APRIL 1997

COMMISSION DECISIONS AND ORDERS

04-04-97	Daanen and Janssen, Inc.	LAKE 95-180-RM	Pg. 665
04-07-97	M & Y Services, Inc.	PENN 97-93	Pg. 670
04-09-97	Broken Hill Mining Company	KENT 94-1208	Pg. 673
04-17-97	Dean Heyward Addison	SE 97-101-M	Pg. 681
04-21-97	Jim Walter Resources, Inc.	SE 94-448	Pg. 685
04-30-97	Harold Moody employed by Grand River Quarry, Inc.	CENT 95-214-M	Pg. 688
04-30-97	Sec. Labor on behalf of James Hyles et al. v. All American Asphalt	WEST 93-336-DM	Pg. 696

ADMINISTRATIVE LAW JUDGE DECISIONS

04-07-97	Basin Resources, Inc.	WEST 95-104	Pg. 699
04-07-97	Basin Resources, Inc.	WEST 95-494	Pg. 711
04-08-97	Walker Stone Company, Inc.	CENT 94-97-M	Pg. 741
04-08-97	James Fork Mining Company	CENT 97-16	Pg. 746
04-10-97	Broken Hill Mining Company	KENT 94-1199	Pg. 751
04-11-97	East Coast Limestone, Inc.	SE 96-352-M	Pg. 761
04-16-97	Marvin E. Carmichael v. Jim Walter Resources, Inc.	SE 93-39-D	Pg. 770
04-18-97	Enlow Fork Mining Company	PENN 94-259	Pg. 775
04-21-97	Sec. Labor on behalf of Andy Howard, Jr. v. Bruce Young & Yogo, Inc.	KENT 96-96-D	Pg. 781
04-23-97	Unique Electric	WEST 95-333-M	Pg. 783
04-24-97	Sec. Labor on behalf of Dewey Runyon v. Consol of Kentucky, et al.	KENT 96-387-D	Pg. 794
04-24-97	Apex Minerals, Inc.	KENT 96-143-R	Pg. 796
04-25-97	Midwest Materials Company	LAKE 94-126-M	Pg. 805

ADMINISTRATIVE LAW JUDGE ORDERS

04-09-97	Texas Gravel Incorporated	CENT 97-54-M	Pg. 807
04-21-97	Rohlin Construction Company	CENT 97-19-M	Pg. 809
04-22-97	Ohio Valley Transloading Company	LAKE 96-158-R	Pg. 813
04-29-97	Consolidation Coal Company	WEVA 97-84-R	Pg. 816

APRIL 1997

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

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

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

Secretary of Labor, MSHA v. Capitol Cement Corporation, Docket No. WEVA 95-194-M, etc. (Judge Melick, March 7, 1997)

Secretary of Labor, MSHA v. Bob Bak Construction Company, Docket No. CENT 96-10-M, etc. (Judge Fauver, March 18, 1997).

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

Lendon Shepherd v. Consol of Kentucky, Inc., Docket No. KENT 97-51-D. (Judge Melick, February 21, 1997).

Secretary of Labor, MSHA v. Eastern Ridge Lime, L.P., Docket No. VA 96-21-M. (Judge Weisberger, February 24, 1997).

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. LAKE 95-180-RM, etc.
DAANEN AND JANSSEN, INC.	:	

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

ORDER

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). The Commission previously granted the petition for discretionary review filed by Daanen and Janssen, Inc. ("D&J") challenging the conclusion of a Commission Administrative Law Judge that D&J violated 30 C.F.R. § 56.9101 for failure to maintain control of a front-end loader, and 30 C.F.R. § 56.14101(a)(3) for failure to maintain the loader's braking system in functional condition. 18 FMSHRC 1796, 1804-15 (October 1996) (ALJ). The citations were issued following investigation of an accident in which a miner died when his loader fell off a 40-foot-high embankment.

On January 30, 1997, counsel for the Secretary of Labor filed a motion for an extension of time, from January 30, 1997 to February 13, 1997, to file the Secretary's brief. S. Ext. Mot. at 1. She explained that the extension was necessary due to a heavy workload. *Id.* Counsel stated she had "contacted the counsel for Daanen and Janssen to apprise him of the situation and he does not object to the granting of this extension." *Id.* On January 31, 1997, the Commission granted the motion.

On February 3, 1997, counsel for D&J filed an opposition to the motion alleging that the motion had been untimely filed, the Secretary had not shown good cause for the extension, and

---

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

counsel for the Secretary had misrepresented that the motion was unopposed. D&J Opp. to Mot. for Ext. at 1-2. Counsel stated that, while the Secretary's counsel had left a message at his office that she would be seeking a 2-week extension of time to file her response brief, she had never inquired whether he objected to the motion. *Id.* at 1. He asserted that he has never spoken with the Secretary's counsel and that he did not inform her that he had no objection. *Id.* On February 5, 1997, the Commission ordered the Secretary to reply to the allegation of misrepresentation, restating that the response brief was due to be filed by February 13, 1997. Unpublished Order at 2 (February 5, 1997).

On February 6, 1997, the Secretary's counsel filed her response to the allegation of misrepresentation. Counsel explained that, prior to filing the motion for an extension of time, she had telephoned counsel for D&J and asked the office secretary if she could speak with the attorneys of record in this case. S. Resp. at 1. Counsel stated that the office secretary informed her that both attorneys were not available. *Id.* Counsel then told the office secretary that she was requesting a 2-week extension that day and that "apprising opposing counsel of what our intentions are . . . is done as a courtesy and is standard practice." *Id.* at 2. Counsel asserted that the office secretary told her that "she foresaw no problem from either attorney regarding the extension of time." *Id.* Counsel requested that the office secretary inform the attorneys of her telephone call. *Id.* Counsel asserted that the office secretary assured her that "this was not going to be a problem, and promised that if either attorney had a problem with [the] request for an extension of time, someone representing that office would call [her] before the end of that business day." *Id.* Counsel stated that, since no one called her, she represented in the motion that opposing counsel did not object to the granting of the extension. *Id.* Counsel stated that, had she received any indication that opposing counsel would object to the motion, she would not have made this representation. *Id.* Therefore, counsel asserted that the allegation of misrepresentation is unfounded. *Id.*

On February 11, 1997, counsel for D&J filed a reply in which it moved to strike the Secretary's response brief. Counsel asserts that, had the Secretary's counsel attempted to reach him again, he would have agreed to the extension. Mot. to Strike at 1. He requests that the Commission strike the Secretary's response brief because the Secretary's counsel "called at the last minute" to announce that she would be seeking a 2-week extension, never inquired whether he objected to the request nor consulted with either attorney of record regarding any such objection, explicitly told the office secretary that no return telephone call was necessary, and subsequently represented that she had consulted with opposing counsel and that he had no objection to the motion for extension. *Id.* at 2.

Attached to the motion to strike is the sworn affidavit of the office secretary. She states that the Secretary's counsel did not ask "if our firm's client would object" to the motion for extension. Aff. at 1. Rather, according to the office secretary, the Secretary's counsel said she would be filing the motion for extension because her office had gotten backed up due to a death in someone's family. *Id.* She states that the Secretary's counsel said the telephone call was a "courtesy call," that she was leaving the office in 45 minutes, and that it was not necessary to call

her back. *Id.* She denies telling the Secretary's counsel that she foresaw no problem from either attorney of record regarding the extension, and assuring her that the extension was not going to be a problem. *Id.* She further denies promising the Secretary's counsel that someone would call her before the end of that business day if either attorney had a problem with the request for extension. *Id.* She asserts that she is in no position to make such assurances and that she does not have authority on behalf of the firm's clients to respond to requests for extensions. *Id.* at 2. She further states that at no time did the Secretary's counsel request that she or the attorneys call her back regarding any objection the client might have to the motion for extension. *Id.*

On February 13, 1997, the Secretary's counsel filed an opposition to the motion to strike. Counsel states that her recollection of the events is as set forth in her reply to the allegation of misrepresentation and not as stated in the motion to strike and accompanying affidavit. S. Opp'n to Mot. to Strike at 1. Counsel requests that the Commission deny the motion to strike because mere differing recollections of events does not warrant the imposition of "the extraordinary sanction of striking the Secretary's brief in a case which involves the interpretation of an important safety standard and the death of a miner." *Id.* at 1-2. On the same date, the Secretary's counsel filed the response brief.

On March 7, 1997, counsel for D&J filed a reply to the Secretary's opposition to the motion to strike. Counsel argues that it remains uncontroverted that the Secretary's counsel represented that she had consulted with opposing counsel who had no objection to the motion for extension. D&J Reply at 1-2. Counsel argues that, by her own admission, the Secretary's counsel did not consult with anyone representing D&J and that she was not told that D&J had no objection to the motion for extension. *Id.* at 2. He argues that the representation by the Secretary's counsel is simply untrue. *Id.* On the same date, counsel filed D&J's reply brief.

The motion to strike is based on D&J's allegation that the Secretary's counsel misrepresented its contact with D&J's counsel in the motion for extension of time. The Commission is authorized to impose a sanction for misrepresentation under its inherent powers.[2] The imposition of such a sanction is committed to the Commission's sound discretion. *See Chambers*, 501 U.S. at 55 (citations omitted).

It is undisputed that the Secretary's counsel initiated a telephone call to opposing counsel, left a message informing him of the motion for extension, but never communicated directly with him. In light of this, counsel for the Secretary's statement that she had "contacted" opposing counsel and that he did not object to the motion is, at best, inaccurate.

---

[2] Inherent powers are "'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)).

We agree with the Secretary that striking the Secretary's response brief would be inappropriate. However the conduct of the Secretary's counsel is characterized, striking the response brief would punish the Secretary of Labor for his counsel's conduct. As the Secretary points out, the Commission needs to hear from the Secretary on the merits on an important question of regulatory interpretation involving the death of a miner. S. Opp'n to Mot. to Strike at 1-2. Moreover, we conclude that D&J has not suffered prejudice as a result of the Secretary's counsel's representation because counsel for D&J admitted that, had she spoken with him, he would have agreed to the extension. D&J Mot. to Strike at 1. Therefore, whatever was said by the parties to the conversation, we conclude that the requested sanction would be inappropriate. Accordingly, we deny the motion to strike the Secretary's response brief.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution

Eric E. Hobbs, Esq.
John H. Kalter, Esq.
Michael, Best & Friedrich
100 East Wisconsin Ave., Suite 3300
Milwaukee, WI 53202

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 97-93
	:	A.C. No. 36-08569-03502
M & Y SERVICES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 27, 1997, the Commission received from M & Y Services, Inc. ("M&Y") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by M&Y.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

M&Y asserts that it did not timely submit its request for a hearing ("Green Card") to the Department of Labor 's Mine Safety and Health Administration ("MSHA") because, despite its

---

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

repeated efforts to contact MSHA to obtain information about the procedures for requesting a hearing concerning a proposed penalty assessment, it was unable to obtain assistance until the deadline for submission of its Green Card was about to expire. M&Y asserts that when it finally made contact with a MSHA representative, on January 4, 1997, it was advised to send in its appeal, even though it was late, and that "there was a possibility that [MSHA] would accept it because of the holidays, vacation time and [the] continued effort to appeal these citations through the hearing process." It is not clear from M&Y's request if and when M&Y returned its Green Card to MSHA. M&Y requests the Commission to reopen this matter.

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

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

On the basis of the present record, we are unable to evaluate the merits of M&Y's position.[2] In the interest of justice, we remand the matter for assignment to a judge to determine whether M&Y has met the criteria for relief under Rule 60(b). If the judge determines that such

---

[2] In view of the fact that the Secretary does not oppose M&Y's motion to reopen this matter for a hearing on the merits, Commissioner Marks concludes that the motion should be granted.

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

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution

Dale L. Malinzak, President
M & Y Services, Inc.
P.O. Box 9
Uniontown, PA 15401

W. Christian Schumann, Esq.
Douglas N. White, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 9, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No . KENT 94-1208
BROKEN HILL MINING COMPANY	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether Administrative Law Judge T. Todd Hodgdon properly applied the penalty assessment criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), in assessing a civil penalty of $1,000 against Broken Hill Mining Company ("Broken Hill") for a violation of 30 C.F.R. § 75.1702.[2] 17 FMSHRC 338, 345 (March 1995) (ALJ). The Commission granted Broken Hill's petition for discretionary review challenging the judge's penalty assessment. For the reasons that follow, we affirm.

---

[1] Commissioner Verheggen 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, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

[2] Section 75.1702, which contains language identical to that of section 317(c) of the Mine Act, 30 U.S.C. § 877(c), provides:

> No person shall smoke, carry smoking materials, matches or lighters underground . . . . The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches or lighters.

I.

Factual and Procedural Background

On May 19, 1994, inspectors Buster Stewart, Gary Gibson and Jimmy Brown, from the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a spot inspection for smoking materials at Broken Hill Mine No. 1 in Pike County, Kentucky. 17 FMSHRC at 339; Pet. Ex. 10 at 3. After searching all miners in the underground working area of the mine for smoking materials, the inspectors directed those miners who had lunch buckets to retrieve them. 17 FMSHRC at 339. Inspector Stewart accompanied miner Donald Kidd to the scoop he operated to retrieve Kidd's lunch bucket. *Id.* When Kidd opened his lunch bucket in the presence of Stewart and Gibson, they found various items including a cigarette lighter. *Id.*

As a result, MSHA issued a citation to Broken Hill pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), for an alleged violation of section 75.1702. *Id.*; Pet. Ex. 1. This citation, as amended, alleged that Broken Hill's search program was inadequate because Kidd was allowed to carry a cigarette lighter underground. 17 FMSHRC at 339-40. MSHA proposed a penalty of $2,500 for this alleged violation. *Id.* at 339. MSHA also issued a citation to Kidd pursuant to section 110(g) of the Mine Act, 30 U.S.C. § 820(g),[3] alleging a violation of the smoking prohibition contained in section 317(c) of the Act. *Id.*; Pet. Ex. 7. Broken Hill and Kidd both challenged the proposed penalty assessments.

Following an evidentiary hearing, the judge concluded that Kidd did not willfully violate section 317(c) of the Mine Act. 17 FMSHRC at 340, 343. Accordingly, he vacated the citation and dismissed the civil penalty petition as to Kidd. *Id.* at 343.[4] The judge further concluded that

---

[3] Section 110(g) provides:

> Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

[4] While the issue of an appropriate sanction for a miner who violates section 317(c) of the Mine Act (as defined in section 75.1702) is not before the Commission in this case, Commissioner Riley wishes to comment on the judge's finding that because the miner's conduct in bringing smoking materials into this mine was not willful, as required by section 110(g), that conduct, although possibly reckless, did not separately violate the Mine Act. He observes that under the strict liability framework of the Mine Act, even though a miner may subject his coworkers to unnecessary risk, the operator alone is obliged to pay for his employee's irresponsible mistake. Commissioner Riley urges the Secretary to seek amendment to section

Broken Hill had committed a significant and substantial ("S&S") violation of section 75.1702. *Id.* at 343-44. The judge also concluded that this violation was not the result of high negligence or unwarrantable failure on the part of Broken Hill, and therefore affirmed the citation as modified to a violation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), rather than under section 104(d)(1). *Id.* at 344-45.

Applying the penalty assessment criteria set forth in section 110(i) of the Mine Act, the judge found that Broken Hill has a lower than average history of prior violations, with no evidence of previous smoking violations; that the No. 1 mine is a small mine and that Broken Hill is a small operator; and that Broken Hill demonstrated good faith in abating the violation. *Id.* at 345. The judge expressly found that "Broken Hill made no claim at the hearing that the penalty proposed by the Secretary was inappropriate to its size or that the penalty would adversely affect its ability to remain in business." *Id.* The judge also noted that while he had reduced the level of negligence, he still considered the violation to be a serious one. *Id.* Based upon these factors, the judge determined that a penalty of $1,000 was appropriate, rather than the $2,500 penalty proposed by the Secretary of Labor. *Id.*

The Commission granted Broken Hill's petition for discretionary review, which challenged the judge's assessment of a $1,000 civil penalty for the section 75.1702 violation.

II.

Disposition

Broken Hill argues that the penalty of $1,000 assessed by the judge is excessive and based upon an erroneous application of the statutory penalty criteria. B.H. Br. at 1-3. In particular, Broken Hill disputes the judge's finding that it made no claim at the hearing that the proposed penalty was inappropriate to its size or would adversely affect its ability to remain in business. *Id.* at 2-3. Broken Hill contends that it referred to its financial difficulties, and the adverse impact that the proposed penalty would have on its ability to remain in business, in both its answer to the proposed penalty assessment and its pre-hearing report. *Id.* at 2-3. Broken Hill also contends that Hobart Anderson, its president and chief executive officer, was denied an opportunity to testify at the hearing about the company's financial condition and the adverse impact of the proposed penalty as a result of an objection raised by counsel for the Secretary to Anderson's testimony. *Id.* at 3. In addition, Broken Hill argues that the $1,000 penalty assessed by the judge is inconsistent with his findings that the violation was not willful or the result of high negligence. *Id.* at 2. Based upon the foregoing factors, Broken Hill asserts that a penalty of

---

110(g) so as to apply the same strict liability standard to miners who needlessly expose their coworkers to danger from prohibited smoking materials. In Commissioner Riley's view, the extreme danger posed by such conduct is illustrated by the South Mountain explosion, where three of nine miners, in a badly operated mine, were found to be in possession of smoking materials underground, with fatal consequences to eight of them.

$100 would be equitable. *Id.* at 3.[5]

The Secretary contends that the judge's penalty assessment reflects proper consideration and application of the statutory penalty criteria. S. Br. at 4-5. The Secretary argues that the judge properly found that Broken Hill failed to establish that the proposed civil penalty would affect its ability to continue in business because it failed to make any claim or introduce any evidence at the hearing regarding the adverse impact of the proposed penalty. *Id.* at 6-8. The Secretary contends that Broken Hill's reliance upon certain assertions made in its pre-hearing filings is misplaced, because those filings do not constitute the type of "specific evidence" that the Commission has required as proof of the adverse impact of a penalty on an operator's ability to remain in business. *Id.* at 6-7. The Secretary also disputes Broken Hill's assertion that it was precluded from offering Anderson's testimony concerning its financial condition, asserting that counsel only objected to his participation as both legal representative for his company and as a witness at the hearing, and that Broken Hill could have introduced relevant evidence on this issue through the testimony of other witnesses and the production of company documents. *Id.* at 7-8.

The Mine Act requires that, in all contested penalty cases, the Commission make an independent penalty determination and assessment based solely on the statutory criteria of section 110(i) of the Act.[6] *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). We have 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. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Sellersburg*, 5 FMSHRC at 294 (citation omitted). In reviewing a judge's penalty assessment, we must determine whether the penalty is supported by substantial evidence.[7] While "a judge's assessment of a penalty is an

---

[5] In its brief, Broken Hill also attempts to challenge the judge's determination that the section 75.1702 violation was S&S. *Id.* at 1-2. In response, the Secretary argues that we are prohibited from considering Broken Hill's S&S claim by section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), because that issue was not raised in its petition for discretionary review. S. Br. at 5-6 n.3.

[6] Section 110(i) sets forth six criteria to be considered by the Commission in the assessment of penalties under the Act:

> 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 the violation.

[7] 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.

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). The judge must make findings of fact on the criteria that "not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93.

We conclude that the judge's penalty assessment is supported by substantial evidence. The judge considered, and made express findings concerning, each of the six statutory penalty criteria. Based upon this analysis, he assessed a penalty of $1,000 against Broken Hill for the section 75.1702 violation, rather than the $2,500 penalty proposed by the Secretary. In our view, the judge's penalty assessment was based upon a proper analysis of the statutory criteria and the circumstances surrounding the violation.

We reject Broken Hill's challenge to the judge's finding that it made no claim at the hearing that the Secretary's proposed penalty was inappropriate to its size or would adversely affect its ability to remain in business. As the judge found, Broken Hill failed to adduce any evidence at the hearing concerning its financial condition or the impact that the proposed penalty would have on its economic viability. While Broken Hill did raise general claims in its prehearing filings concerning the adverse impact of the proposed penalty and its inability to pay,[8] the judge properly concluded that it did not carry its burden with respect to these claims because it failed to introduce any financial information or other specific evidence to support or substantiate them. This finding is consistent with Commission precedent. We have previously held that "[i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse [e]ffect would occur." *Sellersburg*, 5 FMSHRC at 294 (citing *Buffalo Mining Co.*, 2 IBMA 226, 247-48 (September 1973)); *accord Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). *See also Steele Branch Mining*, 18 FMSHRC 6, 15 (January 1996). In *Steele Branch Mining*, we rejected

---

§ 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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

[8] Broken Hill's answer to the penalty petition, dated September 30, 1994, asserted as an affirmative defense that the company was "having severe financial difficulties and any fines or penalties would affect its ability to stay in business." B.H. Answer at 2. In a pre-hearing report dated December 1, 1994, Broken Hill asserted that "the penalty in question is too excessive and unreasonable[,]" and reserved argument on "the excessive amount of assessment." B.H. Pre-Hearing Report at 2.

an operator's unsupported assertion that it should be relieved of its civil penalty liability because it was no longer in business where it "provided neither the judge nor the Commission with any evidence on this claim." *Id.* In *Spurlock*, we rejected the reliance of two operators on evidence far more specific than that presented by Broken Hill — including tax returns, financial statements and balance sheets — as insufficient to establish that proposed penalties would affect their ability to remain in business. 16 FMSHRC at 700.

Nor do we find merit to Broken Hill's assertion that it was deprived of the opportunity to present evidence on its financial position and the adverse impact of the proposed penalty because of an objection raised by the Secretary's counsel to Anderson testifying at the hearing. The record indicates that this objection was based on the alleged conflict that would result if Anderson, who served as Broken Hill's legal representative at the hearing, was also permitted to testify as a witness on its behalf. Tr. 11. The judge never ruled on this objection, however, and it appears that Broken Hill elected voluntarily not to call Anderson as a witness. In any event, Broken Hill could have introduced evidence concerning its financial condition through other witnesses, such as its consultant Charlie Lavender, who was called to testify by the company. *See* Tr. 206. In addition, Broken Hill could have adduced documents and records relevant to its financial condition at the hearing, but failed to do so. Broken Hill thus cannot fairly ascribe its failure to introduce evidence at the hearing on the issue of the financial impact of the proposed penalty to the objection to Anderson's testimony asserted by counsel for the Secretary.

Contrary to Broken Hill's assertion, the record also reflects that the judge did expressly consider his reduction in the level of negligence assigned to this violation, from high to moderate, in lowering the amount of the civil penalty assessment. 17 FMSHRC at 345.

Based on the foregoing, we believe that the assessment of a $1,000 penalty against Broken Hill was within the judge's considerable discretion, based upon proper consideration of the statutory criteria, and is supported by substantial evidence. Accordingly, we affirm the judge's penalty assessment.[9]

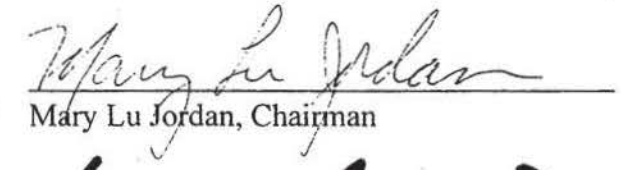
---

[9] We agree with the Secretary that the issue of whether the judge erred in finding this violation of section 75.1702 to be S&S is not properly before us, because it was not raised in Broken Hill's petition for discretionary review. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f). *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (August 1994), *aff'd mem.*, 81 F.3d 173 (10th Cir. 1996); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91 & n.6 (D.C. Cir. 1983).

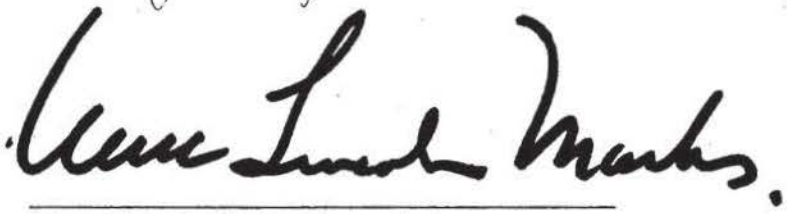
III.

Conclusion

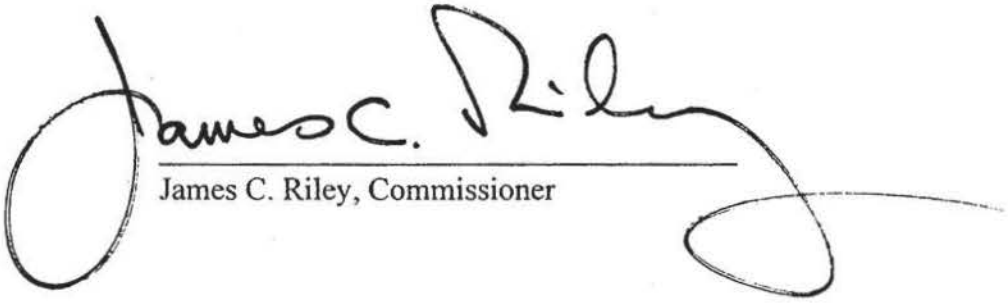
For the foregoing reasons, we affirm the judge's penalty assessment.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner

Distribution

Hobart W. Anderson
Broken Hill Mining Company, Inc.
P.O. Box 356
Sidney, KY 41564

Cheryl Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 17, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 97-101-M A.C. No. 09-01057-05513A
DEAN HEYWARD ADDISON	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 3, 1997, the Commission received from Dean Heyward Addison ("Addison") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Addison.

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Addison asserts that he did not timely submit his request for a hearing ("Green Card") to the Department of Labor 's Mine Safety and Health Administration ("MSHA") because he was

---

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

not totally familiar with the procedures for requesting a hearing concerning the proposed individual penalty assessment and understood, based on a conference call conducted with an administrative law judge and the Secretary's counsel, that the hearing on this assessment would be automatically combined with the hearing on a separate assessment issued to D & H Quarry, Inc., Addison's employer. Addison apparently submitted his untimely request for a hearing on the individual assessment only after learning that this understanding was not correct. Addison requests the Commission to reopen this matter.

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

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

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

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

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution

Dean H. Addison
1405 Rousey Road
Elberton, GA 30635

C. Bryan Don, Chief
Civil Penalty Compliance Office
Office of Assessments, MSHA
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, VA 22203-1984

Karen E. Mock, Esq.
Office of the Solicitor
U.S. Department of Labor
100 Alabama Street, S.W.
Room 7T10
Atlanta, GA 30303

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety and Health Review Commission
1730 K Street, N.W.
Washington, D.C. 20006

sgf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 21, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. SE 94-448 SE 94-586-R
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). Following an evidentiary hearing, Administrative Law Judge David Barbour upheld order of withdrawal No. 3184217 issued to Jim Walter Resources, Inc. ("JWR") under section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2), by the Department of Labor's Mine Safety and Health Administration for JWR's violation of 30 C.F.R. § 72.630(a) at its No. 4 Mine in Birmingham, Alabama. 17 FMSHRC 1423, 1424-27 (August 1995) (ALJ). The judge concluded that JWR violated the standard, that the violation was not significant and substantial, and that the violation resulted from JWR's unwarrantable failure. *Id.* at 1443, 1448, 1450. The Commission thereafter denied JWR's petition for discretionary review and motion for reconsideration. 17 FMSHRC 1682 (October 1995).

Subsequently, JWR filed a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit. On January 17, 1997, the court issued its decision affirming in part and reversing in part the decision of the Commission. *Jim Walter Resources, Inc. v. Secretary of Labor*, 103 F.3d 1020, 1027 (D.C. Cir. 1997). The court affirmed the judge's determination that JWR violated section 72.630(a), but reversed his conclusion that the violation resulted from JWR's unwarrantable failure and remanded the case to the Commission for further action consistent with the court's opinion. *Id.* On March 28, 1997, the court issued its mandate.

Pursuant to the court's order, we delete the unwarrantable failure designation and convert the section 104(d)(2) order to a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a).

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

David M. Smith, Esq.
Warren B. Lightfoot, Esq.
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203

R. Stanley Morrow, Esq.
Jim Walter Resources, Inc.
P.O. Box 133
Brookwood, AL 35444

Colleen A. Geraghty, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 95-214-M
HAROLD MOODY, employed by GRAND RIVER QUARRY, INC.	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is whether substantial evidence supports former Commission Administrative Law Judge Arthur Amchan's determination that the Secretary of Labor did not satisfy his burden of establishing that Harold Moody was individually liable under section 110(c) of the Mine Act,[1] 30 U.S.C. § 820(c), for Grand River

---

[1] Section 110(c) provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this [Act] or any order incorporated in a final decision issued under this [Act], except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

Quarry, Inc.'s violation of 30 C.F.R. § 56.9300(b).[2] 18 FMSHRC 67 (January 1996) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging this determination. For the reasons that follow, we reverse and remand for assessment of a civil penalty.

I.

Factual and Procedural Background

Grand River Quarry, Inc. ("Grand River"), a corporation, owns the Gallatin Quarry in Davies County, Missouri. 18 FMSHRC at 68; Tr. 18. Grand River normally used a truck to transport finished product from its plant to a stockpile. 18 FMSHRC at 68; Tr. 33, 38. For about a year prior to the issuance of the citation, however, the truck broke down once or twice a month; on those occasions, Grand River used a Caterpillar 631 scraper that had been modified for use as a haul truck. 18 FMSHRC at 68; Tr. 109-10. The front tires of the 631 are 84 inches high. 18 FMSHRC at 68. Travel from the plant to the stockpile was on an elevated roadway that is approximately 150 feet long at a 35% downgrade. *Id.*; Tr. 30; Gov't Ex. C.[3]

On the morning of July 21, 1994, the truck carrying finished product to the stockpile broke down and Grand River substituted the 631 to perform this work on the elevated roadway. 18 FMSHRC at 68. Later that day, MSHA Inspector Michael Marler, who was in the midst of a multi-day inspection of the Gallatin Quarry, was informed that the 631 had gone off the elevated roadway and fallen into a drainage ditch. *Id.*; Tr. 27. Marler measured the berm at the point where the 631 left the roadway and found that it was only 24 inches high. 18 FMSHRC at 68; Tr. 31. Based on the height of the wheels on the 631 and the requirement of section 56.3900(b) that the berm be at least mid-axle height of the largest self-propelled mobile equipment usually using the roadway, Marler determined that the berm should have been at least 42 inches tall. Tr. 31-32. Accordingly, he issued Citation No. 4322450 to Grand River, alleging a significant and substantial and unwarrantable violation of section 56.3900(b). 18 FMSHRC at 68-69; Tr. 26-27; Gov't Ex. A.

