCIX plant where the incident for which he was demoted occurred.

It is also undisputed and clear from the record that the incident that triggered the adverse action occurred on February 3, 1993. Higher management on review of the incident held supervisor Crowder responsible for the incident. Two days after the February 3, 1993, incident occurred, management demoted Crowder from his supervisory position.

The incident of February 3, 1993, involved the release of a cloud of anhydrous ammonia gas which engulfed another employee. Crowder's complaint states that the chemical release of the cloud of gas resulted from his efforts to install a test gauge on a pump to determine if the pump was working. Complaint states that the review of the incident by higher management unfairly placed the entire responsibility for the incident on him alone and resulted in his demotion on February 5, 1993, at the same rate of pay which was cut to demotion level on March 1, 1993.

Wharf admits that Complainant was demoted from a supervisory position in February 1993, and that Complainant's salary was reduced to the demotion level effective March 1, 1993. Wharf affirms that Complainant's employment with Wharf was terminated effective April 30, 1993, as the result of a reduction in work

force in which 26 positions were eliminated. Wharf specifically denies that Complainant was discriminated against because of any protected safety activity.

The Respondent filed a motion for dismissal on the grounds that (1) Crowder's complaint fails to state a claim upon which relief can be granted under the Mine Act, (2) the inherent and material prejudice resulting from the miner's 20 months delay in the filing of a section 105(c) complaint and the fact that Crowder's filing of the complaint was untimely in that Crowder knew or should have known of his rights under § 105(c) of the Mine Act well within the 60 day period specified in that section of the Mine Act.

It is clear from the face of Crowder's application that it fails to state a claim upon which relief could be granted. Even when viewed in the light most favorable to Crowder, the allegations in the complaint do not come within the perimeters of activities protected by § 105(c) of the Mine Act. It is clear from Crowder's own words that he was removed from his supervisory position as a result of an incident that occurred on February 3, 1993. The incident consisted of a release of a cloud of ammonia gas while he was endeavoring "to install a test gauge on a pump to determine if the pump was in fact working."

While it may have been unfair for higher management to place on Crowder the entire responsibility for this unfortunate incident and to demote him from his management position for this reason, such disciplinary action by management for an incident such as this does not come within the perimeters of activities protected by the Mine Act. In Chacon 3 FMSHRC 2508 at 2510 the Commission stated:

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 ... . We and our judges should not substitute for the operator's business judgment our views of "good" business practice or on whether a particular adverse action was "just" or "wise".

The failure of Crowder's complaint to state a cause of action or claim upon which relief can be granted under the Mine Act requires dismissal of the Complaint. See Commissioner decision Maynard, Joseph v. Standard Sign & Signal Co., 3 FMSHRC 613 (March 1981); 2 MSHC 1186.

In addition, there is merit in Respondent's motion for dismissal on the grounds the complaint was untimely filed. Section 105(c) of the Mine Act, requires that complaints of discrimina-

tion under the Act be filed "within 60 days after such violation occurs" (emphasis added). The legislative history relevant to this provision limiting time for filings states:

While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances.

S. Rep. 95-181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ("Legis. Hist.").

The time limits in section 105(c) are not jurisdictional. See Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986). However, in that same decision, the Commission also stated that "[t]he fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay ... ." In this case we have serious delay. We are dealing with a late filing where the delay in filing is over 10 times longer than the 60 days specified by the Mine Act. As stated by ALJ Maurer in Sinnott, II, 16 FMSHRC 2445, 2447 "At some point there has to be an outer limit, if the 60-day rule contained in the statute has any meaning at all."

I have reviewed the pleadings and the papers filed by Complainant including the deposition of Mr. Crowder taken in this matter. The record does not indicate any justifiable circumstances for this extraordinary delay.

Crowder in his reply to Respondent's reply to Complainant's Response to Order to Complainant to Show Cause states:

I was seeking legal remedies for the actions of Wharf Resources in March of 1993, that was well within the 60 day statutory time period required by the 105c. The attorney I was working with on this matter could not or did not find any laws or regulations on anhydrous ammonia or containment and equipment requirements for the handling and storage of anhydrous ammonia. - - -

My attorney asked if I wanted to proceed with actions over the wage reduction and I said I wanted to pursue the safety aspect and find the laws governing anhydrous ammonia. Again, she was unsuccessful in finding any laws or regulations governing anhydrous ammonia. (Emphasis added).

Charles B. Wilson, Wharf's manager for Employee Relations/Safety and Security, in his affidavit states:

After Mr. Crowder's termination I was contacted by a noted Rapid City attorney that specializes in employment law regarding Mr. Crowder's dismissal. She requested information regarding Mr. Crowder's severance pay. Additionally, Mr. Crowder contacted me requested a copy of Wharf's employee handbook for his attorney to review.

It is also worthy of note that John A. Begeman, now General Manager of Wharf, in his affidavit of February 29, 1996 shows that each of the three individuals responsible for Mr. Crowder's transfer and termination have left the employ of Wharf and are now located outside the subpoena jurisdiction of the Review Commission.

It satisfactorily appears from the record that Crowder knew or should have known of his rights under section 105(c) of the Mine Act and that under the circumstances of this case the filing of the complaint twenty months after the expiration of the statutory 60 day period is indeed untimely.

ORDER

In view of the foregoing, the Complainant's discrimination complaint under the Mine Act is found to have been untimely filed and, furthermore, does not state a cause of action within the purview or perimeters of the activity protected by the Mine Act. The Respondent's motion to dismiss this case is **GRANTED** and the complaint is **DISMISSED**.



August F. Cetti  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

APR 26 1996

CLYDE PERRY, : DISCRIMINATION PROCEEDING  
Complainant :  
v. : Docket No. WEST 96-64-DM  
: MSHA Case No. RM MD 95-18  
: PHELPS DODGE MORENCI, INC., : Morenci Branch Mine  
Respondent : Mine I.D. 02-00024

ORDER DISMISSING COMPLAINT FOR FAILURE TO STATE  
A CLAIM UPON WHICH RELIEF MAY BE GRANTED

Before: Judge Amchan

In September 1995, Complainant, Clyde Perry, filed a complaint with the Mine Safety and Health Administration (MSHA) alleging that he had been discharged by Respondent, Phelps Dodge, on February 3, 1995, in violation of section 105(c) of the Federal Mine Safety and Health Act. Material attached to the complaint indicates that Mr. Perry was fired either for refusing to provide a urine sample for a drug test, or for testing positive.

Complainant Perry apparently injured his right foot at work on February 16, 1993. After a month off work, Mr. Perry claims that Respondent required him to return on light duty.

