APRIL 2002

COMMISSION DECISION AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDER

APRIL 2002

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

Secretary of Labor, MSHA v. Western Industrial, Inc., Docket No. WEST 2001-473-RM.
(Judge Weisberger, March 1, 2002)

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

Daniel Hernandez v. Asarco Incorporated, Docket No. WEST 2001-308-DM.
(Judge Bulluck, March 20, 2002)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 29, 2002

RODNEY WOODRUFF	:	
	:	
v.	:	Docket No. WEST 2002-163-D
	:	
HOLLINGER CONSTRUCTION	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Jordan and Beatty, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 26, 2002, Chief Administrative Law Judge David F. Barbour issued an Order of Dismissal[1] dismissing this discrimination proceeding because Rodney Woodruff failed to respond to a show cause order the judge issued on February 20, 2002. Woodruff allegedly failed to provide the judge with proof of his service to the operator of his discrimination complaint, as required in the show cause order.

On April 4, 2002, the Commission received from Woodruff a request to vacate the judge's dismissal order. Mot. In his request, Woodruff contends that he responded to the show cause order by sending the judge the return receipt card showing that he had notified the operator of his discrimination complaint. *Id.* Woodruff attached two copies of the return receipt card to his request. *Id.*, attachment. He maintains that the return receipt card he sent in response to the show cause order was either lost in the mail or was misplaced after delivery at the Commission. *Id.*

[1] On April 17, 2002, the judge issued a Corrected Order of Dismissal amending a minor clerical error in the original dismissal order.

The judge's jurisdiction in this matter terminated when his decision was issued on March 26, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Woodruff's request to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

We have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for a failure to respond to an order, the failure may be excused and proceedings on the merits permitted. *Mohave Concrete & Materials, Inc.*, 8 FMSHRC 1646, 1647 (Nov. 1986). On the basis of the present record, however, we are unable to evaluate the merits of Woodruff's position. In particular, we note that, although Woodruff attached to his request copies of the return receipt card showing that he had notified the operator of his discrimination complaint, he did not provide any documentary support for his assertion that he mailed the return receipt card to the Commission in response to the show cause order. Accordingly, in the interest of justice, we vacate the dismissal order and remand this matter to the judge, who shall determine whether relief from dismissal is warranted. *See Dunkard Mining Co.*, 17 FMSHRC 497, 497-98 (Apr. 1995) (vacating default order and remanding to judge where operator alleged that it responded to show cause order but its response was not received by Commission). If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2001-618-M
v.	:	A.C. No. 04-01859-05547
MISSION VALLEY ROCK COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On September 28, 2001, the Commission received from Mission Valley Rock Company ("Mission Valley") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its request, Mission Valley, apparently proceeding pro se, contends that it sent in a proposed assessment form ("green card") requesting a hearing on the proposed penalties regarding Citation Nos. 07998009 and 07998011. Mot. It also asserts that it sent in a check for those proposed penalties that were not in dispute. *Id.* Mission Valley did not indicate when or to whom it sent the green card or the check. *Id.* It contends that only the check but not the green card "reached its proper destination." *Id.* It further asserts that it subsequently received a letter from the Civil Penalty Compliance Office of the Department of Labor's Mine Safety and Health

Administration ("MSHA") stating that it had failed to fully pay the penalty assessments. *Id.* Mission Valley did not attach any documents to its request in support of its position.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, however, we are unable to evaluate the merits of Mission Valley's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See H & D Coal Co.*, 23 FMSHRC 382, 382-84 (Apr. 2001) (remanding to a judge where operator alleged that it sent a hearing request to MSHA, but MSHA did not receive the request); *Missoula County Rd. Dep't*, 23 FMSHRC 369, 369-72 (Apr. 2001) (same). 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, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Mission Valley's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need for or utility of remanding this matter.

Theodore F. Verheggen, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2002-47
v.	:	A.C. No. 46-07178-03571
CATENARY COAL COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 25, 2002, the Commission received from Catenary Coal Company ("Catenary") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its motion, Catenary contends that on October 18, 2001, it received a proposed penalty assessment relating to Citation Nos. 7185826-27 and 7185845-48. Mot. at 1. It asserts that on October 24, 2001, its safety manager, Terry Tolley, mailed a request for a hearing ("green card") relating to the penalties for these citations. *Id.* at 1-2; Ex.1. Catenary received a delinquency letter, dated January 28, 2002, from the Department of Labor's Mine Safety and Health Administration ("MSHA") stating that Catenary's green card had not been received by MSHA

until January 10, 2002. Mot. at 1-2; Ex. 2. The delinquency letter stated that, as a consequence of the untimely filing of the green card, the proposed penalty assessment had become a final order of the Commission. Ex. 2. Catenary states that it does not know why receipt of the green card by MSHA was delayed. Mot. at 1. Attached to Catenary's request is a signed affidavit by Tolley supporting its allegations. Ex.1.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.,* 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Catenary intended to contest the proposed penalties, and that it mailed its request for a hearing to MSHA within the 30-day time limit. *See* Ex. 1 (Tolley Affidavit). The affidavit attached to Catenary's motion is sufficiently reliable and supports the company's allegations. *Id.* In the circumstances presented here, we find Catenary's failure to timely file its hearing request with MSHA due to inadvertence or mistake within the meaning of Rule 60(b)(1). *See Chantilly Crushed Stone, Inc.*, 22 FMSHRC 17, 17-19 (Jan. 2000) (granting operator's motion to reopen where order became final because green card received late by MSHA, but where operator believed it timely mailed green card and its allegations were supported by affidavit).

Accordingly, in the interest of justice, we grant Catenary's unopposed request for relief to reopen the penalty assessment that became a final order with respect to Citation Nos. 7185826-27 and 7185845-48. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. On remand, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2002-38
v.	:	A.C. No. 15-18022-03534
LEECO, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 2, 2001, the Commission received from Leeco, Inc. ("Leeco") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator 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. *Id.*

In its request, Leeco,[1] through counsel, asserts that the proposed penalty assessment was marked as having been received by the operator on August 21, 2001. Mot. at 1. It contends that Andy Fields, Blue Diamond's safety manager, mistakenly filed the green card past the 30-day deadline because he miscalculated the return deadline as September 21, 2001, believing that to be thirty days after the date of receipt, August 21, 2001. *Id.* at 1-2. Leeco attached to its request a signed affidavit by Fields supporting its assertion that it filed the green card past the 30-day deadline due to an inadvertent miscalculation of the required return date. *Id.*, attachment. It also attached to its request a copy of the proposed penalty assessment stamped as having been received by the operator on August 21, 2001. *Id.* In addition, it attached a copy of a delinquency letter from the Department of Labor's Mine Safety and Health Administration which states, as Leeco notes in its request, that the proposed penalty assessment was received by the operator on August 20, 2001. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Leeco intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to an internal oversight. The affidavit attached to Leeco's request is sufficiently reliable and supports its allegations.[2] In the circumstances presented here, we treat Leeco's late filing of a hearing request as resulting from inadvertence or

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[1] Leeco states that it was operating the mine at the time the citation (Citation No. 7507813) relating to the penalty assessment was issued but that mine operations were subsequently transferred to Blue Diamond Coal Company ("Blue Diamond"), an affiliate of Leeco. Mot. at 1 n.1. On August 15, 2001, a proposed penalty assessment relating to the citation was issued to Blue Diamond, "A/K/A LEECO INC" by the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.*, attachment.

[2] We note the confusion in the record over whether the operator received the proposed penalty assessment on August 20 or August 21, 2001, but determine that it does not significantly detract from the operator's allegations.

mistake. *See 46 Sand & Stone*, 23 FMSHRC 1091, 1091-93 (Oct. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error and operator's assertions were supported by affidavit); *Heartland Cement Co.*, 23 FMSHRC 1017, 1017-19 (Sept. 2001) (same).

Accordingly, in the interest of justice, we grant Leeco's request for relief, reopen the penalty assessment that became a final order with respect to Citation No. 7507813, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 2002-58-M A.C. No. 02-02479-05535
KILAUEA CRUSHER, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 21, 2001, the Commission received from Kilauea Crusher, Inc. ("Kilauea") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Kilauea's request for relief.

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

In the request, Kilauea, which is represented by counsel, asserts that its failure to timely submit a hearing request on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") was due to internal mishandling. Mot. at 1-3. Kilauea explains that it received four citations during an inspection conducted on November 21, 2000, and subsequently received two proposed penalty assessments for these citations, the first proposed assessment for Citation No. 7947469, at issue in this proceeding, on August 30, 2001,

and the second proposed assessment for Citation Nos. 7947470 through 7947472 on September 8, 2001. *Id.* at 2. The operator contends that its vice-president, Marcilline Nichols, date-stamped the second assessment September 8, 2001, stapled both assessments together, and on September 10, 2001, handed them to its counsel to file a hearing request. *Id.* The operator contends that because Nichols failed to date-stamp the first proposed assessment for Citation No. 7947469, its counsel mistakenly believed that it received both assessments on the same date and filed hearing requests for both assessments on October 2, 2001. *Id.* at 2-3. It claims that it was not aware that its hearing request on the assessment for Citation No. 7947469 was late until it received a letter from MSHA informing it that the proposed assessment had become a final order. *Id.* The operator requests that the Commission reopen the assessment and permit it to have a hearing on the merits. *Id.* at 5. The operator attached to its request a copy of the proposed penalty assessment for Citation No. 7947469, copies of the citations, and the affidavit of Marcilline Nichols.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Kilauea intended to contest the proposed penalty assessment, but that it failed to do so in a timely manner due to internal mishandling. The affidavit attached to Kilauea's request is sufficiently reliable and supports its allegations. In the circumstances presented here, we treat Kilauea's late filing of a hearing request as resulting from inadvertence or mistake. *See 46 Sand & Stone*, 23 FMSHRC 1091, 1091-93 (Oct. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal mishandling as a result of change in personnel and operator's assertions were supported by affidavit); *Heartland Cement Co.*, 23 FMSHRC 1017, 1018-19 (Sept. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal processing error as a result of its receipt of numerous proposed penalty assessments simultaneously and operator's allegations were supported by affidavit).

Accordingly, in the interest of justice, we grant Kilauea's request for relief, reopen the penalty assessment that became a final order with respect to Citation No. 7947469, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 30, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2002-18-M
ADMINISTRATION (MSHA)	:	A.C. No. 11-01578-05569
	:	
v.	:	Docket No. LAKE 2002-19-M
	:	A.C. No. 11-01578-05570
WEDRON SILICA	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 19, 2001, the Commission received from Wedron Silica a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator 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. *Id.*

On August 7, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Wedron Silica two proposed penalty assessments. Mot., attachments. One proposed penalty assessment (A.C. No. 11-01578-05569) listed 19 citations with proposed penalties in the sum of $1290. *Id.* The other proposed penalty assessment (A.C. No. 11-01578-05570) listed four citations with proposed penalties in the sum of $558. *Id.* In its request, Wedron Silica, apparently proceeding pro se, contends that it filed a green card for each proposed penalty assessment contesting some of the penalties but that it also paid MSHA the proposed

penalties for the remaining uncontested citations. Mot. Wedron Silica states that it was informed by MSHA that the agency did not receive the green cards. *Id.* Attached to its request are copies of the two green cards, both signed and dated September 6, 2001 by a company official. *Id.*, attachment. The box on each green card indicating that the operator wished to contest some of the proposed penalties has been checked. *Id.* On the green card listing 19 citations (A.C. No. 11-01578-05569), the operator circled two of the citations (Citation Nos. 06141257 and 06141261) with penalties in the sum of $355. *Id.* Notations by the operator on the green card indicate that of the total of $1290 in penalties, $935 was paid and $355 was contested. *Id.* On the green card listing four citations (A.C. No. 11-01578-05570), the operator circled two of the citations (Citation Nos. 06141290 and 06141291) with penalties in the sum of $448. *Id.* Notations by the operator on the green card indicate that of the total of $558 in penalties, $110 was paid and $448 was contested. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

Wedron Silica has offered a sufficient explanation demonstrating that it intended to contest the penalties relating to Citation Nos. 06141257, 06141261, 06141290, and 06141291, and that the proposed penalty assessments as to those citations became final as a result of "inadvertence" or "mistake." *See Eighty Four Mining Co.*, 23 FMSHRC 1102, 1102-04 (Oct. 2001) (granting relief where operator paid some of the penalties and allegedly submitted green card contesting the other penalties but MSHA did not receive the green card); *Eighty Four Mining Co.*, 21 FMSHRC 876, 876-78 (Aug. 1999) (same). Wedron Silica's intention to contest these penalties is supported by the copies of the signed and dated green cards attached to its request and by its uncontested assertion that it paid the remaining uncontested penalties. We also note that the Secretary does not oppose Wedron Silica's request. In addition, no other circumstances exist that would render a grant of relief here

problematic. Accordingly, in the interest of justice, we grant Wedron Silica's unopposed request for relief to reopen the penalty assessments that became final orders with respect to Citation Nos.

06141257, 06141261, 06141290, and 06141291. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of ANDREW GARCIA	:	
v.	:	Docket No. WEST 2001-14-DM
COLORADO LAVA, INCORPORATED	:	

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

DECISION

BY: Verheggen, Chairman; and Beatty, Commissioner

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger granted Colorado Lava, Inc.'s motion to dismiss the discrimination complaint filed by the Secretary of Labor on behalf of Andrew Garcia pursuant to section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1).[2] 23 FMSHRC 213, 217-18 (Feb. 2001) (ALJ). The judge found that

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

[2] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . or applicant for employment in any . . . mine subject to this [Act] because such miner . . . or applicant for employment has filed or made a complaint under or related to this [Act], . . . or because of the exercise by such miner . . . or applicant for employment on

the Secretary failed to establish a prima facie case of discrimination. *Id.* at 222. The Commission granted the Secretary's petition for discretionary review challenging the judge's decision. For the following reasons, we vacate the judge's dismissal of the discrimination complaint and remand for further proceedings.

I.

Factual and Procedural Background

The complainant, Andrew Garcia, worked as a front-end loader operator at Mountain West Colorado Aggregates ("MWCA") from January to June 1997. 23 FMSHRC at 213. He then worked as a truck driver in MWCA's truck division from June 1997 to January 2000, and subsequently as a front-end loader operator at the railroad shipping yard in MWCA's Antonito bagging facility from January to June 2000. *Id.*; Tr. 21. Robert Duran was also employed as a loader operator in MWCA's railroad yard. 23 FMSHRC at 213.

In October 1999, Garcia tagged out a loader because the parking brake did not work. *Id.* at 213-14. The following day, Garcia told David McCarroll, the plant manager and Garcia's supervisor, that the parking brake on the loader was not working. *Id.* at 214. McCarroll responded that the loader did not need a parking brake, and ordered Garcia to continue using the loader. *Id.* Garcia complied and later complained to MSHA. *Id.* at 214, 218. As a result, MSHA came to the Antonito site to inspect the loader, issued a citation to MWCA, and initiated an investigation of McCarroll under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). *Id.* at 214.

Shortly after the incident, McCarroll learned of Garcia's complaint to MSHA, and when he was alone with Garcia, asked him "in a high toned voice" about the complaint. *Id.* Garcia denied filing the complaint. Tr. 34. According to Garcia, McCarroll responded, "You know all about it," and "Bull. It will all come out in the wash." Tr. 34. According to McCarroll, he asked Garcia about the complaint and said, "It will all come out in the wash." Tr. 255-56. Garcia also testified that on another occasion in March 2000, when he was unable to load some marble chips because they were frozen, McCarroll swore at him in a loud voice. 23 FMSHRC at 214. McCarroll recalled the incident, but denied confronting Garcia. Tr. 254-55. Nevertheless, McCarroll testified that he was upset with Garcia for complaining to MSHA, acknowledged that he considered Garcia's complaint an example of his "troublemak[ing]," and stopped speaking to Garcia socially. 23 FMSHRC at 214, 217; Tr. 224-27.

> behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1).

Sometime, in the spring of 2000, Ronald Bjustrom, the eighty-percent owner of Colorado Lava, became interested in purchasing MWCA's Antonito facility. 23 FMSHRC at 215. Bjustrom visited the facility on four occasions prior to Colorado Lava's purchase on June 5, 2000. *Id.* During this time, Bjustrom decided to eliminate several positions, and asked McCarroll his opinion as to what jobs could be eliminated. *Id.* McCarroll suggested a railroad yard loader operator position and a mechanic position. *Id.* Bjustrom also asked McCarroll which MWCA employees were weak. *Id.* McCarroll told Bjustrom that Garcia and four other employees were weak,[3] and that Garcia caused trouble, tried to stir up trouble between employees, was a poor operator, abused equipment, and had filed union grievances. *Id.* Garcia was the only employee about whom McCarroll said only negative things. *Id.* Bjustrom testified that his conversations with McCarroll had no bearing on which MWCA employees would be rehired by Colorado Lava. *Id.*

In late May or early June 2000, prior to the interviews on June 5, Bjustrom told McCarroll that he would be retained as the plant manager. Tr. 100-01. Also prior to June 5, Bjustrom retained Terry Kissner, who was not an employee of Colorado Lava, to do the hiring. 23 FMSHRC at 215-16. Kissner had done hiring for Bjustrom in the past.[4] *Id.* at 215.

