

COMMISSION DECISIONS

04-05-2004	Double J Sand & Rock	WEST 2003-124-M	Pg. 325
04-05-2004	Christensen Construction & Gravel, Inc.	WEST 2004-117-M	Pg. 329
04-05-2004	Jerry Lee Wildey, employed by Stewart Excavating, Inc.	WEST 2004-157-M	Pg. 333
04-06-2004	Scott Anderson Trucking	WEST 2003-11-M	Pg. 337
04-06-2004	Stillwater Asphalt	PENN 2003-40-M	Pg. 341
04-06-2004	Highlands Mining & Processing Co., Inc.	KENT 2002-242	Pg. 345
04-06-2004	Double J Sand & Rock	WEST 2004-213-M	Pg. 349
04-15-2004	Moab Salt, LLC.	WEST 2004-130-M	Pg. 353
04-22-2004	John Richards Construction	WEST 2000-168-M	Pg. 357

ADMINISTRATIVE LAW JUDGE DECISIONS

04-12-2004	Charles Conn et al, employed by Rockhouse Energy Mining Company	KENT 2002-356	Pg. 361
04-26-2004	Georges Colliers, Inc.	EAJ 2002-2	Pg. 371
04-26-2004	Sec. Labor on behalf of Christopher Wright v. Americold Logistics LLC.	CENT 2004-110-DM	Pg. 377

APRIL 2004

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

Secretary of Labor, MSHA v. Southwest Concrete & Paving, Inc., Docket No. CENT 2004-49-M. (Chief Judge Lesnick, unpublished Settlement Decision issued February 26, 2004)

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

Secretary of Labor, MSHA v. Cannelton Industries, Inc., WEVA 2002-111-R, etc. (Petition for Reconsideration of the Commission's decision issued March 12, 2004)

Secretary of Labor, MSHA v. Hansen's Truck Stop, Inc., Docket No. WEST 2003-284-M, etc. (Judge Zielinski, March 9, 2004)

Secretary of Labor, MSHA v. John Richards Construction, Docket No. WEST 2000-168-M, etc. (Judge Manning, September 13, 2001. The Commission granted a limited request for appeal on July 23, 2002)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 5, 2004

SECRETARY OF LABOR,	:	Docket No. WEST 2003-124-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-02638-05509
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2003-125-M
v.	:	A.C. No. 02-02638-05510
	:	
	:	Docket No. WEST 2003-126-M
DOUBLE J SAND & ROCK	:	A.C. No. 02-02638-05511

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act").¹ On December 23, 2002, the Commission received from Double J Sand & Rock ("Double J") correspondence which we construe as a motion to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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


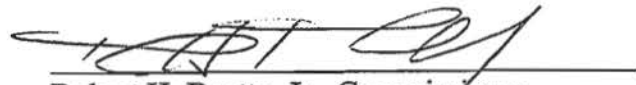
On December 14, 2001, and August 9, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued three proposed penalty assessments (A.C. Nos. 02-02638-05509, 02-02638-05510, and 02-02638-05511) to Double J in La Paz County,

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2003-124-M, WEST 2003-125-M, and WEST 2003-126-M, all captioned *Double J Sand & Rock* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

Arizona. In its motion, Double J contests the merits of the underlying violations and complains about the MSHA inspector's behavior. Mot. Double J attached to its request a copy of a letter, dated September 7, 2001, that it sent to MSHA challenging the citations. The Secretary states that she does not oppose Double J's request for relief.

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

Double J has provided no explanation for its failure to timely contest the proposed assessments. On the basis of the present record, we are thus unable to evaluate the merits of Double J's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Double J's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

Distribution

James E. Jones
Double J Sand & Rock
P.O. Box J
Parker, AZ 85344

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 5, 2004

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

v.

CHRISTENSEN CONSTRUCTION
AND GRAVEL, INC.

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Docket No. WEST 2004-117-M
A.C. No. 42-01828-05513

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

ORDER

BY THE COMMISSION:

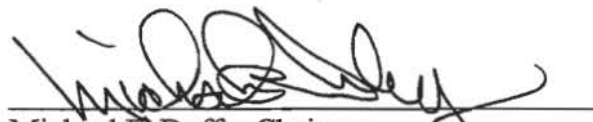
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 20, 2004, the Commission received from Christensen Construction and Gravel, Inc. ("Christensen") a request to reopen a penalty assessment that had become a final order of the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

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

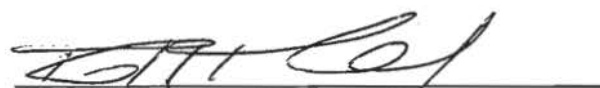
In its request, Christensen states that it failed to contest in a timely manner because it confused the present penalty assessment with an earlier one that it had just settled, which was for a similar amount. Mot. It further asserts that, sometime later, Christensen realized its mistake and contacted the Commission. *Id.* Christensen did not attach any supporting documentation to its request. The Secretary states that she does not oppose Christensen's request for relief.

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

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



Michael F. Duffy, Chairman



Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Distribution

Bert Z. Christensen, Vice President
Christensen Construction & Gravel, Inc.
2151 North 600 West
Logan, UT 84321

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 5, 2004

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

v.

JERRY LEE WILDEY, employed by
STEWART EXCAVATING, INC.