In October, 1993, Complainant states that he was taken off light duty and required to work as a truck driver. Perry states further that he requested that his foreman give him another assignment because driving a truck caused him to have pain in his right foot, knee and back. Respondent apparently declined to provide Mr. Perry with any other type of work.

On January 28, 1995, Complainant was asked to provide a urine specimen for a drug and alcohol test. Documents provided by Complainant indicate an accident occurred in the vicinity in which he was working that evening, although Mr. Perry was not

involved in the accident. Complainant contends that Respondent's demand for a urine specimen was unfair and contrary to Respondent's policies and normal practices. He was fired either for failing to cooperate with the test or for testing positive.

On November 6, 1995, MSHA informed Complainant that it had determined that his discharge did not violate section 105(c) of the Act. Thereupon, Complainant initiated this action on his own behalf pursuant to section 105(c)(3) of the Act. In February, 1996, Respondent filed an Answer to the Complaint and a Motion for a More Definite Statement.

On February 29, 1996, I issued an Order to Show Cause to Complainant and an Order to Provide a More Definite Statement of his claim for relief. In that order, I expressed my opinion that Mr. Perry's complaint did not appear to allege any activity protected by the Federal Mine Safety and Health Act.

Complainant responded to my Order three weeks later. In response to my direction to specify his protected activities, Mr. Perry replied:

When I was forced to go back to work almost a month I had been off of work, still on crutches and medication. I felt it was unsafe to go back to work with doctors orders, and if I did not go back to work I would be discharged. When I was task training other employees on buses while I was on medication I also complained to the Respondent that it was unsafe. I was also kept in a lower paying job, harassed for being off of work for almost the whole month of May for medical reasons and was told that I was terminated, because I told the Respondent that I was unable to perform my duties as a truck driver I felt it was unsafe because of medication and medical reasons. I explained to Respondent that I could not perform my duties with doctors orders to retrain with different type of work.

Mr Perry stated further that, "[t]he basis for my belief [that he was the victim of retaliation] is I complained about my injury and I could not perform my job. I felt I was unsafe for myself and co-workers to operate heavy equipment under my condition. I gave the Respondent a lost time accident".

Having reviewed Complainant's response to my Show Cause Order I hereby dismiss his complaint alleging that his discharge violated section 105(c) of the Act. Assuming that I were to find all the facts alleged by Mr. Perry to be true, I conclude that they fail to state a claim upon which relief may be granted under the Act.

Section 105(c) (1) of the Federal Mine Safety and Health Act provides that:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any ... miner because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent ... of an alleged danger or safety or health violation ... or because such miner ... has instituted or caused to be instituted any proceeding under or related to this Act ... or because of the exercise by such miner ... of any statutory right afforded by this Act.

The Federal Mine Safety and Health Review Commission has enunciated the general principles for analyzing discrimination cases under the Mine Act in Sec. ex rel. Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981), and Sec. ex rel. Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). In these cases, the Commission held that a complainant establishes a prima facie case of discrimination by showing (1) that he engaged in protected activity and (2) that an adverse action was motivated in part by the protected activity.

The operator may rebut the prima facie case by showing either that no protected activity occurred, or that the adverse action was in no part motivated by the protected activity. If the operator cannot thus rebut the prima facie case, it may still

defend itself by proving that it was motivated in part by the miner's unprotected activities, and that it would have taken the adverse action for the unprotected activities alone.

Complainant herein has not alleged that he engaged in activities protected by the Act. Being injured on the job is not an activity protected by section 105(c). Inability to perform one's tasks, even if due to a work-related injury, is similarly not within the scope of this provision. Refusal to take a drug test or testing positive is not protected activity either -- even if the employer's demand for such a test is unfair, unwarranted and contrary to the employer's normal practice<sup>1</sup>.

Finally, I conclude that it is not a section 105(c) violation to decline to provide alternative employment to a person who alleges that their physical condition poses a threat to their safety and the safety of others. An employee, who in good faith, believes his condition threatens others would cease performing such work activities. Although it may be a violation to retaliate against an employee who in good faith asserts that the continued employment of a co-worker poses a safety hazard, it is not a violation of the Act for an employer to take the position that an employee must either be able to perform his current tasks or seek employment elsewhere.

In short, I dismiss Mr. Perry's complaint because even if he were to establish that he was treated unfairly, or in a discriminatory manner, he would fail to establish a section 105(c) violation. The Act does not prohibit all discriminatory or retaliatory conduct. It prohibits only such conduct taken with regard to activities protected by the Act. Since

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<sup>1</sup>However, a demand for a urine specimen might constitute a section 105(c) violation if it was made in retaliation for other protected activities, such as making legitimate safety complaints, assisting MSHA in conducting an inspection, etc.

Complainant has not alleged any such activities, he has failed to state a claim upon which relief may be granted. His discrimination complaint is therefore **DISMISSED**.

  
Arthur J. Amchan  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 26 1996

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 96-53-D
On Behalf of Frank Scott,	:	MSHA Case No. BARB CD 95-21
Complainant	:	
v.	:	No. 68 Mine
	:	
LEECO, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee, for Complainant; Tony Opegard, Esq., Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, for Complainant; Leona A. Power, Esq., Reese & Lang, P.S.C., London, Kentucky, for Respondent; Marco M. Rajkovich, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for Respondent;

Before: Judge Barbour

This proceeding is brought by the Secretary of Labor on behalf of the complainant, Frank Scott, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(c)(2)). The Secretary alleges that on or about June 12, 1995, Scott was discharged constructively for engaging in a work stoppage that was prompted by unsafe conditions and by unsafe job assignments. The Secretary seeks reinstatement, back pay, benefits, interest and an order directing Leeco, Inc. (Leeco) to cease and desist discriminatory activities toward its employees. In addition, the Secretary seeks an order directing Leeco to expunge all references to the matter from Scott's personnel files.

In addition to the complaint of discrimination, the Secretary filed an application for Scott's temporary reinstatement. Like the complaint, the application was filed pursuant to section 105(c)(2) of the Act. Following a hearing on the merits of the application, I ruled that Scott's complaint of discrimination was not frivolously brought, and I ordered Scott's temporary reinstatement (18 FMSHRC 2167 (December 1995)). (The order was amended subsequently to provided for Scott's economic reinstatement until a decision on the merits of the discrimination complaint was issue (Order Requiring Economic Reinstatement (March 28, 1996).)