On June 5, Kissner interviewed the MWCA employees individually according to Bjustrom's instructions, which included asking the applicants the same questions from the booklet, asking the mechanics additional questions, including whether they would accept another position, and eliminating one railroad yard loader operator position and one mechanic position. *Id.* at 215-16; Tr. 174. Kissner testified that, with respect to Garcia, he did not look at his personnel file, letters of recommendation, past safety record, or production levels, and that the interviews were a formality. 23 FMSHRC at 216. He also testified: that he did not review the personnel files of any of the employees he interviewed; that before the day of the interviews, he had never visited the Antonito facility; that he had no personal knowledge of the MWCA employees; and that while he spoke with McCarroll "as few as three times," he did not meet McCarroll until the day of the interviews and never discussed the MWCA employees with him. *Id.* at 215-16; Tr. 159, 178. Bjustrom testified that Kissner made the final decision about which employees to rehire, and that he (Bjustrom) did not participate in that decision, although he retained the ultimate authority to hire. 23 FMSHRC at 215, 220.

Garcia testified that on June 1, 2000, he was told of the sale of MWCA's Antonito facility to Colorado Lava and that all employees would be rehired, but was not informed that any jobs would be eliminated. Tr. 39-40. Garcia also testified that on the morning of June 5, Bjustrom gave the employees application packets, and scheduled each employee for an interview. Tr. 40-

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[3] However, loader operator Duran testified that he supervised Garcia at the rail yard, and found him to be a satisfactory worker. Tr. 291-92.

[4] Bjustrom received from his banker a booklet of interview questions, which he gave to Kissner, to use during the interviewing of the MWCA employees. 23 FMSHRC at 215.

41. At the interview, Kissner did not inform Garcia that one loader operator position at the rail yard was being eliminated. Tr. 42, 177.

On June 6, 2000, Colorado Lava purchased MWCA and rehired all of the MWCA employees except Garcia, and Ernie Lucero, a mechanic. 23 FMSHRC at 216 & n.2. After Garcia learned that he was not going to be rehired, he secured a job with MWCA which is farther from his home, has a lower pay scale, and fewer incentives than his former position at the Antonito railroad yard facility. *Id.* at 215. Bjustrom testified that he first learned about Garcia's complaint to MSHA about a week or two after the decision was made not to hire him. Tr. 143-44.

At the conclusion of the Secretary's case, the judge issued a bench decision granting Colorado Lava's motion to dismiss the discrimination complaint on the basis that the Secretary had failed to establish a prima facie case of discrimination. 23 FMSHRC at 217-18, 222. The judge found that Garcia participated in protected activity when he complained about the parking brake on the loader to his supervisor McCarroll and to MSHA. *Id.* at 218. He also found that Colorado Lava took adverse action against Garcia when Kissner decided not to retain Garcia after Colorado Lava's purchase of the Antonito facility. *Id.* He concluded, however, that McCarroll's animus could not be imputed to Kissner, who independently made the decision to take the adverse action against Garcia, because there was no evidence that McCarroll in any way participated in the decision not to hire Garcia, or that either Bjustrom or Kissner had knowledge of Garcia's protected activity. *Id.* at 218-21. The judge therefore concluded that there was no evidence that the adverse action was motivated in any part by Garcia's protected activity. *Id.* at 220-21.

II.

Disposition

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

Here, the judge found that Garcia engaged in protected activity when he complained to McCarroll and MSHA that the parking brake on the front-end loader was not operational, and also determined that the operator took adverse action against Garcia when it declined to hire him.

23 FMSHRC at 218. Substantial evidence supports both of these conclusions.[5] The remaining issue before us is whether the adverse action taken by Colorado Lava was motivated in any part by Garcia's protected activity.

Concerning motivation, in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, the Commission stated that "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). In *Chacon*, the Commission identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility or animus towards protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510.

Here, the judge concluded that the Secretary failed to show motivation based on his finding that Kissner, the person who allegedly made the decision not to hire Garcia, had no knowledge of his protected activity and no animus towards him. However, it is clear that the judge did not explicitly consider all of the evidence of motivation he was required to consider under *Chacon*. Specifically, it appears that the judge failed to consider fully record evidence of disparate treatment toward Garcia by Colorado Lava. In fact, the judge found "some indication in the record of disparate treatment of Mr. Garcia," but concluded that disparate treatment did not occur, stating instead that "there is a difference between establishing the existence of a fact based on an inference, as opposed to proffering evidence of sufficient probative weight to establish a fact in issue." 23 FMSHRC at 218-19.

On this point the judge was incorrect, because the consideration of indirect evidence when examining motivational intent necessarily involves the drawing of inferences. As the Commission stated in *Bradley v. Belva Coal Co.*, "circumstantial evidence [of discriminatory motivation] and reasonable inferences drawn therefrom may be used to sustain a prima facie case." 4 FMSHRC 982, 992 (June 1982). Furthermore, inferences drawn by judges are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Since the judge's decision is premised upon a mistaken assumption that motivation may not be established through inferences based on circumstantial evidence, he erred.

Indeed, as the judge found, there are many "indication[s] in the record of disparate treatment." For example, the judge explicitly pointed to evidence that (1) Duran was chosen over

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

Garcia for the loader operator position because Duran had more experience than Garcia, on the other hand, Vondrak, who had less experience than Lucero, was hired over Lucero as a mechanic; (2) Lucero, the only other employee not rehired, was offered another position at Colorado Lava, but Garcia was not; and (3) when considering which positions to eliminate, Bjustrom only evaluated the loader operator and mechanic positions, and not other positions at the site. 23 FMSHRC at 218-19.

There is additional record evidence set forth in the judge's decision that could support a finding of disparate treatment. The judge found that Kissner wanted to hire the best qualified employees for the loader operator and the mechanic positions and testified that he reviewed the applications for these two positions prior to making his decision. *Id.* at 216. Kissner stated that he looked at work history and tenure when he decided to hire Duran over Garcia for the loader operator position, but admitted that he did not review Garcia's personnel file, letters of recommendation, safety record, or production levels when considering whom to hire. *Id.*

Moreover, the record indicates that, on approximately June 7, 2000, with Bjustrom's approval, McCarroll hired Jeremy Gallegos, a former MWCA employee who was not working for the company at the time of its purchase by Colorado Lava, to fill a bagger position that had been vacated prior to Colorado Lava's purchase on June 5. Tr. 120-23, 241-42, 270-71. Gallegos apparently had experience as a bagger. Tr. 270-71. Garcia, while still employed at the Antonito facility, was being trained as a bagger and had filled in as a bagger three or four times prior to June, but was not considered for the vacant position. 23 FMSHRC at 214; Tr. 192-93, 274. Although Gallegos had experience as a bagger, Garcia was also experienced both as a bagger and more specifically with the operations at the Antonito facility. Despite Garcia's availability when the bagger position was open, he was not considered for the position.

The record further demonstrates that, in spite of McCarroll's recommendation that Bjustrom retain only one rail yard employee, after assuming operations at the Antonito facility, Colorado Lava continued to use two employees at the rail yard. Tr. 246-48, 289, 298. McCarroll testified that after June 5, a second employee from the Antonito facility worked at the rail site with either Duran or himself, including George Ruybal, Brian Kent, and Joe Padillo, who were former MWCA employees rehired by Colorado Lava. Tr. 246-47. He testified that prior to June 5, Ruybal and Kent did not have experience operating the front-end loader and were being trained. Tr. 247-48. Duran confirmed McCarroll's testimony that two employees continued to work at the rail site after June 6. Tr. 289.

We conclude that the judge did not adequately consider the record evidence of disparate treatment in this case. Under *Chacon*, therefore, his analysis of motivation is incomplete. Accordingly, his conclusion that the Secretary failed to establish motivation cannot be upheld and his decision to dismiss the discrimination complaint for failure to establish a prima facie case must be vacated. On remand, consistent with *Chacon*, the judge should consider all the evidence tending to show improper motivation, including that of disparate treatment of the miner. If the judge finds that a prima facie case has been established, he must reopen the record to allow the

operator to present further evidence, if it chooses, as part of its rebuttal,[6] and to allow the Secretary an opportunity to demonstrate that the operator's justification was pretextual.

III.

Conclusion

For the foregoing reasons, we vacate the judge's dismissal of the discrimination complaint, and remand for further proceedings consistent with this opinion.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

[6] Our concurring colleague, Commission Jordan, would have the Commission address at this time the judge's finding that Kissner lacked knowledge regarding Garcia's protected activity and animus towards him. Slip op. at 8-12. Because we view the finding as not dispositive of the prima facie case issue, we find it unnecessary at this time to address the evidence supporting it. Of course, before the judge again reaches a conclusion regarding the strength of this rebuttal evidence, we would expect him to consider the Secretary's arguments for imputing McCarroll's knowledge of and animus towards Garcia's safety complaints to Bjustrom or Kissner. Having dismissed the case in the middle of the hearing, it is apparent to us that the judge did not have an adequate opportunity to fully consider these arguments, and the evidence supporting them. That can only occur after a complete hearing.

Commissioner Jordan, concurring:

As a result of Andrew Garcia's safety complaint to MSHA, the operator received a citation and David McCarroll, Garcia's supervisor, became the subject of a section 110(c) investigation.[1] 23 FMSHRC 213-214, 218 (Feb. 2001) (ALJ). Subsequently, Garcia was the only worker not retained when Colorado Lava took over the mine from Mountain West Colorado Aggregates ("MWCA") eight months later. *Id.* at 215, 216 n.2. Garcia was also not considered for a job opening that arose shortly after the takeover. Tr. 120-23, 241-42, 270-271. For the reasons discussed below, I agree with my colleagues that the judge's decision dismissing the case should be vacated and the case remanded. However, because I conclude that the Secretary has already established a prima facie case of discrimination, I would not instruct the judge to revisit that issue.

The judge's holding that the Secretary failed to establish a prima facie case was based on his finding that Terry Kissner, the individual who allegedly made the decision not to rehire Garcia, had no knowledge of Garcia's protected activity and therefore could harbor no retaliatory animus towards him. 23 FMSHRC at 220. The judge failed to take into account, however, the pivotal role that Garcia's supervisor, McCarroll may have played in the decision not to rehire Garcia. McCarroll admitted that he was upset about Garcia's complaint to MSHA, Tr. 224, and the judge found that McCarroll harbored animus towards Garcia because of this protected activity. 23 FMSHRC at 219. Prior to the takeover by Colorado Lava, Ronald Bjustrom, who owned eighty percent of that company and had the ultimate authority to make hiring decisions, *id.* at 220, asked McCarroll about the employees he supervised. McCarroll described Garcia as "a poor employee" who "causes trouble" and "talks to other employees, trying to stir up trouble between them." Tr. 229. McCarroll also told Bjustrom that Garcia filed grievances, was a poor operator, and abusive to the equipment. Tr. 231.[2] In addition, McCarroll recommended to Bjustrom that one of the two rail loader jobs (the position Garcia held) be eliminated. 23 FMSHRC at 215; Tr. 240. On June 6, 2000, Colorado Lava purchased MWCA and hired all of the MWCA employees except Garcia.[3] 23 FMSHRC at 216 & n.2

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[1] Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c).

[2] Garcia was the only employee about whom McCarroll made only negative comments. 23 FMSHRC at 220. McCarroll identified four other employees as weak but they were all hired by Colorado Lava. *Id.* at 215, 216 n.2.

[3] Ernie Lucero was initially not rehired; however, he was subsequently offered a job at another location with a cut in pay. 23 FMSHRC at 216 n.2.

To make out a prima facie case of discrimination, the Secretary need only submit enough evidence so that the record *could* support an inference that the failure to rehire Garcia was motivated by his safety complaint. *See Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 127-28 (Feb. 1999) (a complainant establishes a prima facie case "by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. . . . The 'possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them.'" (citation omitted)); *see EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861-862 (6th Cir. 1997) (reversing district court's finding that plaintiffs "failed to present sufficient evidence to meet their burden of establishing a *prima facie* case of retaliation" in a case where there was "ample evidence from which the court could have inferred retaliation at the *prima facie* stage"). The judge should have determined whether there was enough evidence in the record from which a reasonable person could infer that McCarroll's negative review of Garcia resulted, at least in part, from Garcia's protected activity and that the negative review in turn was a factor in Colorado Lava's decision not to hire Garcia.

If McCarroll's criticisms were a result of retaliatory animus and if those negative remarks influenced the decision not to hire Garcia, then the principle announced by the Commission in *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) applies and McCarroll's retaliatory animus should be attributed to the decision maker. In *Metric,* the night superintendent told the project superintendent that certain miners were refusing to perform work, but he did not communicate the protected safety reason behind the miners' refusal. 6 FMSHRC at 226, 228. The project superintendent thereafter terminated the miners. *Id.* at 228. In rejecting the operator's defense that the project superintendent himself did not know of the miners' protected activity, the Commission held that: "[a]n operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Id.* at 230 n.4 (citation omitted). Since the judge here dismissed the case without considering the principle of imputing knowledge announced in *Metric*, he erred.

The approach used by the Commission in *Metric* is one that has also been extensively applied in cases arising under the National Labor Relations Act. If a supervisor has knowledge of an employee's protected activities, harbors animus towards that activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed knowledge and animus to the employer notwithstanding the actual decision-maker's ignorance of the protected activities. *See Boston Mutual Life Ins. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982) (declining to "launder" regional sales manager's knowledge and animus through a neutral superior where superior had no knowledge of employee's protected activity, but "acted in direct response" to regional sales manager's recommendation to dismiss employee); *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112, 114 (6th Cir. 1987) (imputing plant manager's knowledge of and animus against employee's protected activity based on his "involve[ment]" in decision to terminate employee by recommending employee's termination to company's industrial relations manager, who had no knowledge of employee's protected activity and relied on plant manager's recommendation) (internal quotations and citations omitted); *JMC Transp., Inc. v. NLRB*, 776

F.2d 612, 619 (6th Cir. 1985) (imputing operations manager's unlawful animus to company because his corroboration of a fabricated story about employee was "a significant factor" in the president's and general manager's decision to terminate employee, despite the decision-makers' lack of knowledge regarding employee's protected activity).

The courts have used this same approach in cases arising under federal anti-discrimination statutes. For instance, in *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), the Seventh Circuit, applying agency principles in an ADEA suit, found that if the employer's career path committee, which ultimately made the decision to discharge the employee, acted as the "conduit" of the supervisor's prejudice — "his cat's paw" — the innocence of the committee's members would not spare the employer from liability. The court held that if the supervisory employee procured the employee's discharge by evaluating the employee and making recommendations to the committee on an unlawful basis, then the supervisory employee's unlawful actions would be imputed to the employer. *Id.*; *see also Bergene v. Salt River Project Agricultural Improvement and Power District*, 272 F.3d 1136 (9th Cir. 2001) (even if a manager was not the ultimate decision maker, that manager's retaliatory motive may be imputed to the company if the manager was involved in the hiring decision).[4]

Admittedly, in *Metric*, there was no dispute that the supervisor with knowledge caused the project superintendent to fire the miners. Here, on the other hand, the parties disagree as to whether McCarroll's comments played any role in the decision not to hire Garcia. The operator denies that McCarroll's comments were a factor in its decision not to retain Garcia. C. Br. at 9 - 14. Indeed, mine owner Bjustrom claims that the hiring was done by Kissner, an individual Bjustrom retained to interview the miners and who denies any knowledge of McCarroll's comments. 23 FMSHRC at 215-16. Furthermore, although Bjustrom eliminated one railroad loader position, in accordance with McCarroll's advice, *id* at 215, he claims that the decision to choose another miner over Garcia for the remaining loader position was based solely on the other miner's greater length of service. *Id.* at 218-219.