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Docket No. WEST 2004-157-M
A.C. No. 24-02117-09474 A

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 20, 2004, the Commission received from Jerry Lee Wildey, Safety Coordinator and Crusher Foreman of Stewart Excavating Inc., correspondence which we construe as a motion to reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

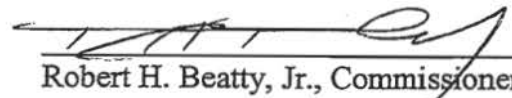

Under section 105(a) of the Mine Act, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); *see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

On September 30, 2003, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 24-02117-09474A) to Wildey. In his motion, Wildey, who is proceeding pro se, states that he was unable to determine the appropriate appeal process to challenge the assessment and that on October 19, 2003, he sent a certified letter to the MSHA Office of Assessments discussing the violations and

requesting lower penalties. Mot. at 1 & attach. Wildey states that in November 2003, he received a phone call from the Office of Assessments, which informed him that it had received his letter but could not reduce the penalties. *Id.* at 1. Wildey further asserts that he was then referred to a number of MSHA district offices and that after speaking with those offices, was again referred to the Office of Assessments where he had started in the first place. *Id.* Only then did the Office of Assessments suggest that Wildey contact the Commission for relief. *Id.* The Secretary states that she does not oppose Wildey's request for relief.

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

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


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

Distribution

Mr. Jerry Lee Wildey
222 Blue Lane
Hamilton, MT 59840

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 6, 2004

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

v.

SCOTT ANDERSON TRUCKING

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Docket No. WEST 2003-11-M
A.C. No. 26-00827-05501 A933

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 13, 2002, former Chief Administrative Law Judge David Barbour issued to Scott Anderson Trucking ("Anderson") an Order to Show Cause for failure to answer the Secretary of Labor's petition for assessment of penalty. On March 12, 2003, Chief Judge Barbour issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

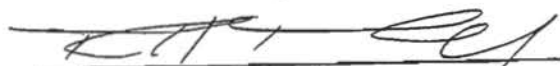

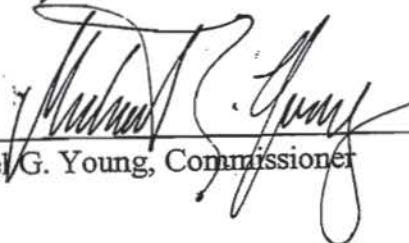
On June 13, 2003, the Commission received from Anderson a letter setting forth its reasons for failing to answer the Secretary's petition for assessment of penalty and to respond to the judge's show cause order. Mot. Anderson states that it negotiated a settlement with the Secretary in which it agreed to pay civil penalties in the sum of \$721 instead of the proposed penalties of \$1442. *Id.*; Mot. to Correct Caption and Approve Settlement at 2. Anderson submits that on April 24, 2003, it paid the settlement amount of \$721. Mot. It states that the Secretary's counsel apparently failed to file the settlement motion in a timely manner because, on March 28, 2003, the operator received the judge's default order, directing Anderson to pay penalties in the amount of \$1442. *Id.*; Default Order dated March 12, 2003. Anderson subsequently received a letter from Judge Barbour stating that the settlement motion was filed on March 31, 2003, after the judge had issued the default order. Letter from Judge Barbour dated May 28, 2003. Finally, Anderson suggests that some confusion in these proceedings may have

been attributable to the use of an incorrect case number in the Secretary's petition for assessment of penalty. Mot. Anderson attached to its letter a copy of Judge Barbour's letter dated May 28, 2003; an Unopposed Motion to Correct Caption and Approve Settlement; and the judge's order of default.

The judge's jurisdiction in this matter terminated when his decision was issued on March 12, 2003. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission has not directed review of the judge's order, which became a final order of the Commission on April 21, 2003.

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

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


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

Distribution

Scott Anderson, President
Scott Anderson Trucking
875 N. Redwood Road
N. Salt Lake, UT 84054

Jan Coplick, Esq.
Office of the Solicitor
U.S. Department of Labor
71 Stevenson St., Suite 1110
San Francisco, CA 94105

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 6, 2004

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

v.

STILLWATER ASPHALT

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Docket No. PENN 2003-40-M
A.C. No. 36-08557-05504

Docket No. PENN 2003-41-M
A.C. No. 36-08557-05505

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act").¹ On November 14, 2002, the Commission received from Stillwater Asphalt correspondence which we construe as a motion to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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



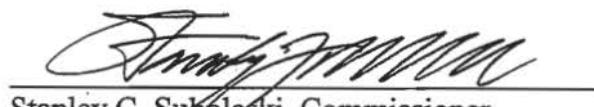

On April 19 and May 31, 2002, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Stillwater Asphalt two proposed penalty assessments (A.C. Nos. 36-08557-05504 and 36-08557-05505). In its motion, Stillwater Asphalt states that the company ceased operations as of December 31, 2001. Mot. No documentation was attached to

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers PENN 2003-40-M and PENN 2003-41-M, both captioned *Stillwater Asphalt* and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

Stillwater Asphalt's motion. The Commission received a response from the Secretary of Labor stating that, because Stillwater Asphalt has identified no grounds for reopening the penalty assessments, she requires additional information before she can express her position on the operator's motion. Sec'y Resp. at 1-2.

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

Stillwater Asphalt has provided no explanation for its failure to timely contest the proposed assessments. On the basis of the present record, we are thus unable to evaluate the merits of Stillwater Asphalt's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Stillwater Asphalt's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

Distribution

Robert Vincent
Stillwater Asphalt
P.O. Box 330
Benton, PA 17814

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 6, 2004

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 2002-242
	:	A.C. No. 15-16011-03530
v.	:	
	:	Docket No. KENT 2002-243
HIGHLANDS MINING & PROCESSING	:	A.C. No. 15-16011-03531
COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act").¹ On July 25, 2002, former Chief Administrative Law Judge David Barbour issued to Highlands Mining & Processing Company, Inc. ("Highlands") an Order to Show Cause in each of these two cases for failure to answer the Secretary of Labor's petitions for assessment of penalty. On September 16, 2002, Chief Judge Barbour issued an Order of Default in each case dismissing the civil penalty proceedings for failure to respond to his show cause orders.