---

[2] Section 56.9300 states in pertinent part:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.
>
> (b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

[3] The 631 was normally used to transport shot rock to a crusher from the blasting area by way of a different roadway than the one at issue here. 18 FMSHRC at 68.

Following issuance of the citation, MSHA Special Investigator Dale St. Laurent conducted a special investigation of the accident involving the 631. 18 FMSHRC at 69. As part of his special investigation, St. Laurent interviewed Robert Flint, the foreman in charge of the daily operations at the quarry, and Harold Moody, the general manager of Grand River. Tr. 66. In his capacity as general manager, Moody had overall responsibility for the Gallatin Quarry. Tr. 19, 73-75. Moody was at the Gallatin Quarry on a daily basis for periods of between one and four hours, gave directions to Flint concerning the work to be performed, and called to check up on things. Tr. 71-72, 73-75, 97.

At the hearing, Flint testified that the berms were kept low because the landowner wanted to keep free of debris a ditch that runs along the side of the roadway and drains 800-900 acres of land upstream from the quarry. Tr. 103-04. Flint also testified that the berms had been higher before issuance of the citation, but had been reduced in height by "hard rain" and "floods." 18 FMSHRC at 70; Tr. 104. During the special investigation, Flint told St. Laurent that the berm had been as high as 2½ feet (30 inches). Tr. 68-69. According to St. Laurent's uncontradicted testimony, Flint stated during the investigation that the berm had been partially removed while the operator was working on the road, and that it had not been replaced because the operator planned to reroute the road and work on the ditch. Tr. 67. Flint agreed that the berm as of the date of July 21 was insufficient to restrain the 631. Tr. 104-05.

The loader operator, Mr. Miller, confirmed to St. Laurent that the berm had previously been higher but had not been maintained or replaced. Tr. 71, 76. The driver of the 631, Lynn Dunnington, told St. Laurent that during his 4 or 5 months at the quarry the berm had never been "of any size." Tr. 76.

According to St. Laurent's testimony, Moody told him during the special investigation that the berm had previously been 3 feet (36 inches) high, but spring rains had washed down the berm and it was an oversight, due to complacency, that the operator failed to return the berm to its full height. Tr. 73.[4] St. Laurent also testified that Moody stated he traveled the elevated roadway almost every day he came to the mine. Tr. 74-75.

Evidence of previous history of violations introduced at the trial shows that MSHA cited Grand River for violating section 56.9300(a) on October 6, 1992, and that a citation was issued for no berms on a different elevated roadway on July 19, 1994, two days before the instant citation was issued. Gov't Exs. F, G; Tr. 47-48.

The judge concluded that Flint knowingly violated section 56.9300(b) and assessed a civil penalty of $300. 18 FMSHRC at 71-72. However, he determined that the Secretary had not

---

[4] St. Laurent also testified that Moody admitted he was aware that the 631 had gone through the same area of the berm on an earlier occasion. Tr. 73. At the hearing, however, Moody denied knowledge of this earlier incident. Tr. 96-97. The judge made no finding on this point.

established that Moody knew or should have known that a violative condition existed on July 21, 1994. *Id.* at 70. He found that Moody had no reason to know that the 631 would be driven on the elevated roadway at times when the berm was less than 42 inches high. *Id.* Finding that "Moody was not on-site on July 21," the judge held that "the evidence does not establish that Moody knew, or had reason to know, that [the 631] would be used on July 21." *Id.* Although he concluded that Moody "had reason to know that the 631 would be used on [the elevated] roadway periodically," the judge found that the Secretary failed to prove that Moody knew the height of the berm on July 21, and opined that "on July 19 the road was not used due to bad weather, and it is quite possible that the berm was substantially smaller on July 21 than it had been the last time Moody had observed it." *Id.* (citing Tr. 52).

II.

Disposition

The Secretary argues that nothing in the record supports the judge's finding that Moody was not present at the quarry on July 21. S. Br. at 6-7.[5] In the alternative, the Secretary contends that in light of Moody's overall responsibility for the quarry, his daily visits and his direction of work activities, Moody's presence was not required on July 21 in order to establish that he knew or should have known of the violative condition of the berm. *Id.* at 7-8. The Secretary points out that Moody "knew" that the 631 was regularly substituted for the truck to haul finished product on the elevated roadway. *Id.* at 8-9. The Secretary asserts that Moody's admission during the special investigation that the berm was not kept high due to oversight and complacency establishes his knowledge of the violative condition. *Id.* at 9. The Secretary further argues that, because Moody traveled the roadway almost every day, he had reason to know that the berm was inadequate. *Id.* at 10. The Secretary asserts that Moody was in a position to protect employee safety and health and, because he failed to take action to place the berm at its proper height, was liable under section 110(c). *Id.* at 10-11.[6]

Section 110(c) of the Mine Act subjects to liability individual corporate agents who "knowingly authorize[], order[], or carr[y] out" a violation of a mandatory health or safety standard. The Commission has held that actual knowledge is not required to establish liability under section 110(c); rather, it is sufficient if the Secretary shows that the individual knows or has "reason to know" of the violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). In *Kenny Richardson*, the Commission held that an individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to

---

[5] Pursuant to Commission Procedural Rule 75(a)(1), 29 C.F.R. § 2700.75(a)(1), the Secretary designated his petition for discretionary review as his brief.

[6] Moody appeared pro se before the judge and did not file a brief on appeal.

act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition . . . ." 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

We note at the outset that there is no dispute that Moody, as Grand River's general manager, is an agent of the corporate operator within the meaning of section 110(c). Further, we read the judge's decision as finding an underlying violation of section 59.6300(b), and we affirm that finding as supported by substantial evidence.[7] Section 59.6300(b) requires berms to be "at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." The record establishes that the berms were never as high as 42 inches, the mid-axle height of the 631. Grand River's regular use of the 631 as the backup to the haul truck for a year prior to the accident brings that vehicle within the scope of section 56.9300(b) as a vehicle which "usually travels the roadway."

However, substantial evidence fails to support the judge's determination that Moody did not have *reason to know* of the violative condition. The judge concluded that Moody had reason to know that the 631 would be used on the roadway. Based on that finding, and in view of the unchallenged testimony that Moody visited the quarry and traveled the elevated roadway daily, we think that the record establishes only one conclusion: that Moody had reason to know the berm was inadequate. Contrary to the judge's statement that "there is no basis on which I could conclude that [Moody] knew [the 631] would be used at times when the berm was not mid-axle height," as noted above, there is no record evidence that the berm was ever higher than 30 to 36 inches. Thus, Moody had reason to know that it was well below the 42 inches necessary to reach mid-axle position on the 631,[8] and the record evidence does not permit any conclusion other than that Moody had reason to know that the berm would be inadequate whenever the 631 was driven on the elevated roadway. Under this set of facts, Moody's knowledge of the precise height of the berm on July 21 is not dispositive of his liability under section 110(c). *See Prabhu Deshetty*, 16 FMSHRC 1046, 1051 (May 1994) (finding 110(c) liability as to employee who

---

[7] 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).

[8] The judge did not base his decision on a conclusion that Moody did not know or have reason to know of the height of the wheels on the 631.

"was aware of ongoing spillage problem . . . that ultimately resulted in the citation, but [who] failed to take measures to remedy the problem").[9]

In sum, substantial evidence establishes that Moody was in a position to protect employee safety but failed to act. Whether the condition of the berms resulted from a deliberate decision to keep the berms low, as Flint testified, or from oversight and complacency, as Moody told Special Investigator St. Laurent, Moody's failure to direct that the berm be built up, in spite of his hands-on control of quarry operations and his reason to know of the inadequacy of the berm, is aggravated conduct constituting more than ordinary negligence and subjects him to liability under section 110(c). Because the judge's conclusion to the contrary is not supported by substantial evidence, we reverse that determination and remand to the Chief Administrative Law Judge for reassignment[10] and assessment of a civil penalty.[11]

---

[9] The Secretary is also correct that Moody's presence at the mine on July 21 is not a precondition for finding him liable under section 110(c). *See Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992). Accordingly, we need not reach the question whether substantial evidence supports the judge's finding that Moody was not present at the quarry on July 21.

[10] Judge Amchan has transferred to another agency.

[11] Given our disposition based on our conclusion that Moody had reason to know of the existence of the violative condition, we need not address the Secretary's argument that Moody had actual knowledge of that condition.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Moody is not liable under section 110(c) of the Act for knowingly authorizing Grand River's violation of section 56.9300(b). Accordingly, we remand this matter to the Chief Administrative Law Judge for reassignment and assessment of a civil penalty.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Distribution

Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Harold G. Moody
702 Feldpar
Kearney, MO 64060

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of JAMES HYLES, DOUGLAS MEARS, DERRICK SOTO, and GREGORY DENNIS	:	Docket Nos. WEST 93-336-DM through WEST 93-339-DM
	:	WEST 93-436-DM through WEST 93-439-DM
v.	:	WEST 94-21-DM
ALL AMERICAN ASPHALT	:	

ORDER

On March 19, 1997, All American Asphalt ("AAA") filed a request for an order to show cause as to why the instant proceeding should not be dismissed. The primary basis for AAA's request was the Secretary's purported noncompliance with the administrative law judge's January 9, 1997 and February 20, 1997 orders regarding the filing of a supplemental brief following the Commission's remand of the case to the judge (*see* 18 FMSHRC 2096 (December 1996)). As authority for the Commission's issuance of a show cause order, AAA relies on Commission Procedural Rule 66(a), 29 C.F.R. § 2700.66(a).

Having considered AAA's request and the Secretary's response, we deny AAA's request. The proceeding is on remand before the judge. Under section 113 (d)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), the judge assigned to this case "shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith." 30 U.S.C. § 823(d)(1). Commission Procedural Rule 66(a), upon which AAA relies, is in Subpart G of the Commission's rules, which governs hearings and related matters before the Commission's administrative law judges. Absent a petition for discretionary review of a final decision by an administrative law judge, Commission Procedural Rule 70, 29 C.F.R. § 2700.70, or compliance with the Commission's interlocutory review procedures, Commission Procedural Rule 76, 29 C.F.R. § 2700.76, this case and motions filed in relation to it remain with the judge.

Accordingly, for the foregoing reasons, we deny AAA's request for the issuance of a show cause order.[1]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[1] We note that the Secretary's actions fall far short of the conduct that has been the basis for show cause orders in prior Commission proceedings. *E.g., Broken Hill Mining Company, Inc.*, 18 FMSHRC 679, 679-80 (May 1996) (failure to file brief or proffer a reason for doing so); *North Star Contractors, Inc.* 17 FMSHRC 886 (June 1995) (failure to file answer to motion for default judgment). Thus, while the Secretary's response to the January 9 order necessitated a second order from the judge and caused a further delay in this proceeding, the Secretary did respond to the orders.

Distribution

Gregory P. Bright, Esq.
Gartner & Young
1925 Century Park East, Suite 2050
Los Angeles, CA 90067

William Rehwald, Esq.
Rehwald, Rameson, Lewis & Glasner
5855 Topanga Canyon Blvd., Suite 400
Woodland Hills, CA 91367

Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge August Cetti
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1244 Speer Blvd., Suite 280
Denver, CO 80204

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

APR 7 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-104
Petitioner	:	A.C. No. 05-02820-03729
	:	
v.	:	Golden Eagle Mine
	:	
BASIN RESOURCES, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Incorporated ("Basin Resources"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges one violation of the Secretary's health regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I.

SECRETARY'S MOTION TO ADD ENTECH, INC., AND MONTANA POWER COMPANY AS RESPONDENTS

A. Background

At the time the order of withdrawal in this case was issued, Basin Resources operated the Golden Eagle Mine in Las Animas County, Colorado. The mine is now closed. The mine was an underground mine that used the longwall method to extract coal. Basin Resources contested the penalty in this case and in 29 other dockets because it believes that the penalties are excessive especially since its only mine is closed and it is in the process of

winding down. It contends that the penalties should be significantly reduced under the criteria set forth in section 110(i) of the Mine Act, specifically the "effect on the operator's ability to continue in business" criterion. 30 U.S.C. § 820(i). The Secretary disagrees and argues that when an operator is out of business, the "ability to continue in business criteria" no longer applies and the penalties should not be reduced.

The Secretary moved for partial summary decision on this issue. By order dated January 7, 1997, I denied the Secretary's motion. 19 FMSHRC 211. I held that if a mine operator establishes that it is no longer in the mining business and does not intend to reopen its mines or otherwise return to the mining business, this fact should be taken into consideration when assessing a civil penalty. My reasons for this conclusion are set forth in my order which I hereby incorporate by reference. To summarize, I held that civil penalties are remedial, not punitive, and are designed to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." *Id.* at 212 (citation omitted). If an operator is no longer in business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary's safety and health standards. I indicated that I would assess lower penalties against Basin Resources than proposed by the Secretary because it was no longer a mine operator.

The Secretary filed a motion to add Entech, Inc. ("Entech"), and Montana Power Company ("Montana Power") as respondents in this and the other Basin Resources cases. The Secretary contends that these entities were "operators" of the Golden Eagle Mine, as that term is used in section 3(d) of the Mine Act. 30 U.S.C. § 802(d). She points to the fact that Basin Resources is a wholly owned subsidiary of Entech and that Entech is a wholly owned subsidiary of Montana Power Company. She argues that these companies own and operate other coal mines and that they were also operators of the Golden Eagle Mine. The Secretary maintains that the parent companies should be financially responsible for the penalties assessed and that her proposed penalties should not be reduced under the "ability to continue in business" criteria.

Basin Resources opposes the Secretary's motion for a number of reasons. First, it argues that the motion is improper because of the extreme delay between the issuance of the citations and the date of the proposed amendment. Basin Resources contends that this delay is contrary to Commission case law and is procedurally improper under Rule 15 of the Federal Rules of Civil Procedure. Basin Resources also maintains that the motion should be denied because neither Entech nor Montana Power are operators under the Mine Act.

B. Delay in Filing Motion

Although I believe that Basin Resources' arguments concerning the Secretary's delay in filing her motion have some merit, I do not deny the Secretary's motion based on this procedural issue because of the unusual set of circumstances in the Basin Resources cases. The order of withdrawal in the present case was issued to Basin Resources on June 22, 1994. The citations and orders in the majority of the other Basin Resources cases pending before

me were issued in the first nine months of 1995. The Secretary's petition for the assessment of a penalty in this case was filed with the Commission on January 23, 1995. The Secretary's motion to amend her petition to add Entech as a respondent was filed on October 25, 1996, a few days before the start of the hearing in this case. The Secretary's motion to add Montana Power as a respondent was included in her brief on this issue, which was filed January 24, 1997.

There is no doubt that a delay of this magnitude is significant and could prejudice putative operators when challenging citations and orders issued by the Secretary. In this case, however, I find that the delay did not prejudice Entech or Montana Power. First, the issue was raised solely in context of the amount of the penalty that should be assessed. Basin Resources takes the position that since it is out of business, the penalty in this case and all of the other cases in which I find a violation, should be reduced to a nominal amount. The Secretary filed the motion to amend the petition for penalty because she believes that penalties should not be reduced. If Basin Resources had not closed, the Secretary would not have filed her motion.

Second, as of this date, hearings have been held in all but ten of the Basin Resources dockets. Basin Resources presented evidence with respect to the citations and orders at these hearings. As discussed below, neither Entech not Montana Power could have presented additional evidence because they did not have any significant presence at the mine. Any violations at the Golden Eagle Mine were the responsibility of Basin Resources' employees not Entech's nor Montana Power's employees. In sum, the evidence presented by the parties at the hearings would not have been different if Entech or Montana Power had been named in the original petition for penalty.

Third, the Secretary is not entirely responsible for the delay. Through discovery, the Secretary learned that Basin Resources owed Entech a large sum of money. The Secretary was not able to depose an Entech employee about this issue until October 25, 1996. After the motion was filed, the parties agreed that I should rule on the Secretary's motion for partial summary decision, filed November 27, 1996, before the parties briefed the issue of whether Entech or Montana Power should be added as respondents. Accordingly, for the reasons set forth above, I find that the Secretary's motion to amend her petition for penalty should not be denied on the basis of the procedural arguments raised by Basin Resources.

C. Entech and Montana Power are not Operators of the Mine

I deny the Secretary's motion because I find that Entech and Montana Power are not operators of the Golden Eagle Mine under section 3(d) of the Mine Act. An operator is defined at section 3(d) of the Mine Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." The Secretary is not contending that either company was an independent contractor, rather she argues that Entech and Montana Power had complete financial control over Basin Resources.

The Secretary points to evidence that Entech acted as a banker for all of its subsidiaries, including Basin Resources. She also points to the fact that Entech provided financial management services to Basin Resources, provided administrative services for Basin Resources' 401(k) plan, prepared its income tax returns, and provided cash advances when necessary. She also points to the fact that management of the three companies often overlapped. For example, the chairman of the board and chief executive officer of Montana Power was Basin Resources' only board member. The president of Basin Resources spent most of his time in Butte, Montana, the headquarters of Montana Power, and only visited the Golden Eagle Mine from time-to-time. Basin Resources's corporate secretary was also the secretary of Entech and is an officer with Montana Power. The Secretary also relies on the fact that Entech's board of directors made the decision to close the mine and that the bulk of Basin Resources' debt is owed to Entech. Finally, she states that Entech officials visited the mine on a regular basis.

There is no dispute that Basin Resources is a wholly owned subsidiary of Entech and that Entech is a wholly owned subsidiary of Montana Power. Other subsidiaries or divisions of Entech operate surface coal mines. These facts, in themselves, do not establish that they were operators of the Golden Eagle Mine. Mining companies are often subsidiaries of other companies that may or may not be directly involved in mining. The Secretary does not name the parent company as a respondent in civil penalty cases when a subsidiary of that parent operates the mine. A normal parent/subsidiary relationship should not be the basis for determining that the parent is also an operator.

The Secretary has not shown that the financial relationship between Basin Resources and Entech was anything other than typical in such situations. It appears that all financial transactions were properly accounted for in the books of both companies and that there was no commingling of funds. It is not unusual for a subsidiary to engage in financial transactions with its corporate parent or for a parent corporation to manage a subsidiary's 401(k) plan or to prepare its tax returns. Likewise, it is not uncommon for officers of a parent corporation to also serve as officers of a subsidiary.

The Secretary did not present credible evidence that Entech or Montana Power employees exercised day-to-day control over the operation of the Golden Eagle Mine. People from Butte would, of course, visit the mine to obtain information or work with mine officials in the budget and forecast planning process. This type of activity is not uncommon between parent and subsidiary corporations. It appears that Entech made the decision to close the mine. Assuming that the Entech board made that decision, it essentially put Basin Resources out of business because the Golden Eagle Mine is Basin Resources' only asset. I believe that the decision by a parent corporation to permanently shut down a wholly owned subsidiary should not be used to establish that the parent controlled the mine under section 3(d). The decision to put a subsidiary out of business must be made by the parent corporation. To establish Mine Act jurisdiction on that basis would automatically transform most parent corporations of mining companies into mine operators.

I find that the evidence presented by Basin Resources on this issue to be more persuasive. The evidence submitted by Basin Resources establish that all of the following activities were performed by Basin Resources employees at the mine in Weston, Colorado: (1) engineering, including planning for mine development; (2) human resource functions, including labor negotiations with the UMWA; (3) safety matters, including interaction with MSHA; (4) underground mining, including the production of coal; and (5) general management of the mine. These activities were performed without any major input from either Entech or Montana Power. I credit the affidavit of John Reynolds, the mine manager, that personnel from Entech and Montana Power "did not participate at all on a day-to-day basis, either directly or indirectly, in any of the operations, control or supervision of the day-to-day activities of the mine." (B.R. Response, Ex. F). He further stated that his only involvement with personnel from Entech or Montana Power was to provide information concerning production or to obtain approval for major capital expenditures. The only time he was given a direct order from Entech was when he was told to shut down the mine at the end of 1995. *Id.*

The Secretary relies heavily on Commission cases discussing whether a mine operator should be held liable for violations of an independent contractor. In *W-P Coal Co.*, 16 FMSHRC 1407 (July 1994), W-P was the lessee of the property and another company operated the mine as an independent contractor. The issue was whether W-P could be held liable for violations of the Secretary's safety standards. In holding that the Secretary could hold W-P liable, the Commission noted that W-P was substantially involved in "the mine's engineering, financial, production, personnel, and safety affairs." 16 FMSHRC at 1411. The Commission also noted that W-P calculated mining projections, prepared the mine plan, visited the mine frequently to discuss production, and met with MSHA personnel regarding safety matters. *Id.* Neither Entech nor Montana Power exercised such control over the Golden Eagle Mine.

In *Berwind Natural Resources Corp.*, 18 FMSHRC 202 (February 1996), *petition for review granted* April 2, 1996, Commission Judge Barbour set forth his analysis of the Mine Act's definition of operator. He stated that the purpose of the statutory definition is to "place responsibility for health and safety upon those entities that create the conditions at the mine or that have actual authority over the conditions on the theory that such responsibility will further compliance." 18 FMSHRC at 231. He further held that "[c]ontrol may be either direct or indirect, but it must be actual." *Id.* An "operator must 'call the shots' at a mine regarding its day-to-day operation, or have the authority to do so." *Id.* In conclusion, Judge Barbour held that "in order to establish an entity as an 'operator' subject to the Act, the Secretary must prove that the entity, either directly or indirectly, substantially participated in the operation, control, or supervision of the day-to-day operations of the mine, or had authority to do so." *Id.* I believe that Judge Barbour's analysis is a fair reading of the definition of "operator" and is harmonious with the Commission's decision in *W-P Coal.*

The evidence presented by the parties establishes that Entech and Montana Power did not substantially participate in the operation, control, or supervision of the day-to-day operations of the Golden Eagle Mine. As the corporate parent, Entech took an interest in and was involved in the financial affairs of Basin Resources, but it did not directly or indirectly control or supervise the operation of the mine. It is not clear from the record if Entech had the authority to take control of the operation of the mine. I believe that such a consideration should come into play only if the facts demonstrate that there is a particular reason to disregard the corporate structure. For example, under certain circumstances, a parent corporation may be deemed to be an operator if it creates a subsidiary to operate a mine and fails to provide sufficient capital to ensure that the subsidiary is able to provide a safe working environment or comply with the requirements of the Mine Act. It also may be necessary to pierce the corporate veil in certain circumstances. In the present case, however, Basin Resources was fully responsible for the safe operation of the mine. The companies appear to have a normal parent/subsidiary relationship. Any oversight over the mine exercised by Montana Power or Entech was insufficient to render them operators of the Golden Eagle Mine. The Secretary's motion to amend the petition for penalty is denied.

II.

ORDER OF WITHDRAWAL NO. 3590955

A. Fact of Violation

On June 22, 1994, MSHA Inspector Melvin Shiveley issued an order of withdrawal to Basin Resources under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 70.100(a), as follows:

> Results of the five most recent samples received by MSHA and collected from the working environment in mechanized mining unit MMU 009-0 shows an average concentration of 2.52 mg/m^3 due to the obvious lack of effort by the operator to control respirable dust. Since 11-1-92 there [have] been 6 excessive dust violations[s], 12 citations issued for excessive dust on MMU 009-0, (1) 104(d)(1) citation issued for excessive dust on MMU 009-0.

Inspector Shiveley determined that the alleged violation was of a significant and substantial nature ("S&S") and was caused by Basin Resources' unwarrantable failure to comply with the standard. The Secretary of Labor proposes a civil penalty of $9,000.00 for the alleged violation. Section 70.100(a) provides, in part, that each operator "shall continuously maintain the average concentration of respirable dust in the mine atmosphere 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...."

The dust samples upon which the order is based were taken at the mine on June 15, 1994, by Inspector Tony Duran. The samples were mailed to MSHA's laboratory in Pittsburgh where they were weighed. The average concentration of respirable dust was found to be 2.52 mg/m^3.

Basin Resources contends that the order should be vacated because the dust samples taken by Inspector Duran are not valid. First, it argues that the samples were taken on a day in which normal activities were not taking place. On June 15, Basin Resources was attempting to make changes in its ventilation and dust control practices on MMU 009-0 (the "unit"). Basin Resources argues that because the conditions were not normal on the unit, the samples are not representative of typical conditions. The Secretary contends that what is "normal" is for the MSHA inspector to decide, not the mine operator. She notes that the health standard contains no exceptions for days in which "normal activities" are not taking place. Second, she argues that changing ventilation to correct dust problems is a normal activity at a mine, especially at the Golden Eagle Mine.

I agree with the Secretary's arguments. What is "normal" in an active longwall section is rather subjective. Miners in a longwall section may frequently be engaged in activities that are not production-related. It would be impossible to draw a clear line between what are normal activities and what are not. The health standard does not draw such a distinction and requires that the operator "continuously maintain" the average concentration of dust at or below 2.0 mg/m^3. In addition, making changes in ventilation at a coal mine to control respirable dust is not outside what should be considered a normal activity.

Basin Resources also maintains that one of the samples taken by Inspector Duran was turned over ("dumped") when a miner was removing the cassette from his clothing. Basin Resources states that when the sample fell upside down in Inspector Duran's presence, he merely tapped it on the table and submitted it to MSHA's laboratory without any notation that this had occurred. Basin Resources argues that MSHA did not follow correct procedures when the sample was dumped and that the citation is invalid.

The Secretary contends that the evidence relied upon by Basin Resources to establish that correct procedures were not followed is unreliable. The evidence consists of the notes of Mr. Salerno, an employee of the company's safety department, setting forth a conversation he had with another employee of the company. (Ex. R-1, Tab U). The note states that the sample for the shield operator was dumped when it was removed from the employee. The Secretary notes that a shield operator was not sampled on that shift and that, in any event, if a single sample of an hourly employee had been dumped in this instance, the results still would have been above that permitted by the health standard.

I find that the Secretary established that the samples taken by Inspector Duran were valid. While turning a cassette upside down may invalidate that sample, it is not entirely clear that such an event occurred in this case. There is no direct proof that a sample was dumped. It is not clear whether the individual referred to in Basin Resources' exhibit was actually sampled. At a minimum there is some confusion about this event. The highest reading obtained for an hourly employee was 2.8 mg/m^3. If that reading is not included in the average, the result is still above the minimum requirement of the health standard. (Tr. 202). Accordingly, for the reasons set forth above, I find that the Secretary established a violation of 30 C.F.R. § 70.100(a).

B. Significant and Substantial

I find that the Secretary established that the violation was S&S. The Commission has held that if the Secretary establishes a violation of section 70.100(a), a presumption arises that the violation is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir 1987). Basin Resources did not present any evidence or argument to rebut this presumption.

C. Unwarrantable Failure

The order alleges an unwarrantable failure to comply with the standard. The order itself states that the violation was the result of "the obvious lack of effort by the operator to control respirable dust." Basin Resources argues that it was engaged in aggressive efforts to control dust at the mine and that MSHA did not take the time to acquaint itself with these efforts. It states that the unwarrantable failure determination was made based on the mine's history of respirable dust violations. Basin Resources contends that MSHA's analysis of this history was simplistic and misleading. It states that almost all of the previous violations occurred when the unit was in a different panel.

In addition, Basin Resources states that it was doing everything that it could to try to control respirable dust at the mine. It argues that dust control was one of the safety department's highest priorities. It contends that such aggressive efforts are not consistent with an unwarrantable failure finding. Basin Resources also points to the fact that MSHA permitted the mine to resume mining a few hours after the order was issued, based on steps that the mine had taken to control dust before the order was issued.

Finally, Basin Resources maintains that the unwarrantable failure finding must be vacated based on the Commission's decision in *Peabody Coal Co.* 18 FMSHRC 494 (April 1996). Basin Resources states that the operator in that case was engaged in significant efforts to reduce respirable dust and that MSHA determined that the violation was the result of an unwarrantable failure based on the mine's dust sampling history. The Commission reversed the judge's unwarrantable failure finding.

The Secretary argues that Basin Resources knew or had reason to know of the conditions which resulted in the violation and had ample opportunity to correct these conditions, yet failed to take effective measures to comply with the health standard. She states that management knew that excessive dust was a significant problem at the mine. She further maintains that mine management made several changes to the dust control and ventilation plan ("dust plan"), but did not follow through to make sure that the dust plan was adhered to on the unit. The Secretary argues that although Basin Resources adopted "temporary or short term fixes to deal with dust at a particular moment, none of [its] efforts resulted in a real or long term solution, largely because the plans or amendments were not followed on a consistent basis." (Sec. Br. at 7).

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1997). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

In analyzing the evidence in the present case using this test, I find that the violation was caused by the aggravated conduct of Basin Resources. The violation was not the result of intentional misconduct, indifference, or a reckless disregard of the dangers posed by respirable dust. I find, however, that Basin Resources' failure to meet the requirements of 30 C.F.R. § 70.100(a) was the result of a serious lack of reasonable care that constituted more than ordinary negligence.

I reach this conclusion for a number of reasons. First, Basin Resources had a history of dust control problems and mine management was well aware of these problems. MSHA officials discussed the mine's dust problems with management on a number of occasions. MMU 009-0 had been out of compliance thirteen times between November 1992 and June 22, 1994. The Secretary contends that this figure indicates that the unit was out of compliance about 50% of the time. While the record does not contain sufficient evidence to support this allegation, it is clear that the unit was having difficulty meeting the 2.0 mg/m^3 requirement. Basin Resources points to the fact that the unit had been out of compliance only once in the ten months prior to the date the order was issued. Although this fact may indicate that progress was being made, it does not establish that the mine's dust problem was under control.