Hearings concerning the merits of the discrimination complaint were convened on March 19, 1996, and on April 9, 1996. Shortly after the April hearing started, it was adjourned to permit the parties to engage in settlement negotiations. When the hearing resumed, private counsel for Scott announced that he, counsel for the Secretary, and counsels for Leeco had settled the case. They requested I approve the settlement (Tr. 15-16).

Private counsel for Scott read into the record the terms and conditions of the settlement that applied to Scott and Leeco (Tr. 16-22). I asked all counsels and Scott whether they agreed with the terms and conditions as stated by private counsel. Each responded affirmatively (Tr.24). Counsels also agreed that as applied to Scott and Leeco, the terms of the settlement were confidential (Tr. 23-24).

Further, counsel for the Secretary stated on the record the terms of the settlement that applied to the Secretary and Leeco - - namely, that Leeco agreed to pay a civil penalty of \$8,000 to MSHA for its alleged violation of section 105(c) of the Act (Tr. 22-23).

I advised counsel that I approved the settlement and would confirm that approval in a written decision, once I received the transcript of the hearing (Tr. 24-25). I also agreed with the parties' request that the terms of the settlement regarding Scott and Leeco be confidential and stated that I would seal the record to protect confidentiality (Id.; See Order Imposing Rule of Confidentiality (April 12, 1996)).

ORDER

The terms of the parties' settlement regarding Scott are APPROVED and the parties are ORDERED to comply with the terms under the conditions and within the time frames stated in the settlement. The terms and conditions of the settlement remain CONFIDENTIAL. Counsels and Scott are ORDERED not to discuss the terms and conditions with any persons other than each other. In addition, the record is SEALED, subject to review only by the Commission or another appellate body.

The settlement of the Secretary's complaint against Leeco with respect to its alleged violation of section 105(c) is also APPROVED, and Leeco is ORDERED to pay the sum of \$8,000 to the Secretary within 30 days of the date of this decision.



David F. Barbour  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

**APR 29 1996**

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-381
Petitioner	:	A.C. No. 46-06051-03689
v.	:	
	:	Stockton Mine
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-100
Petitioner	:	A.C. No. 46-06051-03698-A
v.	:	
	:	Stockton Mine
CHARLES PATTERSON, Employed by	:	
Cannelton Industries, Inc.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-101
Peticicner	:	A.C. No. 46-06051-03697-A
v.	:	
	:	Stockton Mine
GEORGE RICHARDSON, Employed by	:	
Cannelton Industries, Inc.,	:	
Respondent	:	

## DECISION

Appearances: Tina C. Mullins, Esq., Office of the Solicitor, Department of Labor, Arlington, Virginia, for Petitioner;  
John T. Bonham, II, Esq., (David J. Hardy, Esq., on brief), Jackson & Kelly, Charleston, West Virginia, for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through his Mine Safety and Health Administration (MSHA), against Cannelton Industries, Inc., Charles Patterson and George Richardson pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege that the company violated section 75.400 of the Secretary's mandatory health and safety standards, 30 C.F.R. § 75.400, and that Messrs. Patterson and Richardson, as agents of the company, knowingly authorized, ordered or carried out the violation. The Secretary seeks penalties of \$3,600.00 against the company and \$2,000.00 each for Patterson and Richardson. For the reasons set forth below, I find that Cannelton violated the regulation, that the agents knowingly authorized the violation and I assess penalties of \$3,600.00 against the company and \$500.00 each against Patterson and Richardson.

A hearing was held on October 11 and 12, 1995, in Charleston, West Virginia. In addition, the parties filed post-hearing briefs in the cases.

### CIRCUMSTANCES OF THE CITATION

On March 7, 1994, Coal Mine Inspector Michael S. Hess was conducting a quarterly inspection of Cannelton Industries Stockton Mine, Portals No. 1 and No. 130. While inspecting the No. 3 conveyor belt, Hess came upon a pile of coal approximately ten feet wide and ten feet long and four feet high in the area of

the V-scrapper.<sup>1</sup> The top of the pile was flat because the belt was in contact with it and leveling it off. The belt roller was also in the coal. Hess described the pile as being black in color, made up of small lumps of loose coal as well as coal dust, and being dry on top. He estimated that it consisted of eight to twelve tons of coal.

As a result of these observations, Hess issued Citation No. 4195028, pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). The citation alleges that the company violated section 75.400 of the Secretary's regulations in that:

Management showed a high degree of negligence by allowing loose dry coal to accumulate under the No. 3 belt conveyor to a point where the loose coal was in contact with the belt. The coal accumulation measured approximately 10 feet in width, 10 feet in length and 4 feet in height. This condition was reported in the pre-shift mine examination report since 2/15/94 on each shift with no corrective action taken. A fire hazard is present with a moving conveyor belt running in loose dry coal.

(Govt. Ex. 1.) A subsequent special investigation resulted in petitions for assessment of penalty being filed against Patterson and Richardson, under section 110(c) of the Act, 30 U.S.C. § 820(c), for having knowingly authorized, ordered or carried out the violation.<sup>2</sup>

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<sup>1</sup> The V-scrapper is a scrapper located on the bottom belt to remove coal or other material from the inside of the belt.

<sup>2</sup> Section 110(c) provides, in pertinent part: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same penalties . . . ."

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 75.400 is taken verbatim from section 304(a) of the Act, 30 U.S.C. § 364(a), and requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein."

It is well settled that section 75.400 "is violated when an accumulation of combustible materials exists.' *Old Ben Coal Co.*, 1 FMSHRC 1954, 1956 (December 1979); see also *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). The Commission has further explained that a prohibited 'accumulation' refers to a mass of combustible materials that could cause or propagate a fire or explosion. *Old Ben*, 2 FMSHRC at 2808." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1229 (June 1994).

In this case, there is no dispute that an accumulation of coal, as described by Inspector Hess, existed in the area of the V-scraper on the No. 3 belt. There is, however, a conflict as to how and when the accumulation occurred and the implications that arise from the answers to those questions. It is the Respondent's position that the accumulation had happened shortly prior to the time the inspector was making his inspection and that, therefore, no violation had taken place. Contrarily, the Secretary argues that the accumulation had grown over a two week period. I conclude that a preponderance of the evidence supports the Secretary's position.

Dwight Sciemaczko and Lee Tucker, both fire bosses, examined the No. 3 belt as part of their duties everyday during the two week period prior to the issuance of the citation. They testified that beginning on February 14 they observed an accumulation of coal under the No. 3 belt V-scraper. They further testified that the accumulation grew in size daily so that several days before March 1 the belt and rollers were rubbing the top of the pile.