On October 7, 2002, the Commission received correspondence from Robert Stump, president of Highlands, which we construe as a request for relief from the default orders in each case. Mot. In its request, Highlands states that it seeks reconsideration of the default orders because "our representative at this time was ill . . . and we were unaware of the proper procedures in this matter." *Id.* Highlands attached to its request an undated letter to the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2002-242 and KENT 2002-243, both captioned *Highlands Mining & Processing Company, Inc.*, and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

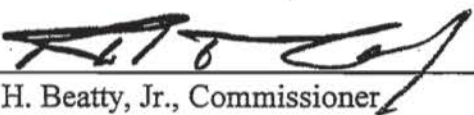
Secretary of Labor's counsel summarizing the circumstances of each citation. Attach. The Secretary has not responded to Highland's request for relief.

The judge's jurisdiction in this matter terminated when his decision was issued on September 16, 2002. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission has not directed review of the judge's orders here, which became final decisions of the Commission on October 26, 2002.

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


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



Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Robert Stump, President
Highlands Mining & Processing Co., Inc.
P.O. Box 280
Whitesburg, KY 41858

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 6, 2004

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

v.

DOUBLE J SAND & ROCK

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Docket No. WEST 2004-213-M
A.C. No. 02-02638-05513

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 6, 2003, the Commission received from Double J Sand & Rock ("Double J") correspondence which we construe as a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

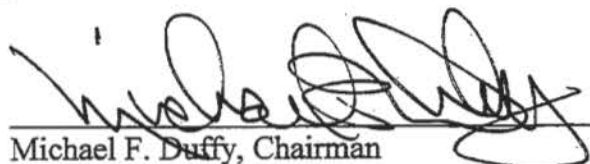
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On or around February 10, 2003, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Double J a proposed penalty assessment (A.C. No. 02-02638-05513). On April 9, 2003, Double J, by its owner, Jim Jones, submitted a request for hearing ("green card") to contest the proposed assessment, which MSHA received on April 12, 2003. However, the penalty assessment had become a final order of the Commission, pursuant to section 105(a), thirty days after Double J received it. In Double J's motion, Jones states that on January 11, 2003, he and his wife were involved in a plane crash, which resulted in his wife's death, leaving him unable to attend to business for several months. Mot. Double J attached to its request a copy of a letter to MSHA's Civil Penalty Compliance Office in Arlington, Virginia

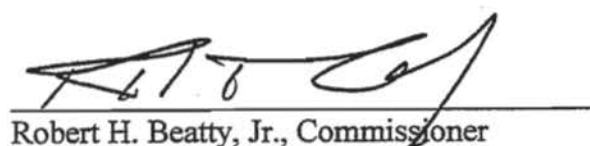
dated April 9, 2003, protesting the citations, a letter from MSHA dated April 18, 2003, acknowledging Double J's late contest letter, and a copy of Barbara L. Jones' death certificate. The Secretary states that she does not oppose Double J's request for relief.

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

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



Michael F. Duffy, Chairman



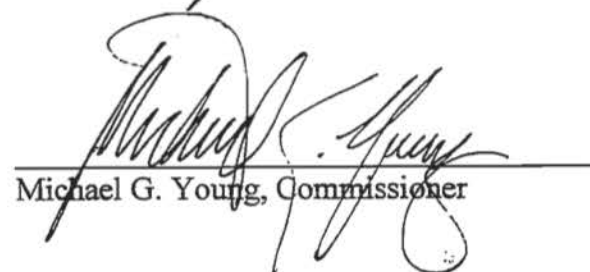
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Distribution

James E. Jones
Double J Sand & Rock
P.O. Box 3337
Parker, AZ 85344

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 15, 2004

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

v.

MOAB SALT, LLC.

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Docket No. WEST 2004-130-M
A.C. No. 42-00155-12176

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 5, 2004, the Commission received from Moab Salt, LLC. ("Moab Salt") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

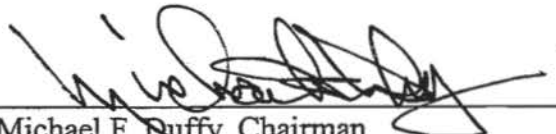
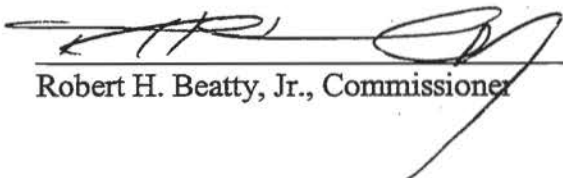
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In its motion, Moab Salt requests relief from the final order. Mot. Moab Salt states that on August 8, 2003, it filed a Notice of Contest challenging Order No. 7907295 as well as three other citations and orders presently before the Commission. *Id.* at 1-2. The contest proceedings were assigned to Administrative Law Judge Richard Manning. *Id.* On October 8, 2003, the Department of Labor's Mine Safety and Health Administration ("MSHA") modified Order No. 7907295 to a citation issued under Mine Act section 104(a), 30 U.S.C. § 814(a). On October 30, 2003, MSHA issued a proposed penalty for Citation No. 7907295, in the amount of \$60.00 (A.C. No. 42-00155-12176). *Id.* at 2. Moab Salt asserts that as a result of internal misunderstanding and confusion over the status of the citation at issue, on or about December 3, 2003, it submitted

a check in the amount of \$60.00 as payment for Citation No. 7907295. *Id.* Moab Salt claims that its intent to contest Citation No. 7907295 is clear, as it filed a pre-penalty Notice of Contest. *Id.* at 2. It did not attach any supporting documentation to its motion. The Secretary states that she does not oppose Moab Salt's request for relief.