Second, although Basin Resources made changes to its dust plan to try to eliminate its respirable dust problems, it did not take sufficient steps to make sure that its dust plan was being followed in the longwall section. For example, miners would turn off water sprays designed to control dust because they did not want to get wet. Mr. Hallows testified that the unit would be in compliance with the dust plan when "miners were convinced to follow procedures and they followed those procedures." (Tr. 164, 184). He stated, however, that miners often failed to follow the company's safety procedures including the requirements of that dust plan. (Tr. 156, 164, 180-81, 183-88). It is apparent the management-labor

relations were rather poor at the mine. Basin Resources' safety director admitted that miners did not always follow the requirements of the mine's dust plan and that management was aware of that fact. I find that Basin Resources' efforts to ensure that miners adhered to the dust plan were insufficient. (Tr. 65-68, 80-81, 143-11).

Basin Resources argues that it presented evidence that it had taken extraordinary efforts to fix its dust problems. I agree with the Secretary that the efforts presented by Basin Resources at the hearing were routine actions taken by most medium to large coal mine operators to comply with the requirements of the Mine Act. For example, the company was training its miners on respirable dust control. (Tr. 104-05; Ex. R-1, Tabs G, H - J, M, & P).

Third, Basin Resources states that MSHA allowed the mine to resume mining without requiring it to take additional steps to control dust. It argues that this fact demonstrates that the company did not engage in aggravated conduct. This argument is based on an incomplete chronology of events. Although the order is dated June 22, the dust samples were taken on June 15. Basin Resources made a number of changes between the time the samples were taken and MSHA's allowing mining to resume. Moreover, MSHA required the mine to file an addendum to its dust plan. (Ex. R-1, Tab Y). It is not uncommon for an order to be lifted following an amendment to a dust plan.

Basin Resources also relies on the Commission's decision in *Peabody Coal Co.* to support its argument. In that case, the Commission reversed an administrative law judge's unwarrantable failure finding because he, in essence, created a rebuttable presumption that the violation was unwarrantable based on the mine's compliance history. 18 FMSHRC at 498. The Commission also held that the judge erred in finding an unwarrantable failure based on "the operator's 'failure to leave any stone unturned' and take 'every conceivable step' in attempting to eliminate the violations." *Id.* The Commission went on to state:

> 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 the standard. 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.

Id. (citations omitted). *See also Jim Walter Resources, Inc.* 19 FMSHRC _____, No. SE 94-74, slip op. at 5 (March 17, 1997).

There can be no question that Basin Resources was on notice that greater efforts were necessary to control dust in the mine. I find that, although Basin Resources had taken some steps to improve dust conditions, it was not doing enough to ensure that its efforts were

actually carried out in the longwall section. I do not doubt that mine management, including the director of safety, was sincerely concerned about the problem, but I do not believe that management, particularly front line supervisors, were doing enough to make sure that the mine's dust plans were being properly implemented.

As stated above, Basin Resources was not indifferent to the respirable dust problem at the mine. Mr. Hallows only started working at the mine as the director of safety a few months before the order was issued and was trying to get a handle on the situation. Thus, I disagree with Inspector Shiveley's statement in the order that there was an "obvious lack of effort by the operator to control respirable dust" at the mine. Nevertheless, as of June 1994, Basin Resources' remedial measures did not "demonstrate a good faith, reasonable belief" that management was taking sufficient steps to solve its dust problem. *Id.* at 499. I find that the violation was the result of a serious lack of reasonable care on the part of management, which constitutes high negligence.

III.

APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 502 citations and orders in the 24 months preceding June 21, 1994, and that Basin Resources paid penalties for 486 of these citations and orders during the same period. (Ex. G-1). I also find that Basin Resources was a medium mine operator with 738,776 tons of production in 1993. (Ex. J-1). Basin Resources' parent company was large with 20,204,994 tons of production in 1993. *Id.* The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of $325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. The Secretary has not alleged that Basin Resources failed to timely abate the order. Based on the penalty criteria, I find that a penalty of $5,000.00 is appropriate for the violation.

IV.

ORDER

Accordingly, the Secretary's motion to amend the petition for assessment of penalty is **DENIED**, Order of Withdrawal No. 3590955 is **AFFIRMED** and Basin Resources, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $5,000.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Andrew Volin, Esq., SHERMAN & HOWARD, L.L.C., 633 17th Street, Suite 3000, Denver, CO 80202 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

APR 7 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 95-494 A.C. No. 05-02820-03766
	:	Docket No. WEST 96-22 A.C. No. 05-02820-03769
v.	:	
	:	Docket No. WEST 96-23 A.C. No. 05-02820-03770
BASIN RESOURCES, INCORPORATED, Respondent	:	Docket No. WEST 96-24 A.C. No. 05-02820-03771
	:	Docket No. WEST 96-36 A.C. No. 05-02820-03773
	:	Docket No. WEST 96-128 A.C. No. 05-02820-03781
	:	Golden Eagle Mine

DECISION

Appearances: Tambra Leonard, Esq., with Margaret A. Miller, Esq. on brief, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Basin Resources, Incorporated ("Basin Resources"), 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 42 violations of the Secretary's safety and health regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I.

SECRETARY'S MOTION TO ADD ENTECH, INC., AND MONTANA POWER COMPANY AS RESPONDENTS

At the time the citations and orders were issued in these cases, Basin Resources operated the Golden Eagle Mine in Las Animas County, Colorado. The mine is now closed. The mine was an underground mine that used the longwall method to extract coal. Basin Resources contested the penalty in these cases and in 24 other dockets because it believes that the penalties are excessive especially since its only mine is closed and it is in the process of winding down. It contends that the penalties should be significantly reduced under the criteria set forth in section 110(i) of the Mine Act, specifically the "effect on the operator's ability to continue in business" criterion. 30 U.S.C. § 820(i). The Secretary disagrees and argues that when an operator is out of business, the "ability to continue in business criteria" no longer applies and the penalties should not be reduced.

The Secretary moved for partial summary decision on this issue. By order dated January 7, 1997, I denied the Secretary's motion. 19 FMSHRC 211. I held that if a mine operator establishes that it is no longer in the mining business and does not intend to reopen its mines or otherwise return to the mining business, this fact should be taken into consideration when assessing a civil penalty. My reasons for this conclusion are set forth in my order which I hereby incorporate by reference. To summarize, I held that civil penalties are remedial, not punitive, and are designed to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." *Id.* at 212 (citation omitted). If an operator is no longer in business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary's safety and health standards. I indicated that I would assess lower penalties against Basin Resources than proposed by the Secretary because it was no longer a mine operator.

The Secretary filed a motion to add Entech, Inc., and Montana Power Company as respondents in these and the other Basin Resources cases. The Secretary contends that these entities were "operators" of the Golden Eagle Mine as that term is used in section 3(d) of the Mine Act. 30 U.S.C. § 802(d). In my decision issued this date in *Basin Resources, Inc.*, Docket No. WEST 95-104, 19 FMSHRC_____ (April 1997), I addressed this issue in detail and denied the Secretary's motion. I incorporate my analysis of that issue into this decision by reference. For the reasons set forth in that decision, the Secretary's motion is denied.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT TO THE CITATIONS AND ORDERS AT ISSUE

A. Accumulation Violations, 30 C.F.R. § 75.400.

1. Order No. 4057257

On February 2, 1995, MSHA Inspector Melvin Shiveley issued an order of withdrawal to Basin Resources under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 75.400, as follows:

> Accumulations of combustible material, loose coal, and fine coal was allowed to exist in #1 entry, 4 left section starting at crosscut #30 inby to crosscut #32. Loose coal measured 8" to 11" deep and was in contact with the belt. Accumulations existed on the off side of the belt starting at crosscut #25 through to crosscut #32. The depth of the loose coal measured 8" deep under the belt and along the belt structure. Float coal dust was present along the mine floor and ribs starting at crosscut #25 to crosscut #22. The belt record showed accumulations were present on 1-30-95, 2-1-95, and 2-2-95. The record is signed by the shift foreman.[1]

Inspector Shiveley determined that the alleged violation was of a significant and substantial nature ("S&S") and was caused by Basin Resources' unwarrantable failure to comply with the standard. The Secretary of Labor proposes a civil penalty of $9,500.00 for the alleged violation. Section 75.400 provides, in part, that "coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible material shall be cleaned up and not be permitted to accumulate in active workings....

Basin Resources does not contest the fact of violation or the S&S designation, but argues that the violation was not the result of its unwarrantable failure to comply with the standard. Basin Resources contends that the accumulations had not been present for three days and that it was taking active steps to remove them. It states that Inspector Shiveley relied exclusively on its preshift examination books when reaching his conclusion. Basin Resources believes that the company's daily production reports and outby mine daily

---

[1] I have edited the language in the citations and orders quoted in this decision to correct minor grammar and punctuation errors.

operations planner show that the accumulations were being cleaned up and that the coal observed by the inspector was of recent origin.

Kay Hallows, the Director of Safety, testified that the continuous mining section was using a flexible coal transport system ("FCT") in lieu of shuttle cars to transport coal to the belt. He stated that the accumulations were the result of a misalignment of the FCT and that Basin Resources was engaged in continuous efforts to correct this alignment problem. He also testified that the mine was continuously cleaning up accumulations caused by this misalignment along the belt, but that new spills were constantly occurring. (Tr. 250-52).

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1997). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

In applying the evidence in the present case to this test, I find that the violation was caused by the aggravated conduct of Basin Resources. The violation was not the result of intentional misconduct, indifference, or a reckless disregard of the dangers posed by accumulations of coal and float coal dust. I find, however, that Basin Resources' failure to meet the requirements of 30 C.F.R. § 75.400 was the result of a serious lack of reasonable care that constituted more than ordinary negligence.

I reach this conclusion for a number of reasons. First, Basin Resources had a significant history of coal accumulation problems. Between January 1992 and February 1995 the Golden Eagle Mine was cited for 190 violations of section 75.400. (Tr. 228-29; Ex. P-5).

More importantly, I find that the physical conditions observed by Inspector Shiveley are consistent with his determination that the accumulations had existed for some time. He observed accumulations under the belt and on the off side of the belt to the rib. The coal was getting caught in the belt and the rollers causing the coal to become pulverized. (Tr. 214-15). The coal was so deep that it was in contact with the moving bottom belt. Many of the rollers under the belt were stuck in the accumulations. The coal was pushing the bottom belt up. (Tr. 244). Inspector Shiveley testified that such conditions cannot be created in just a few hours. *Id.* He stated that the large accumulations under the belt must have developed over a period of at least two to three shifts. (Tr. 247-48).

It is not clear why this accumulation existed. Basin Resources believes that it was caused by the FCT, which was subsequently taken out of service. The Secretary believes that rib sloughage contacted the belt and caused it to become misaligned. In any event, I credit the testimony of Inspector Shiveley that the accumulations under the belt must have existed for some period of time. The conditions observed by the inspector establish that a significant portion of the accumulations had existed for a significant length of time.

The accumulations were large and readily obvious. Parts of these accumulations extended from crosscut 32 to crosscut 22, a distance of about 1600 feet. (Tr. 212, 216-17). Under the belt, the accumulation extended for a distance of about 280 feet. *Id.* Many individuals worked or traveled through this area, including belt cleaners, belt examiners, preshift examiners and the foreman. (Tr. 225). The accumulations are noted in the preshift examination records. (Ex. P-6).

Basin Resources maintains that its production records indicate that the mine was not producing coal during many of the shifts preceding the inspection because miners were cleaning coal that was spilled as a result of the malfunctioning FCT. (Tr. 253-57; Ex. R-3). The records show that between January 30 and February 1, the section was producing coal on seven out of nine shifts. (Ex. R-3). The records also show that miners were cleaning coal along the 4 left belt during all of these shifts, but there is no specific record that coal under the belt between crosscuts 30 and 32 was completely removed. *Id.* No miners were in the area cleaning coal at the time of Inspector Shiveley's inspection. (Tr. 229). In finding that the violation was the result of an unwarrantable failure, I rely more on the physical conditions observed by the inspector than on the records offered by the parties. (Ex. P-6; R-3).

It is also important to recognize that at least nine miners were required to work about ten hours to clean up the cited accumulations. (Tr. 235-36). Thus, assuming that a few miners had been cleaning in the area on the days preceding the inspection, their efforts were insufficient to remove such an enormous amount of accumulated coal and coal dust. For the reasons set forth above, I find that the violation was the result of a serious lack of reasonable care on the part of Basin Resources to prevent or promptly remove the accumulations cited by Inspector Shiveley. This lack of care was aggravated conduct constituting more than ordinary negligence. A penalty of $5,000 is appropriate.

2. Order No. 4057838

On February 8, 1995, MSHA Inspector Shiveley issued an order of withdrawal to Basin Resources under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 75.400, as follows:

> Accumulation of combustible material, loose coal, and fine dry coal was allowed to exist in the form of stock piles in crosscut #15, 4 left section. The piles measured 13 feet long, 12 feet wide, and 6 feet high. The condition could clearly be seen by operator when driving through #2 entry. The coal pile was being stored due to rib sloughage from along the #2 entry roadway.

Inspector Shiveley determined that the alleged violation was not S&S and was caused by Basin Resources' unwarrantable failure to comply with the standard. The Secretary of Labor proposes a civil penalty of $5,000.00 for the alleged violation.

Basin Resources contests the fact of violation and the unwarrantable failure finding. It argues that the order should be vacated because the material in the stockpile was mostly incombustible material. It states that the record does not contain "substantial evidence to support a finding that the material created a hazardous condition subject to the standard." (B.R. Br. at 16).

I find that the Secretary established a violation. The material that was stockpiled at the crosscut was removed from an underground travelway. This material contained loose coal that had sloughed from the ribs as well as material scraped from the floor of the travelway. A significant portion of the material was loose coal and coal dust. This loose coal and coal dust was not cleaned up and was permitted to accumulate in an active working of the mine.

In her brief, the Secretary moved to amend the order to allege an S&S violation. Inspector Shiveley testified that it was unlikely than anyone would be injured as a result of this violation. (Tr. 317-18). Although he stated that the violation presented a fire and smoke inhalation hazard, he believed that such an event was unlikely. Inspector Shiveley may have reached this conclusion for a number of reasons that are not set forth in the record. The Secretary did not present any evidence to contradict his determination. Accordingly, the Secretary's motion to amend the order is denied. The violation was serious.

I find that the Secretary did not establish that the violation was the result of Basin Resources's unwarrantable failure to comply with the standard. Inspector Shiveley testified that he determined that the violation was unwarrantable because he believed that it was a practice at the mine to shove loose coal from rib sloughage into crosscuts. (Tr. 315). He stated that the company had received numerous citations for violations of section 75.400 and that management had been told that "anytime you get loose coal in the mine, you can't stockpile it. It's got to be removed from the mine." *Id.* He testified that he had no idea how long the accumulation had been in the crosscut, but that it had some road and rock dust on it. (Tr. 316).

Basin Resources presented evidence that the accumulation had been in the crosscut for about one shift. Its records indicate that the roadway was graded on the swing shift of February 7 and was watered on the following graveyard shift. (Tr. 342-44; Exs. R-5, R-6). The order was issued at the beginning of the day shift on February 8. Basin Resources argues that rib sloughage is a problem at the mine and the company was in the middle of its cleanup cycle when the inspector issued the order. (Tr. 347-48). Different equipment is used when removing accumulations from an area than is used to grade the roadways.

I find that it is likely that the accumulation had only existed since the beginning of the previous graveyard shift and that it would have been cleaned up on the day shift of February 8. I credit the testimony of Mr. Hallows with respect to the mine's clean up cycle. The fact that the mine has a history of similar violations cannot be the sole basis for an unwarrantable failure finding. *Peabody Coal Co.* 18 FMSHRC 494 (April 1996). Although Basin Resources had been put on notice that "storing" coal accumulations in crosscuts is not permitted, the evidence indicates that Basin Resources regularly removed such accumulations as part of its clean up program. The evidence does not establish "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care" with respect to the cited accumulation. Accordingly, I find that the accumulation was not caused by Basin Resources' aggravated conduct, but was caused by moderate negligence. A penalty of $2,000 is appropriate.

3. Citation No. 4057855

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400, as follows:

> Accumulation of combustible material, empty rock dust sacks, wood, torn rubber belting, old electrical cable, was allowed to exist in entry #10 between crosscut #3 and #4, East Mains.

Inspector Shiveley determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,155.00 for the alleged violation.

Basin Resources contests the fact of violation on the basis of its evidence that the trash would have been removed at the end of the shift as part of its regular clean up program. Inspector Shiveley testified that he did not know how long the trash had been in the cited area. (Tr. 351, 357, 363-64). He also testified that a mine operator may collect trash at various areas in the mine without violating the standard as long as the mine has a clean up program to remove the trash on a daily basis and the mine follows the program. (Tr. 351-52, 357, 359). Inspector Shiveley stated that he issued the citation because the trash was not in one of the mine's designated trash areas and he was concerned it would not be picked up in a timely manner. (Tr. 352-53, 363-64).

Mr. Hallows testified that Basin Resources has a regular clean up program that includes all of the mine, not just the few designated trash areas. (Tr. 365-6). He stated that most trash is removed within a 24-hour period. *Id.*

It is not clear how long the cited trash had been in the entry. The preshift and onshift reports do not indicate how long the trash was there. (Ex. R-9). I agree with Inspector Shiveley that section 75.400 does not require that a mine operator immediately remove combustible trash, such as rock dust bags. Such a requirement would not be practical.

Removing such material at least once a day may be sufficient. The citation was issued at 7:40 a.m. The cited material could have been placed in the entry during the previous graveyard shift and, assuming continued normal mining operations, may well have been removed by the end of the day shift. I find that the Secretary has not established a violation and the citation is vacated.

4. Citation No. 4057859

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400, as follows:

> Accumulation of combustible material, loose paper sacks, oil cans, were present in #i entry in crosscut where overcast is being developed outby the 5 left section.

Inspector Shiveley determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Inspector Shiveley testified that he issued the citation based on his belief that the combustible material had been in the area for longer than one day and possibly a week. (Tr. 571-72). He believes that the material in the entry was generated during the construction of the overcast. He stated that an overcast takes about a week to build. (Tr. 572-73).

Mr. Hallows testified that the cited trash had been placed in the area on the previous day by a scoop. (Tr. 577-78; Ex. R-11) He further stated that the trash would have been removed as part of its trash collection program. He further stated that the material observed by the inspector is used throughout the mine and was not necessarily generated at that location when the overcast was built. (Tr. 581).

Inspector Shiveley's estimate of the length of time that the combustible material had been in the entry was based on his conclusion that the material was created during the construction of the overcast. He also believed that the oil cans were from a roof bolter. (Tr. 571-72). He was not sure if he asked anyone when the trash had been put in the cited location. (Tr. 575).

As with the previous citation, it is not clear how long the cited material had been in the area. The material may well have only been in the cited area since the previous afternoon and may have been removed from the mine the day the citation was issued, assuming continued normal mining operations. I find that the Secretary has not established a violation and the citation is vacated.

5. Citation No. 4057854

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that an accumulation of motor oil and fine coal dust was allowed to exist in the engine compartment on a diesel tractor used underground. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $500 is appropriate.

6. Citation No. 4057857

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that float coal dust and loose coal were allowed to exist in the 3rd North Mains for a distance of about 60 feet. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,155.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $500 is appropriate.

7. Citation No. 4057860

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that an accumulation of hydraulic oil and fine coal was allowed to exist on the coal feeder at the tail of #11 belt. The citation states that the accumulations were present on the deck of the motor compartment and hydraulic valve control compartment. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $500 is appropriate.

8. Citation No. 4057481

On May 1, 1995, MSHA Inspector Jeffrey Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400.

In the citation, the inspector alleged that float coal dust was present on the rock dusted ribs and floor in the 4-Left belt entry between crosscuts 0 and 7. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $1,971.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of $1,500 is appropriate.

9. Citation No. 4057786

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that he observed accumulations of damp, loose, packed coal and coal dust under the 4th Left conveyor belt from crosscut 54 to 56. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $2,606.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $1,000 is appropriate.

10. Citation No. 4057507

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that he observed loose coal, diesel fuel, and motor oil in 4 Left, crosscut 56 between entry Nos. 1 and 2. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,971.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $500 is appropriate.

11. Citation No. 4058078

On August 30, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that he observed float coal dust on rock dusted surfaces in entry No. 1 in the 5th Left Section. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $500 is appropriate.

B. Ventilation Violations, 30 C.F.R. § 75.300 etc.

1. Citation No. 4057475

On June 22, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(a)(1), as follows:

> Page No. 8, item No. 1 of the ventilation plan approved on 12-22-93 was not being followed. The required minimum 3,000 cfm of air was not maintained in the 3rd north working section in the 5-left turn-off, entry No. 1, inby crosscut No. 1, where 1.9% methane was detected in the idle face. An air quantity reading could not be made by chemical smoke.

Inspector Fleshman determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation, but contests the inspector's negligence finding and the civil penalty. It contends that the disruption in the ventilation was temporary and was caused by miners moving ventilation curtains to allow materials to be brought in to build stoppings. (Tr. 510-11, Ex. R-7). In her brief, the Secretary moved to amend the citation to allege an S&S violation.

Inspector Fleshman testified that the negligence was moderate because the violation occurred in a working section and an onshift examination is required. (Tr. 508). I find that the Secretary established a moderate level of negligence. An operator is required to put ventilation curtains back in place after they are opened for legitimate reasons. There has been no showing that the construction materials were being brought in at the time the citation was issued. The curtains were not promptly reestablished after the materials were brought through the area.

The Secretary's motion to amend the citation is denied. No evidence was presented by the Secretary to support an S&S finding. Her motion is based on a conclusion that these types of violations are generally considered to be S&S. The Secretary must present evidence to support her allegations and cannot simply point to general case law in lieu of such evidence. A penalty of $300 is appropriate.

2. Citation No. 4057262

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.364(g). In the citation, the inspector alleged that weekly examinations were not posted in the 3 Left Section, #3 entry. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

3. Citation No. 4057295

On April 12, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.340(a)(1), as follows:

> The energized power center located in 4 Left, Crosscut No. 36, between entry 2 and 3, was being ventilated with intake air, and was not ventilated into a return air course. The intake air passing by the power center was used to ventilate the 4 Left working section.

Inspector Fleshman determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $2,800.00 for the alleged violation. Section 340(a)(1) provides, in part, that power centers shall be ventilated with intake air that is coursed into return air or to the surface and is not used to ventilate working places.

Basin Resources does not contest the fact of violation, but contests the inspector's S&S determination and the amount of the penalty. It argues that Inspector Fleshman did not find any problems with the power center and he did not allege that there was a reasonable possibility that a malfunction would occur in the power center that could create a fire. It states that the power center is a dry contact type that does not contain any fuel. (Tr. 546-48).

The Secretary maintains that the power center was about 40 to 60 feet from the working section, where 14 miners were working. The air that passed by the power center was carried directly into the working face. In the event of a fire, smoke and fumes would be carried to the working area exposing the miners. Given the nature of power centers, the Secretary contends that it was reasonably likely that a fire would occur in the normal course of mining.

In her brief, the Secretary seeks to amend the citation to allege an unwarrantable failure. The power center was subject to preshift inspections and was frequently used by

miners to turn power off and on. The Secretary believes that Basin Resources' failure to correct the violation was aggravated conduct.

Inspector Fleshman testified that transformers can "go at any time." (Tr. 541). He stated that a newly installed power center can last 20 years or it can blow up in a short period of time. *Id.* He determined that the violation was S&S not because of any particular defect he observed, but because power centers can explode or catch fire without warning at any time. He testified that if a power center failed in such a fashion, the 14 miners in the working section would quickly be overcome with smoke.

Mr. Hallows testified that the power center was a mobile unit. (Tr. 546-47). He stated that the power center did not contain oil filled pots, but used only dry contacts. He further testified that this type of power center does not blow up or create smoke when its fails. (Tr. 548). The dry contact points might burn in the event of a failure, but there would be no fuel to propagate a fire or explosion, according to Mr. Hallows.

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is the key in this case: whether it was reasonably likely that the hazard contributed to would result in an injury. It is important to recognize that this element does not require the Secretary to establish that it was more probable than not that an injury will result from the hazard contributed to by the violation. *U. S. Steel Mining Co., Inc.*, 18 FMSHRC 862, 865 (June 1996). The test is whether such an injury is reasonably likely. In this case, the Secretary established that it was reasonably likely that the power center would malfunction and that, if it did, smoke and fumes would quickly travel the 40 to 60 feet to the working area. I have taken into consideration the fact that the power center does not use oil and that Mr. Hallows is not aware of any instance in which a dry contact transformer exploded.

I deny the Secretary's motion to modify the citation to allege an unwarrantable failure. The Secretary did not establish that the violation was caused by the operator's aggravated conduct. Inspector Fleshman presented the facts he relied upon to determine that the violation was caused by Basin Resources' moderate negligence. (Tr. 543-44). In the motion, the Secretary relies upon the same facts to allege that the violation was caused by Basin Resources' aggravated conduct. At the hearing, Basin Resources did not contest the citation and offered evidence only with respect to the S&S issue. It did not present any evidence to refute an unwarrantable failure determination because the Secretary did not allege that the violation was the result of its unwarrantable failure. The record in this case is now closed. It would violate basic concepts of due process to enter an unwarrantable failure finding when Basin Resources was not given the opportunity to present facts to counter such a finding. A penalty of $1,000 is appropriate.

4. Citation No. 4057300 & Order No.4057784

On May 1, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.380(d)(1), as follows:

> The alternate escapeway in the 4 Left working section was not maintained in a safe condition for passage of personnel. Water was allowed to accumulate in Entry No. 3 inby crosscut 53, the width of the entry, for a distance of 40 feet. The water was 12 to 14 inches deep.

Inspector Fleshman determined that the alleged violation was S&S. On May 24, 1995, Inspector Fleshman returned to the mine and issued Order of Withdrawal No. 4057784 under section 104(b) of the Act alleging that "[n]o apparent effort was made to pump the water in the alternate escapeway in the 4 Left working section." The order was subsequently modified to delete the "no apparent effort" language and to insert "the effort made was not sufficient." The Secretary proposes a penalty of $6,250 for the alleged violation.

The safety standard states that each escapeway shall be maintained in a "safe condition to always ensure passage of anyone, including disabled persons." Basin Resources does not contest the fact of violation or the inspector's S&S determination, but contests the section 104(b) order and the penalty.

The evidence makes clear that Basin Resources had been pumping water out of the cited area between May 1 and May 24. There were two holes where a pump would be alternately placed to pump water. The area had been pumped "dry" on at least one occasion. (Tr. 457-58). Basin Resources was pumping almost continuously during this period. *Id.* Inspector Fleshman and MSHA Field Supervisor Larry Ramey do not deny that the area may have been pumped out during the intervening weeks. (Tr. 428, 454-55). MSHA contends that Basin Resources was not doing enough to keep the water at acceptable levels for the escapeway. Fleshman and Ramey testified that the operator could have built a floating bridge over the area, built a ditch to drain the area, or brought in additional pumps to better control the water level.

Section 104(b) provides that if an inspector finds "(1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein ..., and (2) that the period of time for the abatement should not be further extended" he shall issue an order of withdrawal. 30 U.S.C. § 814(b). In *Mid-Continent Resources, Inc.* 11 FMSHRC 505, 509 (April 1989), the Commission held that the Secretary bears the burden of proving that the "violation described in the underlying citation had not been abated within the time period" originally fixed. The Commission went on to state:

> [T]he Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying citation existed at the time the section 104(b) order was issued. The operator my rebut the prima facie case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

Id.

The Secretary established a *prima facie* case. The issue is whether the violative condition had been abated but recurred. I find that under the facts of this case and the particular standard at issue, Basin Resources did not establish that the condition had been totally abated. The evidence establishes that water was a continual problem in the cited area. When Basin Resources pumped out the area, it refilled with water within a short period of time. Indeed, Basin Resources maintains that the area had been "pumped dry" on a number of occasions after the citation was issued, but refilled. Given that fact and the requirement that escapeways be maintained to "always ensure passage of anyone," I find that each cycle of pumping and refilling cannot be viewed as independent or discrete events. The almost continuous succession of flooding and pumping must be considered as one related incident. It is evident that using one pump to remove water from this area was insufficient to abate the violation, given the constant inflow of water. It appears that Basin Resources was using inadequate resources to correct the problem. I agree with the Secretary that it may have been necessary for Basin Resources to install more pumps or use ditches to channel the water. In sum, temporarily removing the water from the area did not abate the cited condition.

Basin Resources did not argue that the time set for abatement was inadequate. Thus, the Secretary established the two elements set forth in section 104(b). Accordingly, the order is affirmed. A penalty of $5,000 is appropriate.

5. Citation No. 4057491

On May 17, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(a)(1). In the citation, the inspector alleged that the ventilation plan was not being followed in that the 3rd North shuttle car roadway was dry and dusty in entry No. 2 between crosscut Nos. 61 and 62. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,450.00 for the alleged violation.

Basin Resources does not contest the violation but contends that its negligence was low and that the penalty is excessive. The cited section of the ventilation plan states: "Dust on haulageways shall be controlled by water wetting or ... other dust suppressants as needed

to maintain respirable dust on intake at or below 1.0 mg/m^3." (Ex. P-17). Inspector Fleshman testified that he did not know when the last time the roadway was watered. (Tr. 529). He did not take any samples to determine if the condition created respirable dust in excess of 1.0 mg/m^3. (Tr. 530-31). Based on this evidence, I find that the violation was not serious. The condition was obvious, however, and I affirm the inspector's moderate negligence determination. A penalty of $200 is appropriate.

6. Citation No. 4057782

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(d). In the citation, the inspector alleged that Basin Resources failed to review a ventilation plan amendment with the miners that were affected by the revision. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,155.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

7. Citation No. 4057783

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.333(b)(3). In the citation, the inspector alleged that Basin Resources failed to maintain a stopping at crosscut 57 on the 4th Left section. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

8. Citation No. 4057785

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.333(b)(3). In the citation, the inspector alleged that Basin Resources did not install a permanent stopping in the 4th Left section setup room, at crosscut 57, to separate the main intake from the belt entry. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation. The standard provides that permanent stoppings or "other ventilation control devices ... shall be built and maintained ... to separate belt conveyor haulageways from intake air courses...."