Sheldon Craft, a general laborer, examined the No. 3 belt on the evening shift of February 25. He testified that he observed a large accumulation at the V-scraper that was flat on the top and was touching the belt and rollers.

Finally, Sciemaczko accompanied Inspector Hess on the inspection and was with him when Hess discovered the accumulation at the V-scrapper. Sciemaczko testified that the accumulation that Hess observed was the same one that he had watched growing since February 14.

Against this, the company presented the testimony of Respondent George Richardson, day shift foreman, Respondent Charles Patterson, evening shift foreman, and Mickey Elkins, midnight shift foreman. While admitting that at various times between February 14 and March 1 they had observed some accumulations at the V-scrapper, all denied seeing an accumulation growing over a two week period and all denied ever seeing an accumulation touching the belt and rollers during that period.

Elkins testified that he had walked the belt about three and one half hours before the citation was issued and although he observed a fairly large accumulation, it was not the size of the one found by Hess and it was not touching the belt or rollers. The three foremen theorized that the accumulation discovered by Hess was the result of a shuttle car hitting the spill board at the belt feeder which in turn knocked the belt out of alignment and caused most of the coal to fall directly onto the bottom belt where it remained until it was removed by the V-scrapper. They believed that this must have happened a short time before the inspector arrived.

I find that the accumulation developed over a two week period as described by Siemiaczko, Tucker and Craft. There is no evidence that any of them had any reason not to tell the truth. Nor was there any indication at the hearing that they were not credible.

On the other hand, Richardson and Patterson not only have the responsibility for defending the company, but face personal liability as well. Their self-serving statements are not persuasive when compared with the other evidence in the case. Furthermore, there is no evidence to corroborate their speculation.

No one testified that in fact a shuttle car hit the spill board that morning, that the belt was out of alignment, that coal

was observed traveling from the feeder to the V-scrapper on the bottom belt or that the belt was re-aligned after the accumulation was discovered. In addition, Inspector Hess testified that if such an accident had occurred, coal would spill off of the belt between the feeder and the V-scrapper, since the bottom belt is not designed to carry coal. No one testified that such spillage occurred and Hess specifically testified that he did not observe any spillage along the belt. Finally, the insinuation that this was how the accumulation occurred was not made at the time that the citation was issued, when it could have been investigated, but was raised after legal proceedings were started.

Having found that the accumulation occurred over a two week period, I find that it should have been cleaned up long before Inspector Hess arrived at the mine. Since it was not, I conclude that Cannelton violated section 75.400 of the regulations.

#### Significant and Substantial

The Inspector found this violation to be "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 Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf*,

*Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

As is frequently the case, the determination as to whether this violation was S&S revolves around the third *Mathies* criterion, whether there was a reasonable likelihood that the safety hazard caused by the violation would result in an injury. As to the first *Mathies* requirement, I have already found that Cannelton violated a mandatory safety standard. I also find that the second factor, that the violation contributed to a measure of danger to safety, has been met because a fire could result from the friction of the belt and the rollers rubbing in the coal and a fire started elsewhere could be propagated by the accumulation. However, the Respondent argues that the third element was not met because of the short time the accumulation had existed and the fact that most of it was damp making it unlikely that a fire would result.

I find that there was a reasonable likelihood that a fire causing injury would result. I have already rejected the company's assertion that the accumulation had just occurred. I also reject its argument that because the coal was damp it would not be reasonably likely to cause a fire. In the first place, Inspector Hess testified that the coal, at least on top of the pile, was dry to the touch. In the second place, even if the coal was damp beneath the surface, the Commission has consistently recognized that damp coal can dry out and ignite. *Utah Power & Light Co., Mining Division*, 12 FMSHRC 965, 969 (May 1990), *aff'd*, 951 F.2d 292 (10th Cir. 1991); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (August 1985). Cannelton's argument fails to take into consideration the "risks emanating from continued normal mining operations." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1226, 1232 (June 1994).

Having found that there was a reasonable likelihood that a fire resulting in an injury would result, it necessarily follows that there was a reasonable likelihood that an injury resulting from a fire would be reasonably serious in nature, the fourth factor, would also result. Accordingly, I conclude that the violation was "significant and substantial."

## Unwarrantable Failure

The inspector found this violation to be the result of an "unwarrantable failure" on the company's part. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The Commission has held that "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance" are factors to be considered in determining whether an accumulation violation was caused by an unwarrantable failure to comply with the regulation. *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992). Applying these factors to this case, I conclude that the violation was caused by Cannelton's unwarrantable failure to comply with section 75.400.

I have already found that the accumulation grew over a two week period. Siemiaczko first reported that the No. 3 belt scrapper was "dirty" on February 14. (Govt. Ex. 9, p.2.) He testified that "dirty" meant that there was a coal accumulation that needed to be cleaned up. For the next two weeks, until the March 1 violation, every belt examiner indicated in the *Preshift - Onshift and Daily Report* that there was a coal accumulation at the No. 3 belt V-scrapper. Richardson countersigned every one of the reports. Patterson signed nine of them.

In spite of this, neither Richardson nor Patterson made any effort to find out what the problem was or made any specific attempt to have it cleaned up. Incredibly, they testified that they viewed the area from time to time during the period and did not notice anything unusual. Elkins, on the other hand, stated

that at one time he did observe a larger than normal pile, although not as large as described by Siemiaczko, Tucker and Craft, which he unsuccessfully tried to have cleaned up.

I conclude that an accumulation which grew in size for two weeks and which was reported on every preshift for that period, should have put the operator on notice that greater efforts to clean it up were necessary, even if the foremen did not see it. Instead, except for Elkins' abortive attempt, the operator made no effort to abate the condition.

I find that Cannelton's conduct in this case amounted to more than ordinary negligence, that it is best described by the terms "not justifiable," "inexcusable" or "indifferent." *Wyoming Fuel Co.*, 16 FMSHRC at 1627; *Youghioghny*, 9 FMSHRC at 2010. Accordingly, I conclude that the violation occurred as a result of the operator's "unwarrantable failure" to comply with the regulation.

#### **Section 110(c) Violations**

The Secretary has alleged that Richardson and Patterson "knowingly" violated section 75.400 and are personally liable under section 110(c) of the Act.<sup>3</sup> I find that Richardson and Patterson knowingly authorized the violation by not taking steps to have the accumulation cleaned up.

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*,

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<sup>3</sup> See n.2, *supra*, for the relevant provisions of this section.