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

Having reviewed Moab Salt's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Moab Salt's failure to timely contest the penalty proposal for Citation No. 7907295 and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Michael F. Duffy, Chairman
Robert H. Beatty, Jr., Commissioner
Mary Lu Jordan, Commissioner
Stanley C. Suboleski, Commissioner
Michael G. Young, Commissioner

Distribution

Laura E. Beverage, Esq.
Jackson Kelly, PLLC
1099 18th Street, Suite 2150
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22203

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

April 22, 2004

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

v.

JOHN RICHARDS CONSTRUCTION

:
:
: Docket No. WEST 2000-168-M
: A.C. No. 24-02070-05503
:
: Docket No. WEST 2000-470-M
: A.C. No. 24-02070-05504
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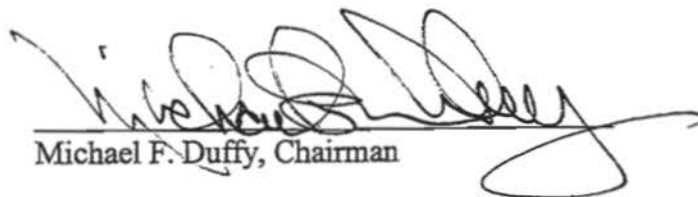
BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

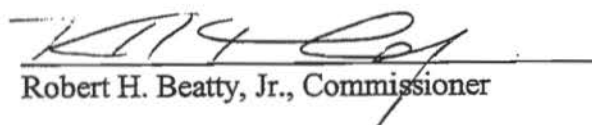
BY THE COMMISSION:

On October 30, 2001, the Commission received from John Richards Construction ("Richards Construction") a request for relief from a final Commission decision. On July 23, 2002, a majority of the Commission issued an order granting the request for the limited purpose of affording the operator an opportunity to provide the Commission with information regarding the filing of its request. On August 5, 2002, the Commission received from Richards Construction the additional information. On October 1, 2002, the Commission received from the Secretary of Labor an opposition to Richards Construction's request for relief.

Having considered the matter, we hereby deny the request for relief.



Michael F. Duffy, Chairman



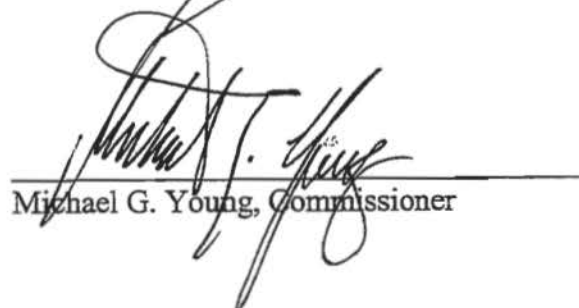
Robert H. Beatty, Jr., Commissioner



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Distribution

John Richards
John Richards Construction
P.O. Box 316
Seeley Lake, MT 59868

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22203

Administrative Law Judge Richard Manning
Federal Mine Safety and Health Review Commission
1244 Speer Boulevard, Suite 280
Denver, CO 80204-3582

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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

Washington, DC 20001

April 12, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	
v.	:	
	:	
CHARLES CONN, employed by	:	Docket No. KENT 2002-356
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03599 A
	:	
CHARLES MORLEY, employed by	:	Docket No. KENT 2003-161
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03624 A
	:	
MITCHELL SALMONS, employed by	:	Docket No. KENT 2002-357
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03600 A
	:	
TOMMY FLUTY, employed by	:	Docket No. KENT 2002-358
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03601 A
	:	
ROGER MANN, employed by	:	Docket No. KENT 2003-162
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03625 A
	:	
GARY VARNEY, employed by	:	Docket No. KENT 2003-163
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03626 A
	:	
and,	:	Docket No. KENT 2003-164
ROCKHOUSE ENERGY MINING CO.,	:	A.C. No. 15-17651-03627
Respondents	:	
	:	Docket No. KENT 2003-5
	:	A.C. No. 15-17651-03602
	:	
	:	Mine No. 1

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor,
Nashville, Tennessee, for Petitioner;
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West
Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Rockhouse Energy Mining Company and Charles Conn, Charles Morley, Mitchell Salmons, Tommy Fluty, Roger Mann and Gary Varney, all employees of Rockhouse, pursuant to sections 105 and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820(c). The petitions allege 13 violations of the Secretary's mandatory health and safety standards by Rockhouse, two violations by Conn and one each by Morley, Salmons, Fluty, Mann and Varney. The Secretary seeks penalties of \$67,000.00 against Rockhouse, \$1,500.00 against Conn, \$800.00 against Morley, \$500.00 against Salmons, \$2,000.00 against Fluty, \$500.00 against Mann and \$2,000.00 against Varney. A hearing was held in Pikeville, Kentucky. For the reasons set forth below, I dismiss the petitions against Conn, Morley, Salmons, Fluty, Mann and Varney, vacate Order No. 7378603 in Docket No. KENT 2003-5, affirm the remaining orders and citations in Docket No. KENT 2003-5 and assess a penalty of \$42,700.00 against Rockhouse.

Settled Orders and Citations

Prior to the hearing, the parties submitted an agreement to settle 11 of the 13 orders and citations in Docket No. KENT 2003-5. The agreement stated that the Secretary had vacated Order No. 7383667. It proposed a reduction in penalty from \$45,000.00 to \$33,700.00 for the other ten orders and citations. After considering the representations and documentation submitted, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and accepted the settlement. (Tr. 16.)