Basin Resources contests the alleged violation. It argues that at the time the citation was issued, it was in the process of building a regulator at that location. (Tr. 500-02). It states that the ventilation device being constructed was never intended to be a stopping. *Id.*

The citation was terminated by the inspector with the following justification: "The stopping has been designated as a regulator and the slant side of the regulator has been fully coated." Inspector Fleshman testified that a regulator was permissible under the standard at the cited location. Although his testimony is confusing, he apparently issued the citation because the ventilation device was not marked on the mine map. (Tr. 492). He stated that if a regulator is not labeled as a permanent ventilation control device on the map, "we don't accept it as such." *Id.*

I credit Mr. Hallows' testimony that the regulator was in the process of construction. (Tr. 500-02). At the time the citation was issued, the construction of the regulator was almost completed. Basin Resources abated the alleged violation by completing the construction of the regulator and marking the device as a permanent ventilation control device on the mine map. I find that the Secretary failed to establish a violation of the standard and I vacate the citation.

9. Citation No. 4057509

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.333(b)(3). In the citation, the inspector alleged that Basin Resources failed to maintain two stoppings at crosscut 58 on the 4th Left section. The citation states that the stoppings were not coated. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $2,606.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

10. Citation No. 4057801

On May 30, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.333(d)(3). The citation states the air lock doors at crosscut No. 19 in the East Mains were open when not in use allowing air to leak from the belt to the intake entry. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

11. Citation No. 4058077

On August 30, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.344(a)(1), as follows:

> The air compressor room in crosscut #6, off #7 entry, West Mains was not totally enclosed with fire-proof material in that the front part of the room was open to track entry #7. The area is above the maintenance loading and unloading area, where personnel are present during the shift. Fire protection provided on unit to shut it down in case of fire.

Inspector Shiveley determined that the alleged violation was not S&S and that Basin Resources' negligence was moderate. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation. The safety standard provides, in part, that "electrical compressors shall be located in a noncombustible structure or area."

Basin Resources does not contest the violation but contends that its negligence was low. It states that the evidence shows that the compressor was enclosed except on one side, the area was rock dusted, and the compressor was equipped with a fire suppression system. Inspector Shiveley testified that the air compressor was in a temporary location while the roof was being fixed in another area. (Tr. 606). The regulation requires that the compressor be totally enclosed in a fireproof structure or area. The compressor was enclosed on all sides except the front. (Tr. 608-09). Inspector Shiveley determined that the operator's negligence should be moderate because when he spoke with the foreman about the condition, the foreman was aware that the compressor should be shut down when no miners are present. (Tr. 607-08). No miners were at the operating compressor at the time the inspector observed it. (Tr. 607). Mr. Hallows testified that Basin Resources had ordered a door for the enclosure but that it had not arrived. (Tr. 610; Ex. R-16).

In her brief, the Secretary moved to modify the citation to allege high negligence and unwarrantable failure. The basis for the motion is that Basin Resources knew that a noncombustible structure was required but did not have one in place and that it also knew that a miner should be at the compressor when in operation.

Although the standard does not provide for an alternative method of compliance, the Secretary seems to believe that the "mine was required to either totally enclose the compressor in a fireproof structure or to keep a miner in the area continuously while the unit was in service." (Sec. Br. at 52; *see also* 30 C.F.R. § 75.344(b)(1)). I do not find such a provision in the regulation. In any event, I deny the Secretary's motion to modify the citation. There has been no showing of aggravated conduct or high negligence. In addition, it would violate basic concepts of due process to enter an unwarrantable failure or high negligence finding when Basin Resources was not given the opportunity to present evidence at the hearing to contest such an allegation. For the reasons set forth by Basin Resources, I find that its negligence was relatively low. A penalty of $100 is appropriate.

C. Roof and Rib Support Violations, 30 C.F.R. § 75.202(a).

1. Citation No. 4057858

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.202(a), as follows:

> A loose and uncontrolled rib was present in #1 entry of 5 left section. The rib pulled down easy and was 5 feet high, 5 feet wide, and 12" thick. The preshift examiner needs to pass this location during his examination.

Inspector Shiveley determined that the alleged violation was S&S and that Basin Resources' negligence was moderate. The Secretary of Labor proposes a civil penalty of $1,610.00 for the alleged violation. The safety standard provides that 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 roof, face or ribs and coal or rock bursts."

Basin Resources contests the alleged violation, but agrees that if a violation is found, it would be S&S. It contends that any hazard created by the condition was confined to an area along the rib. It points to Inspector Shiveley's testimony that the hazard was limited to an area five feet from the rib. (Tr. 398). Because the entry was 16 feet wide, it argues that the examiner would not be exposed to a hazard. Loose cleanup material was present along the same side of the entry as the cited condition, so the examiner could not have walked in a hazardous area. In addition, Basin Resources argues that the loose rib was difficult to detect and there is no evidence that someone should have recognized that the area needed to be barred down.

I find that the Secretary established a violation. The inspector testified that the loose rib was easy to see, that it was five feet high, five feet wide, and one foot thick, and that it would have fallen into the entry. (Tr. 390, 396-97). He stated that he was concerned that an examiner doing methane checks might not see the crack in the rib and expose himself to the hazard. (Tr. 398-99). I credit his testimony. The fact that an examiner might walk more than five feet from the rib does not establish that he would not be exposed to the hazard. I cannot assume that a rib will always fall straight down or that an examiner will always walk in a particular area of an entry. There is no question that the loose rib was in an area where miners work or travel. Although the muck that was piled along the rib line may have made it less likely that miners would travel directly under the loose rib, it did not eliminate the hazard and cannot form the basis for vacating the citation. The Secretary is not required to show that loose roof or rib will fall directly onto someone's head in order to establish a violation. In addition, I must assume continued normal mining operations when considering whether a violation occurred. I reject all of the other arguments presented by Basin Resources' with respect to this citation. A penalty of $1,000 is appropriate.

2. Citation No. 4057479

On July 11, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that the mine roof was not adequately supported or controlled to protect the weekly examiner from the hazards of loose roof where sloughage occurred at two locations in the West Mains. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation but contends that its negligence was low and that the penalty is excessive. Inspector Fleshman testified that the examiner should have been recording the loose roof because the condition had existed for a long time. (Tr. 515). Roof bolts were hanging and plates were loose on the bolts. *Id.* He stated he did not designate the negligence as high because the cited area was dangered off in some areas. *Id.*

Mr. Hallows testified that the cited area had been subject to weekly examinations for only a short time. (Tr. 518-20; Ex. R-12). Basin Resources argues that because the evidence shows that certain of the hazardous areas were dangered off, the hazardous conditions in areas that were not dangered off must have recently occurred. The evidence to support Basin Resources' arguments is very speculative. (Tr. 518-24). I find that the Secretary established moderate negligence and that the violation was serious. A penalty of $500 is appropriate.

3. Citation No. 4057276

On July 27, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the roof at entry #10, crosscut #2, in the East Mains. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of $1,000 is appropriate.

4. Citation No. 4057277

On July 27, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the rib at entry #10, inby crosscut #2, in the East Mains. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of $1,000 is appropriate.

5. Citation No. 4057484

On May 4, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that Basin Resources failed support or control the roof at entry #5, crosscut #58, in the 3rd North Mains. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious but not S&S. A penalty of $500 is appropriate.

6. Citation No. 3848279

On May 24, 1995, MSHA Inspector Ramey issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.202(a). In the citation, the inspector alleged that Basin Resources failed to support or control the ribs on the intake entry of the 4th Left section near crosscut #53. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. Based on the language of the citation, I find that the violation was serious and S&S. A penalty of $1,000 is appropriate.

D. Electrical Violations, 30 C.F.R. § 75.500 etc.

1. Order No. 3849625

On January 11, 1995, MSHA Inspector Shiveley issued an order to Basin Resources under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 75.503. In the order, the inspector alleged the overload protection for a water pump in the last open crosscut of the 3rd North Mains was defeated by splicing the overload wires together inside the control box. He determined that the alleged violation was S&S and was caused by the operator's unwarrantable failure. The Secretary of Labor proposes a civil penalty of $6,000.00 for the alleged violation.

At the hearing the parties reached an agreement to modify the order to a section 104(a) citation with moderate negligence. (Tr. 613-14). With that stipulation, Basin

Resources does not contest the violation or the S&S designation. It only contests the amount of the penalty. Based on the stipulation, I find that the violation was serious and S&S. A penalty of $4,000 is appropriate.

2. Citation No. 3849795

On April 7, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.503, as follows:

> The Allco approved ... face ventilating fan installed in entry #3 return, 4 Left section was not maintained in permissible condition, in that the motor used to provide traction was broken off and pulled away from main frame, main power to motor was pulled inside control.

The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $50.00 for the alleged violation.

Basin Resources contests the violation. Based on the evidence, I find that the citation should be vacated. (Tr. 583-604; Ex. P-18). The mobile face ventilating fan contained two motors. The motor that operates the fan is not involved in this citation. The other motor can be used to move the fan to another area. This motor was on a small platform attached to the frame for the mobile fan. At some point in time, the motor had been struck by another piece of equipment rendering it inoperable. The motor was no longer attached to the equipment in a way that it could be used to move it. The electric power wires were disconnected from the motor at the control box. The coupler between the motor and the speed reducer was not connected. Thus, the motor was not connected to any electrical circuits and was totally inoperable.

The mobile fan was equipped with four wheels and was designed to be moved without using the cited motor. Mr. Hallows testified that the motor would not move the fan even before it was damaged, so it was moved manually. There is no requirement that such fans be equipped with electric motors to move them. For all practical purposes, the cited motor was no longer a piece of electric equipment because all power had been disconnected from it. The concept of permissibility is not really applicable to the motor. Assuming continued normal mining operations, the motor did not pose a hazard of propagating a fire or explosion. All of the other components of the ventilating fan were in permissible condition. The citation is vacated.

3. Citation No. 4057492

On May 17, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.512. In the citation, the inspector alleges that the record of required weekly electrical examinations for

the energized power center on the 3rd North section at crosscut No. 7 had not been made since 4/22/95. The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019 for the alleged violation.

Basin Resources contests the violation. It argues that the required examinations were made and recorded but that the inspector did not look in the correct records. At the hearing, Basin Resources presented records of weekly examinations that indicate that the required weekly inspections were done. (Tr. 470-71; Ex. R-15). Neither the inspector nor Jeff Salerno, a safety official with the company, could find these records at the time of the inspection. The company's records were not well organized. (Tr. 467, 468-69). The safety standard requires that the weekly examinations be made and provides that a "record of such examinations shall be kept and made available to" MSHA inspectors. Since Inspector Fleshman with the help of a company official could not find the correct records, I find that they were not made available for inspection. I affirm the citation, find that the violation was not serious. A penalty of $100 is appropriate.

4. Citation No. 4057856

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.900-1, as follows:

> The 480 volt portable distribution center, located in entry #4 between crosscuts #60 and #61 was not protected from mobile equipment, in that entry #4 is the main haulroad leading into the 3rd North Mains. The distribution center was not energized at time of inspection. Entry measured 18 feet wide and distribution box measured 30" wide.

The inspector determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation. The safety standard provides, in part, that "[c]ircuit breakers used to protect low- and medium-voltage circuits underground shall be located in areas which ... are clear of any moving equipment used in haulageways."

Basin Resources contests the violation. It contends that the distribution center was not in use and was not a functioning piece of equipment. I reject Basin Resources' arguments. It is not disputed that the cited distribution center contained circuit breakers. I credit Inspector Shiveley testimony that the entry was a main haulageway and that he observed tire tracks near the distribution center. (Tr. 376-79). The distribution center extended about 46" into the entry, when the plugs and receptacles are included, and large equipment used the haulageway. (Tr. 373-76; Ex. P-11). I find that the distribution center was not in an area that was clear of "moving equipment used in haulageways."

The fact that the distribution was not in use at the precise time of the inspection is not controlling. It was connected to the power center with a trailing cable. Although the circuit breaker at the power center was off, it could be easily switched on. (Tr. 382-83). Assuming continued normal mining operations, the distribution center could have been energized. Mr. Hallows testified that the distribution center was not "a functioning piece of equipment," but he did not provide any explanation of what he meant. (Tr. 383). He relied on a document prepared by Mr. Salerno that indicated that the distribution center was not energized or in use. (Ex. R-10). The exhibit does not state that the distribution center was not a functioning piece of equipment. I do not credit Mr. Hallows testimony in this regard.

In her brief, the Secretary moved to modify the citation to allege an S&S violation. The Secretary filed the motion after the record in these cases was closed. Basin Resources was not given the opportunity to present evidence on the S&S issue. Accordingly, I deny the Secretary's motion. A penalty of $200 is appropriate.

5. Citation No. 4057730

On November 15, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.503. In the citation, the inspector alleged that the lighting system for the 4 left longwall was not maintained in permissible condition because the cable gland was not assembled properly where it entered into the ballast box at shield #95. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

6. Citation No. 4057731

On November 15, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.503. In the citation, the inspector alleged that the lighting power cable between shield #88 and #95 on the 4 left longwall was not maintained in permissible condition because additional insulation was not provided where it contacted hydraulic hoses and equipment. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

7. Citation No. 4057498

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.515. In the citation, the inspector alleged that the cable entering the switch for the inby airlock door between Crosscut Nos. 23 and 24, in entry No. 5, 3rd North Section, was not suitably bushed and that the insulation was pulled out of the metal switch box. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

E. Other Violations

1. Citation No. 4057261

On June 28, 1995, MSHA Inspector Shiveley issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.1100-3. In the citation, the inspector alleged that water would not flow from three fire hose valves along the #11 coal belt. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

2. Citation No. 4057478

On July 11, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.1003(a). In the citation, the inspector alleged that the energized trolley wire in entry No. 7, West Mains, was not guarded between crosscut Nos. 14 and 15. The main door in the stopping was in the area. He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $1,450.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $1,000 is appropriate.

3. Citation No. 4057487

On May 16, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.1725(a), as follows:

> The first bottom roller inby the No. 11 belt drive was not maintained in a safe operating condition. The No. 11 belt was running and smoke was coming out of the hot left side bearing, on the referenced roller.

He determined that the alleged violation was S&S. The Secretary of Labor proposes a civil penalty of $1,450.00 for the alleged violation. The safety standard provides, in part, that stationary equipment shall be maintained in safe operating condition and equipment in unsafe condition shall be removed from service immediately.

Basin Resources does not contest the violation, but argues that the violation was not S&S, its negligence was low, and that the penalty is excessive. The Secretary contends that the violation was S&S and also moved in her brief to modify the citation to allege an unwarrantable failure.

I find that the Secretary established the four elements of the Commission's *Mathies* S&S test. 6 FMSHRC 3-4. The third element of the test is whether it was reasonably likely that the hazard contributed to would result in an injury. Assuming continued normal mining operations, I find that an injury was reasonably likely. The roller, which was on the bottom belt, was hot and smoking. (Tr. 553-4). Although there were no coal accumulations in the immediate vicinity, the violation created the hazard of a fire. *Id.* The cited condition could have ignited coal fines on the belt and started a fire. *Id.*

I deny the Secretary's motion, filed after the close of the hearing, to amend the citation to allege an unwarrantable failure. First, it would violate basic concepts of due process to enter an unwarrantable failure or high negligence finding when Basin Resources was not given the opportunity to present evidence at the hearing to contest such an allegation. Second, I find that under the circumstances here it would not be appropriate to impute the actions of the beltman, an hourly employee who apparently knew about the condition of the roller, to Basin Resources. A penalty of $1,000 is appropriate.

4. Citation No. 4057500

The Secretary agreed to vacate this citation at the hearing. (Tr. 483).

5. Citation No. 4057781

On May 24, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.403. In the citation, the inspector alleged that five rock dust samples did not meet the required incombustible content requirement of the safety standard. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $1,019.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

6. Citation No. 4057511

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.403. In the citation, the inspector alleged that no rock dust had been applied to the floor in the belt entry between crosscut 57 and 58, on the 4th left section. Very little rock dust was on the ribs in the area. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $2,606.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

7. Citation No. 4057508

On May 25, 1995, MSHA Inspector Fleshman issued a citation to Basin Resources under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 75.1104. In the citation, the inspector alleged that three open diesel fuel drums were in crosscut No. 56, between entry Nos. 1 and 2, in the 4th Left section. He determined that the alleged violation was not S&S. The Secretary of Labor proposes a civil penalty of $690.00 for the alleged violation.

Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. A penalty of $200 is appropriate.

III.

APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Basin Resources was issued 937 citations and orders in the 24 months preceding November 11, 1995, and that Basin Resources paid penalties for 722 of these citations and orders during the same period. (Ex. P-21). I also find that Basin Resources was a medium mine operator with 738,776 tons of production in 1993. (Ex. J-1). Basin Resources' parent company was large with 20,204,994 tons of production in 1993. *Id.* The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of $325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected

its ability to continue in business. The Secretary has not alleged that Basin Resources failed to timely abate the citations and orders, with the exception of Citation No. 4057300 for which a §104(b) order was issued. Unless otherwise noted above, all of the violations were the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

IV.

ORDER

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

Citation/Order No.	30 C.F.R. §	Penalty
WEST 95-494		
3849625	75.503	$4,000.
4057257	75.400	5,000.
4057838	75.400	2,000.
4057475	75.370(a)(1)	300.
WEST 96-22		
4057261	75.1100-3	200.
4057262	75.364(g)	200.
4057854	75.400	500.
4057855	75.400	vacated
4057856	75.900-1	200.
4057857	75.400	500.
4057858	75.202(a)	1,000.
4057859	75.400	vacated
4057860	75.400	500.
4057478	75.1003(a)	1,000.
4057479	75.202(a)	500.
4057276	75.202(a)	1,000.
4057277	75.202(a)	1,000.

Citation/Order No.	30 C.F.R. §	Penalty
WEST 96-23		
3849795	75.503	vacated
4057295	75.340(a)(1)	$1,000.
4057300	75.380(d)(1)	5,000.
4057481	75.400	1,500.
4057484	75.202(a)	500.
4057487	75.1725(a)	1,000.
WEST 96-24		
4057491	75.370(a)(1)	200.
4057492	75.512	100.
3848279	75.202(a)	1,000.
4057498	75.515	200.
4057500	75.1103-4(a)(1)	vacated
4057781	75.403	200.
4057782	75.370(d)	200.
4057783	75.333(b)(3)	200.
4057785	75.333(b)(3)	vacated
4057786	75.400	1,000.
4057507	75.400	500.
4057508	75.1104	200.
4057509	75.333(b)(3)	200.
4057511	75.403	500.
4057801	75.333(d)(3)	200.
WEST 96-36		
4058077	75.344(a)(1)	100.
4058078	75.400	500.
WEST 96-128		
4057730	75.503	200.
4057731	75.503	200.
	Total Penalty	$32,600.

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and orders listed above are hereby **VACATED**, **AFFIRMED**, or **MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $32,600.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716
(Certified Mail)

Andrew Volin, Esq., SHERMAN & HOWARD, L.L.C., 633 17th Street, Suite 3000, Denver, CO 80202 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 8 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-97-M
Petitioner	:	A. C. No. 14-00164-05520
v.	:	
	:	Kansas Falls Quarry & Mill
WALKER STONE COMPANY, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Barbour

This civil penalty proceeding involves a violation of 30 C.F.R. § 56.14105, a mandatory safety standard for metal and nonmetal mines requiring in part that, "Repairs or maintenance of machinery or equipment . . . be performed only after the power is off, and the machinery or equipment blocked against hazardous motion" and that "persons be effectively protected from hazardous motion."

The case was heard by Commission Administrative Law Judge Roy J. Mauer, who concluded Walker Stone Company, Inc. (Walker) did not violate the standard (17 FMSHRC 600 (April 1995)). The Commission reversed the judge, found a violation, and remanded the proceeding for assessment of an appropriate civil penalty. (*Walker Stone Company, Inc.*, 19 FMSHRC 48 (January 1997). Because Judge Maurer was due to leave the Commission, the remanded case was assigned to me.

THE FACTS

In its decision, the Commission's summarized the facts:

> On June 25, 1993, the primary impact crusher at Walker's open-pit limestone quarry . . . became clogged with rock, causing its drive motor to stall. The . . . crusher is located below a hopper into which trucks dump loads of rock. The crusher is powered by a diesel motor, which turns a rotor inside the crusher. As the rotor turns, rock is tossed inside the crusher housing until it breaks into pieces small enough to drop out of the crusher onto a splash pan and conveyor belt, which transports the rock for further processing. When rock becomes lodged inside the crusher, it prevents the rotor from turning and stalls the drive motor, rendering the crusher inoperable until the rock is removed.

> [W]hen . . . [rock clogged the crusher], the crusher operator, Roy Brooner, changed the signal light at the hopper from green to red to indicate to the truck drivers to stop dumping their loads and to help him unclog [it]. Truck drivers Danny Boisclair, Bill Scott and Frank Esterly arrived at the scene. Boisclair and Scott entered the interior of the crusher and, using a sledgehammer, broke up large boulders that were resting on top of the rotor. Upon their exiting the crusher, the crusher operator attempted to jog the rotor to see if it had been unclogged. The rotor did not turn, so Scott, after conferring with the crusher operator, went underneath the rotor to see if rock was lodged in the area of the splash pan. Unbeknownst to the crusher operator, Boisclair reentered the interior of the crusher. Easterly followed Boisclair but remained just outside the crusher. While Scott cleared rock from under the rotor, Boisclair used his hunting knife to remove rock that was lodged between the top of the rotor and the crusher housing. Easterly observed Scott working below and asked him if he needed help. Scott responded that he though he had removed the rock that was clogging the rotor and that he was ready to leave. Easterly told Boisclair to hurry and get out of the crusher because Scott was done. Boisclair began to exit the crusher but, before he was out, Scott told the crusher operator that the rotor was clear and the crusher operator jogged the rotor. The rotor turned and Boisclair was pulled between the rotor and the crusher housing, causing massive injuries to his upper and lower torso that resulted in his death (19 FMSHRC at 49).

Following an investigation, the Secretary's Mine Safety and Health Administration (MSHA) charged Walker for a violation of section 56.14105 for failing to protect Boisclair from the hazardous motion of the rotor. In addition, the Secretary asserted that the violation was a significant and substantial contribution to a mine safety hazard. The Secretary proposed a civil penalty of $9,000 for the violation.

In holding that section 56.14105 was not applicable to the facts under which Boisclair met his death, Judge Maurer found that the miners involved were not repairing or maintaining the crusher and thus that the standard, which specifically states it applies during "[r]epairs or maintenance of machinery or equipment," was inapposite to the work done (17 FMSHRC at 604-605).

Reversing the judge, the Commission held that the standard "clearly and unambiguously reach[ed] the facts" and that the removal of rock to restore the crusher to working condition was "covered by the standard's broad phrase 'repairs or maintenance of machinery or equipment'" (19 FMSHRC at 51). The Commission found a violation and found that the violation was a significant and substantial contribution to a mine safety hazard (Id. at 52-53).

PROCEEDINGS ON REMAND

On remand, I ordered the parties to determine if they were able to agree upon an appropriate penalty and, if not, to "advise me in writing, and with pertinent cites to the record, of the penalty ... [each proposed]" (Order On Remand (February 18, 1997)).

Noting that Judge Maurer assessed a penalty of $7,500 for another violation that was associated with the fatality — a violation that was not before the Commission on review — the Secretary asserted that "the failure to protect against hazardous movement . . . was the proximate cause of a miner's death" and suggested that the penalty should be "at least $7,500" (Letter of Secretary's Counsel (March 17, 1997)). Counsel for Walker countered that the company had a good faith belief the language of the standard was inapplicable to the facts and that Boisclair violated measures in place at the time of the accident to prevent unauthorized entry into the crusher while employees were trying to dislodge rock. Counsel stated that a penalty of $100 was appropriate (Letter of Counsel (March 14, 1997)).

DETERMINATION OF THE PENALTY

The Commission recently has reminded its judges that while they have broad discretion in assessing civil penalties, their assessments must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(i) (Jim Walter Resources, Inc.,19 FMSHRC _ (Docket No. SE 95-459), slip op. 3, (March 27, 1997)).

The parties stipulated to two of the statutory penalty criteria, namely that the penalty would not affect Walker's ability to continue in business and that Walker demonstrated good faith in abating the violation (17 FMSHRC at 601). They also stipulated that Walker had 54,977 man-hours of production in 1992, a level of production that I find makes Walker a small operator. Finally, they agreed that Petitioner's Exhibit 18, which indicates that in the 2 years proceeding the subject accident Walker was cited for 30 violations of various standards, reflects Walker's applicable history of previous violations (Id.). Given that Walker is a small operator, I find this is a medium size history. The remaining criteria are the gravity of the violation and the negligence of Walker in causing it.

It is obvious that the violation was extremely serious. It was a cause of Boisclair's death. It is not as obvious to what extent the company was negligent.

Walker violated the standard when it failed to turn off the power to the crusher and to block it against motion while miners, including Boisclair, were attempting to break up and remove rocks clogging the crusher and when it failed to protect Boisclair from the hazardous movement of the rotor. The fact that Walker may have believed the standard did not apply to the circumstances, does not excuse the company's failure. The Commission found that the language

of the standard "clearly and unambiguously" applied to breaking up and removing rocks clogging the crusher (19 FMSHRC at 51). The company should have known this, and in failing to implement the standard so as to protect the miners, the company failed to exhibit the care required by the circumstances.

Nevertheless, Walker's negligence was mitigated, at least in part, by the fact that Boisclair, for reasons known only to himself, put himself in harm's way in violation of at least two company directives. Walker had a policy of not permitting one person to work above another (Tr. 202-203). Had Boisclair complied with this policy and not worked above Scott, Boisclair would not have needed protection from the hazardous movement of the rotor. Further, the company had a policy that the crusher could not be entered without letting the crusher operator know (Tr. 229). Had Brooner been told that Boisclair was in the crusher, Brooner never would put the rotor into motion.

Judge Maurer observed that in this case "there is plenty of negligence . . . to go around" (17 FMSHRC at 607). While it is true that Boisclair would not have been killed had he complied with company policy, it is equally true he would not have been killed had the company complied with the standard. In my view, as in Judge Maurer's, Boisclair's negligence lessens the degree of, but does not excuse, the company's failure. Like Judge Maurer, I find that Walker is chargeable with ordinary negligence.

In assessing a civil penalty, I have considered the company's small size and its good faith abatement as well as its medium size history of pervious violations. Standing alone these factors would warrant a small to medium size penalty. However, they are overridden by the extreme seriousness of the violation and the fact that Boisclair would not have died, but for the company's negligent violation of the standard.

Accordingly, I find that a civil penalty of $7,500 is appropriate, and I note that this assessment will not affect Walker's ability to continue in business.

ORDER

Walker is ORDERED to pay a civil penalty of $7,500 for the violation of section 56.14105 as set forth in Citation No. 4337450 and to do so within 30 days of the date of this decision.

David F. Barbour
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, U. S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Katherine Shand Larkin, Esq., Jackson & Kelly, 1660 Lincoln Street, Suite 2710, Denver, CO 80264 (Certified Mail)

Keith R. Henry, Esq., Weary, Davis, Henry, Struebing & Troup, 819 North Washington Street, Junction City, KS 66441 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 8 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-16
Petitioner	:	A.C. No. 03-01772-03501
v.	:	
	:	Hoover Mine
JAMES FORK MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Mr. Ned Zamarripa, Conference & Litigation Representative, U. S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Ms. Anna M. Boden, James Fork Mining Company, Manfield, Arkansas for Respondent.

Before: Judge Weisberger

I. Statement of the Case

At issue in this civil penalty proceeding is the validly of an order issued by the Secretary of Labor (Secretary) under Section 104(g)(1) of the Federal Mine Safety and Health Act of 1977 ("The Act"), alleging a violation of 30 C.F.R. § 48.26(a), and three citations alleging violations of 30 C.F.R. § 48.3(a)(3), 30 C.F.R. § 75.160 and 30 C.F.R. § 77.1000-1 respectively. At the hearing on this matter held in Fayetteville, Arkansas, on March 12, 1997, the parties stipulated as follows: ". . . the sole issue in this matter is whether or not the operator of this mine was engaged in work activity in preparation to mine coal and is subject to the Mine Act. This issue alone will determine whether the alleged violations occurred."

It was further agreed that should I find that James Fork Mining Company (the operator), is subject to the Act, then the order and three citations at issue are to be affirmed as written, and the penalties proposed by the Secretary for these violations are to be affirmed. It also was agreed that should I find that the operator is not subject to the Act, then the order and citations at issue are to be dismissed.

II. Findings of Fact

The subject site, consisting of 20 acres, is located in Sebastian County, Arkansas. An underground coal mine located on the property has not been operated since 1977. The portals leading to the underground mine have been sealed.

Steven Marusich is the general manager of James Fork Mining Company, a sole proprietorship. Marusich who has more than 40 years mining experience, buys and sells mining equipment. Sometime in 1994, he purchased a conveyor system consisting of belt drives, and tail pieces. In the same time period, he obtained a bolter machine as payment for services rendered. All this equipment, and other mining equipment such as mine wire, pumps, and a cutting machine, were placed on the property by Marusich in 1995. On or about April 1995, Steven Marusich placed a mobile home, 14 feet by 80 feet on the property and commenced to live there with his family.

On April 26, 1995, Marusich, listing himself as operator and owner, filed with the Arkansas Department of Pollution Control and Ecology, a document entitled A notice of plan to conduct exploration activities on the subject site. He indicated that the reclamation activities were as follows: "area would be graded back to approx. original contours and seeded." (Exh. G-4). Marusich noted that exploration for coal was planned and 250 tons would be removed. He indicated that the method of exploration would be "dozer work" (Ex G-4). Marusich indicated the extent of anticipated exploration as follows: "[m]ax. depth of penetration is approx. 20' disturbed area approx. 1.5 acres" (sic) (Ex. G-4). He indicated that exploration would be carried out for about three months.