16 FMSHRC at 1630; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC at 2003-04.

In *Prebhu Deshetty*, 16 FMSHRC 1046 (May 1994), the Commission found a general mine foreman personally liable under section 110(c) for a violation of section 75.400. In doing so, the Commission held that Deshetty had actual knowledge of the accumulation problem because he was familiar with the belt where the accumulations were found, he had reviewed and countersigned the belt examiners report which indicated that the belt was "dirty" or "need[ed] cleaning" for every shift from January 7 to January 15 and he understood that that language meant a violative or hazardous accumulation existed. *Id.* at 1050-51.

The Commission went on to hold that Deshetty had specific knowledge of combustible accumulation problems in the mine, from reviewing previous citations issued to the mine for accumulations and from an MSHA inspector warning him that the mine needed to "take a closer look" at the problem, which should have occasioned a greater awareness of the situation in him. *Id.* at 1051. The Commission stated: "Deshetty was aware of the ongoing spillage problem along the No. 1 beltline that ultimately resulted in the citation, but failed to take measures to remedy the problem. Such inaction by the responsible supervisor, placed on actual notice by MSHA of the problem, constituted a knowing authorization of the violation." *Id.*

In this case, there is no evidence that either Richardson or Patterson had reviewed the violation history of the mine or that they had been specifically put on notice by MSHA that the mine had an accumulation problem. On the other hand, they clearly had actual knowledge of the accumulation problem. The specific location of the accumulation, the V-scraper, was noted as being "dirty" or "needs cleaned" from February 14 to March 1. Both had countersigned the reports containing these entries and both testified that the entries meant that there was an accumulation that required attention. In addition, both testified that they had observed the V-scraper, and while they did not admit to seeing the accumulation described by Sciemiaczko, Turner and Craft, they did admit to seeing some accumulation.

Their testimony implies that the numerous entries in the examiner's book may not have referred to a continuing

accumulation. However, since neither Richardson nor Patterson bothered to check the situation out, and since the evidence amply demonstrates that the accumulation was a continuing one, their "self-induced ignorance" will not absolve them from liability. *Roy Glenn*, 6 FMSHRC 1583, 1587 (July 1984). Nor will their claim that they did not know whether the accumulation described in preshift book was a prohibited one. *Deshetty* at 1051; *Warren Steen Construction, Inc. and Warren Steen*, 14 FMSHRC 1125, 1131 (July 1992).

I conclude that both Richardson and Patterson were aware of the ongoing accumulation problem at the No. 3 belt V-scraper, but failed to take measures to remedy the problem. Such inaction constituted a knowing authorization of the violation. Accordingly, I conclude that they are personally liable under section 110(c) of the Act.

#### CIVIL PENALTY ASSESSMENT

The Secretary has proposed civil penalties of \$3,600.00 for the company and \$2,000.00 each for Richardson and Patterson. However, it is the judge's independent responsibility to determine the appropriate amount of a penalty, in accordance with the six criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC \_\_\_\_ (April 1996).

In connection with the six criteria, I note that the Stockton Mine (Portals #1 and #130) produced 999,068 tons of coal during the year prior to the violation and that Cannelton is a subsidiary of Cyprus Amax Minerals Company which produced 65,385,647 tons of coal, making this a large mine. (Govt. Ex. 6.) The Assessed Violation History Report indicates that the Respondent's history of previous violations is no more than moderate, although for the two years prior to the violation it had 47 violations of section 75.400. (Govt. Ex. 10.) The parties stipulated that payment of the maximum penalty that could be assessed in this case would not affect the company's ability to remain in business and that the violation was abated in a timely and good faith manner.

On the other hand, the gravity of the violation was serious and it involved a high degree of negligence. Taking these six criteria into consideration, I conclude that the penalty proposed by the Secretary is appropriate in this case.

Gravity and negligence are the only elements the penalty criteria that can be applied to the case of an individual. However, I find it incongruous that a company the size of Cannelton should pay a penalty of \$3,600.00, while an employee of the company is assessed a \$2,000.00 penalty. Consequently, I conclude that a \$500.00 should be assessed against both Richardson and Patterson.

#### ORDER

Citation No. 4195028 issued to Cannelton Industries, Inc. and the civil penalty petitions alleging that George Richardson and Charles Patterson knowingly authorized the violation in the citation are **AFFIRMED**. Accordingly, Cannelton Industries, Inc., George Richardson and Charles Patterson are **ORDERED TO PAY** civil penalties of **\$3,600.00**, **\$500.00** and **\$500.00**, respectively, within 30 days of the date of this decision. On receipt of payment, these proceedings are **DISMISSED**.



T. Todd Hodgdon  
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

April 8, 1996

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 95-604-D  
on behalf of LONNIE BOWLING, : MSHA Case No. BARB CD 95-11  
Complainant :  
v. : Darby Fork Mine

MOUNTAIN TOP TRUCKING COMPANY, :  
MAYES TRUCKING COMPANY, INC., :  
ELMO MAYES, WILLIAM DAVID RILEY, :  
AND ANTHONY CURTIS MAYES, :  
Respondents :

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 95-605-D  
on behalf of : MSHA Case No. BARB CD 95-11  
EVERETT DARRELL BALL, :  
Complainant : Darby Fork Mine  
v. :

MOUNTAIN TOP TRUCKING COMPANY, :  
MAYES TRUCKING COMPANY, INC., :  
ELMO MAYES, WILLIAM DAVID RILEY, :  
AND ANTHONY CURTIS MAYES, :  
Respondents :

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE AND SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 95-613-D  
ON BEHALF OF WALTER JACKSON : MSHA Case No. BARB CD 95-13  
Complainant :  
v. : Darby Fork Mine

MOUNTAIN TOP TRUCKING COMPANY, :  
MAYES TRUCKING COMPANY, INC., :  
ELMO MAYES, WILLIAM DAVID RILEY, :  
AND ANTHONY CURTIS MAYES, :  
Respondents :

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE AND SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-615-D
on behalf of DAVID FAGAN,	:	MSHA Case No. BARB CD 95-14
Complainant	:	
v.	:	Darby Fork Mine
	:	
MOUNTAIN TOP TRUCKING COMPANY,	:	
MAYES TRUCKING COMPANY, INC.,	:	
ELMO MAYES, WILLIAM DAVID RILEY,	:	
AND ANTHONY CURTIS MAYES,	:	
Respondents	:	

**ORDER DENYING NOTICE OF APPEARANCE**  
**AND**  
**CERTIFICATION FOR INTERLOCUTORY REVIEW**

These discrimination proceedings have been initiated on the complainants' behalf by the Secretary of Labor pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(c)(2). Donna E. Sonner, Esquire, has appeared on behalf of the Solicitor in the prosecution of the subject complaints.