At the commencement of the hearing, the parties stated that they had also settled Order No. 7378610, in Docket No. KENT 2003-5, and the individual civil penalty dockets, Docket Nos. KENT 2003-161, KENT 2003-162, KENT 2003-163 and KENT 2003-164, associated with that order. The agreement provided that Secretary agreed to dismiss the individual cases and Rockhouse agreed to pay the proposed penalty of \$9,000.00 for the order in full. Again, after considering the representations and documentation submitted, I concluded that the settlement was appropriate under the 110(i) criteria and accepted the settlement. (Tr. 20.)

The provisions of the agreements will be included in the order at the end of this decision. With the settlements, the only thing remaining to be tried was Order No. 7378603 in Docket No. KENT 2003-5 and the associated individual cases against Conn, Morley and Salmons, Docket Nos. KENT 2002-356, KENT 2002-357 and KENT 2002-358.

Background

Rockhouse Energy Mining Company operates Mine No. 1, an underground coal mine, in Pike County, Kentucky. The mine is a fairly large one and employed around 120 employees in the summer of 2001. At that time, it used both continuous miner and longwall miner mining methods. The one and two sections consisted of longwall panels and the three section was being

mined by a continuous miner in the room and pillar configuration preparatory to also becoming a longwall section.

A roof fall occurred during the second shift on July 17, 2001. The fall happened in the No. 3 belt entry beginning in crosscut 52 and heading up the entry toward crosscut 53. Charles Morley, the second shift mine foreman, arrived at the fall site sometime between 9:30 p.m. and 10:00 p.m. He had the area "dangered off," then he called the superintendent to tell him about the fall and to have the superintendent notify the state and federal mine agencies. Morley next had a scoop brought up to the area and he began cleaning up around the edges of the fall in crosscut 52. He took the material that he cleaned up back down the track entry to crosscut 50 and deposited it by a stopping that was between the return airway and the track entry. Morley was still trying to clean up with the scoop when the third shift arrived in the area between 12:00 and 12:30 a.m.

Mitchell Salmons was foreman of the third shift move crew. He arrived at crosscut 52 with his crew, Robert Crabtree, Tracy Dingess and Charles Sturgill. Charles Conn, also a move crew foreman on the third shift, was in the mantrip with Salmons and his crew. Salmons and Conn proceeded from the track entry up crosscut 52 to examine the fall. Crabtree, Dingess and Sturgill stayed in the track entry and helped unload machinery and supplies as they were brought to the area.

Morley stopped working with the scoop shortly after the third shift arrived and the scoop was taken back to the charger to be recharged. The three foremen then waited for a roof bolter to be brought to the site. The bolter finally arrived sometime around 4:00 a.m. After it was set-up, Conn began installing bolts. He put ten bolts, in two rows, across crosscut 52, by the edge of the fall, and ten bolts, in two rows, across the belt entry, across the front of the fall. Then he put 11 bolts around the inside edge of where the roof had fallen. Salmons helped him with this until he left at 4:30 a.m. to perform a preshift examination of another section.

When Conn finished bolting, Morley brought the scoop back up and began more cleaning around the edge of the fall. Because the scoop was not fully charged, he began putting the material that he cleaned up on the right side of the fall area by the stopping in crosscut 52 that separated the belt entry and the intake airway. He stopped around 5:30 a.m. and attempted to take the scoop back to the charger. He did not make it, however, as the scoop became "hung-up" on the track.

Morley, who had been working since the second shift, then left for home. No further clean-up was done on the roof fall. The foremen had cleaned up about one third of the fall material.

MSHA Inspector William Cole was assigned to investigate the roof fall and arrived at the mine about 8:30 a.m. on July 18. He went into the mine with Kentucky Inspector Randal Smith, Gary Goff, Mine Superintendent, and Gary Varney, first shift foreman. They met the third shift

coming out, so the third shift had to back up several crosscuts where both mantrips could park. The inspection team then walked up the belt entry to the fall.

Based on his investigation, Inspector Cole concluded that Conn, Morley and Salmons had been working under unsupported roof. Consequently, he issued Order No. 7378603, which alleged a violation of section 75.202(b) of the Secretary's regulations, 30 C.F.R. § 75.202(b), because:

Persons were allowed to work inby permanent roof support in the No. 3 belt entry where a roof fall had occurred. Evidence showed that the roof fall was cleaned from the left side of the fall pushing the rock into the right crosscut placing the scoop operator inby permanent roof support[.] The cleaned area of the fall was 16 feet as measured from the last row of permanent roof support to the toe of the fall. There was oil deposited on the mine floor where 11 roof bolts had been installed in the roof where the fall had occurred without safety post [*sic*] or jacks being used for temporary roof support. The ATRS installed on the 300 Galis roof drill would not reach the mine roof due to the height of the fall. There were no safety post [*sic*] or jacks present at the site. The conveyor belt had been cut with a knife 14 feet inby permanent roof support.

(Jt. Ex. 1.) Section 75.202(b) provides that: "No person shall work or travel under unsupported roof"

Findings of Fact and Conclusions of Law

As always, the Secretary has the burden of proving that the alleged violation happened. In this matter, her case is based essentially on the testimony of Inspector Cole. Inspector Cole did not arrive at the mine until after the roof fall and partial cleanup had been accomplished. Thus, his evidence is based on the observations he made at the scene, the conclusions he drew from those observations and statements he and Inspector Smith got from witnesses. Unfortunately for the Secretary, with the exception of one unbelievable witness, none of the miners, who were either interviewed by Cole and Smith and/or testified at the trial, support the Secretary's theory of the case. Furthermore, the physical evidence observed by Inspector Cole is susceptible to more than one interpretation and is not strong enough to overcome the testimony of the witnesses. Therefore, I find that the Secretary has not proved that a violation of section 75.202(b) occurred.