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[4] *See also Gusman v. Unisys Corp.*, 986 F.2d 1146, 1147 (7th Cir. 1993) (holding employer liable under ADEA where employer relied upon supervisory employee's recommendation to discharge employee, and supervisory employee, possessing unlawful animus, lied about employee's ability to work to ensure his discharge); *Long v. Eastfield College*, 88 F.3d 300, 306-08 (5th Cir. 1996) (in Title VII case, remanding to district court to apply principles enunciated in *Shager* and determine whether president who made ultimate decision to terminate employees made *independent investigation* severing causal connection or whether he "rubber-stamped" the supervisory employees' recommendations based on unlawful motive); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1459-60 (7th Cir. 1994) (rejecting president's allegation that he based decision to terminate employee on independent assessment of employee's performance, because he solicited vice-president's opinion, who had knowledge of and animus against employee and recommended his discharge, and holding employer liable under Title VII even though president did not know about employee's protected activity).

Of course, a judge might ultimately decide that McCarroll's knowledge of and animus towards Garcia's safety complaint should not be imputed to either Bjustrom or Kissner, or that even after imputing that knowledge, Colorado Lava nevertheless demonstrated that Garcia would not have been hired on the basis of a valid neutral criteria. Nonetheless, dismissal for failure to make out a prima facie case is not warranted. The appropriate questions to ask for determining whether the Secretary made out a prima facie case is, *could* the evidence support an inference that McCarroll's comments were infected by retaliatory animus, and could one infer that those comments in turn influenced Colorado Lava's decision not to hire Garcia?

Clearly, the answer to those questions is yes. The record indicates that Bjustrom sought McCarroll's advice about jobs that could be eliminated and the performance of the employees under McCarroll's supervision. *Id.* at 215, 220. The judge found that McCarroll harbored animus towards Garcia because of Garcia's complaint to MSHA. *Id.* at 219. It would be reasonable to infer that McCarroll's thoroughly negative evaluation of Garcia, as well as his suggestion as to which jobs to eliminate, were tainted by this retaliatory animus.[5] Could one reasonably infer that McCarroll's remarks influenced the decision not to hire Garcia? I believe the evidence could support such inference.

Although Bjustrom claimed that Kissner decided who would be hired, a factfinder could reasonably conclude that it was Bjustrom who was the actual decision maker. Indeed as the judge pointed out, it was Bjustrom who retained the ultimate hiring authority, and it was Bjustrom who provided Kissner with explicit instructions on how to conduct the interviews, including what questions to ask, and which positions to eliminate. 23 FMSHRC at 215-216. As to whether Bjustrom was influenced by McCarroll's remarks, there is no dispute that Bjustrom followed McCarroll's recommendations regarding which jobs to eliminate, *id.* at 215-216, an action which in itself dramatically decreased Garcia's chances of being rehired. Furthermore, although Bjustrom claimed McCarroll's remarks played no role in the decision not to rehire Garcia, a factfinder could reasonably conclude that it strained credulity for a mine owner to claim that a thoroughly negative evaluation from an employee's former supervisor played no part in the decision not to hire that employee. Indeed, the factfinder could find this claim particularly difficult to accept since the mine owner had solicited the supervisor's views on employee performance. Moreover, since the record shows that Colorado Lava had already decided to retain McCarroll as supervisor by the time it interviewed the other employees, Tr. 215, a factfinder might find this assertion completely implausible. In light of McCarroll's remarks, Bjustrom would have realized that retaining Garcia would be tantamount to placing a permanent thorn in

[5] At the time McCarroll spoke to Bjustrom about Garcia's performance, the section 110(c) investigation against McCarroll was still pending. S. Br. at 3.

McCarroll's side. A factfinder might find it unlikely that Bjustrom would not have been influenced by that realization.[6]

Even if Colorado Lava could persuade a factfinder that McCarroll's remarks had no bearing on its decision of June 6 as to which MWCA employees would be retained, that factfinder could nevertheless conclude that Colorado Lava's failure to subsequently hire Garcia for the bagger position (a job filled on June 7), resulted at least in part from McCarroll's retaliatory animus. Garcia contends that he was receiving training for this position and had filled in for a bagger before he was let go. 23 FMSHRC at 214; Tr. 47. Clearly, Colorado Lava cannot claim that McCarroll did not influence the decision to hire someone other than Garcia for the position. Indeed the record indicates that it was McCarroll himself who filled the job, after consulting with Bjustrom. Tr. 120-23, 241-42, 270-71.

The majority vacates the decision below primarily on the basis of the judge's failure to examine evidence of disparate treatment. Slip op. at 5-7. My colleagues also "expect" the judge to consider the Secretary's imputation arguments before making his ultimate determination on the merits of the case, slip op. at 7 n.6., implicitly vacating his finding that Colorado Lava had no knowledge of Garcia's protected activity. The majority rightly insists that the judge consider all of the evidence regarding the operator's motivation for not hiring Garcia, but paradoxically deems the judge's finding pertaining to whether the operator even knew about Garcia's protected activity as "not dispositive of the prima facie case," and consequently declines to address the evidence supporting it. *Id.*[7] I fear this ruling leaves the judge and parties in a legal limbo.

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[6] Even if Kissner was found to be the decisionmaker, the evidence would still support the inferences necessary to make out a prima facie case. Although Kissner denied receiving any information about Garcia or the animosity between McCarroll and Garcia, a factfinder could reject this claim as incredible in light of the evidence that Kissner "may have talked to McCarroll as few as three times," Tr. 159, including a conversation on the very day he conducted his interviews with the employees. 23 FMSHRC at 216.

[7] Unlike my colleagues in the majority, I believe that evidence pertaining to the operator's lack of knowledge of protected activity is relevant and in fact may be dispositive of whether the Secretary has made out a prima facie case. *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (evidence of knowledge used to make a prima facie case); *Sec'y of Labor on behalf of Clay Baier v. Durango Gravel,* 21 FMSHRC 953, 957-58, (Sept. 1999) (in discussing prima facie case, Commission determines that substantial evidence supported judge's finding that operator had knowledge of miner's protected activity).

In sum, the Secretary has presented sufficient circumstantial evidence to support an inference that McCarroll influenced Colorado Lava's decision not to employ Garcia, and that McCarroll's knowledge and animus should be imputed to that operator. Accordingly, she succeeded in establishing her prima facie case. Thus, I would remand this matter to the judge solely to permit the operator to adduce additional evidence in support of its rebuttal, to provide the Secretary an opportunity to introduce additional evidence in support of her pretext argument, and for the judge to rule on the ultimate issue of whether discrimination occurred in violation of section 105(c).

Mary Lu Jordan, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-129
Petitioner	:	A. C. No. 15-12564-03573
v.	:	
	:	
LEFT FORK MINING INC.,	:	
Respondent	:	Straight Creek No. 1 Mine

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Terry Nelson, Jr., Safety Director, Left Fork Mining, Brookside, Kentucky, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Left Fork Mining Incorporated (Left Fork). The petition seeks to impose a $581.00 civil penalty for three alleged violations of the mandatory safety standards in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines. All of the alleged violations were characterized as significant and substantial (S&S) in nature. These matters were heard on January 23, 2002, in Pineville, Kentucky. The parties' post-hearing proposed findings and conclusions have been considered in the disposition of this matter.

I. Statement of the Case

The Mine Act imposes on the Secretary the burden of proving the fact of occurrence of the cited violations by a preponderance of the evidence. *Garden Creek Poccahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Commission has articulated that the Secretary satisfies her preponderance of the evidence burden by demonstrating "that it was more likely than not" that the cited violation occurred. *Enlow Fork Mining Company*, 19 FMSHRC 5, 13 (January 1997). While the Secretary may satisfy her burden of proof by relying on reasonable inferences drawn from indirect (circumstantial) evidence, such inferences must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek*, 11 FMSHRC at 2153 *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138.

This case concerns three citations issued by Mine Safety and Health Administration (MSHA) Inspector Alexis Goins on October 18, 2000, at Left Creek's Straight Creek

No. 1 Mine. Inspector Goins did not go underground at any time during the course of her October 18, 2000, inspection. (Tr. 123). Rather, Goins inferred that two of the three cited violations occurred underground based on her observations on the surface. For the reasons discussed below, the Secretary has failed to demonstrate that it was more likely than not that these two violations in fact occurred. The Secretary failed to prove these violations because the inferences sought to be drawn by the Secretary were overcome by the direct evidence presented by Left Fork through the testimony of its mine foreman and assistant foreman who had direct knowledge of the events in issue because they were underground. Consequently, two of the three subject citations shall be vacated. In addition, the significant and substantial designation in the remaining citation shall be deleted.

II. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes a significant and substantial 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).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

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

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With respect to the imposition of penalties, this decision applies 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. In this regard, section 110(i) provides, in pertinent part:

> 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.

Applying the general statutory penalty criteria, Left Fork is a subsidiary of Manalapan Mining, a large mining company with approximately 400 employees. (Tr. 15). However, Left Fork employs only two individuals at its inactive Straight Creek No. 1 facility who perform maintenance and rehabilitation duties. Left Fork also uses the services of a contract security guard who is stationed in a security shack at the mine's surface. (Tr. 20). Left Fork has stipulated
that it is subject to the jurisdiction of the Mine Act. (Tr. 14). The Secretary does not contend that Left Fork has a poor compliance history, or, that the subject citations were not abated in a timely manner. (Tr. 17). Finally, it is not contended that the $581.00 civil penalty proposed by the Secretary will have s negative impact on Left Fork's ability to continue in business. (Tr. 16).

III. Findings of Fact

The Secretary stipulated that Left Fork's Straight Creek No. 1 Mine has been in inactive non-producing status since 1996. (Tr. 17). When it was operational, the mine was subject to more frequent MSHA inspections because it had been classified as a "gassy mine" under section 103(i) of the Mine Act, 30 U.S.C. § 823(i), because, during active mining, it liberated excessive amounts of methane. However, the mine is no longer subject to a section 103(i) spot inspection because of its inactive status.

Left Fork employs two individuals to maintain the mine in the event it becomes economically feasible to restart active mining operations. These individuals are mine foreman Russell Kelly and assistant mine foreman Tim Daniels. Their duties consist of maintenance and rehabilitation to ensure that the mine is kept in safe operating condition. For example, they install roof support in areas of roof sloughage, they repair torn cables, and they pump water to maintain safe passage.

In addition to Kelly and Daniels, Left Fork uses the services of Martin's Fork Security, a contractor that provides a security guard on a 24-hour-a-day basis that remains in a guard shack on the mine's surface. The security guard is responsible for communicating with Kelly and Daniels on an as needed basis by means of a voice activated walkie-talkie type telephone system that has been approved by MSHA. Although MSHA generally approves the communications system, MSHA's approval does not require that telephones

must be located at specific locations. There are several telephones on the surface in the guard shack as well as in the hoist house and main fan house. Telephones are located underground at various locations at approximately 500 feet intervals. There are approximately seven phones located underground in the working section in the vicinity of the intake slope area and at the elevator. (Tr. 83). As noted below, the location of the underground phones satisfied the Secretary's regulations governing two-way communications systems.

As discussed below, ventilation through the main mine shaft is accomplished through two discrete slopes to the surface - - an intake slope and a return slope. There are two means to exit the Straight Creek Mine. The route designated as the primary escapeway relies on an elevator shaft located approximately 1,500 feet from the bottom of the intake slope. (Gov. Ex. 1; Tr. 203). As an alternative to using the elevator to exit the mine, the intake slope serves as a secondary escapeway to the surface. (Tr. 127).

At the time immediately preceding Goins' October 18, 2000, inspection, Kelly and Daniels were in the return slope of the fan shaft installing additional roof support to abate a citation that had been previously issued and that is not in issue in this proceeding. They were several hundred feet from the nearest telephone. To install the roof support, Kelly and Daniels were using steel auger drills that were connected to, and powered by, a compressor located on the surface in the hoist house. A steel auger drill has a spiral drill bit that, in the absence of any ventilation controls, causes the drill-dust roof material to fall directly from the roof to the floor below.

A. The Inspector's Perspective from the Surface

Alexis Goins has nine years experience as a coal mine inspector and she is currently assigned to MSHA's Barbourville Field Office. Goins arrived at the Straight Creek No. 1 Mine
on October 18, 2000, at approximately 11:45 a.m. Upon arriving at the mine, Goins stopped at the guard shack and requested the security guard to call underground to inform Kelly to meet her on the surface at the elevator.

Goins traveled to the elevator and waited there until approximately noon, however, Kelly never arrived at the surface. Consequently, Goins left the elevator area and traveled to the mine office where she examined the pre-shift and onshift examination book. After realizing that Kelly was not going to meet her in the mine office, at approximately 12:30 p.m., Goins traveled back to the guard shack to determine if Kelly had been contacted underground. The guard informed Goins that he could not contact Kelly underground. Goins estimated the closest phone underground was located at the base of the return and intake slopes approximately 200 feet from where Kelly and Daniels were roof-bolting in the return slope. (Tr. 132-35). Goins conceded
the locations of the phones underground satisfied the requirements of sections 75.1600 and 75.1600-2, 30 C.F.R. §§ 75.1600 and 75.1600-2, that require telephones or equivalent two-way communications systems at the base of slopes and within 500 feet outby the last open crosscut. (Tr. 139-41).

Goins returned to the elevator to see if Kelly had arrived at the surface. She waited at the elevator approximately 10 minutes before going to the hoist house. The hoist house contains hoisting equipment and it also serves as the employee locker room. The hoist house is also where the secondary escapeway intake track slope meets the surface. The intake slope is approximately 200 yards long and Goins estimated that it takes approximately 20 to 25 minutes to travel the intake slope. (Tr. 125).

The hoist house also contains the fan house where the main mine exhaust fan is located at the top of the return mine shaft slope. The main mine fan is approximately five feet in diameter and it draws approximately 123,000 CFM (cubic feet per minute) of air through the exhaust slope. The fan shaft is a travelable return slope that runs parallel to the secondary escapeway intake slope. Although the fan shaft return slope is travelable, unlike the intake slope, it is not used to access and exit the mine because it has a sharp incline. (Tr. 126).

Goins testified she arrived at the hoist house at approximately 12:35 p.m.. At that time,
she noticed that the main mine fan was not operating. Goins also noted an absence of a warning signal to alert personnel underground that the mine fan had stopped working. Goins opened the door to the fan house where a fan chart was located. The fan chart graphs the operation of the fan similar to the operational design of a seismograph. (Resp. Ex. 1). The fan chart documents the time of the fan's shutdown when the red ink of the graph touches the innermost black concentric circle of the graph.

Goins examined the fan chart and testified it indicated the fan recently had stopped at 12 noon on that day. (Tr. 37). Despite Goins' testimony that the fan chart reflected the fan had stopped at 12:00 noon, the fan chart, proffered by Left Fork, clearly reflects the fan actually stopped considerably later than noon. Significantly, the fan chart reflects the fan stopped between12:30 p.m. and 1:00 p.m. on Wednesday, October 18, 2000.[1] (*See* Resp. Ex. 1).

After examining the fan chart, at approximately 12:40 p.m., Goins heard muffled voices coming from the return slope to the surface. Although she heard the voices through the return shaft she "couldn't actually tell where they were coming from." (Tr. 39). Goins went to an area in the vicinity of the fan house where she observed a telephone with disconnected wires hanging from it. Although the phone at the fan house was disconnected, Goins testified there were several other phones in the hoist house which were located nearby the fan house. (Tr. 91). The closest surface telephone to the fan house was located approximately 50 feet away in the hoist house. (Tr. 209).

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[1] The fan chart was admitted in evidence over the objection of the Secretary. The Secretary objected to its admissibility because she was not informed prior to trial that it would be offered as an exhibit. Goins had no reason to question the fan chart's authenticity. The record was left open for the Secretary to file an affidavit by a person qualified to interpret the fan chart. (Tr. 150-67). The Secretary declined to do so.

Goins returned to the guard shack to inquire if the guard had communicated with the miners underground because the miners had to be withdrawn because of a lack of exhaust ventilation. The guard informed Goins he was unable to contact the men underground. However, the guard did not distinguish whether Kelly and Daniels had not answered the phone, or, whether the phone was not working. (Tr. 81). Significantly, Goins conceded that surface to underground communication may have been unsuccessful because no one was located close enough to the receiving phone to hear the incoming message. (Tr. 142-46).

Goins and the guard returned to the hoist house to see if the men had arrived at the surface through the intake slope. Kelly testified that he had instructed the guard to turn off the compressor if Kelly was ever needed on the surface and he could not be reached by telephone. (Tr. 198). When it became clear that the men were still underground, the guard told Goins he would get their attention by shutting off the compressor that was used to power the steel auger drills used for roof bolting. The compressor was turned off at approximately 1:00 p.m. (Tr. 49-50).