On December 27, 1995, Tony Opegard, Esquire, of the Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, filed a notice of appearance in these proceedings "as counsel for Lonnie Bowling, Darrell Ball, David Fagan, and Walter Jackson." The notice of appearance did not explain the nature and extent of Mr. Opegard's participation in these matters given Ms. Sonner's appearance in these cases. Consequently, on February 6, 1996, I issued an Order Requesting Clarification of Mr. Opegard's request to appear in these matters.

The February 6, 1996, Order, citing John A. Gilbert v. Sandy Fork Mining Co., Inc., 9 FMSHRC 1327, 1336-39 (August 1987), rev'd on other grounds, John A. Gilbert v. FMSHRC, 866 F.2d 1433 (D.C. Cir. 1989), as well as Commission Rule 40(b), 29 C.F.R. § 2700.40(b), noted that a complaining miner is precluded from filing a private action pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3), if the Secretary initiates an action on behalf of the complaining miner under section 105(c)(2),

30 U.S.C. § 815(c)(2). The February 6, 1996, Order also noted that although a complainant cannot bring an action on his own, Commission Rule 4(a), 29 C.F.R. § 2700.4(b) provides, in pertinent part, that "[i]n a proceeding instituted by the Secretary under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), the complainant on whose behalf the Secretary has filed the complaint is a party and may present additional evidence on his own behalf (emphasis added). "

Consequently, the February 6, 1996, Order requested Mr. Oppedard to explain how his participation in the discovery and trial phases of these proceedings will differ from the full representation associated with prosecuting an individual complaint under section 105(c)(3) of the Act. Mr. Oppedard replied to the February 6, 1996, Order on March 29, 1996. Mr. Oppedard stated that he is private counsel for the affected miners. With regard to the nature and extent of his representational role, Mr. Oppedard stated:

First, it should be noted that the Nashville Solicitor's Office has consistently taken the position (for many years) that it does not represent the affected miners(s) in safety discrimination proceedings. Rather, the Solicitor's Office has long maintained that it represents the Secretary of Labor, although the proceeding before the Review Commission is initiated by the affected miner's filing of a discrimination complaint with MSHA (footnote omitted).

Unless the affected miner has private counsel, technically he is not represented at the hearing on the merits, although evidence adduced at the hearing certainly inures to his benefit. It must be noted, however, that the interests of the affected miner and the Secretary in the prosecution of a safety discrimination proceeding are not always the same. (Emphasis added).

Mr. Oppedard further opined, "[o]f course, both counsel for the Secretary and counsel for the affected miners have the right to ask additional follow-up questions regardless of which attorney starts the examination (footnote omitted)."

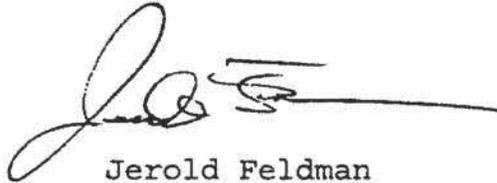
Thus, with the exception of providing assurances that he would not ask duplicative questions, Mr. Opegard seeks to make an unfettered appearance as private counsel in these proceedings. Such an unlimited appearance, totally independent of, and, in addition to, the appearance of the Solicitor, is in apparent contradiction of Commission Rule 4(a) and the Commission's Gilbert decision. In Gilbert, the Commission, in interpreting the statutory provisions of section 105(c) of the Act, held a complainant may file a "private [discrimination] action only after the Secretary informs the complainant of his determination that a violation has not occurred... ." 9 FMSHRC at 1337.

In addition, the responsibility to regulate the hearing is committed to the discretion of the presiding judge under Commission Rule 55(e), 29 C.F.R. § 2700.55(e). Pursuant to Commission Rule 4(a), the complaining miners are parties by virtue of the Secretary's initiation of this 105(c)(2) proceeding. The Secretary and the complainants' interests are the same, i.e., establishing that the complainants engaged in protected activity and that the adverse actions complained of were motivated, at least in part, by that activity. While complainants in an action brought by the Secretary may elect to retain private counsel, the scope of private counsel's participation must be consistent with the Commission's Rules and Congressional intent. See 9 FMSHRC at 1339, n.6.

Allowing both the Secretary's counsel and private counsel the unlimited discretion to examine and cross-examine each witness would violate due process, and permit indirectly, what is prohibited by the Commission's Rules and case precedent. Accordingly, Mr. Opegard's Notice of Appearance to participate without restrictions in these proceedings **IS DENIED**.

Commission Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i), authorizes a judge, on his own motion, to certify for review an interlocutory ruling if his ruling involves a controlling question of law that, in the judge's opinion, will materially advance the final disposition of the proceeding. This interlocutory decision concerns fundamental questions of law concerning the permissibility, nature and extent of private counsel's participation in a 105(c)(2) proceeding that must be resolved before the hearing of these matters, currently scheduled for April 30, 1996, can proceed.

Therefore, pursuant to Commission Rule 76(a)(1)(i), **THE QUESTION HEREBY CERTIFIED** for Commission review is whether private counsel may generally appear on behalf of a complaining miner, without regard to the Solicitor's appearance, in an action initiated by the Secretary under section 105(c)(2) of the Act, and, if not, the restrictions, if any, that should be placed on private counsel in such a discrimination case brought by the Secretary.



Jerold Feldman  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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APR 11 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-170-M
Petitioner	:	A.C. No. 26-00500-05510
v.	:	
	:	Docket No. WEST 95-171-M
NEWMONT GOLD COMPANY,	:	A.C. No. 26-00500-05536
Respondent	:	
	:	Docket No. WEST 95-172-M
	:	A.C. No. 26-00500-05537
	:	
	:	South Area-Gold Quarry
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-520-M
Petitioner	:	A.C. No. 26-00500-05545 A
v.	:	
	:	South Area Gold Quarry
RICHARD GONZALES, Employed by	:	
NEWMONT GOLD COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-521-M
Petitioner	:	A.C. No. 26-00500-05544 A
v.	:	
	:	South Area Gold Quarry
MICHAEL R. SIMMONS, Employed by	:	
NEWMONT GOLD COMPANY,	:	
Respondent	:	

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 95-541-M  
Petitioner : A.C. No. 26-00500-05546 A  
v. :  
: South Area Gold Quarry  
KEITH BROGOITTI, Employed by :  
NEWMONT GOLD COMPANY, :  
Respondent :

PREHEARING RULINGS AND ORDER

Statement of the Proceedings

These cases are scheduled for a consolidated hearing in Elko, Nevada, during the trial term April 23 through April 26, 1996. The hearing notice was issued on January 16, 1996, and the parties were informed of the hearing location by notice issued on April 8, 1996.