As indicated in his order, three factors led Inspector Cole to conclude that the three foremen had been working under unsupported roof. The first was the presence cleaned up roof

fall material located on the right side of the fall area against a stopping.¹ The second was the presence of roof bolts placed in the roof, inside the fall area, at a height which he believed exceeded the height that the roof bolting machine's automatic temporary roof support (ATRS) would reach. Finally, the third factor was a piece of conveyor belt which he believed had been cut by someone while under unsupported roof. These factors will be discussed *seriatim*.

Cleaned-up material on the right side of the fall.

Inspector Cole testified that he inferred that the roof fall had been cleaned up from the left side of the fall, pushing the rock into the right crosscut, because "[t]hat would have been the only way, due to the conditions, that they would have pushed it in there." (Tr. 69.) However, he also testified that the material could not be pushed straight across the entry. He said that if one did that, "[y]ou'd run your batteries down. There's too much digging. There's not enough power to flip this stuff up and bring it back in your bucket." (Tr. 76.) The inspector further testified that when cleaning up with a scoop you have to work around the edges of the fall material. (Tr. 76, 157-58.) He also testified that because the operating controls of a scoop are located 12 feet behind the scoop's bucket, a miner operating the scoop could stay under supported roof and work 12 feet into the fall. (Tr. 158.) Finally, he testified that there was no evidence that equipment had traveled over the top of the remaining fall material. (Tr. 71.)

Morley testified that he began scooping from the edge of the fall and took the material he cleaned up back to crosscut 50. (Tr. 422-23.) He was doing this when the third shift arrived. (Tr. 424.) He said that he was "under supported [*sic*] at all times," that the mine had "reflectors hung on the bolts" to indicate the last row of support and he was "watching it." (Tr. 424-25.) He said that he cleaned up around the toe of the fall, that "there was room to get a scoop around through there and still be under support." (Tr. 425.)

After cleaning around the edges of the fall, Morley stopped so a roof bolter could be brought in to bolt the brow of the fall. While waiting for the roof bolter the scoop was put on a charger. (Tr. 428.)

After Conn finished bolting, Morley testified that:

We brought the bolter out, took the scoop back and I cleaned across the front across the outby end. And there was some gob in that break, and I cleaned it up, took it out, put it in. Then I pulled over with the scoop end to[ward] that break, and back down toward the belt and then cleaned up the fall.

¹ To assist in understanding the facts in this case, Joint Exhibit Three, a not-to-scale drawing of the area of the fall made by Inspector Smith, is attached to this decision as Appendix I.

(Tr. 429-30.) Morley said that the second time that he cleaned with the scoop he put the fall material in the break on the right side of the fall because: "I didn't have a whole lot of power in the scoop, so I wanted to put it closer. So I put it over in that break." (Tr. 436-37.) He testified that he was able to perform this second cleanup while under supported roof. (Tr. 438.) After he finished, he attempted to return the scoop to the charger, but it got "hung up" on the track. (Tr. 439.)

Charles Sturgill and Robert Crabtree, two hourly employees called by the Secretary, testified that they observed Morley working around the edges of the fall and staying under supported roof. (Tr. 288, 316.) Salmons and Conn also testified that Morley did not operate the scoop under unsupported roof. (Tr. 391, 478-79, 490.)

Only Tracy Dingess, another hourly employee called by the Secretary, testified that the scoop was "going through the intersection." (Tr. 333, 343.) On cross examination, he later equivocated:

Q. Okay. All right. So you see [the scoop] operating up there, but you don't know whether it's under supported top or not, because you're 70 feet away and you don't know what's bolted and not bolted; right?

A. Well, I just saw it going through the intersection. It could have been, it could not have been. It could have been on this side, but I saw him go through the intersection.

(Tr. 343-44.)

Whatever he meant to say, I did not find him to be a credible witness. When they interviewed him on the day of the investigation, less than 12 hours after allegedly witnessing it, Dingess did not tell Cole and Smith that he seen Morley operating the scoop under unsupported roof, even though Cole specifically asked him that question. (Tr. 350-51, 522.) In addition, he allegedly observed this from the track entry between crosscuts 52 and 53, some 70 feet from the fall area, in a crosscut that was lighted only by miners' cap lights and the scoop's lights. (Tr. 343-45.) Furthermore, his testimony was contradicted by the testimony of Conn, Morley and Salmons. More importantly, it was also contrary to the testimony of Crabtree and Sturgill, who were together with him when he purportedly made his observations. (Tr. 344, 362.) Finally, Dingess' manner and demeanor while testifying indicated that what he had to say was not reliable.² Therefore, I give his testimony no weight.

² Indeed, even before he claimed that he had seen Morley go through the intersection, I found myself wondering why the Secretary had saved him for last because he seemed to be such a poor witness.

One factor leading to Cole's conclusion that the fall material had been pushed from left to right across the entry was his belief that all of the material that was cleaned up was located in the crosscut on the right side of the fall. (Tr. 159, 197.) He said he was not aware that any material had been taken back to crosscut 50. (Tr. 159, 197.) However, as noted above, Morley, when he was cleaning the first time, took the material back to crosscut 50. This was confirmed by Sturgill, Crabtree, Salmons and Conn. (Tr. 274-75, 322, 380, 479.)

The Secretary's case that Morley operated the scoop under unsupported roof is based almost exclusively on Cole's conclusion that that is what must have happened. There is no physical evidence, such as scoop tracks clearly going under unsupported roof, to support Cole's theory. In fact, he testified that there was no evidence that equipment had gone over the fall material. On the other hand, testimony of those who participated in the cleanup plausibly explained how, taking into consideration the 12 feet from the bucket of the scoop to its operator controls, which are on the side of the scoop, and its eight foot width, the cleanup was performed without going under unsupported roof. One of the reasons that Cole believed that the scoop had to have gone under unsupported roof was his assumption that all of the fall material had been placed on the right side of the fall. The testimony indicates, however, that that was not the case. Much of the material was taken two crosscuts outby the fall and the scoop was not taken around the right side of the fall until the roof had been bolted.