Goins waited in the hoist house for Kelly and Daniels to arrive at the surface. Goins observed Kelly and Daniels arrive at the surface by exiting the intake slope at approximately 1:30 p.m. (Tr. 55-56, 124). Goins approached Kelly to determine what Kelly and Daniels had been doing underground. Goins testified:

> . . . [Kelly] said to me that he noticed that there was no air moving at about 12:15 and they traveled from the return slope to the elevator. He said it took about ten minutes. And then they got on the elevator and it didn't function properly. They then traveled back from the return, crossed over to the intake slope, and it took them about 20 minutes to walk up the slope.

(Tr. 108).

Kelly's statement to Goins that he knew the fan had stopped is consistent with Goins' testimony. In this regard, Goins explained:

> They should have known the mine fan was off because they were in the return entry working. Once that fan goes down, if you're coursing 123,000 CFM air down that . . . coming through that return, and they wasn't (sic) far from the top of the return shaft there, I mean, you can feel when the air stops.

(Tr. 111).

At approximately 1:00 p.m. Terry Nelson, Left Fork's Safety Director, arrived at the guard shack. The guard informed Nelson that Goins was in the hoist house waiting for Kelly and Daniels to exit the mine. Nelson went to the hoist house where he observed that Kelly and Daniels had already exited the mine. Nelson turned the mine fan on by routinely using the power switch. Nelson speculated the fan had stopped due to a power failure experienced by Kentucky Power because the fan restarted after he turned on the fan's power switch. Goins took two air bottle samples. The first was obtained at 1:35 p.m. before the fan was turned on. The second was taken at 1:42 p.m. after the fan became operational. (Tr. 168). Both air bottle samples were negative for any traces of methane. (Tr. 171-72). Goins' notes

reflect Kelly and Daniels arrived at the surface at 1:30 p.m. shortly before the first air bottle sample was taken. (Tr. 168-69).

B. The Miners' Perspective from Underground

Mine Foreman Russell Kelly has 16 years mining experience. Assistant Mine Foreman Timothy Daniels has 13 years mining experience. On October 18, 2000, Kelly and Daniels were installing roof bolts in the return fan shaft slope with an auger drill. An auger drill is an air-powered drill with augured steel bits that suction and remove roof material so that bolts can be driven into the roof. Kelly and Daniels explained that, in the fan shaft, roof dust falls from the auger directly into the face of the drill operator if the mine fan is not operating. (Tr. 195-96, 238-39). When the fan is running, it draws dust away from the face of the drill operator who is positioned under the hole being drilled. On October 18, 2000, Kelly carried a methane spotter that sounds a beeper alarm in the presence of hazardous methane concentrations. Kelly's methane monitor did not detect any significant levels of methane on that day. (Tr. 194-96).

Although Kelly does not remember the exact time, Kelly testified that the fan went off "somewhere around 12:00." (Tr. 195). At that time, Kelly and Daniels immediately discontinued drilling. (Tr. 225, 238-39). Although section 75.313(c)(1) of the Secretary's regulations permits personnel to remain underground for 15 minutes after the mine fan ceases to operate before withdrawing, Kelly and Daniels testified there was no point in waiting since the only way the fan could be turned on was by them returning to the surface. (Tr. 205, 242-43). Consequently,
Kelly and Daniels disengaged their drills from the roof, removed the steel bolts from the hole being drilled, and placed the steel at the side of the slope. They then proceeded to the telephone at the bottom of the slope that was located 2½ breaks away, approximately 160 feet from where they had been working. They attempted to contact the guard by holding down the speaker button and talking into the telephone's headset, but they were unsuccessful. Kelly explained that it was not important to communicate with the guard since only Kelly and Daniels were authorized to turn the fan back on. (Tr. 196-97).

After unsuccessfully attempting to communicate with the surface, Kelly and Daniels used the three-wheel mantrip to travel to the elevator that is designated as the primary escapeway.
(Tr. 199, 240). They entered the elevator and used the automatic buttons inside. The elevator malfunctioned and stopped after it rose approximately 25 feet. Kelly climbed to the top of the elevator and managed to use manual controls to get the elevator to return to the surface.
Kelly and Daniels estimated that they were delayed approximately 15 to 20 minutes at the elevator. (Tr. 202, 240). They next walked from the elevator to the bottom of the intake secondary escapeway slope, a distance of approximately 1,500 feet. Upon arriving at the bottom of the intake slope, they walked approximately 900 feet up its 18 percent grade. (Tr. 203). Kelly and Daniels estimated it took them approximately 15 minutes to walk up the slope. (Tr. 203, 241).
In total, Kelly estimated it took approximately one hour to exit the mine. (Tr. 224-25).

Although Kelly's recollection was that he and Daniels exited the mine at approximately 1:05 p.m., significantly, Goins testified her notes reflect the miners exited the mine at approximately 1:30 p.m. (Tr. 168-69, 203). Given the approximate one hour it took to exit the mine, a
1:30 p.m. arrival at the surface is consistent with the fan map that reflects the fan stopped operating on Wednesday, October 18, 2000, shortly after 12:30 p.m. (Resp. Ex. 1).

IV. Further Findings of Fact and Conclusions of Law

A. Citation No. 7508622 - Fan Warning Signal

Based on Goins' observations that a warning signal was not sounded when the mine fan stopped, she issued Citation No. 7508622 citing a violation of the mandatory safety standard in section 75.310(a)(3), 30 U.S.C. § 75.310(a)(3), that requires mine fans to be equipped with an automatic warning device to signal when the fan ceases to operate. (Gov. Ex. 2). Although Citation No. 7508622 initially alleged the cited violation was unwarrantable, the citation was subsequently modified to reduce Left Fork's degree of negligence from high to moderate, thus deleting the unwarrantable failure charge.

Goins designated the violation as significant and substantial (S&S) opining that it was reasonably likely that a methane explosion and resultant serious injury will occur if normal mining operations continued. Although the mine was inactive, Goins was concerned that burn-related injuries could occur if methane leaked and migrated to pockets in the roof from seals from
worked-out areas of the mine. In such an event, methane could be ignited by sparks generated from roof-bolting the shale and sandstone material in the roof.

With respect to the fact of occurrence of the cited section 75.310(a)(3) violation, Left Fork admits the fan signal device was not operational at the time of Goins' inspection. Thus, the Secretary has demonstrated the fact of the violation. Turning to the S&S issue, ordinarily, the absence of an operational warning signal to alert miners underground that mine fan ventilation had been interrupted *in an active mine* undoubtedly would constitute an S&S condition that was reasonably likely to contribute to serious injury.

As related by Goins, the discrete safety hazard contributed to by this violation was the inability to recognize that, as a consequence of an interruption in ventilation, methane could have escaped from seals and migrated to roof pockets in proximity to roof-bolting operations. Resolution of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Company*, 9 FMSHRC 2007 (December 1987). In the present case, *the mine is inactive* and it will remain so for the foreseeable future. Thus, there is no ongoing liberation of methane as a result of mining operations. As the Commission noted in *Texasgulf*, "the key question here is whether there was a reasonable likelihood that this hazard would result in an ignition or an explosion." 10 FMSHRC at 501.

In other words, the question is whether it was likely that the absence of a ventilation warning device would result in an ignition or explosion. The degree of likelihood of an explosion is dependant on the likelihood of methane as a fuel source. Although almost anything is possible, to prevail on the S&S issue, the Secretary must bear the burden of demonstrating a likelihood of a methane explosion. Given the apparent history of no recent methane liberation as a consequence of the mine's inactivity, as well as a reasonable expectation of no methane liberation in the foreseeable future, it cannot be said that it is reasonably likely that the hazard contributed to
by the cited violation of section 75.310(a)(3) will result in a mine ignition or explosion. *Id.* at 503. In this regard, while not dispositive, it is noteworthy that Goins' air bottle samples, collected both before and after the fan had been turned on, disclosed no traces of methane. Consequently,
the significant and substantial designation in Citation No. 7508622 shall be deleted. Although the violation is attributable to a moderate degree of negligence, given the low gravity
of this non-S&S condition, **a civil penalty of $55.00 shall be assessed.**

B. Citation No. 7508623 - Two-Way Communications System

Based on her observations on the surface that the phone at the fan house had been disconnected and that the security guard had told her that he unsuccessfully tried to telephone underground "several times," Goins also issued Citation No. 7508623 citing an alleged S&S violation of the provisions of section 75.1600, 30 C.F.R. § 75.1600. (Tr. 77-78, 81; Gov. Ex. 3). This mandatory standard requires, in pertinent part, that telephone service approved by the Secretary shall be provided between the surface and each landing of main shafts and slopes. Although Citation No. 7508623 also initially reflected the cited violation was unwarrantable,
the citation later was modified to remove the unwarrantable allegation.

The issue is whether the two-way telecommunications system was operational on October 18, 2000. Left Fork does not have to prove that the telephone system was working. Rather, the Secretary, as the proponent, must demonstrate that the telephone system was not working. It is undisputed that the telephone located at the fan house was disconnected and that the closest surface telephone was in the hoist house approximately 50 feet away. However, the Secretary does not contend that Left Fork's approved communications system required a telephone at the fan house, or, that the surface and underground phone locations were otherwise inadequate or in violation of the Secretary's regulations. (Tr. 227-29). The fact that the fan house phone was disconnected is not material to whether the phone system was operational. Although the fan house phone was reconnected to abate Citation No. 7508623, there is no evidence that any other telephone system repairs had been performed before the citation was terminated by Goins the following morning on October 19, 2000. (Tr. 89-92; Gov. Ex. 3, p.2).

In the final analysis, the evidence presented by the Secretary establishes that the security guard was unable to contact the miners underground by telephone, not that the phone
was not working. In essence, the Secretary has shown that neither Kelly nor Daniels answered
the phone. Such an event permits two divergent inferences - - that, for whatever reason,

Kelly and Daniels "were not home" in that they did not answer the phone, or, that the phone was not working. Who knows? Based on this evidentiary record, surely not the Secretary. **Accordingly, Citation No. 7508623 shall be vacated.**

C. Citation No. 7508624 - Withdrawal from the Mine Within 15 Minutes

Section 75.313(c)(1), 30 C.F.R., 30 C.F.R. § 75.313(c)(1), provides that "if ventilation is not restored within 15 minutes after a main mine fan stops . . . everyone shall be withdrawn from the mine." Based on her observations on the surface Goins concluded Kelly and Daniels had not ceased roof-bolting and had not begun their withdrawal from the mine within 15 minutes after the mine fan had stopped. Goins' conclusion was inferred from facts known to her on the surface. Namely, Goins knew there was no mine fan warning signal to alert the miners that the fan had stopped. In addition, the compressor on the surface enabled the miners to continue roof-bolting despite the operational interruption of the fan. Finally, Goins believed the fan had shut down at 12:00 noon and the miners had not reached the surface until 1:30 p.m.

Consequently, Goins issued 104(d)(1) Citation No. 7508624 citing an alleged violation
of section 75.313(c)(1). The violation was attributted to Left Fork's unwarrantable failure. Citation No. 7508624 states:

> The main mine fan system was not operating while two employee's (sic) were underground working in the Return Slope performing roof bolt operations. According to the Main Fan Chart the system went down at 12:00 noon. This inspector observed the fan not operating at approximately 13:00 hours.

Goins has no direct knowledge of the underground activities of Kelly and Daniels. Contrary to their testimony, Goins concluded Kelly and Daniels continued to roof-bolt long after the fan ceased operating. However, Goins' conclusion is inferred from contradictory and erroneous facts, and, as such, it is not inherently reasonable. As a threshold matter, Goins conceded that Kelly and Daniels immediately became aware of the fan's shutdown when the roof dust generated by the drills was no longer being ventilated away from them. Thus, the absence of a fan warning signal, the guard's failure to communicate from the surface underground, and the energized compressor on the surface, do not provide a basis for concluding that the men were unaware, or otherwise unconcerned, that the fan had stopped.

Moreover, Goins' conclusion that the men's arrival on the surface at 1:30 p.m. was evidence that they did not timely begin their withdraw from the mine is based on Goins' belief that the fan map reflected the fan had stopped at 12:00 noon. However, in fact, the fan map reflects the fan stopped after 12:30 p.m. Thus, the miners' arrival on the surface at 1:30 p.m., less than
60 minutes after the fan stopped, rather than more than 90 minutes after the fan stopped as Goins had assumed, is not evidence that supports the conclusion that their withdrawal was

untimely.[2] Accordingly, the Secretary has failed to carry her burden of establishing that it was more likely than not that Kelly and Daniels delayed their withdrawal in violation of the provisions of
section 75.313(c)(1). **Thus, Citation No. 7508624 shall also be vacated.**

ORDER

In view of the above, **IT IS ORDERED THAT** Citation Nos. 7508623 and 7508624 **ARE VACATED.**

IT IS FURTHER ORDERED THAT Citation No. 7508622 **IS MODIFIED** to delete the significant and substantial designation, and, as modified, Citation No. 7508622 **IS AFFIRMED.**

IT IS FURTHER ORDERED THAT, Left Fork Mining, Inc., **SHALL PAY** a $55.00 civil penalty in satisfaction of Citation No. 7508622 within 45 days of the date of this decision. Upon timely receipt of payment, Docket No. KENT 2001-129 **IS DISMISSED.**

Jerold Feldman
Administrative Law Judge

Distribution:

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/hs

[2] The provisions of section 75.313(c)(1) do not require miners to withdraw until 15 minutes after the fan has stopped. Thus, the 1:30 p.m. arrival of Kelly and Daniels on the surface occurred less than 45 minutes from the time they were required to start their departure from the mine.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 16, 2002

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
On behalf of WILLIAM DENNY	:	Docket No. VA 2002-32-D
GRIFFITTS,	:	NORT CD 2002-07
Complainant	:	
v.	:	
	:	
COALFIELD SERVICES, INC.,	:	VP 8 Mine
Respondent	:	Mine ID 44-03795 R58

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary
Kurt J. Pomrenke, Esq., Coalfield Services, Inc., Bristol, Virginia, for the Respondent

Before: Judge Schroeder

Introduction

This matter is before me on the application filed by the Secretary on behalf of Mr. William Denny Griffitts, a miner previously employed by Coalfield Services, Incorporated, the Respondent. On March 26, 2002, the Respondent requested a hearing on the application. The hearing was held in Abingdon, Virginia on April 5, 2002. Testimony was received and oral arguments made. Because of the limited time available, post-hearing briefs were not submitted.

Background

This case arises under the "whistle blower" section of the Federal Mine Safety Act, section 105(c)(1). The law prohibits discrimination in employment on the basis of the exercise of any right assured by the Mine Safety Act, and has been specifically interpreted to include protection to persons that make reports or complaints of violations of safety requirements in the

operation of a mine subject to the jurisdiction of the Secretary. Secretary of Labor ex rel Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). When a person submits a complaint of discrimination under this section, the Secretary is required to perform an initial investigation. If the investigation establishes to the satisfaction of the Secretary that the complaint is "not frivolous", or "not clearly without merit", the Secretary is required to apply to the Commission for a order temporarily returning the complaint to the *status quo ante* any allegedly discriminatory action. Jim Walter Resources, Inc. v. FMSHRC, 920 F2d 738 (11th Cir. 1990) This order is limited in duration to permit the Secretary to complete a more thorough investigation of the alleged discrimination and to decide whether to pursue more permanent relief. This matter is not intended as a final determination of whether impermissible discrimination occurred but rather whether the complaint is deserving of the temporary relief sought by the Secretary in the application filed on March 26, 2002.

Factual Findings

At the hearing, the parties stipulated that the facts support the conclusion that the Commission has jurisdiction to consider this application for temporary reinstatement.

Prior to February 18, 2002, Mr. Griffitts had been employed by Coalfield Services for more than 14 years. His nominal occupation is welder, but the variety of construction and maintance work done by his employer required him to perform a variety of functions. On February 18, 2002, Mr. Griffitts was a member of a small crew under the supervision of Mr. Mike Powers assigned to replace metal liner plates in a chute which carried coal from a production hoist to a conveyor belt to the processing plant. The plates are replaced periodically because of the wear caused by the sliding of coal. To perform this work Mr. Griffitts climbed up the inside of the chute to near the point coal is normally dumped into the chute. While Mr. Griffitts was in this exposed location, the production hoist was activated and one of the skips which carry coal to the chute entered the dump position. He observed a sheet of metal which appeared to be loose in the skip. It appeared to him that with very little more movement of the skip the metal sheet would be dumped into the chute and cause him serious injury, perhaps "cut his legs off."

Mr. Powers later testified that the lining sheets in the skip were also in need of replacement and may have come partially unfastened from the frame. He was of the opinion that Mr. Griffitts was at no time in any actual danger. From the testimony as a whole I conclude Mr. Griffitts had a reasonable belief that his health and safety were in immediate and serious peril.