On April 4, 1996, attorneys Mark N. Savit, Henry Chajet, and Ruth Ramsey, Patton Boggs, L.L.P., Washington, D.C. (hereinafter Patton Boggs counsel) entered their appearance as counsel for the individual three section 110(c) respondents in Docket Nos. WEST 95-520-M, WEST 95-521-M, and WEST 95-541-M, and as additional counsel in the corporate respondent cases, Docket Nos. WEST 95-170-M, WEST 95-171-M, and WEST 95-172-M. Prior to this time, from April 26, 1995, to the present, all of the respondents have been represented by Attorney Charles Newcom, Sherman and Howard, Denver, Colorado.

On April 5, 1996, I issued an order accepting the appearances of Patton Boggs counsel and denying their request for a continuance of the April 23, 1996 hearing.

On Monday, April 8, 1996, I received a fascimile copy of a Notice of Depositions filed by Patton Boggs counsel advising that during April 9-11, 1996, they would depose ten MSHA employees and officials and various other unnamed MSHA personnel, including all witnesses and experts that petitioner intended to call at the scheduled hearing. The listed individuals were requested to bring certain documents which are broadly itemized in 15 groups listed in the deposition notice.

On Tuesday, April 9, 1996, I received a motion from Patton Boggs counsel to compel the petitioner to produce the previously named MSHA individuals for depositions. Counsel stated that the petitioner's counsel refused to provide the individuals for the noted depositions, and included with the motion is a copy of a letter dated April 8, 1996, from the petitioner's counsel stating as follows:

The Secretary objects to your Notice of Depositions served on April 5, 1996. The Notice is untimely as there are only two weeks remaining before trial and your request to continue the trial has been denied. In addition, even assuming a notice was timely filed, the Secretary would not make available the supervisory personnel which you have identified in that these individuals have no first hand information about the citations and the probative value of such depositions is greatly outweighed by the burden posed to the Government. Accordingly, please be informed that the persons identified in your Notice will not appear on your noticed dates.

The foregoing objections notwithstanding, the Secretary will make Mine Inspector Michael Drussel available for deposition in Elko, Nevada, on April 18, as previously agreed with Charles Newsom, Esq.

Patton Boggs counsel, in their capacity as newly retained counsel for the three individual section 110(c) respondents, initiated a conference call with MSHA counsel DeSmith and me at 1:30 p.m., Tuesday, April 9, 1996. Counsel Newcom was not included as part of the conference, but to avoid any further delay, the conference proceeded, with focus primarily on the section 110(c) cases, and the motion to compel the depositions of MSHA personnel in connection with those cases.

#### Discussion

In the course of the telephone conference, petitioner's counsel DeSmith stated that he and Attorney Newcom have agreed to a deposition schedule and exchange of documents in preparation

for the trial and that Mr. Newcom has been furnished with copies of many MSHA documents and materials, including excised copies of the special section 110(c) investigation and witness statements. Mr. DeSmith vigorously objected to the untimely requests by Patton Boggs counsel to depose additional MSHA personnel, and he believed this to be an unwarranted interference with his trial preparation and the pre-trial arrangements that he and Mr. Newcom had agreed on prior to the entry of appearance by Patton Boggs counsel.

I expressed agreement with the petitioner's objections that the request to compel the depositions in question, two weeks prior to the hearing, was untimely, and I reminded the parties that in accordance with the Commission's procedural rules, any discovery in civil penalty cases must be initiated within 20 days after an answer is filed to the petition for assessment of penalties and it must be completed within 40 days after its initiation. Although the presiding judge has discretion to permit the extension of discovery for "good cause," I find no reasons to do so in these cases. As previously noted in my denial of a continuance of the hearing, the respondents have had more than ample notice and time for trial preparation, and any difficulties that may be experienced by Patton Boggs counsel in this regard is the direct result of the dilatory decision of the three named section 110(c) respondents to retain new counsel two week before the hearing. (I find nothing to suggest that Attorney Newcom was a party to this decision.)

The corporate respondent in Docket No. WEST 95-171-M, and the individual section 110(c) respondents are charged with an alleged violation of mandatory safety standard 30 C.F.R. 56.5002, as stated in section 104(d)(1) "S&S" Citation No. 4139762, issued on May 5, 1994, at 1:00 p.m. The cited condition or practice issued by MSHA Inspector Michael J. Drussel states as follows:

Commonwealth employees were working on the #2 thickner where visible mercury was found on 5/2/95 at 9:00 a.m. These employees were allowed to work until 5/3/94 at 4:00 p.m. when mercury vapor reading showed high levels. No mercury vapor readings were taken before this time. The company had had mercury in this area over the last 4 years.

"This is an unwarrantable failure."

The citation was terminated one hour after it was issued, and within the time fixed by the inspector for abatement. The abatement action taken by the respondent states that "mercury vapor reading (sic) are being taken and logged."

Petitioner's counsel has agreed that Inspector Drussel will be made available for deposition at the time and place agreed upon with Attorney Newcom. I assume that Patton Boggs counsel will avail themselves of this opportunity to participate.

The individual respondents' assertion that the depositions of MSHA personnel are the only method by which they can defend themselves against the charges are not well taken. The respondents have been aware of the alleged violation for which they are charged since August 11, 1995, when MSHA's proposed civil penalties were served, and again on August 23 and September 8, 1995, when they filed their notices of contest. I simply cannot believe that Mr. Newcom, the respondents' counsel of record, has not prepared the individual respondents for the scheduled hearing of April 23, 1996. The respondents will have a full opportunity to present evidence on their behalf, to cross-examine all of the petitioner's witnesses, and to examine all of the documentary exhibits offered by the petitioner.

In the individual section 110(c) cases, the petitioner has the burden of proving the violation by a preponderance of the credible and relevant evidence. The petitioner must prove that the respondents were acting as "agents" of the corporate respondent at the time of the alleged violation and that they "knowingly" authorized, ordered, or carried out the alleged violation.

The cited section 56.5002 regulation states that, "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." The citation alleged that visible mercury was found at 9:00 a.m., on May 2, 1994, that employees were allowed to work until 4:00 p.m. the next day, May 3, 1994, when mercury vapor readings showed high levels, and that no vapor readings were taken before this time. The citation further states that mercury had been present in the cited area over the last four years.