Roof bolts inside the fall area, installed at a height higher than the ATRS would reach.

Inspector Cole believed that 11 roof bolts had been installed around the brow of the area where the fall had come out of the roof, while the roof bolt operator was under unsupported roof. He reached this conclusion because there were no timbers or steel safety jacks of appropriate length, that could have been used as temporary roof support, in the area of the fall when he examined it, there were oil spots on the floor where he believed the roof bolter was used and he thought that the roof was higher than the roof bolter's ATRS would extend. (Tr. 89-97.) Since the company does not claim that temporary roof supports were used, the issue is whether roof bolting was performed without the proper use of the bolter's ATRS.

The inspector estimated that the mine roof was six and one half to seven feet high and that after the fall it was 12 feet high. (Tr. 93-4, 162.) He agreed that the cavity in the roof left by the fall tapered up from the edge. (Tr. 180-81.) He said that with use of the "stab jack," the ATRS would reach a height of seven and one half feet. (Tr. 94, 162.) He did not, however, measure the height of the roof where the 11 bolts were installed. (Tr. 209.)

Conn testified that the highest point where he installed a roof bolt was "eight feet, eight and a half." (Tr. 501.) He testified that at all times when he installed the 11 roof bolts his ATRS was against the roof. (Tr. 485-86.) He explained that to be able to reach the roof, "[w]e took and moved some material to where I could get the pinner, or the roof bolter up on the edge of the fall, the gob and stuff, so that we could get up into the cavity part and start bolting" (Tr. 484.)

He said that he only put in the 11 bolts because “any farther out through there, my t-bar wouldn’t—I mean, my ATRS wouldn’t touch the top.” (Tr. 485.)

Morley corroborated Conn’s testimony. He estimated the height of the bolted area inside the brow was “only about eight-foot high . . .” (Tr. 433.) Relating how Conn was able to install the bolts, he said: “Well, I left some rock in there on the bottom. Just a little bit and packed it down with the scoop bucket. He backed down there and he run up on that and he raised the canopy up to bolt it.” (Tr. 433.) He confirmed that the ATRS was touching the roof in that area. (Tr. 433.)

The only testimony contrary to Morley’s and Conn’s was Dingess’. He claimed that the ATRS would not reach high enough “to do what they were going to do or needed to be done.” (Tr. 337.) He asserted that “you could just tell that it was going too far.” (Tr. 362.) For the reasons enumerated in the previous section, I do not find this testimony credible. I find it particularly significant that he was 70 feet away from the area, looking at an unlighted roof, and would further have his view blocked by the top of the ATRS being inside of the brow.

Cole also believed that oil on the floor had leaked from the roof bolter, which indicated that the bolter had been operated under unsupported roof. (Tr. 85-87.) However, this circumstantial evidence is not persuasive because: (a) Cole admitted that the area he pointed out as having oil was not under an area where roof bolts were installed; and (b) he admitted that what he thought was oil could, in fact, have been pieces of black draw rock. (Tr. 167-68.)

Once again the testimonial evidence does not support Cole’s theories and the circumstantial evidence is, at best, equivocal. Thus, the Secretary has not shown that roof bolts were installed in areas where the ATRS did not support the roof.

Cut Conveyor Belt

Finally, Inspector Cole cited a cut conveyor belt as evidence that someone had gone under unsupported roof. The belt was located 14 feet in by supported roof and it was Cole’s theory that a miner had gone under the unsupported roof to cut it with a knife. (Tr. 105-107.) He believed that it had been cut with a knife because of “[t]he clean edge on the belt.” (Tr. 105.) He did not think that it could have been cut by the scoop because: “There was no ragged edges on the belt. If the scoop had torn that, you would have strings, it would [have] stretched it. There would have been jagged edges.” (Tr. 107.)

Morley testified that he “didn’t think too much about it at the time, really,” but believed that he hit the belt “with the scoop and it just came out with the scoop.” (Tr. 434-35.) The evidence provides more support for Morley’s contention than it does for the inspector’s.

In the first place, an examination of the picture of the belt in question does not show a straight, smooth cut. (Govt. Ex. 2A.) Instead, it shows at least two places where frayed strings

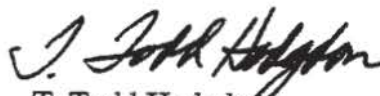
are sticking out of the belt as well as several jagged areas on the top half of the belt. In the second place, the belt was under the roof fall material. (Tr. 192, 435.) Thus, it could only have been cut by a knife after the roof fall was cleaned up. There does not appear to be any reason why the belt would have been cut after the area was cleaned. Consequently, I find that it is more likely that the belt was cut when the scoop was cleaning the area, than when the area had already been cleaned.

Conclusion

The Secretary's case on this order is based primarily on circumstantial evidence. That is, the inspector reached his conclusions based on his view of the scene, after the alleged working under unsupported roof had occurred, and not on eye witness testimony. However, the witness evidence is contrary to the inspector's conclusions. While the testimony of Conn, Morley and Salmons could be suspect because of their obvious interest in the case, I find it to be credible. Their explanation as to what they did is reasonable and not inconsistent with the facts reported by the inspector. Further, it is corroborated in many respects by Crabtree and Sturgill, who do not have the foremen's interest in the outcome of the case. With the exception of Dingess, none of the witnesses' demeanor and manner while testifying indicated that they were not worthy of belief. Accordingly, I find that the Secretary has not proven a violation of section 75.202(b) as alleged and will vacate the order and dismiss the petitions against Conn, Morley and Salmons.