Mr. Griffitts exited the chute as quickly as possible and began to draw attention of those present to his belief that he had been placed in danger by the operation of the hoist without adequate communication and awareness of his exposure in the chute. His efforts to regain his

composure following this incident were unsuccessful. He went home after informing his supervisor, Mr. Powers. As Mr. Griffitts was leaving the job site, Mr. Powers asked him whether he would return the next day. Mr. Griffitts replied that he did not know when he would be back.

The following day, February 19, 2002, Mr. Griffitts made two telephone calls, one to the Safety Director of Coalfield Services, and one to the Human Resources Director. He advised the Safety Director of the danger he had been exposed to in the chute. He advised the Human Resources Director that he would not be in to work and did not know when he would be able to return to work.

On February 20, 2002, Mr. Griffitts went to work late and apparently did not call his supervisor to advise him of the late arrival. He did call the local MSHA Office and reported his concerns with the way the hoist was operated while he was in the chute to perform maintance work. As a result of this call, the MSHA inspector normally responsible for this mine made a visit to the mine to inquire into the incident. The inspector, who testified at the hearing, did not identify the person responsible for the inspection. Mr. Powers, however, indicated he strongly suspected Mr. Griffitts had called MSHA. He questioned Mr. Griffitts about that possibility and Mr. Griffitts denied having made a call to MSHA.

Mr. Griffitts finished the work day on February 20, and worked his usual shift on both February 21 and February 22. After completing his shift on February 22, 2002, Mr. Griffitts received a notice of suspension with the intention to terminate. The notice was a formality required under a collective bargaining agreement with the UMW before a miner can be discharged. The notice of suspension listed two reasons for discharge; (1) failure to report for work, and (2) failure to follow company policy for notification of an absence from work. Company policy on notification apparently included telephone notification of specified company officials, including the Director of Human Resources.

On February 21, 2002, Coalfield Services had received a citation from the MSHA inspector for the incident involving Mr. Griffitts on February 18. The citation did not identify Mr. Griffitts as the complaining party.

Mr. Griffitts' termination became official on February 23, 2002.

Analysis

I easily conclude the Secretary has established the elements of a discriminatory discharge as tested under the "not frivolous" standard of Section 105(c). Mr. Griffitts exercised his right to raise safety concerns of a reasonable nature to both company management and to MSHA. He was discharged from his employment reasonably close in time to the exercise of this right. He was discharged under circumstances in which a reasonable inference can be drawn that management was aware of his exercise of this right.

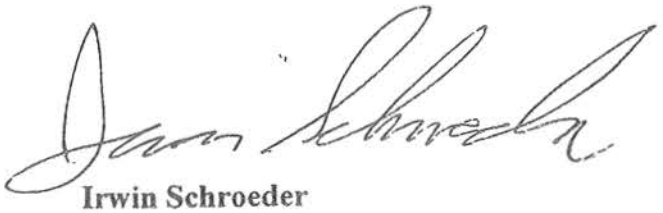
Management response to the application for temporary reinstatement has two parts. First, Coalfield Services argues business justification in failing to follow company policy on notification of absence. This is embellished with unsupported references to prior similar violations of company policy. Second, Coalfield Services claims it could not have discriminated against Mr Griffitts since it did not know for certain that he had complained to MSHA until long after the discharge became effective.

Applying again the "not frivolous" standard to these objections, it is reasonably clear that Mr. Griffitts made a reasonable good faith effort to comply with company policy on notification of absence from work. He called the corporate office and spoke to one of the people authorized by company policy to receive such calls. While he was apparently vague on the period of intended absence he did put the company on notice that he would be absent for reasons related to the incident which he reported to the company as a safety concern. For the limited purpose of the application for temporary reinstatement, the company has not established a compelling defense on this point.

As to the time of knowledge on the part of Coalfield Services of the exercise of rights under the Mine Safety Act, these rights are not limited to reports to MSHA. It is clear under Commission precedent that a report to a supervisor or a report to a Safety Director is protected activity. Coalfield Services knew long before it composed a discharge notice that Mr. Griffitts had exercised these protected rights. Where an employee has exercised rights under the Mine Act, management has a heavy burden of showing an independent business justification for adverse action against the employee. Coalfield Services has not made a credible showing of business justification in this instance.

Order

For the reasons given above, the application for temporary reinstatement filed by the Secretary on behalf of William Denny Griffitts is granted, and the Respondent Coalfield Services, Inc., is directed to reinstate Mr. Griffitts in his prior position at his then rate of pay. Reinstatement is to be effective on the date of this order and to continue until the Secretary makes a final determination as to discrimination within the period afforded by the statute.



Irwin Schroeder
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

April 16, 2002

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
on behalf of RANDY LEE BENNETT,	:	PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-292-DM
v.	:	SC-MD-02-06
	:	
SMASAL AGGREGATES,	:	
Respondent	:	Cole Camp Sand & Gravel
	:	Mine ID 23-02198

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Complainant;
Michael R. Roderman, Roderman Safety Associates, Inc., Salem, Missouri, for the Respondent.

Before: Judge Feldman

This matter, heard on April 2, 2002, in Springfield, Missouri, is before me based on an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2)
of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against Smasal Aggregates on behalf of Randy Lee Bennett. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations or who have engaged in other safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner pending the full resolution of the merits of his discrimination complaint. Smasal Aggregates has stipulated that it is a mine operator subject to the jurisdiction of the Mine Act.

I. Procedural Framework

As a general proposition, in order to prevail, a complainant has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, a complainant must demonstrate that he participated in safety related activity protected by the Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981);

Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981).

A mine operator may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. An operator may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d 738, 750 (11th Cir. 1990), *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction 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).

Unlike a trial on the merits in a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act as well as Commission Rule 44(c), 29 C.F.R. § 2700.44(c), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought."
Rule 44(c) provides:

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

In its decision in *Jim Walter Resources* The United States Court of Appeals noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.'

920 F.2d at 747 (emphasis in original) (citations omitted).

The Court further stated:

> . . . Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor.

Id. at 748, n.11 (emphasis in original).

Although the focus here is extremely limited, the Supreme Court has articulated that the narrow scope of these temporary reinstatement proceedings, as well as the minimal statutory standard of proof required by the Secretary under section 105(c)(2) of the Act, far exceed the Constitutional requirements of due process. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

II. Statement of the Case

Consistent with the above discussion concerning the "not frivolously brought" standard of proof, the issues presently before me are whether protected activity in fact occurred, and, if so, whether the protected activity was reasonably contemporaneous with the adverse action complained of. In this case, the protected activity relied upon by the Secretary is the safety related complaint Bennett filed with the Mine Safety and Health Administration (MSHA) on January 17, 2002. (Tr. 230). The Secretary alleges the adverse action that gives rise to her application for reinstatement is Bennett's alleged termination on January 18, 2002, by Leo Michael Smasal (Mike Smasal), President of Smasal Aggregates, allegedly motivated by Bennett's MSHA complaint.

It is undisputed that Bennett's January 17, 2002, MSHA complaint was protected activity. However, Smasal Aggregates contends that Bennett was not fired. Rather, Smasal Aggregates insists that Bennett voluntarily quit his employment on the morning of January 17, 2002, before he complained to MSHA, when he elected to go home, rather than drive his haulage truck more slowly, after he was repeatedly warned about his driving on January 15, January 16 and January 17, 2002. Thus, the ultimate issue to be resolved in this limited proceeding is whether Bennett's claims that he did not quit his job on January 17, 2002, and, that he was fired on January 18, 2002, after filing a complaint with MSHA, are frivolous.

III. Findings of Fact

Randy Lee Bennett has been employed by several operators in the mining industry since 1996. Bennett's duties have included driving haulage trucks and operating backhoes and front-end loaders. Bennett was hired by Smasal Aggregates as a haulage truck driver in July 2000. Smasal Aggregates operates a limestone quarry. Smasal Aggregates also operates the Cole Camp Sand and Gravel facility where portable sand and gravel is extracted and crushed into concrete sand. Although the Smasal Aggregates' limestone quarry and the Cole Camp Sand and Gravel operation have been assigned different MSHA mine I.D. numbers, both facilities are co-located on the same property. Bennett was employed by Smasal Aggregates but also performed work at the Cole Camp Sand and Gravel facility.

Bennett was recalled to resume work on Tuesday, January 8, 2002, by Mike Smasal after a brief temporary layoff. Bennett was given the option of operating the bobcat that is used to clean under the crusher, or operating the haulage truck. Bennett chose to drive the haul truck because it had a heater. Bennett was assigned to drive truck No. 44, a 35-ton Euclid. At all times relevant to this proceeding, Bennett was the only haulage truck driver assigned to transport limestone and gravel material within the quarry facilities. Bennett testified he drove his truck in fourth gear at speeds between 15 to 20 miles per hour fully loaded. (Tr. 46). Smasal testified a safe truck speed was between five and ten miles per hour. (Tr. 150).

Bennett's haulage route consisted of driving into the lime pit where lime material was loaded into his haul truck by Connie Thornburg, the lime pit loader operator. Bennett then drove the extracted lime material approximately ½ mile to the crusher where he backed the truck up a ramp so that the material could be dumped from the truck into a hopper.

After unloading his truck, Bennett drove down the hopper ramp approximately 400 yards to the opposite end of the crusher where fine ¼ inch rock and limestone material exits the crusher on a conveyor belt. Bennett's truck was then loaded with material from the belt by Charlie Birch, the beltline front-end loader operator.

Bennett then drove approximately ¼ mile to the asphalt rock pile where he unload the material from the belt. Bennett would then make another round trip from the beltline, where Charlie Birch would fill another load, and then back to the asphalt rock pile. From the asphalt rock pile, Bennett would drive back to Connie Thornburg at the lime pit to begin another cycle of transporting limestone and crushed rock material. In other words, Bennett received two truck loads of material at the beltline for every truck load of limestone material he obtained at the lime pit. Bennett estimated that he completed three round-trip cycles per hour, averaging approximately 24 cycles per eight hour workday.

On the morning of January 8, 2002, after turning the ignition of the Euclid No. 44 truck, Bennett heard a loss of air pressure when he released the parking brake. Bennett reported the problem to mechanic Matt Castle and mine foreman Darrell Siercks. Bennett testified Castle and Siercks told him the parking brake had been disconnected because it wasn't working properly. Castle told Bennett he would repair the parking brake when he got

a chance. (Tr. 44-45). Bennett further testified that Castle and Siercks told him not to worry about it because the service brakes worked well because new rear brakes recently had been installed.

Bennett testified he did not refuse to drive the truck because he had to "feed [his] kids and make [his] mortgage." (Tr. 40). Bennett drove his truck from Tuesday, January 8 through Friday, January 11, 2002, without incident. Bennett described an incident that reportedly occurred on Monday, January 14, 2002, when his Euclid truck lurched forward while on the asphalt rock pile despite the fact that he was firmly depressing the service brake pedal. Bennett testified that he did not report this incident to Mile Smasal. (Tr. 48-49). Moreover, as noted below, an MSHA inspection conducted on January 18, 2002, revealed the service brakes were not defective.

Bennett admits that he was repeatedly warned about driving too fast on January 15, 16 and 17, 2002. Mike Smasal testified that on the morning of Tuesday, January 15, 2002, Superintendent Larry Castle cautioned Bennett because Bennett was driving at excessive speeds in the vicinity of the crusher. When Smasal arrived at work on Wednesday, January 16, 2002, Larry Castle informed Smasal that he complained to Bennett about his driving the previous day. Matt Castle also told Smasal that he had cautioned Bennett to drive slower the previous day. Upon receiving these complaints, at approximately 11:00 a.m. on January 16 Smasal contacted Connie Thornburg at the lime pit by radio and instructed Thornburg to tell Bennett to slow down. Thornburg testified that, consistent with Smasal's instructions, he told Bennett that Smasal wanted him to drive more slowly. (Tr. 199). Bennett was again warned by Matt Castle at 4:00 P.M. on January 16 to slow down.

Despite the warnings given to Bennett on January 15 and January 16, on the morning of Thursday, January 17, 2002, Smasal personally observed Bennett driving too quickly and he saw Bennett's truck slide around a corner of the quarry road. Smasal stated that he attempted, to no avail, to flag Bennett down to warn him to slow down. Unable to stop Bennett, at approximately 10:00 a.m. Smasal contacted Connie Thornburg at the lime pit by radio and instructed Thornburg to tell Bennett "to slow the truck down or park it and go home if he could not do so." (Tr. 145). Thornburg testified that he communicated Smasal's ultimatum to Bennett. (Tr. 200). Bennett testified he was "frustrated" over the repeated warnings he had received because he had tried to slow down by driving in third rather than fourth gear. Thornburg testified Bennett said, "'F-it; I'll go home,' and he didn't return to the pit, so I just took it that he went home." (Tr. 201). Bennett parked his truck at approximately 10:30 a.m. Before leaving the mine facility Bennett completed a pre-operation inspection report dated January 17, 2002, reflecting the condition of the brakes on truck #44 as "None[,] No Parking Brake." (Comp. Ex. 1).

After leaving the quarry, Bennett went to Mike Letourneau's house. Letourneau is Bennett's friend, and he was a former supervisor at Smasal Aggregates. Latourneau also is the husband of Diane Latourneau, Mike Smasal's secretary.

After leaving Latourneau's house, at approximately 2:00 p.m. on January 17, 2002, Bennett telephoned MSHA's Rolla, Missouri field office to report several alleged hazardous

conditions at Smasal Aggregates. Namely, Bennett complained about the #44 haul truck's parking brake and service brake. Bennett also complained about a missing crusher guard, equipment not being tagged out-of-service, and a wire from a generator that was exposed to truck traffic.

Bennett did not report to work on Friday, January 18, 2002. Bennett asked his wife, Christina, to telephone Smasal Aggregates to tell them he was not reporting for work. Bennett went to Kansas City to look for a job.

At approximately 8:00 a.m. on January 18, Christina Bennett called Diane Latourneau to tell her that her husband was going to Kansas City and that he would not be reporting to work. (Tr. 185). Christina asked Latourneau if she could take her husband's paycheck home so that Bennett could pick it up at her house rather than go to the quarry. Christina testified she asked Latourneau to take her husband's paycheck because he would not be able to return from Kansas City before the quarry closed. (Tr.88-89). Bennett testified he wanted to pick his paycheck up at the Latourneau's house because it was located closer to his home than the quarry. (61-62). Latourneau told Christina that she would ask Mike Smasal if she could take Bennett's check home.

At approximately 8:00 a.m. on January 18, at the same time Bennett apparently was en route to Kansas City in search of another job, MSHA Inspector Rodney Lee Rice arrived at Smasal Aggregates in response to Bennett's complaint. During his inspection, Rice initially was accompanied by Darrell Siercks and later joined by Mike Smasal. Rice inspected the #44 haul truck that had been driven by Bennett. Rice's inspection confirmed that the parking brake had been disconnected. However, Rice determined that the service brakes were not defective. In fact, Rice observed that the rear brakes locked before the front brakes and he determined that a new set of rear brakes recently had been installed. Rice did not find any guarding violations. There is no evidence that any of Bennett's other complaints were confirmed during Rice's inspection. Rice testified that it was obvious to Smasal that Bennett was the source of the complaint because Bennett had driven truck #44 and he did not report to work. Smasal admits he knew Bennett had complained to MSHA. (Tr. 171).

At approximately 2:00 p.m. Christina again telephoned Latourneau who told her Bennett's "final paycheck" would be sent by certified mail. Christina told Loutourneau that her husband would telephone Smasal later in the day. (Tr. 186).

At approximately 3:00 p.m., Smasal received a telephone call from Bennett. Bennett's version of the telephone conversation is markedly different from Smasal's recollection of the telephone conversation. Bennett alleges Smasal told him "'I'm firing you - - or you quit'" because he walked off the job and because he complained to MSHA. (Tr. 64). Bennett testified that he told Smasal that he had not quit. (Tr. 62-64).

Contrary to Bennett's testimony, Smasal testified that the primary purpose of Bennett's call was to inquire about his paycheck. Smasal stated he told Bennett he should have slowed his truck down instead of quitting and going home at which time Bennett asked if his unemployment would be contested. When Bennett was told that he could not get

unemployment because he had quit, Smasal testified Bennett became disturbed and threatened to make Smasal's life difficult. (159-61).

On January 25, 2002, Bennett filed the subject discrimination complaint with MSHA. In his complaint Bennett asserts he was terminated on January 18, 2002, because he "complained about safety."