In May 1995, Marusich intended to hire an independent contractor to do exploration and reclamation work on the property to reduce some of the dangers located therein. Marusich contacted the Arkansas Department of Pollution Control and Ecology, in connection with a request to obtain an exploration permit, and explained that he was " . . . proposing to open up a small area near my house that has some Hartshorne Crop Coal under it." He indicated further as follows: "I would hope to permit a surface mining operation on these properties if all goes well." (Respondent's Exhibit 2).

On April 10, 1996, Marusich filed with the Mine Safety and Health Administration, a Legal Identity Report which set forth James Fork Mining Company as the operator for the subject site. The mine name was listed as the Hoover mine. The words "coal mine-underground", were placed on the report under the following: "commodity (type of product and operation-surface, underground or facility)" (Ex. G-3, P.2).

By letter dated June 1, 1996, Marusich submitted to the District Manager of MSHA in Denver, Colorado, a Fan Stoppage Plan. Marusich indicated that the plan was being submitted " . . . as required by 30 C.F.R. § 75.314." (Ex. G-5. tab 1, P.2)

On June 10, 1996, Marusich submitted to the District Manager, MSHA, Denver, Colorado, a Smoking Prohibition Plan "as required by Section 75.1702, C.F.R., Title 30." The plan, inter alia, provides that all persons entering the mine will be subject to a systematic search for smoking articles, and that "No Smoking" signs shall be prominently displayed at all mine entrances. (Ex. G-5, tab 3)

A training plan for the Hoover mine was received by the MSHA in McAllister, Oklahoma

office on June 21, 1996. The plan, entitled Part 48. Training Plan Surface indicates that the approximate number of miners employed is 25.

In June 1996, Lester Coleman, an MSHA inspector inspected the subject property, and noted that an old structure on the site constituted a hazard. He agreed that the reclamation work being performed was removing some of the hazards present on the property. Coleman placed the mine in an active non-producing status.

On August 5, 1996, MSHA, Inspector Jimmy Stewart inspected the site, and issued the order and citations that are at issue in this proceeding.

III. Discussion

A. The operator's position

Marusich testified that when the site was purchased it presented various hazards. He indicated that there were eroded areas, banks that contained unconsolidated materials, cracks in the spoil piles, and highwalls with steep slopes. He also noted the presence of concrete with exposed sharp edges, and an old building with exposed metal parts. Marusich indicated that all these conditions presented hazards to persons walking in the area, especially to his seven years old son who lived on the property. According to Marusich, hazards were mitigated or eliminated by decreasing the slopes, trimming the highwall back eight feet, leveling, sloping, and grading the reclaimed area, creating a pond to prevent erosion, and removing the old metal structure. Also, Marusich removed a dam on the property that could have created hazardous conditions to persons traveling on adjacent roadways, as the dam leaked when it rained. It is Marusich's position that all these operations were taken, not to prepare the site for mining, but to eliminate hazardous conditions. He also indicated that he does not have the necessary financial funds to open a mine. Instead, he would like to sell the property to another person who could operate it as a mine.

B. Analysis

Section 4 of the Act provides that each coal mine . . . shall be subject to the provisions of this Act." The term "coal mine" is defined in section 3(h)(1) of the Act as follows:

> (h)(1) "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 the work of preparing coal or other minerals, ...

In deciding whether the activities that were being performed by the operator are within the scope of the definition of a coal mine as set forth in Section 3(h)(1), supra, I am guided by the legislative history of the Act. In this connection, I take cognizance of the following expression of legislative intent set forth in the Senate Report,[1] as relied upon the District of Columbia Circuit in Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984) "'. . . it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation.' Id. (Emphasis added). Close jurisdiction question are to 'be resolved in favor of inclusion of a facility within the coverage of the Act.' Id." (734 F.2d. supra at 1554).

In applying the definition in Section (h)(1) of the Act and the legislative history to the case at bar, I note first of all, as indicated by photographs of the site, the extensive nature of the grading and leveling performed by the operator. Marusich testified that he did not consider the operation on the property "... as preparation for underground coal mine" (sic) (Tr. 111). He alleged that no exploration had taken place. He also stated that at the present time "... it's in planning stage and permitting stage" (sic) (Tr. 109). However, is significant to note that he indicated that "in the future we want to open coal mine. We are working toward opening coal mine" (sic) (Tr. 109). Also, although he indicated that it was not yet decided where to perform exploration on the site, he has interviewed persons familiar with the old abandoned mine on the property in order to determine the best sites for exploration. Further, the operator, has already taken actions to enable it to operate a mine such as filing for and obtaining a mine identity number, filing a Notice of Plan to Conduct Exploration Activities with the Arkansas Department of Pollution Control and Ecology, and the filing of a training plan, and unintentional fan stoppage plan with MSHA. I find that the reclamation work herein in combination with these enumerated activities placed the property in question of the purview within the term "coal mine", especially considering the legislative intent to give the broadest possible interpretation to the Act. I find that the operator was under the jurisdiction of the Act when cited in August 1996. I thus further find, in conformity with the parties' agreement at the hearing, that since jurisdiction attaches, the order and citations at issue are to be affirmed as written, and the penalties sought by the Secretary are also to be affirmed.

IV. Order

It is ordered that, within 30 days of this decision, the operator shall pay a total civil penalty of $418. It is further ordered that the order and citations at issue in this proceeding shall be affirmed as written.

Avram Weisberger
Administrative Law Judge

---

[1]S. Rep. No. 181, 95th Cong., 1st Sess. (1977).

Distribution:

Nep Zamarripa, Conference & Litigation Representative,
U.S. Department of Labor, MSHA, P.O. Box 25367, DFC, Denver, CO 80225 (Certified Mail)

Ms. Anna Marie Boden, c/o Mr. Steven Marusich, James Fork Mining Company, P.O. Box 840, Mansfield, AR 72944 (Certified Mail)

/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

April 10, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 94-1199
Petitioner	:	A .C. No. 15-14959-03561
v.	:	
	:	Docket No. KENT 94-1200
BROKEN HILL MINING COMPANY,	:	A .C. No. 15-14959-03562
Respondent	:	
	:	Docket No. KENT 95-240
	:	A .C. No. 15-14959-03569
	:	
	:	Docket No. KENT 95-310
	:	A. C. No. 15-14959-03570
	:	
	:	Mine No. 3

DECISION

Before: Judge Merlin

These matters are before me pursuant to the Commission's order of remand dated March 14, 1997. These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against the operator under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820. The case was assigned to an administrative law judge who is no longer with the Commission.

By notice dated December 19, 1996, the judge set a hearing for January 9, 1997. Commission records contain the return receipt showing that the notice was received by the operator. However, when the hearing was convened on the appointed day, the operator failed to appear. The operator has not explained its non appearance.

Section 2700.66 of Commission regulations, 29 C.F.R. § 2700.66 (1996), provides that when a party does not appear at a hearing, the judge may find the party in default without issuing

a show cause order. Prior versions of this regulation required the issuance of a show cause order whenever a party failed to comply with a judge's order. 29 C.F.R § 2700.63 (1991) (amended 1993). The comments to the present version make clear that elimination of the requirement for a show cause order under these circumstances was conscious and intentional. 55 Fed. Reg. 4853, 4856 (1990); 58 Fed. Reg. 12, 158 (1993).

In this case when it became obvious that the operator was not going to appear, the Solicitor moved on the record for a default judgment (Tr. 10). The judge stated that the motion was well taken (Tr. 10). However, the judge then said that the hearing would proceed with the testimony of the inspectors so that "we'll have some factual basis to assess the penalty" (Tr. 13). Thereafter, the Solicitor elicited testimony from the inspectors about the violations contained in the subject penalty petitions (Tr. 21-84). After listening to the testimony regarding each citation, the judge "affirmed" the citation (Tr. 38, 56-57, 69-70, 77-78, 85).

Section 2700.1(a) of Commission regulations, 29 C.F.R. § 2700.1 (a), provides that the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure. Rule 55 (a) of the Federal Rules of Civil Procedure provides that when a party against whom a judgment for relief is sought fails to plead or otherwise defend, the party's default may be entered. Under subparagraph (1) of Rule 55 (b) when a claim is for a sum certain the clerk of the court shall enter a judgment for the amount due and under subparagraph (2) in all other cases the party entitled to a judgment by default must request it.

In applying Rule 55, the courts have stated that in a default situation all well pleaded allegations are taken as true. Benny v. Pipes, 799 F.2d 489, 495 (9th Cir. 1986), cert denied, 484 U.S. 870, 108 S.Ct. 198 (1987). And when a default judgment is entered, facts alleged in the complaint may not be contested. Black v. Lane, 22 F.3d 1395, 1399 (7th Cir. 1994). The standard for appellate review of a default judgment is whether the trial court committed an abuse of discretion. Johnson v. Gudmundsson, 35 F.3d 1104, 1117 (7th Cir. 1994). An entry of a default judgment is not an abuse of discretion where a party who fails to appear at a scheduled hearing, because such conduct strays from recklessness to bad faith. Id. Moreover, pro se representation does not excuse a party from complying with the court's orders or the Federal Rules. Ackra Direct Marketing Corp. v. Fingerhut Corporation, 86 F.3d 852 (8th Cir. 1996). Wilful misconduct by a pro se litigant justifies entry of default even where the judgment is for a large amount. Id. Finally, where a party is put on notice of the amount of damages sought, he is not entitled to an evidentiary hearing on damages. Taylor v. City of Baldwin, Missouri, 859 F.2d 1330 (8th Cir. 1988). By its terms Rule 55 leaves the decision of whether a hearing on damages is necessary to the discretion of the judge. Fustok v. Conticommodity Services Inc., 873 F.2d 38 (2nd Cir. 1989).

Defaults have been analogized to dismissals for want of prosecution. Hritz v. Woma Corporation, 732 F2d 1178, 1184 (3rd Cir. 1984). The Supreme Court has upheld such dismissals. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 96 S. Ct. 2778 (1976); Link v. Wabash Railroad Company, 370 U.S. 626, 82 S. Ct. 1386 (1962). In National Hockey League, the Court recognized that use of this sanction was not only directed toward the particular conduct at issue, but also was designed to deter similar conduct in the future. National Hockey League, 427 at 643.

Section 110(a) of the Act, 30 U.S.C. § 820(a), provides that a mine operator of a facility covered under the Act where a violation of a mandatory health or safety standard occurs, shall be assessed a civil penalty. The Secretary has the burden of proving a violation. Keystone Coal Mining Corp., 17 FMSHRC 1819, 1838 (November 1995). Where a violation is proved, section 110(i), 30 U.S.C. § 820(i), sets forth six factors to be considered in determining the appropriate amount of a civil penalty as follows: gravity, negligence, prior history of violations, size, ability to continue in business, and good faith abatement.

Default judgments are not uncommon at the Commission. For fiscal year 1996 the Office of the Chief Administrative Law Judge entered defaults in 177 cases and for the first half of fiscal year 1997 there have been 73 such defaults. The defaults were entered by the Chief Judge because the operator either failed to answer or respond to a show cause order. In all those cases the facts set forth in the citations were accepted as true and the violations determined to exist. The inspector's findings regarding gravity and negligence were accepted as well as the Solicitor's representations for the other four criteria set forth in the petition and the operator was directed to pay the proposed penalty.

In the instant cases the operator's failure to appear at the hearing was more serious than the failures in the Chief Judge defaults, because here the Government incurred the unnecessary expense of travel by the Judge, Solicitor, and court reporter and the fees of the reporter. In addition, the dereliction of this operator is particularly egregious since he is completely familiar with Commission procedures. He has appeared at hearings on the merits. Broken Hill Mining, 17 FMSHRC 1548 (September 1995); 17 FMSHRC 1539 (September 1995); 17 FMSHRC 338 (March 1995), affirmed, 19 FMSHRC ____, No. KENT 94-1208 (April 9, 1997). He has been a party to settlements. Broken Hill Mining, 16 FMSHRC 1949 (September 1994). Nor is this the first time this operator has ignored Commission procedure and orders. He has had an appeal dismissed by the Commission for failure to file necessary materials. Broken Hill Mining, 18 FMSHRC 679 (May 1996). And he previously failed to appear for a hearing. Broken Hill Mining, 15 FMSHRC 515 (March 1993). I am, of course, mindful that default is a harsh remedy. But this knowledgeable operator has chosen to scorn the process.

In light of the foregoing, it is clear that immediate entry of default for these cases would have been proper and that the judge was not required to go on the record and take evidence regarding the violations. If the statements in the citations are taken as true, they establish the existence of the violations as well as the presence of gravity, negligence and good faith abatement. The printout submitted by the Solicitor shows the history of prior violations. Financial information regarding ability to continue in business is particularly within the province of the operator and it has long been recognized that it is the operator's responsibility to come forward with such evidence. Spurlock Mining Company and Sarah Ashley Mining, 16 FMSHRC 697, 700 (April 1994); Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983). The Commission has just now applied these principals to this very operator. Broken Hill Mining, 19 FMSHRC ____, slip op. at 5. The same approach would also appear to be applicable to size, if the operator wished to use that factor to mitigate proposed penalty amounts.

In the present matters the judge purported to enter a default judgment. However, he did not accept as fact the matters set forth in the withdrawal orders before him. Instead he took evidence and appeared to decide the validity of the orders on the merits based upon the testimony given by the inspectors. A decision on the merits requires a finding with respect to the existence of a violation as well as findings on the six criteria which section 110 (i), supra, directs be considered in reaching a penalty amount. The judge did not make the necessary findings to support his affirmance of the orders. Therefore, as directed by the Commission I will make the appropriate findings.

Order No. 4003845

Order No. 4003845 charges a violation of 30 C.F.R § 75.902. because the ground monitor circuit to a roof bolter had been bridged out, rendering the monitor inoperative (Exh. No. 3). The inspector described the condition and how the circuit which was designed to prevent electrocutions had been intentionally defeated (Tr. 23-26, 28). Based upon the foregoing, I find a violation existed. According to the inspector if there were a default, the machine would stay energized (Tr. 29). There was a danger of fatal electrocution (Tr. 26-27, 31). Based upon the foregoing, I find the violation was serious. The inspector stated that the operator was aware of the condition since the chief electrician, a member of mine management, was present and admitted that he knew what had been done (Tr. 30). Based upon the foregoing, I find the intentional bridging out demonstrated a reckless disregard for safety and that therefore, the operator was guilty of gross negligence. Such conduct was clearly aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Emery Mining Corporation, 9 FMSHRC 1997, 2004 (December 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2010 (December 1987). Based upon data in the order, I find that there was good faith abatement. The print out of the operator's history of prior violations shows that

history is low. The record in these cases contains no information regarding the operator's size. As already set forth, I believe that the operator bears the responsibility to produce evidence on this factor if it is relevant to the amount of penalty. However, in this instance I take judicial notice that in a prior proceeding which was decided after hearing, the operator was found to be small. Broken Hill Mining Company, 17 FMSHRC at 345, affirmed, 19 FMSHRC ____, (April 9, 1997). I accept that finding for present purposes.

As has already been pointed out, financial information regarding the operator's ability to continue in business is peculiarly the operator's own. It is the operator's duty to produce such data if it bears upon possible mitigation of the penalty amount. Even if it made sense to ask the Solicitor to come forward with such evidence, he could not do so because he would have to obtain it from the operator who has demonstrated his contempt for Commission process. And even if the Judge were to stray from his adjudicatory responsibilities by issuing on his own initiative orders to produce data, his efforts would be fruitless since the operator has shown he will not comply. In a case involving other mines of this operator the Commission approved the principle that in absence of proof that the imposition of penalties would adversely affect an operator's ability to continue in business, it is presumed that no such adverse effect would occur. Broken Hill Mining Company, 19 FMSHRC ____, (April 9, 1997); Spurlock Mining Company, supra, at 699-700; See also, Sellersburg Stone Co., supra, at 294. Although in Spurlock this operator submitted tax returns and balance sheets, the Commission still held that he failed to introduce specific evidence to show that the penalties would affect his ability to continue in business. In light of the foregoing, ability to continue in business is found to be non contributory to a determination of an appropriate penalty amount.

After careful consideration of the foregoing, I conclude that a penalty of $ 1,000 should be assessed.

Order No. 4004145

Order No. 4004145 charges a violation of 30 C.F.R. § 75.603 because improper temporary splices were made in the trailing cable of a shuttle car used to transport coal (Exh. No. 8). The inspector testified that he observed a splice in the trailing cable with exposed power wires (Tr. 41-42, 45). He actually saw the metal in the power wire (Tr. 45). A splice is supposed to restore the protective nature of the outer jacket so people will not get electrocuted if they touch the cable where it was spliced (Tr. 44). In the inspector's opinion the splice was not made in a workmanlike manner as required by the mandatory standard (Tr. 46). Based upon the foregoing, I find a violation existed. According to the inspector, the cable which supplied power to the shuttle car had 480 volts, an amount sufficient to kill or injure a miner (Tr. 42, 45). Based upon the foregoing, I find the violation was serious. The inspector testified that the operator's chief

electrician admitted he knowingly made the improper splices, alleging he did not have the materials necessary for a proper splice (Tr. 49). Based upon the foregoing, I find that the intentional making of a defective splice demonstrated a reckless disregard for safety and that therefore, the operator was guilty of gross negligence. Such conduct was clearly aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $2,500 should be assessed.

Order No. 4017905
Order No. 4017906
Order No. 4017907

Order No. 4017905 charges a violation of 30 C.F.R. § 75.400 because combustible materials such as loose coal spillage underneath the conveyor belt were allowed to accumulate in the Nos. 3 and 5 neutral and the No. 4 conveyor belt entries where the No. 6 conveyor belt was installed. The order recites that beginning at the conveyor belt the accumulations extended for approximately 2,000 feet inby the three named entries and that the certified foreman and belt examiner knew of the condition and had recorded it in the record book since January 3, 1994 (Exh. 9).

Order No. 4017906 charges a violation of 30 C.F.R. § 75.400 because combustible materials such as loose coal and float coal dust were allowed to accumulate beneath the No. 5 belt in the No. 4 entry and in the Nos. 3 and 5 neutrals. The order recites that these accumulations began at the No. 5 belt drive and continued for a distance of 2,500 feet including all connecting crosscuts and that the certified foreman belt examiner knew of the condition and had recorded it in the record book since January 3, 1994 (Exh. 10).

Order No. 4017907 charges a violation of 30 C.F.R. § 75.400 because loose coal and float coal dust were allowed to accumulate beneath the No. 4 conveyor belt in the No. 3 entry and the No. 4 neutral entry and all connecting crosscuts and extended inby to the No. 4 belt entry for a distance of approximately 400 feet (Exh. 11).

The inspector testified at the same time about these three orders. He explained that three different belts were involved in the orders (Tr. 51-52). He observed pretty much the same condition in all the areas cited in the orders (Tr. 52). At the time he traveled the belt conveyors from the underground section to the surface, the areas of the neutral entries beside the belts were

black with float coal dust and loose coal was present underneath the belts and in the belt entries (Tr. 51). Based upon the foregoing, I find the violations existed. According to the inspector, there was a hazard of mine fires and explosions (Tr. 55). The belt drives carry 480 volts of electricity and the belt is a source of heat when it is running (Tr. 55). An arc is created when the belt starter kicks in and could ignite the float coal dust that was present in or around the belt control starter box and in the neutral entries (Tr. 55-56). Extensive areas were involved in each of the orders. Based upon the foregoing, I find these violations were very serious. The inspector testified that the belt examiner/foreman admitted he had been reporting these conditions in his record book but said that due to an alleged lack of manpower the conditions were not corrected (Tr. 54). The belt examiner/foreman was a member of mine management (Tr. 54). Based upon the foregoing, I find that the intentional failure over 2½ months to correct the cited conditions demonstrated a reckless disregard for safety and that therefore, the operator was guilty of gross negligence. Such conduct was clearly aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Jim Walter Resources, Inc., 19 FMSHRC ____, slip op. at 6-10, No. SE 94-74 et al. (March 17, 1997). Based upon data in the orders, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that penalties of $5,500 should be assessed for each of these three orders for a total of $16,500.

Order No. 3812856

Order No. 38122856 charges a violation of 30 C.F.R. § 75.203(a) because the approved method of mining was not being complied with. Excessive widths were present in the crosscut between the No. 3 and No. 4 entries in that the crosscut was mined 23 to 27 feet wide for a distance of 18 feet. Also, pillar dimensions had been reduced in the coal pillar block between the No. 6 and No. 7 entries to a point where the pillar only measured nine feet thick. The section was being mined on 50 by 40 centers which leave 20 foot coal pillars. No additional support was installed (Exh. 12). The inspector testified that there were 33 foot widths and 20 was the maximum allowed (Tr. 63). He also said that the pillar is the most important thing in the control of the roof (Tr. 63). Based upon the foregoing, I find a violation existed. According to the inspector, the roof was real weak and especially weak in the crosscuts which were heavily traveled (Tr. 63, 66). A fatal roof fall could have occurred (Tr. 67). Based upon this testimony, I find the violation was very serious. The inspector stated that the excessive widths could have been seen by anybody and should have been apparent to the foreman who was responsible for the section (Tr. 66-67). Based upon the foregoing, I find that negligence was high and that the operator's conduct was aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement.

For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $2,000 should be assessed.

Order No. 4012283

Order No. 4012283 charges a violation of 30 C.F.R. § 75.202(b) because the preshift examiner traveled inby roof support while making his preshift examination. The order recites that date, time and examiner's initials were painted inby the last row of roof supports (Exh. 14). The inspector testified that he was traveling and observed dates, times and initials placed inby roof supports (Tr. 73). Any area examined must be indicated by dates, times and initials (Tr. 74). He issued the violation for persons being beyond the last row of roof bolts (Tr. 74). Based upon the foregoing, I find a violation existed. According to the inspector, the unsupported roof could have collapsed and caused a fatality (Tr. 77). He said that going inby roof supports is the major cause of roof fatalities (Tr. 77). Based upon this testimony, I find the violation was serious. The inspector stated that the preshift examiner was the third shift maintenance foreman and that therefore, he was a representative of the operator who had the responsibility to see that such conditions did not exist with respect to anyone, much less himself (Tr. 76). Based upon the foregoing, I find that negligence was high and that the operator's conduct was aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $2,500 should be assessed.

Order No. 4012344

Order No. 4012344 charges a violation of 30 C.F.R. § 75.220(a)(1) because the approved roof control plan which states that three rows of bolts must be installed before mining in a crosscut, was not being complied with. The order recites that the right crosscut had been cut 13½ feet deep and the left crosscut also was partially cut, but that the roof had not been supported (Exh. 15). The inspector testified that the plan provides that mining could not take place in the cited area without three rows of roof bolts being installed and he described how the crosscuts had been cut (Tr. 81-82). Based upon the foregoing, I find that a violation existed. According to the inspector the roof was

very weak because it did not have the required bolts (Tr. 84). People were exposed to this roof (Tr. 82). Based upon this testimony, I find the violation was serious. The inspector also stated that the condition was apparent and should have been observed by the section foreman (Tr. 83). Based upon the foregoing, I find that negligence was high and that the operator's conduct was aggravated and constituted unwarrantable failure as that term has been defined by the Commission. Based upon data in the order, I find there was good faith abatement. For the reasons already set forth, I find that prior history is low, the operator is small in size, and ability to continue in business is non contributory.

After careful consideration of the foregoing, I conclude that a penalty of $1,800 should be assessed.

ORDER

It is **ORDERED** that the findings of a violation for Order Nos. 4003845, 4004145, 4017905, 4017906, 4017907, 3812856, 4012283, and 4012344 be **AFFIRMED**.

It is further **ORDERED** that the unwarrantable failure findings for Order Nos. 4003845, 4004145, 4017905, 4017906, 4017907, 3812856, 4012283, and 4012344 be **AFFIRMED**.

It is further **ORDERED** that Order Nos. 4003845, 4004145, 4017905, 4017906, 4017907, 3812856, 4012283, and 4012344 issued under Section 104(d)(2) be **AFFIRMED**.

It is further **ORDERED** that penalties be **ASSESSED** as follows:

Order No.	Penalty
4003845	**$1,000**
4004145	**$2,500**
4017905	**$5,500**
4017906	**$5,500**
4017907	**$5,500**
3812856	**$2,000**
4012283	**$2,500**
4012344	**$1,800**

It is further **ORDERED** that the operator **PAY** the above sums, totaling $26,300, within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Hobart W. Anderson, President, Broken Hill Mining Company, Inc., P.O. Box 356, Sidney, KY 41564 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 1 1 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 96-352-M
Petitioner	:	A. C. No. 31-01633-05552
v.	:	
	:	
EAST COAST LIMESTONE, INC.,	:	
Respondent	:	Maple Hill Mine

DECISION

Appearances: Frances B. Schleicher, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for the Petitioner;
Connie M. Goodson, Vice President, East Coast Limestone, Inc., for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of $1,386.00 for nine alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the regulations. This matter was heard on March 11, 1997, in Wilmington, North Carolina. Connie M. Goodson, Vice President of East Coast Limestone, Inc. (ECL), appeared on behalf of the respondent Corporation. Bobby Goodson, Mrs. Goodson's husband, is the corporate President. The parties stipulated the respondent is a mine operator subject to the jurisdiction of the Act.

At the hearing, the respondent withdrew its contest of the $50.00 proposed civil penalty for Citation No. 4550963. At the conclusion of the hearing, the parties were advised that I would defer my ruling in this case pending post-hearing briefs, or, issue a bench decision if the parties waived their rights to file post-hearing briefs. The parties declined to file briefs. (Tr. 171-72). Accordingly, this decision formalizes the bench decision issued at the end of trial. (Tr. 175-97). The bench decision affirmed five citations, modified two citations by deleting the significant and substantial (S&S) designations, and vacated one citation. The total civil penalty assessed in these matters for the eight citations, including the citation for which the contest was withdrawn, is $785.00.

I. Pertinent Case Law
and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assesing civil penalties:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

For penalty assessment purposes, the evidence reflects mitigating factors in that the respondent is a small to moderately sized operator that does not have a significant history of violations. (Gov. Exh. 11). The proposed civil penalties will not effect the respondent's ability to remain in business, and the respondent rapidly abated the cited violations.

II. Findings and Conclusions

ECL operates a limestone quarry in Maple Hill, North Carolina. At this facility ECL extracts limestone through a drilling and blasting process. The limestone is hauled from the pit by truck where it is dumped at conveyors. The limestone is placed on conveyors by front-end loaders for transport to the crushing plant where it is crushed, cleaned, sized and stockpiled for

distribution. Kelly Fultz, A Mine Safety and Health (MSHA) Inspector assigned to the Columbia, South Carolina Field Office, conducted a routine safety inspection of the Maple Hill plant on June 18 and June 19, 1996. During the course of his inspection, Fultz was accompanied by Craig Dixon or Buck Pierce. Dixon and Pierce are ECL foremen.

A. Citation No. 4550657

Fultz, accompanied by Dixon, entered the respondent's shop and observed oil located on the floor around barrels and a large tank that had a capacity of approximately 500 to 1,000 gallons. The tank and barrels were connected to electric pumps that were used to fill smaller, hand-held cans with hydraulic fluids and oil to service and maintain equipment. Consequently, Fultz issued Citation No. 4550657 citing a non-S&S violation of the mandatory safety standard in section 56.20003, 30 C.F.R. § 56.20003, that requires that "the floor of every workplace shall be maintained in a clean and, as far as possible, dry condition (emphasis added)."

Goodson stated the floor around the drums and tank was constantly being cleaned because of spills that invariably occurred from drips or overflows during the can filling process. Consistent with Goodson's testimony, Fultz explained that he designated the violation as non-S&S because the spills were confined to an area that was "not in a regular traveled workway" in that the cited area was not "where you do your normal walking through the shop." (Tr. 26-27). The Secretary proposed a civil penalty of $50.00.

The undisputed condition cited by Fultz constitutes a violation of section 56.20003. Although men may have been cleaning up the oil at the time of Fultz's inspection as asserted by Goodson, there is a reasonable inference to be drawn that the cleanup was motivated by Fultz's presence in the shop. Significantly, Dixon did not inform Fultz that the spills in question were very recent, or, that they were in the process of being cleaned. Therefore, Citation No. 4550657 is affirmed. Although I recognize the slip and fall hazard associated with stepping in oil, given the viscosity of oil, the inherent drips and spills that will occur during the can filling process, and the confined affected area, the negligence attributable to the respondent is reduced from moderate to low. Accordingly, a slightly reduced civil penalty of $35.00 shall be assessed for Citation No. 4550657.

B. Citation No. 4550658

As Fultz was leaving the shop area, he observed a haulage truck being driven from the direction of the plant to the pit with the driver's door open. Fultz looked up through the open door and observed the seatbelt hanging from the seat. Fultz stopped the truck and talked to the driver. The driver, Rodney James, informed Fultz that he had just gotten back in the truck after checking something outside, and that he had forgotten, or not had a chance, to buckle his seatbelt. Consequently, Fultz issued Citation No. 4550658 for an alleged S&S violation of the mandatory safety standard in section 56.14131(a), 30 C.F.R. § 56.14131(a), that requires that

"seatbelts shall be provided and worn in haulage trucks." The Secretary seeks to impose a civil penalty of $362.00 for this violation.

The evidence clearly establishes a violation of the cited mandatory standard. However, the issue of whether the violation was properly designated as S&S is not so clear. With the exception of respirable dust violations, that are presumed to be S&S because of the cumulative effects of respirable dust inhalation, issues concerning S&S must be decided based "on the particular facts surrounding the violation...."[1] *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *See Consolidation Coal Co.*, 8 FMSHRC 890, 898 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir. 1987). Thus, there is no legal authority for the MSHA policy, as enunciated by Fultz, that all seatbelt violations must be presumed to be S&S in nature.