Based on my reading of the cited standard and the narrative description of the cited condition, it would appear to me that the individual respondents are charged with "knowingly" failing to take mercury vapor surveys prior to May 3, 1994, when high levels were recorded, and possibly before May 2, 1994, when visible mercury was found. Given the regulatory language requiring surveys "as frequently as necessary to determine the adequacy of control measures," it would appear to me that the pivotal issue is whether or not any surveys were made prior to May 2 or 3, 1994, and, if so, whether one may reasonably conclude that they were made as frequently as necessary given the prevailing conditions and circumstances at the time of the alleged violation. I fail to comprehend how this scenario is so unique and so difficult in terms of trial preparation requiring the depositions of any and all MSHA personnel having the remotest connection with the facts and circumstances surrounding the issuance of the contested citation.

Counsel for the individual 110(c) respondents assert that all of the MSHA personnel noticed for deposition, including supervisory personnel, have first-hand information relating to the citation. Counsel has listed and identified these individuals as follows:

1. Cathy Matchett and David J. Brabank, the special investigators assigned to the cases.
2. Paul A. Belanger, "a party to correspondence generated in connection with" the citation.
3. Fred M. Hanson, the individual who "approved the accident investigation report."
4. Gary Frey, an individual who "participated in the accident investigation."
5. Robert Morley, an individual who "served as acting supervisor during the period of time of these matters.
6. Margie Zelasak, MSHA's expert witness.

7. Garry J. Day, the individual "who recommended a special investigation into these matters."

An individual listed as Jaime Alvarez is not further identified. Counsel also requested to depose "any other MSHA inspectors, special investigators, managers in the field, sub-district or district offices, or other MSHA personnel with any knowledge of the citation in issue," including all witnesses, including experts," who the petitioner intends to call at the hearing.

In the course of the aforementioned telephone conference, I informed Patton Boggs counsel Henry Chajet that I would deny his request to depose Messrs. Belanger, Hansen, Frey, Day, and Morley, because I am not convinced that they have any direct material or relevant personal knowledge or information concerning the merits of the cited conditions which led to the issuance of the alleged violation or to the citation that was issued by Inspector Drussel. In any event, if the petitioner calls any of these individuals to testify at the hearing, Mr. Chajet will have an opportunity to cross-examine them.

Counsel Chajet maintained that he should at least have an opportunity to take the depositions of MSHA special investigators Cathy Matchett and David J. Brabank and MSHA's expert witness Margie Zelasak. I expressed my view that special investigators conduct an investigation after a violation notice has been issued and that they have no first-hand knowledge about the conditions that may have prevailed when the citation was issued. They routinely, and after the fact, interview individuals who may have information concerning the cited conditions, take unsworn hearsay statements, note their own general opinions, and then package all of this information and label it "Special Investigation Report." Unless the individuals interviewed are called to testify at the hearing, subject to cross-examination, with an opportunity for the presiding judge to evaluate their credibility, the report, in and of itself, is of little or no probative evidentiary value.

In view of the untimely request to take depositions, and accepting the petitioner's objection that the special investigators have no first-hand knowledge about the citation, I agree that the probative value of such depositions is greatly outweighed by the unwarranted disruption that would result so

close to the convening of the hearing. In this regard, I am not unmindful of the rights of the individual respondents in these cases. However, they have been represented by competent counsel during the inception of these cases, and they are entitled to a speedy trial. The "eleventh hour" appearance of new counsel should not contribute to any further delays.

#### ORDER

In view of the foregoing, and on the facts of the case, I cannot conclude that the respondents will be prejudiced if they are not permitted to depose the special investigators in advance of the hearing. Under the circumstances, Patton Boggs counsel's request to formally depose the special investigators **IS DENIED**. However, in the interest of justice, if the petitioner chooses to call these individuals to testify at the hearing, Patton Boggs counsel will have an opportunity to interview them before they are called, subject to further rulings of the presiding judge. In this regard, I expect the parties to work together so as to preclude any protracted hearing delays.

In addition, if he has not already done so, and if he intends to call them, petitioner's counsel shall also provide to Mr. Chajet copies of any statements made by witnesses who were interviewed by the special investigators. Petitioner's counsel shall also provide Mr. Chajet with a copy of the special investigation report, subject to any privileged or confidential objectional deletions. All of this information is to be furnished in advance of the commencement of the hearing on April 23, 1996.

With regard to MSHA expert witness Margie Zelasak, petitioner's counsel confirmed that he intends to call her in connection with the "significant and substantial (S&S)" finding made by the inspector, and to support an argument that employee exposure to high mercury vapors support an "S&S" finding. I informed the parties of the possibility of stipulating to this, and in any event, limiting any "expert" opinion to this "S&S" issue.

In view of the untimely request to depose Ms. Zelasak, Mr. Chajet's request to formally depose her **IS DENIED**. However, if she is called to testify, Mr. Chajet will have an opportunity

to interview her in advance of her testimony, subject to the presiding judge's rulings. Further, petitioner's counsel shall provide Mr. Chajet with a summary of Ms. Zelasak's expected testimony, including information (or a stipulation) concerning her expertise, and copies of any documentary materials that may be offered into evidence.

The request by Mr. Chajet to depose Messrs. Belanger, Hansen, Frey, Day, Alvarez and Morley IS DENIED.

  
George A. Koutras  
Administrative Law Judge

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April 12, 1996

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. Kent 96-53-D  
On Behalf of Frank Scott, : MSHA Case No. BARB CD 95-21  
Complainant :  
v. : No. 68 Mine  
: :  
LEECO, INCORPORATED, :  
Respondent :

ORDER IMPOSING RULE OF CONFIDENTIALITY

On April 9, 1996, and subsequent to the commencement of a hearing on the merits of this discrimination proceeding, the parties agreed to settle the matter. The terms and conditions of the settlement were placed on the record. Counsels orally affirmed their agreement to the terms and conditions, as did Frank Scott, the person upon whose behalf the complaint was brought. I orally approved the settlement and upon receipt of the transcript I will affirm that approval in a written decision. The parties requested that the terms of the settlement with respect to Scott be sealed. I agreed and stated that I would include that condition in the written decision. The terms and conditions of the settlement will be subject to review only by the Commission or another appellate body.

The parties are advise that until a written decision is issued, the terms and conditions of the settlement are to remain CONFIDENTIAL. Counsel are ORDERED not to discuss the terms and conditions with any persons other than counsels of record and Scott. Further, when copies of the transcript are received, counsels are ORDERED not to give copies of the transcript to any persons, excepting each other or Scott, or to otherwise divulge the contents of the transcript as it relates to the terms and conditions of the settlement.

  
David F. Barbour  
Administrative Law Judge

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