IV. Further Findings and Conclusions

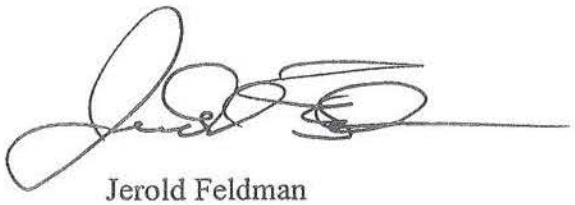
As noted, the scope of this temporary reinstatement proceeding is extremely limited. Specifically, the Secretary is not presently obliged to demonstrate that Bennett's complaint is meritorious. Rather, the Secretary need only show that Bennett's claim is not frivolous.

It is undisputed that Smasal Aggregates was aware of Bennett's alleged protected activity, *i.e.*, his January 17, 2002, MSHA complaint. However, Bennett's January 17, 2002, MSHA complaint is protected activity for the purposes of his complaint only if Bennett had not already severed his employment relationship with Smasal Aggregates by walking off the job. In this regard, the present record contains contradictory evidence concerning whether Bennett's actions on January 17 and January 18, 2002, provide an adequate basis for concluding that Bennett quit his job as Smasal Aggregates contends, or, whether Bennett was fired.

Nevertheless, it is not the judge's duty to resolve conflicts in testimony at this preliminary stage of this discrimination matter. *Secretary on behalf of Earl Charles Albu v. Chicopee Coal Company,* Inc., 21 FMSHRC 717, 719 (July 1999). I need only determine whether Bennett's claim that he was fired is non-frivolous, not whether there is sufficient evidence to justify Bennett's permanent reinstatement. *Id.* At this preliminary stage of this discrimination proceeding I conclude that the Secretary has satisfied her very minimal burden of demonstrating that Bennett should be temporarily reinstated.

ORDER

In view of the above, Smasal Aggregates **IS DIRECTED** to immediately reinstate Randy Lee Bennett to the haulage truck driver position he held on January 17, 2002, or to a substantially similar position, at the same rate of pay and benefits Bennett formerly received. In ordering reinstatement, I am expressing no inclination regarding the ultimate outcome of Bennett's underlying discrimination complaint. The Secretary should endeavor to complete, as soon as is practicable, its investigation in this matter so that Bennett's discrimination complaint may progress to a full evidentiary hearing on the merits.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Telephone No.: 202-653-5454
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April 16, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2001-65-M
Petitioner	:	A. C. No. 19-01081-05502
v.	:	
	:	Mine: Read Customs Soils
READ SAND & GRAVEL,	:	
Respondent.	:	

ORDER DENYING MOTION TO REOPEN
ORDER TO PAY

Before: Judge Barbour

This case is before me pursuant to an order of the Commission dated October 23, 2001, remanding this matter for further consideration and determination as to whether the operator, Read Sand & Gravel ("Read"), is entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure.[1] Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect."

This matter arose because Read failed to notify the Secretary that it wished to contest the proposed penalty within 30 days of receipt of the proposed penalty assessment. In support of its request to reopen, Read makes four assertions: (1) it does not own, control or manage the subject property; (2) many of the violations exceed the scope of the Mine Act jurisdiction; (3) some of the cited areas are outside of the mine area; and (4) the Mine Safety & Health Administration ("MSHA") did not contact the president and sole shareholder regarding visits, issues, or violations. Letter Dated Feb. 26, 2001.

The Secretary filed a response to the request, arguing that the first three grounds proffered by Read pertain to the substantive merits of the case rather than grounds for reopening the matter. Secretary's Motion at 2. Further, the Secretary states that while the fourth ground may pertain to reopening, Read did not provide sufficient evidence to enable the Secretary to determine whether reopening is warranted. *Id.* In addition, the Secretary notes that MSHA did receive a certified mail receipt indicating that the assessment was received by Read. *Id.* at 2 n.2.

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[1]While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). *See* 29 C.F.R. § 2700.1(b).

Subsequently, on December 28, 2001, I issued an order requiring Read to submit more information as to why it believes the case should be reopened within 30 days of the date of that order. In particular, I instructed Read to explain why it believes MSHA's failure to contact its president personally warrants reopening this matter. I did not receive Read's response within that time, and, therefore, I issued a second order on February 20, 2002, in which I gave Read 20 days to file the information. Finally, on March 7, 2002, I received a letter from Read dated March 4, 2002.

In the letter, Read president, Anthony P. Nickinello, asserts that on or about April 2000, MSHA made an unannounced visit at the work site of A.D. Makepeace ("A.D."), a cranberry grower for whom Read removed earthen materials from various locations. Nickinello states that he purchased Read on January 1, 2000, and continued the operation under the previous set of rules and guidelines of A.D. He further claims an MSHA inspector began to direct Read personnel towards presumed violations and continued to do so for several months without the knowledge of Nickinello or A.D. personnel. Nickinello contends he became aware of the circumstances while on a site visit when a second MSHA inspector arrived to investigate prior activity. The inspector, Nickinello further declares, informed him of the nature of the inspections, provided a correction list, and issued orders, with which Read complied. Neither A.D. management nor Read management, according to Nickinello, were informed by the "department"[2] that it would enforce mine safety regulations on an agricultural business. He finally asserts that A.D. and Read meet health and safety regulations, regardless of the agency responsible for ensuring compliance.

It appears that Read is questioning MSHA's jurisdiction because A.D. is an agricultural business and Read is its vendor. However, Read's response does not address the inquiry in my Orders as to why Read did not timely notify the Secretary it wished to contest the proposed penalty within 30 days of its assessment.

Accordingly, since Read has failed to address the issue, the request to reopen is **DENIED**. Read is **ORDERED** to pay the full proposed penalty assessment of $944.00 within 30 days of the date of this order.[3]

David F. Barbour
Chief Administrative Law Judge

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[2] I assume Nickinello means MSHA.

[3] Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U. S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 360250M, PITTSBURGH, PA 15251

Distribution:

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

Tyler T. Foster, Controller, Read Sand and Gravel, 171 VFW Drive, P. O. Box 546, Rockland, MA 02370 (Certified Mail)

Anthony P. Nickinello, ALM Custom Soils Inc. d/b/a Read Sand & Gravel, P. O. Box 546, Rockland, MA 02370 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041
April 19, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-24-D
ON BEHALF OF	:	NORT CD 2000-04
DONNIE LEE LOWE,	:	
Complainant	:	
v.	:	
	:	
ISLAND CREEK COAL COMPANY,	:	VP #8 Mine
Respondent	:	Mine ID 44-03795

DECISION

Appearances: Alfred R. Hernandez, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Stephen M. Hodges, Esq., and Eric R. Thiessen, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Donnie Lee Lowe, against Island Creek Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Abingdon, Virginia. For the reasons set forth below, I find that Island Creek did not take any adverse action against the Complainant because he engaged in activities protected under the Act.

Background

The VP No. 8 Mine is a large, underground coal mine operated by Island Creek Coal Company in Buchanan County, Virginia. It was created when the VP No. 5 and VP No. 6 mines were connected in the middle. It has more than 37 miles of tunnels, approximately nine and one half miles of electrified track and seven and one half miles of belt line. Coal is produced by two continuous miner sections and one longwall section.

The mine can be entered by two portals, the Deskins portal and the Garden portal, which are five and one half to six miles apart on the surface. Each portal has two shafts, an "A" shaft for the removal of coal and a "B" shaft for the entry and exit of miners.

Underground traffic in the mine is controlled by a dispatcher located in an office on the surface near the Garden portal. A dispatcher must be on duty at all times during a shift. There is one dispatcher for each shift. Donnie Lee Lowe was the day shift dispatcher in April 2000. He also was a miners' "walk-around representative."[1]

On April 12, 2000, Lowe accompanied MSHA Inspector Ronald Blankenship on an inspection as a walk-around representative. The inspection ended on the surface at the Garden portal "B" shaft at 2:45 p.m. Shift foreman William Akers directed Lowe, through company Safety Inspector Mike Canada, to finish out the shift shoveling coal along the belt line at the bottom of the "A" shaft. Although he told Canada that he wanted to return to dispatching, Lowe went down the "B" shaft and walked to the "A" shaft to perform the assigned work. By the time he arrived the shift was over, so he never did any shoveling.

On April 13, 2000, Lowe served as a walk-around representative with MSHA Inspector Randall Ball. The inspection terminated around 1:00 p.m. on the surface at the Garden portal. Akers told Canada to take Lowe back to the belt line, to make sure that Lowe was properly task trained in shoveling and to have him shovel the belt. Lowe shoveled for a short time until the shift was over.

On April 14, 2000, Inspector Ball arrived at the Deskins portal to inspect the surface areas. Lowe elected to serve as walk-around representative for the inspection. To do that he had to travel from his office at the Garden portal to the Deskins portal. On the surface this would have taken between 15 and 20 minutes. However, Lowe was advised that no surface transportation was available so he had to travel through the mine by rail car which took a little over an hour. When he arrived, the inspection had been completed. Akers assigned Lowe to spot clean along the belt line near the Deskins "A" shaft.

On all three occasions, Lowe was replaced as dispatcher by Johnny Baker. At that time, Baker's regular position was as a belt man, whose main job was shoveling along the belt line.

In his complaint filed with the Commission, Lowe claimed that the Respondent had required him "to perform work that was more laborious than his typical job duties required, and which [he] would not perform when he did not act as a representative of miners."[2] (Comp. at 2.)

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[1] Section 103 (f) of the Act, 30 U.S.C. § 813(f), provides that: "[A] representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine . . . for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine."

[2] Lowe's original discrimination complaint, filed with MSHA, was not included in any of the pleadings in this matter, nor was it offered as an exhibit at the hearing.

He averred that these "actions by Respondent and its personnel constituted unlawful and discriminatory conduct . . . ."[3] (*Id.*)

Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), 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."

In order to establish a *prima facie* case of discrimination under Section 105(c)(1) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Driessen v. Nevada Goldfields,* Inc., 20 FMSHRC 324, 328 (April 1998); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). 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).

There can be no doubt that when he served as a walk-around representative, Lowe was engaging in protected activity. Indeed, the Respondent does not dispute that fact. The issues to be decided in this case, then, are whether Island Creek took any adverse actions against the Complainant, and, if it did, whether it did so because he acted as a walk-around representative. I find that while the Complainant may have shown that being required to shovel the belt line was adverse, he has not met his burden of demonstrating that the adverse action was taken as the result of his protected activity.

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[3] Lowe also alleged in the complaint that such discriminatory action took place when he served as a miners' representative on April 19 and 20, 2002. However, those allegations were withdrawn at the hearing. (Tr. 19-20.)

Was the Action Adverse?

The complainant asserts that because shoveling the belt line is harder work than being a dispatcher and is more dangerous because it is underground, his temporary assignments to perform that function after serving as walk-around representative constituted adverse action. He relies on *Secretary of Labor on behalf of Glover and Kehrer v. Consolidation Coal Co.*, 19 FMSHRC 1529 (September 1997), for this proposition.

In *Glover*, two long-time "scooter barn" mechanics were transferred to positions as underground, section mechanics. Both had been serving as walk-around representatives, which took up about two-thirds of their time while at the mine. They were initially informed that they were being transferred because of their walk-around duties. Later, they were told that the "official" reason for the transfers was to make the scooter barn more productive. In affirming the judge's decision that they were discriminated against, the Commission held that "the transfer of these two longstanding scooter barn mechanics to a more dangerous assignment on the section was adverse." *Id.* at 1535.

There is, however, one major difference between this case and *Glover*. Lowe was not transferred to the position of belt man, but was temporarily assigned to perform that function to complete his shift after serving as a walk-around representative. In the first instance, there was so little time left that he did not have to do any shoveling. The second time, he only worked for a short while and the third time, while the evidence is not clear, it appears that he spent several hours underground. While the permanent transfer to a more dangerous assignment may be adverse, it does not necessarily follow that a temporary assignment to a more dangerous position is adverse, particularly in an area like underground coal mining where almost all jobs are dangerous and somewhat arduous.

Nonetheless, it is not necessary to decide whether having to shovel the belt line constituted adverse action. Even giving the Complainant the benefit of the doubt and assuming that it was adverse, he has failed to meet his burden of demonstrating that the action was taken because he engaged in protected activity.

Did Lowe Establish a Prima Facie Case?

There is no doubt that Lowe would not have been assigned to shovel if he had not been serving as walk-around representative. One ineluctably followed the other. But, that does not mean that the task was given to him because he engaged in protected activity. For example, if Lowe had gone from his dispatcher's position to perform some public relations function for the company and was assigned to shovel belts when he returned, while the one would be the direct result of the other, there could be no claim of discrimination because performing a public relations function would not be engaging in protected activity. Thus, the Complainant must demonstrate that his assignment was not merely because he had left his dispatcher's job to do

something else, but because he was engaging in the protected activity of serving as a walk-around representative.

Clearly, the reason for Lowe's assignment rests with Akers' intent or motivation at the time he gave Lowe the assignments. Since it is obviously very hard to discern what a person is thinking, the Commission has set out some guidelines for determining motivation. Thus, it recently stated:

> We have acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, we listed some of the circumstantial indicia of discriminatory intent, including (1) knowledge of protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Id.*

Secretary on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (September 1999).

The Complainant has established that Akers knew that he had served as a walk-around representative and that there was a coincidence in time between his serving as a walk-around representative and the adverse action. This is sufficient to meet his burden of establishing a *prima facie* case. To rebut this, the company has presented evidence to show that the adverse action was not motivated by the protected activity.

Did Island Creek Rebut the Complainant's Prima Facie Case?

Akers testified that the reasons he assigned Lowe to shovel the belt, rather than returning him to his job as dispatcher, were: "[R]eason number one, I had no vacancy as a dispatcher. That position was already filled. Two, it just wasn't efficient to displace a second time a man that could be working." (Tr. 164.) He also stated that he did not assign Lowe to belt cleaning duties to punish him or to try to dissuade or discourage him from being a walk-around representative. (Tr. 163.) Thus, the company asserts that it required Lowe to finish his shift in a position other than dispatcher for business reasons and not to harass him because he had acted as a walk-around representative.

As the Commission has long held, when a business justification is given as the reason for an action, "[o]ur function is not to pass on the wisdom or fairness of such asserted business justifications, but rather to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). In determining whether a business justification is credible, the Commission has offered the following guidance:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquiries must be restrained.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether credible justification figured into the motivation and, if it did, whether if would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . ., then a *limited* examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that operator to [take the adverse action].

Chacon at 3 FMSHRC 2516-17 (citations omitted).

Finally, the Commission has cautioned that:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination does *not* mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intend that a judge, in carefully analyzing such defenses, should not substitute his business judgment or sense of "industrial justice" for that of the operator.

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (November 1982).

I find that Island Creek's averred business justification for the challenged adverse action is entirely plausible and credible. Lowe occupied a unique position at the mine which accounts for the company's actions toward him. Further, contrary to his assertions, Lowe was not treated differently than other walk-around representatives. Finally, there is no evidence that the company, generally, or Akers, specifically, had any animus or hostility toward walk-around representatives.

Island Creek is required by MSHA to have a dispatcher on duty at all times. That meant that when Lowe served as a walk-around representative, he had to be replaced. The company asserts that it was inefficient to replace the replacement by returning Lowe to dispatcher at the conclusion of his walk-around duties. No evidence was presented that any other walk-around representatives occupied jobs that required the position to be filled at all times. Since Lowe occupied the only position at the mine required to be performed at all times, the company's justification must be viewed in that context. I find that in such a situation its actions were reasonable.

Further, there is no evidence to show that Lowe was treated differently than other walk-around representatives. Johnny Baker and Danny Lyons both testified that they had served as walk-around representatives. Baker, as has already been noted, was a belt man and Lyons was an electrician. At the hearing, the Complainant attempted to show that he was treated differently than they when serving as a walk-around representative. This attempt fails for two reasons. In the first place, to show disparate treatment the Complainant would have to show that he was treated differently than similarly situated miners, that is, miners who served in a position that required that they be replaced when absent. Clearly, neither Baker nor Lyons served in such a position and no evidence was offered concerning any other walk-around who did.

Secondly, neither Baker nor Lyons testified that they always returned to the same job they had been performing before serving as a representative. When asked if he always returned to his classified position, Baker responded: "No, sir, not every time but most of the time I did go back but not every single time." (Tr. 130.) He further related that he had done such things, after completing his walk-around duties, as replacing a man at A shaft, picking up trash and moving a motor, none of which were his classified duties. Lyons testified that he did not always return to the particular job he was working on, but sometimes went to the electrical shop and performed maintenance to finish his shift. (Tr. 150-51.)