In this case, Fultz testified that the respondent has a very strict policy that requires all drivers to wear seatbelts. The spontaneous exculpatory statement by James, that he had just gotten back in his truck moments before, supported by his open driver door, is credible and of significant evidentiary value. Whether a violation is properly characterized as S&S must be viewed in the context of continued mining operations. *Halfway Incorporated*, 4 FMSHRC 8, 12-13 (January 1986). Here the testimony supports the respondent's contention that James's failure to buckle up was a momentary lapse of memory that was contrary to company policy. The Commission has stated that an S&S designation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is [a serious] injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The Secretary has not demonstrated, or even asserted, that James's failure to secure his seatbelt was more than an isolated event. Thus, there is an inadequate basis for concluding that there was a reasonable likelihood of an injury causing event. Accordingly, the S&S designation for Citation No. 4550658 shall be deleted. Balancing the reduction in gravity in view of the S&S deletion, with the importance of wearing seatbelts at all times, a civil penalty of $125.00 is assessed for this citation.

C. Citation No. 4550659

During his inspection, Fultz, in the presence of Dixon, examined John Deere haulage truck No. 578. Fultz determined the service brakes, park brakes, service horn and windshield wipers were in proper working order. Fultz requested Dixon to put the truck in reverse. Fultz stood by the side, rear of the truck and noted that although he could hear the backup alarm with the truck idling, he could not hear the backup alarm when Dixon revved the engine up. (Tr. 61).

---

[1] There is also case law suggesting that violations of the mandatory safety standard in section 75.360(a), 30 C.F.R. § 75.360(a), concerning preshift examination requirements are presumptively S&S "because of the inherent potential hazards existing in underground mining." *Manalapan Mining Company, Incorporated*, 18 FMSHRC 1375, 1395 (August 1996) (concurring opinion).

Consequently, Fultz issued Citation No. 4550659 for an alleged violation of section 56.14132(b)(2), 30 C.F.R. § 56.14132(b)(2), that requires alarms to be audible above surrounding noise levels. Fultz concluded the violation was non-S&S because he did not observe any foot traffic in the loading or unloading areas.

The evidence reflects the backup alarm was operational. However, depending upon how forcefully the engine was revved, there became a point when the alarm could not be heard. Fultz conceded that it is difficult to keep a haulage truck backup alarm in optimum operating condition because it frequently gets clogged with mud. (Tr. 63-64). Given the operational condition of the alarm, and the mitigating testimony by Fultz concerning the difficulty of maintaining the cited alarm, the degree of the respondent's negligence is reduced from moderate to low. Therefore, a corresponding reduction in the proposed penalty from $50.00 to $25.00 shall be assessed.

D. Citation No. 4550660

Fultz issued Citation No. 4550660 for a violation of the mandatory standard in section 56.14132(a), 30 C.F.R. § 56.14132(a), because he determined the respondent's Kobelko LK 300A front-end loader's service horn was not operational. The respondent has stipulated that the horn was not working. Although the service horn malfunction had been noted in the preshift examination book, there was no explanation noted for why it had not been repaired. Fultz designated the violation as non-S&S because he did not observe any foot traffic in the area. He also determined the cited loader's service brakes were in good operating condition, and he concluded the brakes could be relied upon to stop the loader thus minimizing the need for using the horn. (Tr. 73). The Secretary proposes a civil penalty of $50.00 for this violation.

As noted, the respondent admits the fact of the violation. With respect to the appropriate penalty to be assessed, the administrative law judge is not bound by the civil penalty proposed by the Secretary. Rather, as the trier of fact, I must consider the statutory penalty criteria and the deterrent purposes underlying the Act's penalty assessment provisions. *See Sunny Ridge Mining Company, Inc., et al*, 19 FMSHRC 254, 263 (February 1997) *citing Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). Here, the respondent failed to take any action to repair a malfunctioning horn noted in the preshift examination book. Ignoring a condition noted during a preshift examination negates the purpose of the examination. Such conduct must not be condoned and warrants a finding of an increase in the degree of the respondent's negligence. Consequently, an increased civil penalty of $100.00 shall be assessed.

E. Citation No. 4550961

Fultz inspected the respondent's Terex 90B front-end loader. Fultz observed a cut in the operator's seatbelt, which he estimated was "more than half way through" the width of the belt, in the area where the seatbelt extends up from the vehicle floor. As a result, Fultz issued Citation No. 4550961 citing an alleged S&S violation of section 56.14130(i), 30 C.F.R. § 56.14130(i).

This mandatory safety standard requires seatbelts to be "maintained in functional condition, and replaced when necessary to assure proper performance." The Secretary proposes a civil penalty of $362.00 for this citation.

With respect to the fact of occurrence of the cited violation, the respondent does not deny that there was a cut in the subject seatbelt. In fact, the respondent has provided a photograph of the cut in question. (*See* Resp. Exh. 6). Based upon the condition of the seatbelt depicted in Resp. Exh. 6, there was a reasonable basis for Fultz's conclusion that this seatbelt should be replaced "to assure proper performance." Accordingly, the evidence establishes the fact of the violation.

Turning to the issue of S&S, once again we are confronted with the propriety of MSHA's policy that all seatbelt violations are deemed to be significant and substantial in nature. However, as discussed above, S&S questions must be resolved on a case-by-case basis based on the totality of circumstances surrounding the violation. It is well settled that the Secretary has the burden of proving a violation is S&S. *See Peabody Coal Co.*, 17 FMSHRC 26, 28 (January 1995) *citing Union Oil of Cal.*, 11 FMSHRC 289, 298-99 (March 1989). Thus, it is incumbent on the Secretary to demonstrate that there is a reasonable likelihood, based on the facts in this case, that the condition of the seatbelt (the hazard) will result in a serious injury causing event (the failure of the seatbelt).

At the outset, while Fultz characterized the cut in the belt as "more than half way through," there is no evidence of actual measurements of the cut and belt width. Examination of the photograph on Resp. Exh. 6 reveals the cut to have been approximately one-third through the belt. (Tr. 93). In any event, I credit Fultz's testimony that the seatbelt was "probably compromised 40 to 50 percent." (Tr. 87). While such a cut on a seatbelt in a haulage truck may be properly designated as S&S, this citation concerns a front-end loader. Fultz testified operation of this loader was confined to the crusher area where it was maneuvered to pick up dumped material and load it into the crusher hopper. (Tr. 101). Although this area was on an incline, Fultz conceded the maximum speed attained by this front-end loader was between 5 and 10 miles per hour. (Tr. 102). While I recognize Fultz's concern about the potential for the loader to turn over, such an event still requires a reasonable likelihood of seatbelt failure in order for the Secretary to prevail on the S&S issue.

In the final analysis, if a seatbelt is intended to hold drivers securely in place at highway speeds, is the same seatbelt, approximately 40 percent compromised, reasonably likely to fail at speeds of 5 to 10 miles per hour? I don't think so. Accordingly, Citation No. 4550961 is modified to delete the significant and substantial designation.

Although the S&S designation has been deleted, thus reducing the gravity of the violation, I concur with the Secretary that a defective seatbelt is a serious violation attributable to a moderate degree of negligence on the part of the respondent. Consequently, a civil penalty of $150.00 shall be imposed.

F. Citation No. 4550962

Fultz determined the parking brake on the respondent's John Deere No. 406 haulage truck would not hold the loaded truck when tested on a slight incline. Fultz issued Citation No. 4550962, citing a violation of section 56.14101(a)(2), 30 C.F.R. § 56.14101(a)(2). This mandatory standard requires parking brakes to be "capable of holding [mobile] equipment with its typical load on the maximum grade it travels." The Secretary seeks to impose a $50.00 civil penalty for this violation which the Secretary has designated as non-S&S.

The respondent does not deny the inadequacy of the parking brake. Rather, the respondent asserts there is no violation because its haulage trucks are routinely parked on level ground. The respondent misses the point. Parking brakes are commonly known as "emergency brakes." When the service brakes malfunction or become inoperable, such as in instances where a haulage truck stalls, the emergency brake may be the last resort for controlling the vehicle. Parking brake malfunctions can contribute to fatal accidents. *See, e.g., Fluor Daniel Incorporated*, 16 FMSHRC 2049 (October 1994), *rev'd on other grounds* ,18 FMSHRC 1143 (July 1996). While I disagree with the Secretary's under-zealous characterization of the cited violation as non-S&S, the *sua sponte* authority of an administrative law judge to modify a citation to add an S&S designation under section 105(d) of the Act, 30 U.S.C. § 815(d), is unclear. See *Mechanicsville Concrete, Inc., t/a Materials Delivery*, 18 FMSHRC 877, 880 (June 1996). While I will affirm the citation as issued, the serious gravity and degree of negligence associated with the continued operation of a multi-ton haulage truck without adequate parking brakes, at the very least, warrants a doubling of the initial penalty proposed by the Secretary. Accordingly, a civil penalty of $100.00 shall be assessed for Citation No. 4550962.

G. Citation No. 4550963

At the hearing, the respondent withdrew its contest of Citation No. 4550963. (Tr. 117). This citation concerned the malfunction of the service horn on the respondent's John Deere 844 front-end loader in violation of 56.14132(a), 30 C.F.R. § 56.14132(a). The violation was designated as non-S&S, and the Secretary proposes a civil penalty of $50.00. Consequently, Citation No. 4550963 is affirmed, and the respondent shall pay the proposed $50.00 civil penalty.

H. Citation No. 4550964

Fultz issued Citation No. 4550964 for a violation of section 56.9300, 30 C.F.R. § 56.9300, on the basis of his observation that berms and guardrails were not provided on the outer bank of the roadway going to the filler plant hopper feeder. This roadway is traversed by the John Deere 844 front-end loader. Fultz designated the violation as S&S because of the exposure of the loader to unprotected sides of the roadway. Fultz opined that given the absence of a berm, under conditions where the loader is frequently unbalanced because of a full raised bucket, it was reasonably likely that the loader will fall off the side of the roadway causing serious injuries to the loader operator. Fultz testified the roadway was approximately 14 feet wide, and that the height of the inclined roadway to the ground below, from the beginning to the end of the roadway's 40 feet length, increased from zero feet to a maximum of 6 to 10 feet. (Tr. 136-37). Fultz testified there was evidence that berms were once there, although they apparently had been washed away.

At the hearing, the respondent essentially conceded the absence of the berms. However, the respondent relied on a building, located approximately 5 feet from the side of the roadway, to prevent the loader from overturning as an alternative to berm protection.

I credit Fultz's testimony concerning the respondent's failure to maintain berms on the cited roadway. A building, located near the side of a roadway, does not satisfy the mandatory safety standard section 56.9300 that requires berms on elevated roadways. Accordingly, the evidence supports the fact of the cited violation. Fultz's testimony regarding the likelihood of the loader falling off the side of this unprotected roadway was credible. Consequently, the S&S designation in Citation No. 4550964 is also affirmed. Given the conflicting testimony concerning whether the maximum height of the roadway was 6 feet as alleged by the respondent, or 10 feet as asserted by Fultz, which impacts on the gravity and degree of negligence penalty criteria, the $362.00 civil penalty proposed by the Secretary shall be reduced to $200.00.

I. Citation No. 4550965

Based on Fultz's inspection findings of defective mobile equipment, such as malfunctioning front-end loader service horns, an inadequate back-up alarm, a defective seatbelt, and defective parking brakes, Fultz concluded the respondent was failing to inspect its mobile equipment before each shift as required by section 56.14100, 30 C.F.R. § 56.14100. Consequently, Fultz issued Citation No. 4550965 citing a non-S&S violation of this mandatory standard. The Secretary proposes a $50.00 civil penalty for this citation.

Fultz admitted that his basis for issuing this citation was his assumption that no preshift inspections had been performed. Fultz admitted he did not ask any employees if they had preshifted the vehicles. He also acknowledged that he did not ask to examine preshift records or otherwise seek to determine if preshift inspection reports were kept by the respondent. At the hearing the respondent presented preshift inspection reports. (Tr. 158-60).

I am unpersuaded by the Secretary's position that an operator is presumed to have failed to perform preshift inspections of mobile equipment simply because defects in the equipment are revealed during the course of an MSHA inspection. In the absence of specific evidence constituting inadequate preshift inspection procedures, mere speculation that the respondent failed to perform preshift examinations because of defects detected by an MSHA inspector does not provide an adequate basis for establishing that the failure to preshift in fact occurred. Accordingly, Citation No. 4550965 shall be vacated.

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 4550658 and 4550961 are modified to delete the significant and substantial designations. **IT IS FURTHER ORDERED** that Citation No. 4550965 **IS VACATED**. The respondent shall pay a total civil penalty of $785.00 within 30 days of the date of this decision in satisfaction of the citations in issue in this matter. Upon timely receipt of payment, this docket proceeding **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Frances B. Schleicher, Esq., Office of the Solicitor, U.S. Dept. of Labor, 61 Forsyth Street, Room 7T10, Atlanta, GA 30303 (Certified Mail)

Connie M.Goodson, Vice President, East Coast Limestone, Inc., 14620 N.C. Highway 53 East, Maple Hill, N.C. 28454 (Certified Mail)

/lt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 16 1997

MARVIN E. CARMICHAEL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. SE 93-39-D
	:	
JIM WALTER RESOURCES, INC.,	:	BARB CD 92-08
Respondent	:	
	:	No. 7 Mine

DECISION

Appearances: Tommy E. Tucker, Esq., Bessemer, Alabama, for Complainant;
Arnold W. Umbach, III, Esq., Bradley, Arant, Rose & White,
Birmingham, Alabama, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Marvin E. Carmichael against Jim Walter Resources, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). For the reasons set forth below, I find that the Complainant was not discriminated against because he did not engage in activities that are protected under the Act.

Carmichael filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2),[1] on December 2, 1991. On October 8, 1992, MSHA informed both the company and the Complainant that on the basis of its investigation it had determined that "a violation of Section 105(c) of the Act has not occurred." Carmichael instituted this proceeding before the Commission, on October 23, 1992, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

A hearing in the case was scheduled for May 26, 1993. However, the date was continued and, on June 1, 1993, proceedings in the case were stayed "until such time as the complainant is

---

[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

medically able to proceed." The stay was lifted on September 18, 1996, and a hearing was held on October 16, 1996, in Birmingham, Alabama.

The parties were given the opportunity to file post-hearing briefs in this matter. However, only the Respondent filed a brief.

Background

On October 10, 1991, the Complainant and three fellow roof bolters were working the evening shift in the No. 6 section. They were informed by one of the section foremen, Mark Buzbee, that in the time before they had to begin roof bolting, and during the time when no bolting was required throughout the shift, they were going to be "task trained" on operating a scoop.[3] The miners refused to take the training. Consequently, they were escorted out of the mine and informed that they were being given a five day suspension with intent to discharge for insubordination.

After meetings with mine management, as required under the collective bargaining agreement, the discharge was converted to a two day suspension without pay. The miners agreed not to file a grievance seeking back pay and returned to work on Monday, October 14. On that day, the four miners were task trained on the scoop without incident.

Carmichael asserts that he refused to be trained to operate the scoop for safety reasons and that his suspension was, therefore, a violation of section 105(c) of the Act. The company maintains that the suspension had nothing to do with safety but was imposed for insubordination, which is not protected by the Act.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act,[4] a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on*

---

[3] This was to comply with section 48.7 of the Regulations, 30 C.F.R. § 48.7, entitled: **"Training of miners assigned to a task to which they have had no previous experience; minimum courses of instruction."**

[4] Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

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. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Carmichael alleges that he refused to be trained on the scoop because he was "afraid of it." He testified:

> We were told that we were going to have to run this piece of equipment and that we were to be test trained by Mark Buzbee, and I told them that I had never run this piece of equipment.
>
> I wasn't familiar with it. I was actually afraid of that piece of equipment, to operate it. Besides that, we were told we had to sign the task training paper stating that you had been task trained on that.

(Tr. 9.) He further claimed that he refused to work on the scoop "[b]ecause I didn't know how to operate it. The machine was not operating right. It was broke." (Tr. 15.)

Trent Thrasher testified that he was the Shift Mine Foreman in charge of the evening shift on October 10. He related that he directed the shift foremen, Buzbee and Looney, to task train the four roof bolters on the No. 6 section on the operation of the scoop. He stated that sometime after the shift began he received a call from Looney advising that the miners were refusing the training. Thrasher narrated that he went underground to see what the problem was and that as he was going in the mine he met Assistant Mine Foreman Bruce Bailey bringing the four miners out of the mine. After determining that Bailey did not know what had transpired between the miners and the foremen, Thrasher took the miners back to the section to talk to the foremen.

Thrasher said that he talked to the foremen for about 30 minutes and they told him that they had barely gotten started with the training when "the guys told them that they weren't going to accept the training, they knew how to do the job, they didn't want to be trained, they weren't going to run the scoop and they weren't going to sign the forms." (Tr. 42.) He testified that the

foremen also told him that the roof bolters had said that "they weren't going to take another man's job." (*Id.*)

Thrasher provided the following testimony concerning the resolution of the matter:

Q. Did you attempt to task train them?

A. No.

Q. Why not?

A. I went back to get the story and to make sure they had been given every option to accept the training including given some ultimatums of discipline [which] would follow.

Once I proved it to myself they had every opportunity to accept the training, I went back to the track where Bruce Bailey was and talked to Bruce, and Bruce, who was assistant mine foreman as I said, he was trying, not at that time, but he said that he had tried to get them to take the training as well.

They wasn't interested in it. So, at that point I told them that they were under suspension and given five days suspension with intent to discharge and I was taking them out of the mines [*sic*].

Q. You told the men that?

A. Right.

Q. Was there any discussion between you and the men as you were taking them out of the mine?

A. Yes.

Q. Tell us what they said.

A. Someone asked for a committeeman, safety committeeman. I don't know which one because the diesel engine is just a foot away from my head. I am facing one direction. They are sitting behind me.

One of them asked for a safety committeeman. I didn't provide them one because there wasn't a safety issue. It was training. Another reason was the suspension had already been given.

(Tr. 45-46.)

The Commission has held that a miner's refusal to perform work is protected activity under the Act if it is based on a reasonable, good faith belief that the work involves a hazard. *Pasula, supra*, 2 FMSHRC at 2789-96; *Robinette, supra*, 3 FMSHRC at 807-12; *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133-38 (February 1982). *See also Secretary on behalf of Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 321-24 (March 1985), *aff'd sub nom. Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 366-68 (4th Cir. 1986); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 229-30 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985). In this case, Carmichael's refusal to accept task training on the scoop does not meet this test.

In the first place, the purpose of the task training was to teach the Complainant how to safely operate the scoop. In the second place, neither Carmichael nor any of the other miners advanced a basis, reasonable or otherwise, as to how the task training involved a hazard.[5] Furthermore, since such training is required by section 48.7, Carmichael's refusal to accept it could hardly be protected activity. Therefore, I conclude that Carmichael's refusal to be task trained was not activity protected under the Act.

ORDER

Accordingly, since the Complainant has failed to show that he was suspended for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Marvin E. Carmichael against Jim Walter Resources, Inc., under section 105(c) of the Act, is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Arnold W. Umbach, III, Esq., Braxton Schell, Jr., Esq., Bradley, Arant, Rose & White, 1400 Park Place Tower, 2001 Park Place, Birmingham, AL 35203 (Certified Mail)

Tommy E. Tucker, Esq., Assistant District Attorney, Tenth Judicial Circuit, Bessemer Division, Courthouse Annex, Bessemer, AL 35020-4907 (Certified Mail)

Mr. Marvin E. Carmichael, P.O. Box 117, Bessemer, AL 35021-0117 (Certified Mail)

\mca

---

[5] Carmichael testified that he learned subsequent to this incident that Buzbee may not have been qualified to train on the scoop. However, he admitted that he did not think this at the time he refused the training.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 1 8 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-259
Petitioner	:	A. C. No. 36-07416-03651
v.	:	
	:	Docket No. PENN 94-400
ENLOW FORK MINING COMPANY	:	A.C. No. 36-07416-03658
Respondent	:	
	:	Enlow Fork Mine

DECISION ON REMAND

Before: Judge Weisberger

On January 15, 1997, the Commission issued a decision, 19 FMSHRC 5, in which it, inter alia, reversed my initial determinating that the violation of 30 C.F.R. § 75.400[1] by Enlow Fork Mining Company ("Enlow Fork") was not significant and substantial ("S&S"), and not the result of its unwarrantable failure. The Commission remanded this matter to me for evaluation of all the material record evidence relating to S&S, and for reanalysis of the issue of unwarrantable failure.

On March 27, 1997, Enlow filed a Brief on Remand. On April 3, 1997, Petitioner's Brief on Remand was received.

I. Significant and Substantial

As analyzed by the Commission, the issue presented is whether there was a reasonable likelihood that the hazard contributed to by the accumulation violation would result in an injury. The Commission 19 FMSHRC supra, at 9, set forth the controlling case law as follows:

---

[1]Section 75.400, entitled "Accumulation of combustible materials," provides:

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

An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). When evaluating the reasonable likelihood of a fire, ignition, or explosion, the Commission has examined whether a "confluence of factors" was present based on the particular facts surrounding the violation. Texasgulf, Inc., 10 FMSHRC 498, 501 (April 1988). Some of the factors include the extent of accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. Utah Power & Light Co., 12 FMSHRC 965, 970-71 (May 1990) ("UP&L"); Texasgulf, 10 FMSHRC at 500-03.

In analyzing this issue, I am constrained to follow the determination of the Commission that substantial evidence does not support my initial finding that there was no evidence that liberation of methane in explosive concentrations was reasonably likely to have occurred. The Commission's determination was based on the inspector's testimony that the Enlow Mine is object to a 5-day spot inspection, as it liberates more than 2,000,000 cubic feet of methane in a 24-hour period. The Commission also indicated that I did not analyze the inspector's testimony "that, because any methane liberated from the face will pass through this area, the tailgate area was a likely spot for an explosion" (Tr. 92-93). Since this testimony was not contradicted, I accept it.

Considering the Commission's determinations set forth above, and the Commission's determination that, my initial finding was not supported by substantial evidence, I am constrained to find, upon reevaluation, that liberation of methane in explosive concentrations was reasonably likely to have occurred.

Further, in considering the effect of continued mining operations, I note, the inspector's uncontradicted testimony as follows which tends to indicate that continued mining would create more coal dust: "When you have loose coal established in those toes and the shields are moving, it grinds the coal up, pulverizing it...it's more readily put into atmosphere or suspension . . ." (Tr. 115).

I note the confluence of the following: the existence of accumulation of coal dust, loose coal, and oil, the liberation of methane in the mine, the presence of rags over the top of the fluid coupler, dry coal dust on electrical boxes, and ignition sources including bearings on the drive shaft, gear case, and a 4160-volt drive motor.

Hence, upon reconsideration, and for all the above reasons, I find that it has been established that there was a reasonable likelihood that the hazard contributed to by the

accumulation violation would result in an injury. Further, considering the nature of the hazard i.e., a fire or explosion, I find that there was a reasonably likelihood that resulting injuries would be of a reasonably serious nature. For these reasons I find that the violation was S&S.

II. Unwarrantable Failure

The Commission, in its decision, 19 FMSHRC supra at 12 directed as follows:

> On remand, the judge should evaluate all the evidence related to prior warnings, including the three citations for accumulation in other areas of the mine that were issued on October 6, 7, and 28, 1993, approximately 1 month prior to the violation (Govt. Exs. 7, 8, 9), and Enlow's 2-year violation history (Govt. Ex. 12). He should also discuss all relevant evidence relating to the operator's compliance efforts and the extensiveness of the violation.

The Commission reiterated the applicable law as follows (19 FMSHRC, supra at 11):

> In Emery Mining Corp., 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. At 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id.; at 2003-04; Rochester & Pittsburgh Coal Company, 13 FMSHRC 189, 193-94 (February 1991); see also Buck Creek, 52 F.3d at 136 (approving Commission's unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. Mullins & Sons Coal Co., 16 FMSHRC 192, 195 (February 1994); Peabody Coal Company, 14 FMSHRC 1258, 1261 (August 1992); Quinland Coals, Inc., 10 FMSHRC 705, 709 (June 1988); Kitt Energy Corp., 6 FMSHRC 1596, 1603 (July 194). 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. Peabody, 14 FMSHRC at 1263-64.

A. Prior Warnings

Sixty-two citations or orders were issued to Enlow for violations of Section 75.400 for the 2-year period December 8, 1991 to December 7, 1993. Citations were issued on October 6, 7, and 28, 1993 for accumulations of combustible materials. MSHA Inspector Hardy testified that after the issuance of each citation "[w]e discussed the severity--the consequences of not having an adequate clean-up program, mine fires, exposure, et cetera" (Tr. 87). According to Hardy, he told mine management on October 7, 1993 that he was "not satisfied with the clean-up program of the face equipment" (Tr. 88). He testified that he told the operator that "...if compliance wasn't gained by the citations being issued, I would have to increase my enforcement." (Tr.88). According to Hardy, Enlow was responsive to his concerns, and made appropriate responses to his citations.

MSHA supervisor Robert Newhouse stated that prior to the issuance of the orders at issue, he had instructed mine management on the hazards of dust accumulation.

The Commission is analyzing my initial evaluation of the testimony of Hardy and Newhouse relating to their discussions with management regarding inadequate clean-up procedures stated as follows:

> We agree with the Secretary that the judge employed an incorrect legal analysis with respect to the factor of repeated similar violations and past warnings. The judge, discounting the testimony of MSHA Inspectors' Hardy and Robert Newhouse that they had met with mine management to discuss inadequate clean-up and preshift procedures, incorrectly characterized their testimony as "not probative of the degree of [Enlow's] negligence in allowing the specific materials at issue to have accumulated." 17 FMSHRC at 568 (emphasis in original). In evaluating evidence of prior warnings as part of the unwarrantable failure analysis, the Commission has not required the previous condition to involve materials identical to those involved in the condition at issue. (19 FMSHRC supra, at 11).

The Commission concluded as follows:

> Thus, to the extent that the inspectors' discussions with management placed Enlow on notice of its need for greater compliance efforts with Section 75.400, those discussions were relevant to the unwarrantable failure evaluation and should have been considered by the judge. (19 FMSHRC supra, at 12).

Following the dictates of the Commission not to discount the testimony of Hardy and Newhouse, I find that their testimony indicates that they did put Enlow on notice of the need for greater compliance efforts with Section 75.400, which is a factor to be considered in evaluating unwarrantable failure.

B. Compliance efforts

Petitioner argues that Enlow did not present any testimony that its clean-up program of hosing the longwall area was "changed or was increased after the inspector's original warnings in October." However, it is significant to note that Hardy, on cross examination indicated that once management understood what his concerns were, they did "take steps to address those conditions" (Tr. 146). He also indicated that after he issued citations for accumulations in October 1993, management did "make changes to their clean-up program" (Tr. 146). He did not issue any subsequent accumulation citations for the equipment cited in October 1993. I thus find there was no aggravated conduct involved in Enlow's compliance efforts.

C. Extensiveness of the violation

In directing me to discuss all relevant evidence relating to the extensiveness of the violation, the Commission indicated that I failed to consider "that it took three to four miners 2 ½ hours to clean up the accumulation" (19 FMSHRC supra at 12). This finding by the Commission becomes the law of the case. Taking this finding into consideration along with Hardy's testimony that the area of accumulation of hydraulic oil on the floor was 4 feet by 10-15 feet, that there was coal packed on the floor to a height of 2½ feet, and that over 90 percent of the housing fuel coupler and gear box were covered with floor dust and oil, I find that the accumulation was extensive.

Based on all the above, upon reevaluation, and taking into account the dictates of the Commission, I conclude that the violation was the result of Enlow's unwarrantable failure.

III. Penalty

In my initial decision I found that a penalty of $2,000 was appropriate, based, inter alia, upon a finding that the gravity of the violation was relatively high. This finding is essentially consistent with my findings herein that the violation was S&S. Hence, the original penalty is not to be increased due to the factor of gravity. However, considering the degree of Enlow's negligence, as discussed above (II, infra), I find that the penalty I initially assessed shall be increased to $3,000.

ORDER

It is ordered that, within 30 days of this decision, Enlow pay a total civil penalty of $3,000 for the violation set forth in Order No. 3660021.

Avram Weisberger
Administrative Law Judge

Distribution:

Linda Henry, Esq., U.S. Department of Labor, Office of the Solicitor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Elizabeth S. Chamberlin, CONSOL Inc., 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 2 1 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-96-D
on behalf of ANDY HOWARD, JR.,	:	
Complainant	:	PIKE CD 95-21
v.	:	
	:	Martiki Surface Mine
BRUCE YOUNG AND YOGO, INC.,	:	
Respondents	:	

FINAL ORDER

Before: Judge Fauver

A Decision Approving Settlement was entered on June 21, 1996, directing payment of the settlement amount no later than August 1, 1996.

Following motions by Andy Howard, Jr., on July 16, 1996, and August 22, 1996, to compel payments, and to award late payment interest, and attorney fees, a Show Cause Order was entered on September 3, 1996. Following responses to the Show Cause Order, an Order was entered in September 26, granting the motion to compel payments and to award interest and an attorney fee, and ordering total payment within 30 days.

Andy Howard, Jr., filed a motion on January 27, 1997, to compel payment of attorney fees of $1,200, including the fee due under the Order of September 26, 1996, and a fee for the time spent in preparing the motion filed on January 27, 1997.

Counsel for Respondents apparently takes the position that his clients are unable to make payment of the attorney fees. However, Respondents have made no showing in this proceeding that they are unable to pay the attorney fees.

Having considered the motion and the record as a whole, I conclude that the motion to compel payment should be granted.

WHEREFORE IT IS ORDERED that:

1. The Motion to Compel payment of attorney fees filed on January 27, 1997, is **GRANTED**.

2. Respondents, Bruce Young and Yogo, Incorporation, shall pay the Mine Safety Project attorney fees of $1,200 within 20 days from the date of this Order. Respondents are individually and jointly liable for the above amount.

3. This Order constitutes the judge's final disposition of this proceeding.

William Fauver
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)

Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., 415 Second Street, P.O. Box 351, Pikeville, KY 41502-0351 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

APR 23 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-333-M
Petitioner	:	A.C. No. 04-03425-05503 TIR
v.	:	
	:	Washington Mine
UNIQUE ELECTRIC,	:	
Respondent	:	

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Kim Warnock, Owner, Unique Electric, Shasta Lake City, California, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of a civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Unique Electric, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petition alleges one violation of the Secretary's safety standards.

A hearing was held in Redding, California. The parties presented testimony and documentary evidence, and the Secretary filed a post-hearing brief. Unique Electric relies upon the hearing record.

I. BACKGROUND

At about 6:30 p.m. on September 5, 1994, Henry E. Feutrier, General Manager of the Washington Mine, went into the mine to check a pump on sub-level 2. He entered the mine alone and no one else was in the mine at that time. The following morning, miners traveled underground to commence work. Two miners discovered Mr. Feutrier face-up under the water. His body was removed from the mine and the appropriate authorities were notified of his death including the California Division of Occupational Safety and Health ("Cal/OSHA") and MSHA.

At the time of the accident, the Washington Mine was a small, underground gold mine in Shasta County, California, that employed about six people. It was operated by the Washington/Niagara Limited Partnership ("Washington/Niagara"). MSHA conducted an investigation of the accident with Cal/OSHA and concluded that Mr. Feutrier sustained an electrical shock and subsequently drowned. (Ex. S-1 at 74). MSHA's accident investigation report stated:

> The accident occurred because the neutral bar inside the breaker panel enclosure was not bonded to the grounded enclosure. There was no equipment ground path between the grounded enclosure and the transformer neutral for the fault current so that the circuit breaker could trip.

Id. at 77.

Washington/Niagara was issued a section 104(d)(1) citation for a violation of 30 C.F.R. § 57.18025 because Mr. Feutrier entered the mine alone. (Ex. S-1 at 78). This citation was subsequently vacated by MSHA. (*Washington/Niagara*, WEST 95-310-M, January 11, 1996 (unpublished order of dismissal)). On September 9, 1994, MSHA Inspector Arnold E. Pederson issued a section 104(d)(1) citation to Unique Electric alleging a violation of 30 C.F.R. § 57.12025, as follows:

> The 1 HP submersible pump motor, located on sub-level 2 drift was electrically energized from a secondary of a 230/120-volt single phase transformer that was protected by a double pole 20-amp circuit breaker. The circuit breaker was located at a distribution panel at the track level wye. The neutral bar inside the breaker panel enclosure was not bonded to the grounded enclosure therefore there was no equipment ground path between the grounded enclosure and the transformer neutral for fault current so that the circuit breaker could trip.
>
> A fatal accident occurred at the underground Washington Mine on September 5, 1994, at approximately 8:00 p.m., when the general mine manager received an electrical shock while moving an energized 1 HP submersible pump and subsequently drowned in a flooded drift on sub-level 2. This is an unwarrantable failure.

Inspector Pederson determined that the violation was of a significant and substantial nature, and that Unique Electric's negligence was high. The cited safety standard provides, in pertinent part, that all "metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." MSHA proposes a penalty of $8,500 for the alleged violation.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case does not present any legal issues; both parties agree that if the neutral conductor was not bonded to the ground circuit, ground fault protection was not provided for the pump in violation of the safety standard. The parties, however, vehemently dispute the facts.

A. Summary of Uncontested Evidence

Some of the underlying facts were stipulated to by the parties through the Secretary's request for admissions, as set forth below. (Ex. S-1 at 4-11, 125-130). Other facts were not contested at the hearing. Unique Electric was a small, electrical contractor operated by Kim Warnock. Unique Electric was a sole proprietorship without any employees or assets. Unique Electric was simply the name that Mr. Warnock used when he provided services to his customers; it was not a separate legal entity. Mr. Warnock is a licensed electrician. He was a mine "operator," as that term is used in section 3(d) of the Mine Act because he was an "independent contractor performing services ... at [a] mine." 30 U.S.C. § 802(d). Unique Electric performed electrical work for the mine between 1992 and 1994.

Sub-level 2 of the mine contained water in the drift which necessitated continuous pumping. Two pumps were used to remove the water. The pump in question in this case was an ABS one-horsepower submersible pump (the "pump") that was used to pump water at the face area of the drift. The pump was energized at 230-volts, single phase AC. Power to the pump was supplied by a 480-volt AC single phase circuit from a 3 KVA transformer, with a secondary voltage of 230/120-volts AC, single phase. The primary side of the transformer was wired directly to a 30-amp, 600-volt fused safety switch. The secondary circuit of the transformer was connected to a metal-enclosed panel board which contained a double pole 20-amp thermal magnetic circuit breaker (the "circuit breaker"). The pump was electrically energized from the secondary side of the transformer that was protected by the circuit breaker. The purpose of the circuit breaker was to protect the pump circuit from overcurrent, short circuits, and ground faults. A three-conductor cable was connected to the circuit breaker and the green equipment grounding conductor, which was bonded to the metal enclosure. A three-prong plug was attached to the end of the cord for the pump.

After the accident, MSHA's investigation revealed that there were two ground faults in the circuit that supplied power to the pump (the "pump circuit"). One ground fault was in the pump. This ground fault was caused by the pinching of the black conductor between the inside casing of the pump and the capacitor clamp. A second ground fault was in the cable between the circuit breaker and the pump where the cable was damaged. (Tr. 235-36).[1] The second fault created a phase-to-phase fault. (Tr. 259).

---

[1] The transcript citations in this decision do not necessarily reference all testimony given on a particular subject.

Sub-level 2 of the mine was opened in 1994. Unique Electric performed the electrical work that was needed to open sub-level 2, including installing the transformer and the electrical panel board that contained the circuit breaker. (Tr. 24-25). Mr. Warnock worked alone in performing these tasks, made all the electrical connections, and conducted any tests to ensure that the connections were properly made. Mr. Warnock first installed the pump on a 110-volt circuit that was protected by a ground fault circuit interrupter (" GFCI"). (Tr. 26, 110-11). That circuit would not work because the pump overloaded the circuit thereby tripping the GFCI. *Id.* The pump was also designed to function at 230-volts, so Warnock rewired the pump for that voltage and installed it in the 230-volt circuit about one month prior to the accident. (Tr. 26, 101).

MSHA's investigation into the accident was conducted in two phases. Inspector Pederson investigated the accident at the Washington Mine. After his site inspection was completed, the pump and pump cable were sent to MSHA's Denver Safety and Health Technology Center, where it was examined by Terrance Dinkel, an electrical engineer.

The pump was an industrial, submersible pump, but it was designed to be suspended in a bore hole or well casing, not moved from place to place. (Tr. 264-66, 427-28). The pump was purchased by Washington/Niagara without consulting Mr. Warnock. It was the practice of Washington/Niagara to move the pump around in the water as needed. The pump was not equipped with an on/off switch and Washington/Niagara personnel would move the pump in the water while it was energized. Employees would wade into the water while holding the energized pump. (Tr. 113, 115). Sometimes the water was chest deep. *Id.* It is presumed that Mr. Feutrier sustained an electrical shock while moving the pump and subsequently died as a result of drowning. The cable to the pump was badly damaged. Washington/Niagara personnel apparently pulled the cable over the rocks when moving the pump. The pump was moved prior to blasting and when it needed to be repositioned in the water.

B. Arguments of the Parties

The Secretary contends that when Mr. Warnock installed the transformer and the panel board, he neglected to properly ground the system. As a consequence, when the pump was installed, the metal casing for the pump was not grounded. As evidence, she points to the fact that the neutral link was not connected to the neutral bar in the panel board. She also relies on the fact that when Inspector Pederson tested the circuits at the panel board, his ohmmeter indicated that the neutral circuit was an open circuit. The Secretary also contends that when Mr. Warnock rewired the pump for 230-volts, a black current carrying wire was inadvertently crushed against the casing of the pump when it was put back together. The bare conductor contacted the casing of the pump creating a ground fault. She argues that the ground fault was not detected at that time because the circuit was not grounded at the panel board. The Secretary maintains that when Mr. Feutrier moved the pump on the evening of

September 5, a second ground fault occurred in the cable to the pump. Because the circuit was not properly grounded, the circuit breaker did not trip.

Mr. Warnock disputes the Secretary's contentions. He testified that when he installed the transformer he grounded the center tap of the secondary side of the transformer to the frame of the transformer and connected the frame of the transformer to the grounding bar in the panel board. (Tr. 35-40, 65, 84-89, 350-52). He stated that he did not connect the neutral link in the panel board with the neutral bar because the system was grounded in the transformer. He stated that he tested the transformer before it was put into service and determined that it was grounded. (Tr. 40, 402-03). Mr. Warnock also testified that after he converted the pump from 110-volts to 230-volts, he tested the pump with an ohmmeter. (Tr. 27).

Mr. Warnock testified that the test Inspector Pederson performed to determine if the circuit was grounded was invalid. He contends that Inspector Pederson fumbled around with his ohmmeter and kept pushing buttons until he got the result he wanted. (Tr. 57, 104, 358-60). He believes that at the time he installed the pump, the circuit was grounded and the pump did not contain a ground fault.

Mr. Warnock maintains that when he was called to install the pump, he advised Feutrier that the pump was not designed to be moved around. (Tr. 74-75, 100, 372). He states that he told Mr. Feutrier that a compressed air pump would be more appropriate because air lines were already installed in sub-level 2. *Id.* He also stated that he recommended that an on/off switch be installed for the pump. (Tr. 74-75, 100, 277-79). Further, he testified that the cable used to power the pump was not strong enough to withstand being pulled over rocks when the pump was moved. *Id.*

Mr. Warnock states that when he converted the pump to 230-volts, there was no ground fault in the pump. He contends that he tested the pump after the work was completed and no ground faults were present. (Tr. 357). In addition, he states that miners holding the pump in the water would have been able to feel electric current if there had been a ground fault, even if they did not receive a strong electric shock. (Tr. 370, 374). He believes that the ground fault in the pump developed over time as the pump was moved about. Warnock maintains that the cable to the pump was seriously damaged by Washington/Niagara employees as they pulled it over the rocks. (Tr. 75-76, 79, 356, 375, 412). He believes that the grounding wire in the cable was severed at some point during this period. (Tr. 375-76). He thinks that the ground fault in the pump and the ground fault in the cable developed after he installed them. Thus, he believes that Mr. Feutrier received an electric shock because the ground wire in the cable had been severed preventing the circuit breaker from functioning.

C. Analysis of the Issues.

1. Violation of Section 57.12025

Mr. Warnock testified that he performed electrical work at the mine on an as needed basis. (Tr. 41). He did not have a contract with Washington/Niagara, but would come to the mine to perform a specific task when called by mine personnel. (Tr. 99-102). Thus, he did not have overall responsibility for or authority over the mine's electrical system. Ms. Mary Lou George, the office manager for the mine, testified that Mr. Warnock had broad authority with respect to the mine's electrical system. (Tr. 304). I agree with Ms. George that when Mr. Warnock was called to do electrical work at the mine, Washington/Niagara relied upon his expertise to perform the task in a workman-like manner. Nevertheless, I find that he only had authority over the specific tasks that he was called upon to perform. In this instance, he was instructed to install the transformer and pump in Sub-level 2, along with the associated wiring. Mr. Warnock did not purchase the pump nor does it appear that anyone from Washington/Niagara asked for his advice with respect to the type of electric pump that should be purchased. He was simply given the pump and told to install it. Accordingly, Mr. Warnock can be held liable for any violations of the safety standards that occurred at the time he installed the transformer and pump, but he cannot he held liable for any violative conditions that developed after their installation.

As stated above, the Secretary relies on three facts to establish a violation. First, she relies on the fact that the neutral link was not connected to the neutral bar in the panel board. By itself, this fact does not establish a violation. Mr. Warnock testified that he bonded the center tap on the secondary side of the of the transformer to the frame of the transformer and the frame of the transformer to the ground bar on the panel board. There is no dispute that if this bonding had been completed, the pump circuit would have been grounded in accordance with the requirements of the safety standard. (Tr. 156-57, 187-88, 218-19, 257). Inspector Pederson did not look inside the transformer to see if the circuit was grounded at that location. (Tr. 157, 204). Accordingly, the fact that the circuit was not grounded at the panel board does not establish a violation.

The Secretary also relies on the fact that the circuit breaker did not trip when the pump was first energized and placed in the water. She believes that Mr. Warnock created a ground fault when he replaced the casing on the pump after converting it to 230-volts. The Secretary reasons that if the circuit had been grounded, the circuit breaker would have tripped soon after the pump was installed. (Tr. 180). Because the circuit was not grounded, the fault current was not able to get back to its source (the transformer) and the breaker did not trip. Mr. Warnock argues that if that were the case, persons handling the pump would have been able to feel the fault current. For example, a person holding the energized pump while entering the water would feel at least a trickle of power if not an electric shock. The Secretary's witnesses did not agree with this statement and took the position that it is possible that employees would not know that there was a ground fault in the pump. (Tr. 182, 201-02, 239).

I find that it is highly likely that employees handling the pump in the water would have felt the current under the circumstances set forth by the Secretary. Fault current seeks the path of least resistance to its source, in this case the transformer. A person standing in water with some mineral content holding the metal casing of an ungrounded pump that has a ground fault in the casing will act as a conduit for at least some current trying to reach the transformer. I believe that he would feel at least a trickle of current. Many employees had been in the water with the pump, including Mr. Kevin Baldwin. (Tr. 27). Mr Baldwin testified that he walked chest high into the water while holding the energized pump soon after it was installed and that he did not receive any electrical shocks. (Tr. 112-15, 119). I credit the testimony of Mr. Warnock and Mr. Baldwin in this regard. Accordingly, I find that the fact that the circuit breaker did not trip soon after the pump was installed does not establish that it was not grounded. The circuit breaker may not have tripped after the pump was installed because the ground fault in the pump developed later. Although a wire was pinched when Mr. Warnock reassembled the pump, it is not clear when the fault occurred. The conductor may have come into contact with the metal casing at a later time.

The third factor that the Secretary relies upon to establish a violation is the ohmmeter tests conducted by Inspector Pederson. He tested the pump circuit twice with an ohmmeter and determined that it was an open circuit, meaning that it was not grounded. Mr. Warnock disputes Inspector Pederson's findings. He believes that the inspector did not conduct a proper test and the fact that Inspector Pederson "fumbled" with the meter indicates that he did not know how to use it or that he set the controls on the meter so that it would show that the circuit was not grounded. (Tr. 57-60). He further stated:

> My reason for contesting this [citation] is because I know this system was bonded. If Mr. Pederson would have taken the time to take that cover off that transformer, follow those wires down, he would have seen that the thing was bonded.
>
> But he saw that the strap was not connected to that neutral bar. And right there, boy, they think they got the whole case solved....

(Tr. 368). Thus, Mr. Warnock believes that when the inspector saw that the neutral link (the strap) was not connected to the neutral bar, he concluded that the pump circuit was not grounded and conducted the remainder of the inspection in a manner to support this conclusion.

Inspector Pederson is an experienced MSHA inspector, who specializes in electrical inspections. (Tr. 131). When he opened the door to the panel board, he observed that the neutral link was not connected to the neutral bar. Inspector Pederson then used his meter to take a continuity test between the neutral bar and the frame of the panel board, the neutral link. (Tr. 157-58). The test show on open circuit, which indicates that the pump circuit was not grounded. *Id.* He performed this test at the panel board and at the transformer, which

were adjacent to each other. (Tr. 157-58, 177). The first time he conducted these tests he was accompanied by MSHA Inspector Eugene Lopez, Cal/OSHA Associate Safety Engineer Gordon Taylor, and Mike Burgess, the acting general manager of the mine. (Tr. 158). Inspector Pederson testified that his meter was functioning properly and that the meter's two probes had good contact with the circuit. (Tr. 161, 172). He testified that his tests showed that the neutral was not connected to the ground. (Tr. 174). If the circuit was bonded in the transformer, the test would have indicated that the circuit was grounded.

He tested the circuit at the panel box again in the presence of Mr. Warnock. (Tr. 159, 174-75). The test results showed that the pump circuit was not grounded. *Id.* He does not recall any conversation with Mr. Warnock. (Tr. 175, 183). Inspector Pederson used a multi-meter tester. This tester can be used for many purposes, including measuring resistance, voltage, and testing electronic devices. When conducting continuity tests, the meter has a number of scales. Inspector Pederson denies that he fumbled with his multi-meter, but admits that he adjusted the scale several times when he conducted the continuity test for Mr. Warnock. (Tr. 164-68, 173, 204-209). A continuity test with the multi-meter is only meaningful when it is set at the appropriate scale. (Tr. 170-71, 249). He has been using this tester for about 18 years. (Tr. 203). I find that Inspector Pederson knew how to properly use his multi-meter when testing for continuity in circuits.

Mr. Warnock testified that when he questioned Inspector Pederson about his test of the circuit, Inspector Pederson cut him off by stating "it wouldn't make any difference in this case anyway." (Tr. 51, 53, 92). Mr. Warnock testified that he was about to explain to Inspector Pederson that the circuit was grounded in the transformer when the inspector cut him off. *Id.* Mr. Warnock interpreted the inspector's statement to mean that grounding of the circuit did not have anything to do with the case, so Warnock kept quiet. (Tr. 65-67). Mr. Warnock believes that the circuit breaker would not have tripped in any event because the pump was in a large body of water, which would have dissipated the current. (Tr. 67, 97). I credit the testimony of Mr. Dinkel that the circuit breaker would have tripped if the pump were properly grounded, even though the pump was in a large body of water. (Tr. 237-39, 242). As stated above, fault current will seek the most efficient route back to the transformer, which would be the copper ground wire if it is not broken. Although Warnock apparently interpreted Inspector Pederson's statement as an attempt to cut him off, I believe that their conversation was simply a miscommunication.

Based on the tests that Inspector Pederson made with his multi-tester, I find that the pump circuit was not properly grounded at the time of the accident in violation of 30 C.F.R. § 57.12025. As stated above, Unique Electric was only responsible for the work that it performed at the mine. Thus, if Mr. Warnock properly grounded the pump circuit when he installed the pump, he can not be charged with a violation. Washington/Niagara was responsible for the conditions in the mine and if the grounding system was damaged in the interim, Mr. Warnock can not be held responsible. Based on the evidence presented in this case, I find that it is highly unlikely that a grounding system in the transformer would have been damaged. Mr. Warnock testified that he grounded the pump circuit by bonding the

neutral to the frame of the transformer at the time the transformer was installed. The transformer is a stationary piece of equipment that is not in an area that would be subject to damage. It was a few feet from the panel board. The photographs introduced in this case do not show any damage. (Ex. R-1). While it is possible that the wire bonding the transformer came loose, such an event is extremely unlikely in this case and there is no evidence that it had. Mr. Warnock's test of the transformer following its installation must not have revealed the problem. Accordingly, I find that the pump circuit was not properly grounded at the time Warnock installed the pump at 230-volts about a month prior to the accident. Therefore, Unique Electric violated the safety standard.

In theory, the Secretary did not bring this case against Unique Electric to establish responsibility for the fatality. (Tr. 28, 414). Statements in MSHA's accident investigation report and the amount of the proposed penalty, however, indicate that the Secretary believes that Mr. Warnock was responsible for the accident. Many events led up to this tragic accident, in addition to the events discussed above. As stated above, Washington/Niagara received one citation as a result of the accident, which was subsequently vacated by the Secretary.

First, Mr. Feutrier was alone at the time he received the electric shock. Even if the circuit breaker tripped, he could have received a serious electrical shock and, with no one to pull him out of the water, he may have drowned in any event. Second, the cable to the pump was seriously damaged because it had been pulled over the rocks by Washington/ Niagara employees. (Tr. 197-200, 217, 224-25, 255, 269; Ex. S-1 at 56-63). It is possible that the ground wire in the circuit was sufficiently severed that the circuit breaker would not have tripped even if the circuit was grounded at the panel board. (Tr. 209-12, 375). Third, Washington/Niagara employees were holding the energized pump while standing in deep water when it was moved. In moving the pump, the cable was often pulled over rocks, which seriously damaged it. One does not need to be an expert in mine safety or electricity to recognize that this practice was inherently dangerous.

Finally, Ms. George called Mr. Warnock sometime in July 1994 to ask him to perform the annual continuity tests for the grounding systems at the mine, as required by 30 C.F.R. § 57.12028. (Tr. 289). She left messages for him on a number of occasions. (Tr. 289). At one point in mid-August, Mr. Warnock told Ms. George that he would perform the tests before the Labor Day weekend. (Tr. 295). This test on the pump circuit would have revealed that the circuit was not grounded. Mr. Warnock arrived at the mine the day after Labor Day to perform the test. (Tr. 48, 296-97). Mr. Warnock testified that he could not get out to the mine to perform the test any earlier because he was "very busy" with other work. (Tr. 44). The accident occurred on Labor Day.

2. Significant and Substantial

I find that the Secretary established that the violation was of a significant and substantial nature. The failure to ground the metal parts enclosing electrical circuits creates a

discrete safety hazard. There is a reasonable likelihood that this hazard will result in an injury of a reasonably serious nature. The parties do not dispute that a serious hazard is created when a circuit is not grounded. (Tr. 81).

3. Unwarrantable Failure

The Secretary did not present any evidence with respect to the unwarrantable failure allegation contained in the citation. The Secretary's brief does not mention the unwarrantable failure allegation. The Secretary bears the burden of proof on this issue. Accordingly, the unwarrantable failure allegation is vacated and the citation is modified to a section 104(a) citation.

D. Appropriate Civil Penalty

Section 110(i) of the Mine Act sets forth six criteria to be considered in assessing an appropriate civil penalty: "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 the violation." 30 U.S.C. § 820(i).

Unique Electric has no history of previous violations of the Secretary's safety standards. Unique Electric was very small. Mr. Warnock is now employed by an electrical contractor that works exclusively at state and federal installations, so Unique Electric no longer exists. Mr. Warnock will have to pay any penalty assessed.

In *Basin Resources, Inc.*, 19 FMSHRC 211 (January 1997), I held that if a mine operator is no longer in business and does not intend to return to the mining business, this fact should be taken into consideration in considering the ability to continue in business criterion. I held that civil penalties are remedial, not punitive, and are designed to "induce those officials responsible for the operation of a mine to comply with the Act and its standards." *Id.* at 212 (citation omitted). There is no question that Mr. Warnock is no longer performing electrical work at the Washington Mine or any other mine.

I find that the violation was serious and that Unique Electric was negligent in failing to ground the pump circuit. Mr. Warnock must have neglected to effectively bond the pump circuit in accordance with his normal practice. The violation was abated in good faith. Mr. Warnock connected the neutral link to the neutral bar in the panel board as soon as the mine was released from the section 103(k) order. Based on the penalty criteria, I find that a civil penalty of $400.00 is appropriate for this violation.

III. ORDER

Accordingly, Citation No. 3910427 is **MODIFIED** to a section 104(a) citation, the citation is **AFFIRMED**, as modified, and Unique Electric is **ORDERED TO PAY** the Secretary of Labor the sum of $400.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

Kim Warnock, Owner, UNIQUE ELECTRIC, 1136 Cedar Street, Shasta Lake City, CA 96019 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 2 4 1997

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-387-D
on behalf of	:	PIKE CD 96-06
DEWEY RUNYON,	:	
Applicant	:	Racoon Branch and
	:	Jones Fork/Brushy Mines
v.	:	Mine ID 15-17667
	:	
CONSOL OF KENTUCKY, INC. AND	:	
NORMAN BLANKENSHIP,	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 96-388-D
on behalf of	:	PIKE CD 96-06
DEWEY RUNYON,	:	
Complainant	:	Racoon Branch and
v.	:	Jones Fork/Brushy Mines
	:	Mine ID 15-17667
CONSOL OF KENTUCKY, INC., AND	:	
NORMAN BLANKENSHIP,	:	
Respondent	:	

DECISION

Appearances: Donna E. Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, on behalf of Secretary;
Tony Oppegard, Esq., Lexington, Kentucky, on behalf of Dewey Runyon;
David J. Hardy, Esq., Charleston, West Virginia, and Elizabeth Chamberlin, Esq., Consol of Kentucky, Pittsburgh, Pennsylvania, on behalf of Consol of Kentucky.

Before: Judge Melick

Following initial hearings, the Secretary, in effect, requested approval to withdraw his Application for Temporary Reinstatement and Discrimination Complaint in the captioned cases

on the grounds that the parties have reached a settlement. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. These cases are therefore dismissed.

Gary Melick
Administrative Law Judge

Distribution:

Donna E. Sonner, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research & Defense Fund of KY, Inc., 630 Maxwelton Court, Lexington, KY 40508

Elizabeth Chamberlin, Esq., Consol, Inc., 1800 Washington Road, Pittsburgh, PA 15241

David J. Hardy, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 2 4 1997

APEX MINERALS, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. KENT 96-143-R
	:	Citation No. 4011717; 1/29/96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Apex No. 1 Mine
ADMINISTRATION (MSHA),	:	Mine ID 15-02096
Respondent	:	

DECISION

Appearances: John T. Bonham, Esq., Jackson & Kelly, Charleston, West Virginia, for Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Fauver

This is a contest proceeding under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. Apex Minerals, Inc., contests Citation No. 4011717, which was issued by MSHA on January 29, 1996.

The case arises from a water outburst through a mountain side in January, 1996. The key question is whether the water outburst occurred within Apex No. 1 Mine and, if so, whether it rendered Apex No. 1 Mine unsealed within the meaning of 30 C.F.R. § 75.334(b)(2), which provides:

> After pillar recovery a bleeder system shall be maintained to provide ventilation to the worked out area, or the area shall be sealed.

Hearings were held in Pikeville and Prestonsburg, Kentucky.

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 following facts and further findings in the Discussion below:

FINDINGS OF FACT

1. Shortly before January 29, 1996, an outburst of water erupted from the side of a mountain above Blackberry Creek, near the community of Ransom, Pike County, Kentucky.

2. MSHA Inspector Garrett Robinson, who is a ventilation specialist and mining engineer, investigated the outburst on January 29, 1996. He described it as a water flow that pushed through the surface out of an old mine entry. He estimated the outburst hole to be 15 feet wide, 4 feet high. After observing the outburst, talking to local residents, including a former miner who had worked in the mine where the water outburst occurred, and reviewing old mine maps, Inspector Robinson concluded that the water outburst came from the old works of Eastern Coal Corporation's Mine No. 7, which had been shut down in 1978.

3. After the hearing in Pikeville, Inspector Robinson used an altimeter to locate the elevation of the seam where the outburst had occurred. He determined that the outburst was in the Pond Creek Coal seam. This finding confirmed his conclusion that it had occurred in Eastern Mine No. 7.

4. Eastern Coal Corporation had operated mines in this area for several decades, including Eastern Mines Nos. 4 and 7, both of which were in the Pond Creek seam. Mine No. 7 was shut down by Eastern in 1978, and Eastern continued to operate Mine No. 4 until June 1992, when it was shut down.

5. In February 1993, Apex acquired mineral rights to coal reserves in a part of Eastern Mine No. 4. Within the boundaries of Eastern Mine No. 4, there are currently at least two separate owners of the coal reserves, i.e. Berwind Land Company and Pocahontas Land Company. Apex has mining rights to the coal reserves owned by Berwind Land Company within the Eastern Mine No. 4 boundaries. Apex has no mining agreement with respect to any part of Eastern Mine No. 7. The other coal reserves in Eastern Mine No. 4, and all the coal reserves in Eastern Mine No. 7, appear to be owned by Pocahontas Land Company.

6. At the time of Apex's application to MSHA, in 1993, to operate Apex No. 1 Mine, Eastern Mine Nos. 4 and 7 were connected underground. There were a number of entries through both mines, and the mines shared ventilation controls and air.

7. Eastern Mine No. 7 was never permanently closed and sealed. Eastern apparently treated Mine No. 7 as part of its No. 4 Mine after it shut down Mine No. 7.

8. When Apex applied to MSHA for an operator ID to operate Apex No. 1 Mine, it was given the same ID number as Eastern Mine No. 4 because it was using a Mine No. 4 portal and did not open a new portal for its mining operations. It submitted a rehabilitation and a ventilation plan, which were approved by MSHA. Under the rehabilitation and ventilation plans, Apex would ventilate Eastern Mine Nos. 4 and 7 for a short period in the same manner as they had been ventilated, but then (in September 1993) Apex would seal off all entries near the boundaries of its mining rights in Eastern Mine No. 4. The plans were carried out and after September 1993, Apex Mine No. 1 did not ventilate or have any physical connection with areas outside its seals, and had no connection with any part of Eastern Mine No. 7.

9. The outburst occurred in Eastern Mine No. 7, which had been assigned MSHA ID 15-04315. Eastern Mine No. 7, although inactive, had never filed an abandonment notice or final map in accordance with the applicable regulations. Nor had the mine been sealed as provided by the regulations.

10. MSHA issued Citation No. 4011717, on January 29, 1996, to Apex No. 1 Mine, charging a violation of 30 C.F.R. § 75.334(b)(2). Apex contested the citation, which is the subject of this proceeding.

11. At the time of the water outburst, January 1996, there were two active mine operations in that part of the Pond Creek seam. Apex Mine No. 1 was mining in a part of Eastern Mine No. 4. It was sealed off from the rest of Mine No. 4, and had no connection with Eastern Mine No. 7. The second operator was Narrows Branch Coal, Inc., which was mining coal reserves in Eastern Mine No. 2, which had no connection with Eastern Mine No. 4 or 7.

12. Narrow Branch Coal, Inc., began mining in Eastern Mine No. 2 in February, 1992. It was given a new MSHA ID (No. 15-17164) because it developed a new portal in Mine No. 2. It does not have the right to mine coal reserves in Eastern Mine No. 4 or 7.

13. MSHA issued to Narrows Branch Coal, Inc., Citation No. 4011716, on January 29, 1996, which alleges the same type violation as that alleged against Apex concerning the water outburst.

14. Citation No. 4011716 was terminated by MSHA on May 1, 1996, upon Narrow Branch's sealing the area of the outburst.

15. Apex had no contractual dealings with Eastern Coal Corporation concerning Eastern Mine No. 4 or 7 or any other mine.

DISCUSSION WITH FURTHER FINDINGS, CONCLUSIONS

The basic question is whether Apex Mine No. 1 includes the area of Eastern Mine No. 7 where the outburst occurred, and if it is does, whether the outburst caused Apex Mine No. 1 to be unsealed in violation of section 75.334(b)(2).

The term "coal mine" is defined in section 2(h)(2) of the Act as follows:

> (2) For the purposes of titles II, III, and IV, "coal mine" means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities.