Moreover, although both Baker and Lyons had served as a walk-around representative numerous times, neither of them testified that they had ever had any adverse action taken against them by the company for doing so. Nor was any evidence offered that either the company or

Akers had ever expressed any animosity or demonstrated any hostility toward walk-around representatives.[4]

Finally, the Complainant spent a lot of time at the hearing and in his brief trying to demonstrate that it would have been just as easy, if not easier, to return Lowe to his dispatcher position as to have him return underground. To reach this conclusion, however, requires that the judge substitute his business judgment, views of good business practice or notions of fairness for that of the operator. This is precisely what the Commission has counseled against doing.

For the reasons discussed above, I find that Island Creek's justification for having Lowe finish out his shifts on April 12, 13, and 14, 2000, shoveling the belt line was not so weak, implausible or out of line with normal practice that it was a mere pretext to disguise the company's discriminatory motive. Therefore, I conclude the Respondent has successfully rebutted the Complainant's *prima facie* case.

Conclusion

There is no dispute that the Complainant engaged in protected activity. For the purposes of this decision, it is also assumed that his being required to shovel the belts was adverse. In addition, the Complainant has shown that Island Creek knew that he had engaged in protected activity and that there was a coincidence in time between the protected activity and the adverse action. However, the Respondent has rebutted the Complainant's claim of discrimination by credibly showing that it had a non-discriminatory reason for requiring Lowe to finish his shifts shoveling the belt line.

Order

Accordingly, since the Complainant has not established that the company took adverse actions against him because he engaged in protected activity, it is **ORDERED** that the complaint filed by the Secretary of Labor on behalf of Donnie Lee Lowe against Island Creek Coal Company is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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[4] Baker and Lyons also testified that they were not aware of any animosity or hostility directed toward Lowe as a walk-around representative. (Tr. 132, 153.)

Distribution: (Certified Mail)

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yi

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

April 22, 2002

MIKE FLETCHER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2001-150-DM
	:	WE MD 00-11
v.	:	
	:	Portable Crusher #1
MORRILL ASPHALT PAVING, Respondent	:	Mine I.D. 45-03357

FINAL DECISION
ORDER OF DISMISSAL

Appearances: Larry Larson, Esq., Lukins & Annis, Moses Lake, Washington, for Complainant;
Lewis L. Ellsworth, Esq., Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim, Tacoma, Washington, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Mike Fletcher against Morrill Asphalt Paving ("Morrill") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). An evidentiary hearing was held in Wenatchee, Washington. On February 22, 2002, I entered my decision on the merits finding that Morrill discriminated against Fletcher in violation of the Mine Act. 24 FMSHRC 232. I directed the parties to confer and attempt to reach agreement on the relief to be awarded Fletcher. Fletcher did not seek reinstatement, but sought back pay through November 14, 2000, when the crusher was shut down. After having conferred, the parties reached agreement on all outstanding relief issues. On April 18, 2002, Fletcher filed a motion to dismiss this proceeding on the basis that he received the monetary settlement from Morrill that the parties agreed upon. The motion to dismiss is signed by Mr. Fletcher and his counsel.

ORDER

Settlement of this case to the satisfaction of Mr. Fletcher is in the public interest and it complies with the requirements of the Mine Act. Because Morrill fully satisfied the terms of the parties' agreed upon settlement, the motion to dismiss is **GRANTED** and this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
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April 29, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-528-M
Petitioner	:	A.C. No. 42-01912-05513
	:	
	:	Docket No. WEST 2001-538-M
v.	:	A.C. No. 42-01912-05514
	:	
	:	Docket No. WEST 2001-557-M
DARWIN STRATTON & SON, INC.,	:	A.C. No. 42-01912-05515
Respondent	:	
	:	Airport Pit

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Johnpatrick Morgan, Hurricane, Utah, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Darwin Stratton & Son, Inc. ("Darwin Stratton"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). An evidentiary hearing was held in St. George, Utah.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Preliminary Issues

Darwin Stratton operates at least three facilities in Washington County, Utah: the Airport Pit, the Rattlesnake Pit, and a ready-mix plant. All of these facilities are in the vicinity of Hurricane, Utah. At all times during these proceedings, Darwin Stratton was represented by Johnpatrick Morgan. Although Mr. Morgan states that he lives in Hurricane, he has his mail delivered to him via general delivery in Fredonia, Arizona, which is about 64 miles from Hurricane. (Tr. 89). Mr. Morgan represented Darwin Stratton in two other sets of proceedings before me. In those cases,

Mr. Morgan refused all mail that was sent by me and all mail from the Office of the Solicitor. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265, 1268-69 (Oct. 2000).[1] In the present cases, Mr. Morgan accepted some of the mail that I sent him but still failed to pick up most mail. The mail was returned by the postal service stamped "unclaimed." I questioned him about that at the hearing and he replied that he will "become more diligent." (Tr. 90). I have also been sending a copy of every mailing to the office of Darwin Stratton in Hurricane. Mr. Morgan appeared at the hearing on behalf of Darwin Stratton, but he did not present any witnesses other than himself. Mr. Morgan is not an attorney but he states that he is a friend of the family that owns and operates Darwin Stratton. He apparently also has a financial interest in Darwin Stratton. I permitted Mr. Morgan to represent Darwin Stratton at the hearing under the authority of 29 C.F.R. § 2700.3(b)(4).

Mr. Morgan's primary argument is that because the Airport Pit does not sell its products in interstate commerce, the Department of Labor's Mine Safety and Health Administration ("MSHA") is without jurisdiction to inspect it. Mr. Morgan does not deny that gravel is mined and processed at the Airport Pit and that the Airport Pit is a mine. (Tr. 94,127). Rather, he argues that all of the product is sold within Washington County, Utah, principally in and around Hurricane and La Verkin. The material is sold to local contractors and residents. (Tr. 101). The material is used in residential and commercial construction. (Tr. 125-26). The Secretary contends that MSHA does have jurisdiction because of the broad interpretation of interstate commerce under the Mine Act.

I find that the Airport Pit is a "coal or other mine" as that term is used in section 3(A)(1) of the Mine Act. A coal or other mine is defined, in pertinent part, as "(A) an area of land from which minerals are extracted . . ., (B) private ways and roads appurtenant to such area, and (C) lands, excavations . . . structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting minerals from their natural deposits, . . . or used in . . . the milling of such minerals . . . ." 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984). It is clear that the Airport Pit fits within this definition. Rock is extracted from the pit and this material is sized and crushed at the site. Some of the crushed rock and gravel is sold to customers and some of it is further processed at Darwin Stratton's ready-mix plant in Hurricane.

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[1] On November 24, 2000, I dismissed three other contest proceedings brought by Darwin Stratton because it failed to respond to my orders. (Docket No. WEST 2000-589-RM etc). Mr. Morgan also refused all mail service in those cases.

Section 4 of the Mine Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." This provision was enacted pursuant to Article I, Section 8, Clause 3 of the United States Constitution, which states that "Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian Tribes . . . ." Since the early 1940s, the commerce clause has been interpreted very broadly by the Supreme Court and the inferior courts. For example, in *Wickard v. Filburn,* 317 U.S. 111, 125 (1942), the Supreme Court held that the federal government's power to regulate private economic activities under the commerce clause is not confined to the regulation of commerce between the states, but extends to a local activity if "it exerts a substantial economic effect on interstate commerce . . . ." "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States . . . ." *Fry v. United States*, 421 U.S. 542, 547 (1975).

Congress and the courts have determined that mines, including quarries and pits, exert a substantial economic effect on interstate commerce. In *Donovan v. Dewey*, 452 U.S. 594, 602 (1981), the Supreme Court stated:

> As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

The Court relied upon the legislative history and the preamble to the Mine Act in reaching this conclusion. In that case, the Court determined that MSHA had the authority to conduct a warrantless inspection of a stone quarry that was located on private property in Wisconsin.

The circuit courts have uniformly recognized MSHA's authority to inspect mines under the commerce clause. For example, in *U.S. v. Lake*, 985 F3d 265, 268 (6th Cir. 1993), the court of appeals held that "the language of the [Mine] Act, its broad remedial purpose, and its legislative history combine to convince us that Congress intended to exercise its full power under the Commerce Clause." The machinery and equipment used to produce the products at the Airport Pit were manufactured outside the State of Utah and the products of the pit are sold to customers within Utah. (Tr. 28-29, 31, 33, 35; Exs. G-2 through 5). Thus, the "operations or products of [the Airport Pit] affect commerce." 30 U.S.C. § 803. I conclude that Darwin Stratton's Airport Pit is subject to the provisions of the Mine Act. Consequently, the Secretary has the authority to conduct warrantless inspections of this pit, to issue citations and orders for violations of her safety and health regulations, and to propose civil penalties for those

violations. MSHA has been inspecting the Airport Pit since at least 1989 without interference by Darwin Stratton.

B. Individual Citations

1. WEST 2001-538-M, Citation No. 7966590

On August 2, 2000, MSHA Inspector Dennis Harsh issued Citation No. 7966590 to Darwin Stratton alleging a violation of 30 C.F.R. § 50.30. The citation states that the "Operator failed to complete and submit a quarterly mine employment report (7000-2) for the second quarter of 2000." The citation states that the report was due by July 15, 2000. Inspector Harsh determined that the violation was neither serious nor significant and substantial ("S&S"), but that Darwin Stratton's negligence was high. Darwin Stratton sent the required form to MSHA but, using rubber stamps, had placed the words "NOT ACCEPTED," "CANCELED," and "WITHOUT DISHONOR U.C.C. 3-505" on every page and it had not submitted the requested information. (Ex. G-9). Section 50.30 provides, in part, that each operator of a mine "in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instructions and criteria in § 50.3–1 and submit the original to [MSHA] within 15 days after the end of such quarter." The Secretary proposes a penalty of $500 for this alleged violation under her special assessment regulations at 30 C.F.R. § 100.5.

Inspector Harsh was the Field Office Supervisor of MSHA's Boulder City, Nevada, office. Because he passed away, David Pennington, the current field office supervisor, testified for the Secretary. (Tr. 77). The notes taken by Inspector Harsh indicate that when he went to the Airport Pit on or about April 22, 2000, he observed the plant running and an employee operating a loader. (Tr. 79-80; Ex. G-10 p.3). Inspector Pennington testified that Darwin Stratton sent MSHA the form used for the quarterly report but that it contained no data and that it had been marked with the rubber stamps described above. (Tr. 77-78, 80-81; Ex. G-9). Inspector Pennington stated that because MSHA's records indicate that it has been inspecting Darwin Stratton's Airport Pit since the late 1980s and had filed these reports in the past, the company was familiar with the requirements of the regulation. (Tr. 81; Ex. G-6). He believes that Darwin Stratton intentionally failed to file the required employment report.

Mr. Morgan testified that he submitted the form to MSHA with the rubber stamps on it to notify MSHA that the mine was closed to further MSHA inspections. (Tr. 95). Mr. Morgan believes that the relationship between Darwin Stratton and MSHA is a matter of contract and that by sending in the uncompleted and stamped Form 7000-1, he was canceling the contract. (Tr. 6, 61, 105-06). On April 22, 2000, there was a fatal accident at Darwin Stratton's nearby Rattlesnake Pit. *See* 22 FMSHRC at 1267-68. When MSHA officials heard about the accident, they proceeded to the Airport Pit because Darwin Stratton had never notified MSHA of the existence of the Rattlesnake Pit. Darwin Stratton's actions in the present cases are heavily influenced by MSHA's investigation of that accident. Mr. Morgan came to the

conclusion that the fatal accident was going to cost Darwin Stratton over one million dollars. (Tr. 121-22).

MSHA's jurisdiction over the Airport Pit is not the result of a contract between Darwin Stratton and the Department of Labor. The Uniform Commercial Code does not apply to MSHA or the Mine Act. Because the Secretary established that Darwin Stratton failed to submit the information required by section 50.30, a violation was established. The violation was not serious.
I affirm the Secretary's allegation of high negligence because Darwin Stratton was aware of the requirement to file the employment information. Its failure to do so was a deliberate act on its part. Darwin Stratton voluntarily chose Mr. Morgan to be its representative in these cases, as well as in the cases involving the Rattlesnake Pit. Mr. Morgan is misinformed as to the source of MSHA's jurisdiction over the Airport Pit. I reduce the penalty for this citation to $200 because of the small size of Darwin Stratton and the Airport Pit.

2. Docket No. WEST 2001-557-M, Citation No. 7984337

On August 8, 2000, MSHA Inspector Stephen Wegner issued Citation No. 7984337 to Darwin Stratton alleging a violation of Section 103(a) of the Mine Act. The body of the citation states as follows:

> Mr. Clayton Stratton, President, and Pat Morgan, a consultant for the company, refused to allow an authorized representative to enter the mine. Mr. Pat Morgan had marked "CANCELED" on the recent update to the legal Id for this property and had mailed it to MSHA. Mr. Pat Morgan claimed this action canceled any contract with MSHA. Mr. Stratton and Mr. Morgan were told that refusal to allow the inspection was a violation of the provisions of section 103(a) of the Mine Act.

Inspector Wegner determined that the violation was not S&S but that Darwin Stratton's negligence was high. Section 103(a) of the Mine Act provides that authorized representatives of the Department of Labor "shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under . . . this Act." The Secretary proposes a penalty of $2,500 for this alleged violation under her special assessment regulations at 30 C.F.R. § 100.5.

As stated above, MSHA is authorized to inspect a mine without obtaining a search warrant for the purpose of determining whether the mine operator is complying with the health and safety standards. The failure to allow an MSHA inspector onto mine property is a violation of the Act. There is no dispute that Darwin Stratton, at the direction of Mr. Morgan, refused to allow Inspector Wegner onto the Airport Pit to conduct an inspection.

Mr. Morgan testified that he took this action because there was an error in the legal identity report. Darwin Stratton had previously filed a legal identity report under 30 C.F.R. § 41.11 for the Airport Pit. When MSHA discovered that Darwin Stratton also operated the Rattlesnake Pit during its investigation of the fatal accident, it required Darwin Stratton to file two new legal identity reports: a revised one for the Airport Pit that showed that the company also operated the Rattlesnake Pit and a new one for the Rattlesnake Pit. The Airport Pit and Rattlesnake Pit have different identification numbers. When the forms were being filled out, the identification number for the Airport Pit was inadvertently placed on both forms. This mistake was immediately corrected by striking out the incorrect number on the form for the Rattlesnake Pit and placing the correct number immediately above it. (Ex. R-1). For reasons that I do not completely understand, this correction was not satisfactory to Mr. Morgan. He testified that he advised Darwin Stratton to prohibit further inspections until a new legal identity report was issued for the Rattlesnake Pit. In closing arguments he also stated that:

> This is a small operator of a mine where there was written documentation that the legal identity forms were completed and done under force and fear; that there was intimidation, there was harassment, there [were] tremendously bad feelings between the operator and mine safety, and this is what precipitated these actions.

(Tr. 142). Mr. Morgan did not explain how the operator was intimidated or harassed. (Tr. 112-13). It may relate to the fact that MSHA required Darwin Stratton to execute these legal identity reports during its investigation of the accident in which a family member of the owners of Darwin Stratton was killed. *See* 22 FMSHRC at 1272. Mr. Morgan testified that the fact that the identification number for the Rattlesnake Pit had been crossed out and rewritten created "confusion on which was the Rattlesnake Pit and which the Airport Pit." (Tr. 96; Ex. R-1).[2] He further testified that he advised the company to prohibit any MSHA inspections until he could get the "legal identity report reissued." (Tr. 97). He believed that the report with the crossed out number was "inaccurate." (Tr. 97-99).

I find that the Secretary established a violation. It is clear that Darwin Stratton refused to allow Inspector Wegner to conduct a regular annual inspection on August 2, 2000. MSHA has been regularly inspecting the Airport Pit since at least 1989 and Darwin Stratton had never interfered with an inspection in the past. The revised Legal Identity report for the Airport Pit that was signed by Clayton Stratton in April 2000 did not contain any errors. Mr. Morgan wrote "CANCELED" with a rubber stamp. The new legal identity report for the Rattlesnake

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[2] Inspector Wegner testified that Clayton Stratton's wife filled out the new legal identity forms and made the correction to the Id. number on the Rattlesnake Pit form. (Tr. 131-33). Mr. Morgan stated that Inspector Harsh changed the Id. number. (Tr. 134). Although the handwriting for the corrected number appears different from the handwriting on the rest of the form, this dispute does affect the outcome in this case because it does not matter who made the change.

Pit was initially filled out with the Id. number for the Airport Pit, but that number was immediately crossed out and replaced with a new Id. number. It was signed by Clayton Stratton on April 22, 2000. (Ex. R-1). Mr. Morgan's concern about these forms is difficult to understand. The forms have no binding legal importance as far as MSHA's jurisdiction over the two properties is concerned. MSHA issues legal identity numbers for accounting purposes. It uses these numbers to identify mines and to track enforcement history at these mines. As corrected, there were no errors on these forms. Even if there had been an error, Darwin Stratton could have simply requested new blank forms from MSHA and sent then back by mail. An error on a legal identity form does not provide justification to prevent MSHA from conducting a safety and health inspection.