"Coal mine" is further defined in Title III, § 318(l) of the Act as follows:

> For the purpose of this title and title II of this Act, the term ---
>
> * * *
>
> (l) "Coal mine" includes areas of adjoining mines connected underground.

These definitions, which were first enacted in the Federal Coal Mine Health and Safety Act of 1969, were not changed by the 1977 Amendments, which renamed the statute the Federal Mine Safety and Health Act of 1977.

In 1970, the Secretary promulgated Part 75 - Mandatory Safety Standards - Underground Coal Mines, 30 C.F.R. The definition of a "coal mine" in section 318(l) of the 1969 Act was adopted as section 75.2 in the regulations, and provides: "Coal mine. Includes areas of adjoining mines connected underground."

The 1977 legislative history calls for a liberal interpretation of the definition of a mine, as stated in Senate Report 95-181:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibly [sic] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

1977 U.S Code and Ad.News 3414 (S.Rep 95-181).

The legislative history of the 1969 Act does not elaborate on the meaning of section 318(l), other than to add the words "physically connected." As stated in House Report 91-563 (1969):

> Section 318. Definitions
>
> * * *
>
> Subsection (e) further defines the term "coal mine." The term "coal mine" is broadly defined in section 3(h) of the Act to cover all coal mines whether underground or not. In addition, this section [enacted as section 318(l)] would further define the term, in the case of underground adjoining mines physically connected underground.

1969 U.S. Code Cong. And Ad.News 2562 (H.Rep. 91-563).

Physical Connections Between Apex Mine No. 1 and Eastern Mines Nos. 4 and 7

MSHA Inspector Garrett Robinson, who is a ventilation specialist and a mining engineer, testified that the maps he reviewed, including Exhibit G-2, which was provided by Apex, show that Eastern Mine No. 7, in which the water outburst occurred, was connected underground through Eastern Mine No. 4 to Apex Mine No. 1. He identified 11 entries on Exhibit G-2 that show this connection. He concluded that Eastern Mine No. 7 was a part of Apex Mine No. 1 under the Secretary's regulations and, therefore, that the outburst occurred in Apex Mine No. 1. He found that the outburst caused the worked out areas in Apex Mine No. 1 to be "unsealed" within the meaning of section 75.334(b)(2).

The Secretary presented further proof of a physical connection between Apex Mine No. 1 and Eastern Mine No. 7 in the representations by Apex in 1993, before its seals were installed, that Eastern Mine Nos. 4 and 7 were being ventilated by Apex Mine No. 1. Also, Eastern represented to MSHA in 1985 that it was ventilating Mine Nos. 4 and 7 together.

The mine maps that Apex provided to MSHA to show its ventilation controls and the extent of its mining in Apex Mine No. 1 (Exhibits G-3, G-14, and G-15) show no demarcation between Eastern Mines Nos. 4 and 7. Apex's witness Darrell Hinley, Superintendent of Apex Mine No. 1, who had also been superintendent of Eastern Mine No. 4, agreed that the maps showed that Eastern Mine Nos. 4 and 7 Mine were connected underground.

I find that Apex Mine No. 1 was connected underground with Eastern Mines Nos. 4 and 7 prior to Apex's sealing of the boundary of its mining operations in Eastern Mine No. 4, in September 1993.

Effect of Sealing the Boundary of Apex's Mining Rights

Apex sealed the boundary of its mining rights in Eastern Mine No. 4 in September 1993, under a mine ventilation plan approved by MSHA. Thereafter, Apex Mine No. 1 was not connected with the part of Eastern Mine No. 4 beyond the Apex seals or any part of Eastern Mine No. 7, which is entirely outside the Apex seals.

Disposition of Issues

The Apex seals raise the legal issue whether a mine that is connected underground with another mine may seal off its connections and thereby become a separate mine with no responsibility for the adjoining mine.

Section 318(1) extends the definition of a "coal mine" to include "areas of adjoining mines connected underground." "Connections" of mines may be changed, and with those changes the application of the definition must change accordingly. The definition does not provide or imply that a mine having under-ground connections with an adjoining mine may not seal off those connections (with a plan approved by MSHA) and thereby become a separate mine with no responsibility for the adjoining mine. If construed otherwise, the definition would permit the anomalous situation in which one mine could be held liable for the conditions and practices in another mine despite the fact that it has sealed off any underground connections with the other mine and has no legal or contractual right to enter the other mine to change conditions or practices.

Accordingly, I hold that when Apex, with a plan approved by MSHA, sealed off all physical connections with the part of Eastern Mine No. 4 that is beyond Apex's mining rights, Apex Mine No. 1 became legally separated from Eastern Mine No. 7, and had no responsibility or liability for events and conditions in Mine No. 7. The same ruling applies to the areas of Eastern Mine No. 4 beyond the Apex seals.

So long as the former physical connections between Apex Mine No. 1 and Eastern Mine No. 7 (through Eastern Mine No. 4) remain permanently sealed, Apex Mine No. 1 is legally separated from Eastern Mine No. 7 and has no responsibility or liability for the conditions in Eastern Mine No. 7. This same ruling applies to the areas of Eastern Mine No. 4 that are beyond the Apex seals.

This holding is consistent with the responsibilities that are imposed on an operator, such as Eastern Coal Corporation, that abandons or closes a mine.

30 C.F.R. § 75.1711, "Sealing of Mines," provides:

> On or after March 30, 1970, the opening of any coal mine that is declared inactive by the operator, or is permanently closed, or abandoned for more than 90 days, shall be sealed by the operator in a manner prescribed by the Secretary. Openings of all other mines shall be adequately protected in the manner prescribed by the Secretary to prevent entrance by unauthorized persons.

30 C.F.R. § 75.1204, "Mine Closures; Filing of Map with Secretary," provides:

> Whenever an operator permanently closes or abandons a coal mine, or temporarily closes a coal mine for a period of more than 90 days, he shall promptly notify the Secretary of such closure. Within 60 days of the permanent closure or abandonment of the mine, or, when the mine is temporarily closed, upon the expiration of a period of 90 days from the date of closure, the operator shall file with the Secretary a copy of the mine map revised and supplemented to the date of the closure. Such copy of the mine map shall be certified by a registered surveyor or registered engineer of the state in which the mine is located and shall be available for public inspection.

The regulations continue to apply to a former operator after a mine is closed or deactivated. For example, with reference to section 105(b)(1) actions for civil penalties, the MSHA Policy Manual states that such actions may be used "where the imposition of a withdrawal order is ineffective to correct existing violations * * * [e.g.,] where an operator that has abandoned a mine has been issued a citation for failure to seal (or properly seal) it and the operator has permitted the abatement time to expire without making any effort to properly seal the mine." MSHA PPM, Vol. I, Sec. 105 (July 1, 1988; release I-1). Reopening of an abandoned or deactivated mine is governed by section 75.1721, which requires, among other things, that MSHA approve any proposal for the rehabilitation of the mine. In the instant matter, the plan for reentering the Eastern works and creating Apex Mine No. 1 was approved by MSHA without any mention of sealing or maintaining a sealed area in Eastern Mine No 7.

MSHA's announced policy with regard to the assignment of legal identity numbers is inconsistent with the Secretary's contention that there was a "merger" of Apex Mine No. 1 and Eastern Mine No. 7. Program Policy Letter No. P89-III-10[1] states that an operator reactivating a

---

[1]Although Program Policy Letter No. P89-II-10 shows an expiration date of March 31, 1991, a thorough review of subsequent publications by MSHA does not reveal any recission or modification of its stated policy. Therefore, absent any contradictory statement of policy on the subject, the procedures outlined in PPL, P89-III-10 are considered applicable.

closed mine assumes the legal identity number of the closed mine, unless an existing mine is divided into two or more separate mines. In such a case, P89-III-10 provides that if certain conditions are met the applicant may be assigned a new ID number.

All of the conditions for a new ID number were met by Apex. First, the mine seeking a new identity number must have an easily identifiable division between it and other mines. Apex Mine No. 1 is readily identifiable by the seals separating it from the Eastern works beyond Apex's mining rights. Secondly, the mine must not share haulage or ventilation with any part of another mine. Apex No. 1 Mine has no physical connection with Eastern Mine No. 7. Finally, Apex Mine No. 1 is a separate entity from Eastern Coal Corporation and has no common employees or economic interests with Eastern Coal Corporation. Accordingly, had this policy been followed by MSHA when it approved the establishment of Apex Mine No. 1, Apex would have received a new ID and the remaining area of Eastern Mine No. 4 would have retained Eastern No. 4 Mine's ID.

However, whether MSHA assigns a new operator a new ID or the ID of an abandoned, closed, or deactivated mine, the ID is not a substitute for the definition of a "coal mine" under the Act and regulations. An operator is not responsible or liable for another mine merely because MSHA uses the same ID for both mines.

If Eastern Coal Corporation failed to comply with applicable regulations when it abandoned or deactivated its Mine No. 7, that fact did not alter Apex's legal right to seal off its mining rights boundary and thereby become a separate mine without responsibility or liability for conditions in Eastern Mine No. 7. Apex had no contract with Eastern Coal Corporation and did not assume Eastern's liability for any past or future violations respecting Mine No. 7.

CONCLUSIONS OF LAW

1. Apex Mine No. 1 is subject to the Act.

2. The water outburst involved in this case did not occur in Apex Mine No. 1 or in an area connected underground with Apex Mine No. 1.

3. The Secretary failed to prove that Respondent violated 30 C.F.R. § 75.334(b)(2) as alleged in Citation No. 4011717.

ORDER

WHEREFORE IT IS ORDERED that Citation No. 4011717 is **VACATED** and this proceeding is **DISMISSED**.

William Fauver
Administrative Law Judge

Distribution:

John T. Bonham II, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 25 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-126-M
Petitioner	:	A.C. No. 11-02742-05516
v.	:	
	:	Lacon Plant
MIDWEST MATERIALS COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Fauver

This is a civil penalty action under § 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. The parties have filed a motion to approve a settlement agreement and to dismiss the case. I have considered the representations and documentation submitted and I conclude that the proffered settlement is consistent with the criteria in § 110(i) of the Act.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is **GRANTED.** Respondent shall pay the approved penalties of $15,000 as follows: The payment by Respondent to the Secretary for $1,500, already received, leaves a balance of $13,500, which shall be paid by 12 monthly certified checks of $1,125 each, commencing on May 15, 1997, and due on the 15th day of each consecutive month until the balance is paid. Provided: If Respondent fails to make any monthly payment when due, the entire balance shall become due the next day with interest accruing from that date until paid. The applicable interest rates shall be those announced by the Executive Secretary of the Commission.

William Fauver
Administrative Law Judge

Distribution:

Cheryl C. Blair-Kijewski, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 400, Arlington, VA 22203

Paul Williams, President, Midwest Materials Company, Box 63, Suite 103-B, Naperville, IL 60566

dcp

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 9, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-54-M
v.	:	A.C. No. 41-03595-05519
	:	
TEXAS GRAVEL INCORPORATED,	:	Texas Gravel Inc.

ORDER REJECTING SETTLEMENT MOTION
AND
ORDER TO RESUBMIT SETTLEMENT MOTION

The parties have filed a settlement motion pursuant to Commission Rule 31, 29 C.F.R § 2700.31, concerning proposed civil penalty assessments for eleven section 104(a) citations served on the respondent alleging violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

The proposed settlement includes two citations (44473390 and 4447396) alleging violations of mandatory safety standards 30 C.F.R. § 56.12032 and 56.4200(b)(2). The parties agree that these citations should be vacated. In support of the proposed vacation, the parties rely on their agreement that the violations were "not as serious as initially thought" and that "an accident or injury was unlikely to happen".

The record reflects that the citations in question were issued as non-"S&S" violations with $50 proposed penalty assessments, and it seems obvious to me that the gravity criterion found in section 110(i) of the Act has been considered in the non-"S&S" classification and proposed penalty assessments of $50. I find no justification for vacating the citations simply because the parties have now agreed to these initial gravity findings. Further, the parties do not state or express any agreement that the conditions or practices cited by the inspector do not constitute violations of the cited standards.

In view of the foregoing, the proposed settlement dispositions for the two citations in question ARE DENIED and REJECTED. The proposed settlement dispositions for the remaining citations are tentatively approved subject to the final disposition of this case.

The parties ARE ORDERED to submit an amended motion addressing the factual basis for their agreement that the citations should be vacated. In other words, if the facts as now known to the parties, other than reduced gravity, do not amount to violations of the cited standards, they should clearly say so. The parties ARE FURTHER ORDERED to resubmit their motion within twenty (20) days of the date of this order. The scheduled hearing on April 29, 1997, IS CONTINUED.

George A. Koutras
Administrative Law Judge

Distribution:

Ronald M. Mesa, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 1100 Commerce Street, Rm. 4C50, Dallas, TX 75242-0499 (Certified Mail)

Dirk Fox, Investment Manager, Texas Gravel, Inc., P.O. Box 1518, Edinburg, TX 78540 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 21, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 97-19-M
Petitioner	:	A.C. No. 13-02149-05513
v.	:	
	:	Portable Wash Plant #1
ROHLIN CONSTRUCTION COMPANY,	:	
Respondent	:	
	:	
ROHLIN CONSTRUCTION COMPANY	:	CONTEST PROCEEDING
Contestant	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	Docket No. CENT 96-134-RM
MINE SAFETY AND HEALTH	:	Order No. 4419637;5/23/96
ADMINISTRATION (MSHA),	:	
Respondent	:	Portable Wash Plant #1

ORDER TO SHOW CAUSE

In a motion for summary decision filed by Rohlin Construction Company, Inc. (Rohlin) on March 27, 1997, it is alleged, *inter alia*, that Order No. 4419637 should be vacated on the gounds that such order charges a "training violation which cannot be enforced by MSHA in Fiscal Year 1996, pursuant to the Departments of Labor, Health and Human Services, and Eduction and Related Agencies Appropriations Act, 1996, Public Law 104-134, [H.R. 3019] (the "Appropriations Act")".

Rohlin's complete argument is set forth below:

The Appropriations Act contains the following Rider language:

> Provided, That none of the funds appropriated under this paragraph shall be obligated or expended to carry out section 115 of the Federal Mine Safety and Health Act of 1977 or to carry out that portion of § 104(g)(1) of such Act relating to the enforcement of any training requirements, with respect to . . . any sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mine.

[reference omitted]

The training requirements referenced in the above rider language, are set forth in 30 C.F.R. § 48.1 *et seq.* Section 48.25(b)(12) is particularly relevant to this discussion. Section 48.25 provides in pertinent part, as follows:

> (a) Each new miner shall receive no less than 24 hours of training as prescribed in this Section. Except as otherwise provided in this paragraph, new miners shall receive this training before they are assigned to work duties.
>
> (b) The training program for new miners shall include the following courses:
>
> (12) Health and safety aspects of the tasks to which the new miner will be assigned.
>
> The course shall include instructions in the health and safety aspects of the tasks to be assigned, the safe work procedures of such tasks, and the mandatory health and safety standards pertinent to such tasks.

Here, the Plant clearly falls within the coverage of the above Rider language. Moreover, it is clear from the notes contained in Order No. 4419637, the deposition testimony of Mr. Toscano, and a letter dated February 18, 1997 sent by James M. Salois, MSHA District Manager, to Mr. Sidles [footnote omitted], that at most, the alleged facts of Order No. 4419637 support a violation of 30 C.F.R. § 48.25(b)(12) training standards, and not of the general requirements contained in 30 C.F.R. § 56.18006.[1] A true and correct copy of Mr. Salois' February 18, 1997, letter to Mr. Sidles is attached as Exhibit S. In essence, Rohlin asserts that Mr. Toscano is attempting to "bootstrap" the Part 48 new miner task specific training regulations, set forth in 30 C.F.R. § 48.25(b)(12) into the § 56.18006 violation, in a blatant attempt to do an "end run" around the above-mentioned Rider.

The Secretary has attempted this "end run" maneuver in at least one other case, entitled Secretary v. Premier Granite, Inc., MSHRC Docket No. CENT 94-186-M, Assessment No. 41-03421-05504; MSHRC Docket No. CENT 94-226-M, Assessment No. 41-03421-05505; Docket No. CENT 95-41-M, Assessment No. 41-03421-05507, Stacia Rose Quarry (Premier). However, the Secretary ultimately realized that its position was not warranted and, as such, agreed to vacate the § 56.18006 citation issued to Premier on the basis that "[a]lthough the standard cited in that citation is not specifically covered by the appropriations bill, the alleged facts of the citation were a violation of covered training standards and not of the general requirements of the cited standard, 30 C.F.R. §

---

[1] 30 C.F.R. § 56.18006 provides that "[n]ew employees shall be indoctrinated in safety rules and safe work procedures."

56.18006." (Reference omitted) In view of the foregoing, Rohlin submits that the Secretary's position with regard to Order No. 4419637 is not "substantially justified" and Order No. 4419637 should be dismissed.

In his response to this issue the Secretary states as follows:

> Task training should have been conducted in addition to the indoctrination requirements set forth in 56.18006. 30 C.F.R. Part 48. Indoctrination, and safety specifically, are only a small part of task training. As set forth above, Rohlin was not cited for its failure to properly task train its crew, due to the rider, cited by Rohlin in its brief, in which MSHA is not allowed to expend funds enforcing Part 48 at sand and gravel operations.

This ambiguous statement is not a satisfactory response and does not adequately address the issue presented. It appears although it is not clear that the Secretary concedes that the "indoctrination and safety training" under 30 C.F.R. § 56.18006 is within the ambit of training under 30 C.F.R. Part 48 which the Secretary admittedly cannot expend funds to enforce. If he does not so concede, the Secretary, in responding to this show cause order, must state with particularity what training Rohlin allegedly failed to provide (and which is alleged to be a violation of 30 C.F.R. § 56.18006 as charged in Order No. 4419637) that is specifically required under 30 C.F.R. § 56.18006 but is not required under Part 48 of his regulations. See in particular 30 C.F.R.§ 48.25(a) and 30 C.F.R. § 48.25(b)(12).

The Secretary is accordingly ordered to show cause on or before May 9, 1997, why he is not barred by the cited statute from enforcement of Order No. 4419637.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5715 (Certified Mail)

Douglas N. White, Esq., Office of the Solicitor, U.S. Dept. of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203 (Certified Mail)

David B. Ellis, Esq., One Tabor Centre, Suite 3000, 1200 Seventeenth Street, Denver, CO 80202 (Certified Mail)

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 1997

OHIO VALLEY TRANSLOADING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 96-158-R
	:	Order No. 3500961; 8/22/96
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 96-159-R
ADMINISTRATION (MSHA),	:	Order No. 3500862; 8/22/96
Respondent	:	
	:	Powhatan Transportation Center

ORDER IN LIMINE

The Secretary has filed a motion in limine seeking an order to exclude as irrelevant the following documents and testimony at hearings on the merits:

1) any "documents reflecting coal terminals at which MSHA knowingly has made a decision not to exercise jurisdiction"

2) Letter dated March 22, 1996 from Dave Shreve to Davitt McAteer "which requested MSHA to exercise jurisdiction over PTC."

3) Letter dated May 3, 1996 from Marvin W. Nichols, Jr., MSHA's Administrator for Coal Mine Safety and Health to Larry Ward, President, UMWA District 6 "which announces MSHA decision to exercise jurisdiction and notes prior decisions by MSHA not to exercise jurisdiction."

4) "Any other document produced by the Secretary during discovery" which concerns the above documents or in any way concerns MSHA's decision to exercise jurisdiction over Contestant.

5) Testimony of Marvin W. Nichols, Jr. Contestant seeks testimony from Mr. Nichols regarding the above documents. Further, Contestant seeks testimony regarding MSHA's basis for the assertion of jurisdiction, the change of decision to exercise jurisdiction, the change in interpretation of jurisdiction, the assertion of jurisdiction over other terminal facilities and decisions concerning the exercise of jurisdiction over other facilities.

6) Testimony of Robert Crumrine. Contestant seeks testimony from Mr. Crumrine regarding the above documents. Further, Contestant seeks testimony regarding the decisions of MSHA not to exercise jurisdiction over the facility, how the decision to exercise jurisdiction was announced and other terminals over which MSHA does not exercise jurisdiction.

It is noted preliminarily that these are Contest Proceedings and, accordingly, the civil penalty criteria are not at issue. Thus documents and testimony that might evidence a change in the Secretary's enforcement policy, which might otherwise go to the issue of negligence, are not here at issue. I also find the Secretary's request in paragraph (4), above, to be overbroad and lacking in sufficient specificity to enable determination of relevance as to the entire document. A determination of relevance as to such documents must therefore be made on a case-by-case basis at hearing. In addition, while the Secretary's basis for the assertion of jurisdiction is relevant to the issues in these cases it is a question of law to be asserted and argued by the Secretary and is not a question subject to factual inquiry. Only the facts necessary to support the Secretary's assertion of jurisdiction, e.g whether breaking, crushing, sizing cleaning, washing, etc. has occurred at the subject facility, are at issue.

Under Commission Rule 63, 29 C.F.R. § 2700.63, only relevant evidence is admissible. The relevant issue as identified by the parties is whether the Contestant's facility was a "coal or other mine" within the meaning of Section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, the "Mine Act". In particular the issue is whether Contestant's activities at this facility constituted "work of preparing the coal" within the meaning of Section 3(i) of the Mine Act. Under the latter section, "work of preparing the coal" means the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine". The issue for hearing then is whether, by applying the clear and unambiguous Mine Act definitions, the facts support a finding of Mine Act jurisdiction over the subject facility. It is accordingly irrelevant to these cases and to the issue of jurisdiction, how or why the Secretary made his policy decision to proceed against the subject facility.

Even assuming, *arguendo*, as Contestant has previously maintained, that the definition of "work preparing the coal" set forth in the Mine Act is not plain and unambiguous within the framework of a "*Chevron I*" analysis, *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837, 842 (1984), and that therefore a "*Chevron II*" analysis would be necessary, such an analysis would in any event not require inquiry as to how the Secretary's employees reached their decision or why the Secretary may not have inspected all facilities that are ostensibly similar to the facility at issue. The only analysis required under "*Chevron II*" concerns whether the agency's interpretation is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language. *K Mart Corporation v. Cartier, Inc.*, 486 US 281, 291 (1988).

Under the circumstances the following evidence is irrelevant and will be excluded as evidence at hearings now scheduled to commence on April 30, 1997:

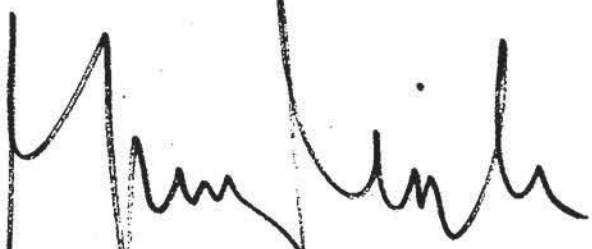
1) Evidence pertaining to "coal terminals at which MSHA knowingly has made a decision not to exercise jurisdiction"

2) Letter dated March 22, 1996 from Dave Shreve to Davitt McAteer to the extent that it "requested MSHA to exercise jurisdiction over PTC."

3) Letter dated May 3, 1996 from Marvin W. Nichols, Jr., MSHA's Administrator for Coal Mine Safety and Health to Larry Ward, President, UMWA District 6 to the extent that it "announces MSHA decision to exercise jurisdiction and notes prior decisions by MSHA not to exercise jurisdiction."

4) Testimony of Marvin W. Nichols, Jr., regarding MSHA's basis for the assertion of jurisdiction, the change of decision to exercise jurisdiction, the change in interpretation of jurisdiction, the assertion of jurisdiction over other terminal facilities and decisions concerning the exercise of jurisdiction over other facilities.

5) Testimony of Robert Crumrine, regarding the decisions of MSHA not to exercise jurisdiction over the facility, how the decision to exercise jurisdiction was announced and other terminals over which MSHA does not exercise jurisdiction.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

William I. Althen, Esq., and William K. Doran, Esq., Smith, Heenan & Althen, 1110 Vermont Ave., N.W., Washington, D.C. 20005 (Certified Mail)

Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Dept. of Labor, 881 Federal Bldg., 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

/jf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

April 29, 1997

CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 97-84-R
v.	:	Order No. 3493571; 5/16/96
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Robinson Run No. 95
Respondent	:	Mine ID 46-01318

ORDER DENYING MOTION TO DISMISS
ORDER DIRECTING SOLICITOR TO ANSWER

This case is a notice of contest seeking review of an order issued to Consolidation Coal Company by an inspector of the Mine Safety and Health Administration under section 104(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(b).

Pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), an inspector of the Mine Safety and Health Administration on March 18, 1996, issued a citation to the operator for an alleged violation of the Act. Thereafter, on May 16, 1996, the inspector issued an order under section 104(b), supra, for an alleged failure to abate the violation. On June 27, 1996, the Mine Safety and Health Administration issued a proposed assessment of civil penalty which referenced both the citation and the order. Thereafter, on September 10, 1996, the Solicitor in accordance with section 2700.28 of the Commission's regulations, 29 C.F.R. § 2700.28, filed a petition with the Commission for the assessment of a civil penalty as provided for in section 110 of the Act, 30 U.S.C. § 820. Attached to the petition was a copy of the citation but not a copy of the order. That case was assigned to a Commission Judge. Because the operator had not filed a notice of contest for the order under section 105(d), the Solicitor argued in the penalty case that the operator could not obtain review of the order itself, although he admitted that good faith abatement was in issue as one of the six criteria specified in section 110(i), 30 U.S.C. § 820(i), to be taken into account in determining an appropriate penalty amount. On March 11, 1997, the judge before whom the penalty case was pending, held that he had no jurisdiction with respect to the validity of the order. The operator then filed this action.

The Act and Commission regulations specify the time limits within which actions must be brought. Section 105(a) and (d), 30 U.S. C. § 815(a) and (d), directs that an operator who wishes to contest a penalty assessment must notify the Secretary within 30 days. 29 C.F.R. § 2700.25. However, the Commission has routinely held that untimely challenges may be

reviewed to determine whether relief is warranted under Rule 60(b)of the Federal Rules of Civil Procedure. Jim Walter Resources, Inc., 15 FMSHRC 782, 789 (May 1993). Upon such inquiry untimely penalty actions have been allowed and the cases reopened. See, e.g., R B Coal Company, 17 FMSHRC 2153 (November 1995); Lakeview Rock Products, No. WEST 95-56-M (December 13, 1995); Rocky Hollow Coal Co., No. KENT 94-105 (September 22, 1994); Jim Walter Resources Inc., No. SE 94-383 (July 15, 1994). Pursuant to Commission regulations the Solicitor is required to file the penalty petition within 45 days of receipt of the operator's contest. 29 C.F.R. § 2700.28(a). Here too, when the Solicitor shows good cause for the delay and there is no prejudice shown, late filed penalty petitions have been permitted. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Company, 15 FMSHRC 2089, 2092-2093 (October 1993), aff'd, 57 F.3d 982 (10th Cir. 1995). Late filed discrimination suits under section 105(c)(2) and (3), also have been allowed upon consideration of whether material legal prejudice occurred. Nally & Hamilton Enterprises, Inc., 16 FMSHRC 2208, 2215 (November 1994); Secretary on behalf of Hale v. 4-A Coal Co., 8 FMSHRC 905, 908 (June 1986).

In addition to allowing an operator 30 days to contest a penalty assessment, section 105(d), supra, gives an operator 30 days to file its own notice of contest with respect to an order or citation. 29 C.F.R. § 2700.20. Cases that have been late filed under this provision have been dismissed. The rationale underlying these dismissals has been that the operator could mount the same challenges in the subsequent penalty proceeding. C and S Coal Company, 16 FMSHRC 633 (March 1994); Diablo Coal Company, 15 FMSHRC 1605 (August 1993); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Prestige Coal Co., 13 FMSHRC 93 (January 1991); Allentown Cement Company, Inc., 8 FMSHRC 1513 (October 1986); Industrial Resources, Inc., 7 FMSHRC 416 (March 1985); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982). As already pointed out, that avenue of relief is not available here. It is noted that section 2700.21 of Commission regulations adopted in 1993 provides that an operator's failure to file a notice of contest of a citation or order does not preclude a review in the penalty proceeding of special findings including, but not limited to, significant and substantial and unwarrantable failure. 55 Fed. Reg. 4853, 4855 (1990); 58 Fed. Reg. 12158, (1993). The intent to secure review of special findings is clear. However, since the penalty case is not before me, I make no determination of what can properly be considered in that proceeding.

Late filing of a contest of a citation or order has been allowed where the Secretary's own conduct is responsible for the operator's delay in filing a notice of contest to a withdrawal order. Blue Diamond Coal Company, 11 FMSHRC 2629 (Dec. 1989), See also, Freeman Coal Mining Corporation, 1 MSHC 1001 (1970). In cases involving section 104(b) orders the Solicitor customarily files both the 104(a) citation and the 104(b) order with his petition for the assessment of civil penalty and does not object to review of the order in the penalty proceeding. Energy West Mining Company, 18 FMSHRC 565 (April 1996), aff'd, No. 96-1243 (D.C. Circuit April 25, 1997); Mid Continent Resources Inc., 9 FMSHRC 1757, 1760 (October 1987), aff'd, 11 FMSHRC 505 (April 1989). This is the first time I have seen the Solicitor attempt to thwart review of a 104(b) order in this manner. Moreover, in this case like other 104(a) and 104(b)

cases the notice of proposed assessment referred to both the citation and the order. Indeed, until the Solicitor changed course and opposed review of the subject order, the operator had no way of knowing that the Solicitor would depart from prior practice. The operator was, therefore, justified in believing that as in prior cases, it could obtain review of the failure to abate order in the penalty case. When such review became unavailable because of the Solicitor's unexpected departure from previous practice, the only choice left to the operator was to bring the present action. Under the circumstances, the failure to timely file this case is excusable and will be allowed.

In light of the foregoing, it is **ORDERED** that the motion to dismiss be **DENIED**.

It is further **ORDERED** that the Solicitor file an answer within 30 days of the date of this order.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22203

☆U.S. GOVERNMENT PRINTING OFFICE: 1997-417-508-73379