I agree that Darwin Stratton's negligence was high because Darwin Stratton was fully aware of MSHA's right to inspect the Airport Pit. Mr. Morgan's justification for the refusal is illogical. Mr. Morgan's uninformed and ill-advised recommendation to prohibit the inspection is attributable to Darwin Stratton because it voluntarily retained him to represent the company in this proceeding. Nevertheless, I reduce the civil penalty to $1,000 because of the company's small size and because the company prohibited the inspection based solely on Mr. Morgan's recommendation. There is no indication in the record that Darwin Stratton had interfered with an MSHA inspection in the past. I note, however, that Darwin Stratton prohibited another MSHA inspection at a later date and, as a consequence, the Secretary brought an action seeking a temporary and permanent injunction in the U.S. District Court for the District of Utah. That action is still pending.

3. WEST 2001-528-M, Citation No. 6282323

On November 21, 2000, MSHA Inspector Manuel Palma issued Citation No. 6282323 to Darwin Stratton alleging a violation of 30 C.F.R. § 56.18002(a). The citation states that a "competent person designated by the mine operator was not properly examining the crusher plant area at least once every shift for conditions which could adversely affect safety or health." The citation further states that the violation was "evidenced by the 11 citations issued for failure [to conduct] a complete examination of working places." Inspector Palma determined that the violation was S&S and that Darwin Stratton's negligence was moderate. Section 56.18002(a) provides, in part, that a "competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The Secretary proposes a penalty of $140 for this alleged violation.

Inspector Palma testified that he issued the citation because eleven citations had been issued during the inspection. (Tr. 43; Ex. G-8). He understood that examinations were taking place, he just believed that they were not thorough enough to comply with the safety standard. He testified that "due to the numerous violations, I felt that perhaps the designated person responsible was not doing a good job of doing a pre-shift exam in the mine property." (Tr. 37-38, 42). That was his sole basis for issuing the citation. Mr. Morgan testified that this citation was actually issued several months after November 21, 2000. He states that Darwin Stratton

was served with the citation on or about February 22, 2001. (Tr. 105; Ex. R-2). Mr. Morgan believes that this fact should invalidate the citation.

In order to determine whether a violation occurred, the requirements of the standard must be examined. The Commission has identified three requirements of section 56.18002 as follows: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1989). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defines a competent person as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2.

There is no dispute that the citations issued by the inspector used to support the instant citation were issued in "working places," as that term in defined in section 56.2. Inspector Palma did not establish that Darwin Stratton had not conducted examinations of the working places. He testified that he was advised by Darwin Stratton that the examinations were being done. (Tr. 43).

The Secretary did not introduce any evidence as to the competency of Darwin Stratton's examiner. The Commission held that the term "competent person" within the meaning of the standard "must contemplate a person capable of recognizing hazards that are known by the operator to be present in the work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." 11 FMSHRC at 1629. In *FMC Wyoming*, the Commission determined that the examiner was not competent because he had no training or experience in asbestos recognition and was assigned to examine areas in which asbestos was being removed without his knowledge. In the present case, there is no evidence as to whether Darwin Stratton's examiner was familiar with and could recognize safety hazards that are typically present in a pit and crusher environment.

The mere fact that multiple citations are issued during an MSHA inspection is generally not sufficient to establish a violation if the mine operator demonstrates that the examinations were being conducted and the results of these examinations were being recorded. *See Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1136 (Oct. 1999) (ALJ Manning); *Lopke Quarries, Inc.*, 22 FMSHRC 899, 912 (July 2000) (ALJ Hodgdon). In this case, the mine operator did not present any evidence to rebut the Secretary's *prima facie* case. The fact that the citation was actually issued later than the other citations during the inspection does not provide sufficient grounds for vacating it. Consequently, I affirm this citation.

With one exception, all of the citations issued by Inspector Palma on November 21, 2000, that were presented by the Secretary at the hearing were designated as non-S&S. (Ex. G-8). Two citations were issued because records of monthly fire extinguisher examinations were not being kept. Another citation was issued because a sign was not present on the back of the

hopper warning employees that material is loaded into the hopper from the front side. Another was issued because a breaker panel was not labeled to show what unit it controlled. Another citation was issued for a defective parking brake on a front-end loader. The S&S citation states that the brake lights on the same front-end loader were not working properly. Another citation states that the back-up alarm was not working on a service truck, that is usually parked and is seldom used. The final citation presented states that the compressed-air receiver vessel on the service truck had not been inspected by a boiler and pressure vessel inspector in accordance with the National Board Inspection Code. It appears that Darwin Stratton's examiner was not qualified to perform the vessel inspection.

Most of these citations do not allege violations that were particularly serious. Many of them cited conditions that were not obvious violations. Nevertheless, Darwin Stratton did not present any evidence to rebut the Secretary's evidence as to the S&S nature of the violation. Consequently, I hold that the Secretary established that the violation was S&S. Darwin Stratton's negligence was moderate. I assess a penalty of $75 for this violation based on the company's small size.

II. 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 about four paid citations were issued at the Airport Pit during the two years preceding August 8, 2000. (Ex. G-11). Darwin Stratton is a small operator. Darwin Stratton did not present any evidence that the penalties assessed in this decision will have an adverse effect on its ability to continue in business. With the exception of Citation No. 7984337, the violations were abated in good faith. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. 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:

Citation No.	30 C.F.R. §	Penalty
WEST 2001-528-M		
6282323	56.18002(a)	$75.00
WEST 2001-538-M		
7966590	50.30	200.00

WEST 2001-557-M

7984337	103(a) of Mine Act	$1,000.00
	Total Penalty	$1,275.00

Accordingly, the citations contested in these cases are **AFFIRMED** as set forth above and Darwin Stratton & Son, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,275.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

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

April 18, 2002

CDK CONTRACTING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2001-420-RM
	:	Order No. 7919016; 4/23/2001
	:	
	:	Docket No. WEST 2001-421-RM
	:	Order No. 7919017; 4/23/2001
v.	:	
	:	Docket No. WEST 2001-422-RM
	:	Order No. 7919018; 4/23/01
	:	
	:	Docket No. WEST 2001-423-RM
	:	Order No. 7919019; 4/23/2001
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2001-424-RM
ADMINISTRATION (MSHA), Respondent	:	Order No. 7919021; 4/23/2001
	:	
	:	Docket No. WEST 2001-425-RM
	:	Order No. 7919022; 4/23/2001
	:	
	:	Docket No. WEST 2001-426-RM
	:	Citation No. 7919023; 4/23/2001
	:	
	:	Docket No. WEST 2001-427-RM
	:	Citation No. 7919024; 4/23/2001
	:	
	:	Docket No. WEST 2001-428-RM
	:	Citation No. 7942519; 4/23/2001
	:	
	:	Mine ID 05-00037 L35
	:	Portland Plant/Quarry

ORDER GRANTING, IN PART, CONTESTANT'S MOTION TO COMPEL PRODUCTION

CDK Contracting Company ("CDK") filed a motion to compel the Secretary to produce a document entitled "Draft Fatal Accident at Holnam Cement Plant, Summary of Physical Factors" in response to its discovery requests ("Physical Factors Summary"). The Secretary withheld the Physical Factors Summary pursuant to the deliberative process privilege.

CDK asserts that the Physical Factors Summary contains relevant information that is essential to the preparation of its defense in these cases. One of its employees fell to his death while working at the Holnam Cement Plant, in Florence, Colorado. Employees of the Mine Safety and Health Administration's ("MSHA") Technical Support branch provided assistance to the supervisory MSHA inspector who investigated the accident. In his deposition, this inspector testified that he relied on information contained in the Physical Factors Summary when he issued the citations and orders at issue. CDK contends that the Physical Factors Summary contains information that directly relates to the issues in these cases. It argues that the deliberative process privilege does not apply to factual information contained in the Physical Factors Summary and that it is therefore entitled to this information. In addition, CDK argues that the reasoning behind MSHA's decision to issue citations in these cases is not protected by the privilege. It maintains that the privilege protects personal opinions by agency employees not policies adopted by the agency. CDK argues that, in any event, a document loses its protected status once MSHA relies on the document when taking enforcement actions. In the alternative, it asks for an *in camera* review of the Physical Factors Summary.

The Secretary opposes an *in camera* review and asks that I deny CDK's motion. The Secretary provided CDK with a privilege log which states that the Physical Factors Summary is "privileged pursuant to the deliberative process privilege." She contends that the privilege protects communications between subordinates and supervisors that are antecedent to adoption of agency policy. She states that the Physical Factors Summary is a four-page document prepared by Michael Shaughnessy, an MSHA Mechanical Engineer, for review by Ronald Pennington, an MSHA supervisory mine inspector. Mr. Shaughnessy was assigned to evaluate the physical factors involved in the fatal accident. The Secretary further states that Shaughnessy's Physical Factors Summary includes a "section describing the purpose of the evaluation, an analysis and conclusion about the physical factors that contributed to the fatality, and a section summarizing Mr. Shaughnessy's findings." (S. Response at 6). The Physical Factors Summary was sent to Inspector Pennington before any citations or orders were written and before MSHA issued its written report on the accident, which the Secretary asserts "contains MSHA's final opinion about the contributing factors and causes of the fatal accident investigated by Inspector Pennington's team." *Id.* She states that the contested document was written in order to provide "Inspector Pennington with the perspective of a mechanical engineer on the facts of the case prior to any decisions on citations and orders and the Report of Investigation." *Id.* at 7.

Based on the above, the Secretary contends that the Physical Factors Summary is pre-decisional because it was submitted to the supervisory inspector before any enforcement action was taken and before the final accident report was written. She states that it is deliberative because it is the work product of a "subordinate team member" prepared for use by the lead accident investigator "who is charged with making final agency decisions." *Id.* The Secretary argues that the Physical Factors Summary is "a pre-decisional recommendation by a subordinate team member to an agency decision-maker who was free to accept or reject

the factual conclusions contained within it." *Id.* at 8. The Secretary contends that CDK is free to discover the reasons for any decision made by MSHA in these cases; it just cannot "pry into the agency's internal deliberations." *Id.* at 9.

The Secretary also maintains that any facts contained in the Physical Factors Summary are Shaughnessy's "interpretation of the facts, not the agency's." *Id.* As a consequence, the Secretary contends that the any "facts" contained in the document are also deliberative. She argues that the deliberative process privilege protects the ability of subordinates with technical expertise to present to the agency's enforcement personnel their perspective on the facts of a case without the fear that their view of the facts will be released in future litigation. The Secretary also contends that an *in camera* review is unnecessary because the court can determine that the privilege has been properly invoked without such an inspection.

ANALYSIS

The deliberative process privilege protects the "'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (DC Cir. 1978) (citations omitted). To be covered by the privilege, the material must be both pre-decisional and deliberative. Purely factual material that does not expose an agency's decision-making process is not covered by the privilege unless it is so inextricably intertwined with the deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary's burden to establish that the privilege applies to material it seeks to protect from disclosure.

During his deposition, Inspector Pennington stated that he relied upon information provided to him by Mr. Shaughnessy in the Physical Factors Summary when he issued the citations and orders to CDK. (Pennington Dep. at 174). CDK contends that it is entitled to review this factual information because it was part of the basis for the Secretary's enforcement action. The Secretary maintains that even the factual portions of the Physical Factors Summary represent "Shaughnessy's opinion on what the facts in this case were." (S. Response at 9). The contested document merely contains Shaughnessy's "interpretation of the facts" with the result that the document is protected by the privilege. *Id.*

The Secretary states that Inspector Pennington made the final decision to issue the citations and orders in these cases. CDK is entitled to know what facts Inspector Pennington relied on when he issued citations and orders, no matter what the source of these facts were. I agree with the Secretary that Shaughnessy's "interpretation of the facts" is protected by the privilege. If, however, Inspector Pennington relied on any of "Mr. Shaughnessy's facts" when taking enforcement actions against CDK, then these facts are no longer protected because the agency adopted these facts as its own findings when it took these enforcement actions. *See Newmont Gold Co.*, 18 FMSHRC 1532, 1535-37 (Aug. 1996) (ALJ).

Relying on *National Wildlife Federation v. U.S. Forest Service,* 861 F.2d 1114 (9th Cir. 1998), the Secretary contends that the entire Physical Factors Summary is protected because disclosing the document would expose MSHA's deliberative process to public scrutiny. In that case, the court held that the issue was whether the contested documents were part of the deliberative process of the agency not whether they were essentially deliberative or factual. *Id.* at 1118. The court held, "even if the content of a document is factual, if disclosure of the document would expose 'the decision-making process itself' to public scrutiny by revealing the agency's 'evaluation and analysis of the multitudinous facts,' the document would nevertheless be exempt from disclosure." *Id.* (citation omitted). Under this process-oriented analysis, "documents containing nonbinding recommendations on law or policy would continue to remain exempt from disclosure." In addition,

> [f]actual materials . . . would likewise be exempt from disclosure to the extent that they reveal the mental processes of decision-makers. In other words, whenever the unveiling of factual materials would be tantamount to the "publication of the evaluation and analysis of the multitudinous facts" conducted by the agency, the deliberative process applies.

Id. at 1119 (citation omitted). The Commission adopted this analysis, *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992-93 (June 1992).

The dispute over the deliberative process privilege arose under significantly different circumstances in *National Wildlife Federation* ("*NWF*") than in the present cases. *NWF* involved draft forest plans and draft environmental impact statements that were considered by the agency when it developed a plan for the Wallowa-Whitman National Forest. Many documents and parties were involved in the adoption of the forest plan. The present case involves civil litigation that was initiated after the Secretary issued the citations and orders against CDK. In issuing the citations and orders that engendered these cases, the Secretary relied upon certain facts developed by Mr. Shaughnessy during his investigation. Disclosing to CDK the facts that Inspector Pennington relied upon when issuing the citations will not "reveal the mental processes of decision-makers." The Secretary does not dispute that CDK is entitled to discover the reasons why she issued the citations and orders. Thus, the Secretary will inevitably be revealing the mental processes that MSHA's decision-makers went through when they concluded that CDK violated the agency's safety standards. Disclosing the facts that Inspector Pennington relied upon will, at most, only reveal these same mental processes. The document in question is a four-page summary prepared by Mr. Shaughnessy. Release of the facts in the document that were relied upon by the agency in issuing the citations and orders is not "tantamount to the publication of the evaluation and analysis of the multitudinous facts conducted by the agency." In *NWF*, the agency voluntarily released portions of the disputed documents and the District Court, after an *in camera* inspection, ordered that additional portions be released. *Id.* at 1115-16. On review, the 9th Circuit held that the remaining portions were protected by the privilege because release of the remaining portions

would reveal the agency's deliberative process. *Id.* at 1123. The Secretary has not released any portion of the Physical Factors Summary nor has she shown how the release of facts in the document will reveal MSHA's deliberative processes. She opposes an *in camera* review.

I hold that CDK is entitled to those portions of the Physical Factors Summary that set forth facts relied upon by MSHA when it issued the citations and orders at issue in these cases. Although the Physical Factors Summary is pre-decisional, the facts relied upon by MSHA to justify the issuance of the citations are not deliberative and the privilege does not apply. In her response to the motion to compel, the Secretary stated that she will be calling Mr. Shaughnessy as an expert witness at the evidentiary hearing and that she will produce an expert witness report pursuant to Fed. R. Civ. P. 26(a)(2) when required by the administrative law judge. Thus, as a practical matter, the Secretary will be disclosing prior to trial all of the facts she is seeking to protect here. I find that CDK's need for the information far outweighs the Secretary's interest in keeping it confidential.

ORDER

CDK's motion to compel the production of documents is **GRANTED**, but only to the extent described in this order. It is **ORDERED** that counsel for the Secretary shall direct Inspector Pennington to review the Physical Factors Summary and specify those portions of the document that he relied upon when he determined that the subject citations and orders should be issued to CDK. The Secretary may redact those portions of the Physical Factors Summary that Inspector Pennington did not rely upon in issuing the citations and orders. The opinions and nonbinding recommendations of Mr. Shaughnessy that were not factual in nature need not be released. All information that is purely factual in nature must be released, even if Inspector Pennington did not rely upon such facts. Counsel for the Secretary **SHALL PROVIDE** to counsel for CDK, on or before **May 15, 2002**, those portions of the Physical Factors Summary that I have held are not protected by the deliberative process privilege, as described above. Except as set forth above, CDK's motion to compel the production of documents is **DENIED**.

Richard W. Manning
Administrative Law Judge

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RWM