Order

In accordance with the discussion above, Order No. 7378603 in Docket No. KENT 2003-5 is **VACATED** and Docket Nos. KENT 2002-356, KENT 2002-357 and KENT 2002-358 are **DISMISSED**. In accordance with the settlement agreements, the remaining orders and citations in Docket No. KENT 2003-5 are **AFFIRMED**, Docket Nos. KENT 2003-161, KENT 2003-162, KENT 2003-163 and KENT 2003-164 are **DISMISSED** and Rockhouse Energy Mining Company is **ORDERED TO PAY** a civil penalty of \$42,700.00 within 30 days of the date of this decision.

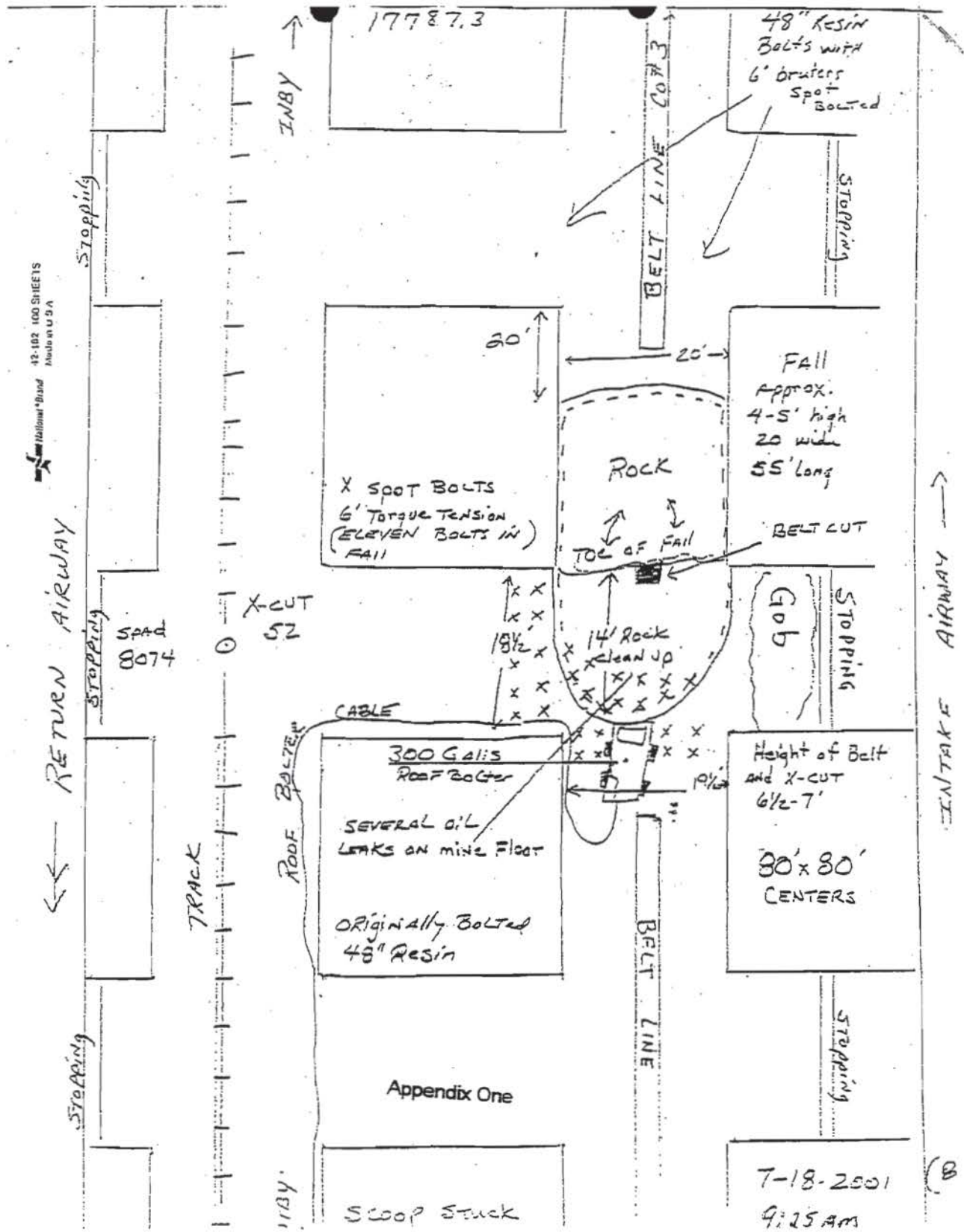


T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

Distribution: (Certified Mail)

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor,
2002 Richard Jones Road, Suite B-201, Nashville, TN 37215-2862

Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, The Spilman Center,
P.O. Box 273, Charleston, WV 25321



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

Washington, D.C. 20001-2021

Fax No.: (202) 434-9949

April 26, 2004

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

v.

GEORGES COLLIERS,
INCORPORATED

: Docket No. EAJ 2002-2
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DECISION ON REMAND

This Equal Access to Justice Act (EAJA) case has been returned to me by the Commission with instructions to determine whether the penalties proposed by the Secretary were substantially in excess of those assessed, whether the penalties proposed were unreasonable, and, if so, whether circumstances exist which, nonetheless, should bar an award. The remand is necessary because, when I initially ruled on Georges Colliers, Inc.'s (GCI's) application for attorney's fees (Georges Colliers, Inc., 24 FMSHRC 572 (June 2002)), I did not apply "the standard set forth in Commission EAJA Rule 105(b)¹ and the legal principles set forth in L&T Fabrication [& Constr., Inc., 22 FMSHRC 509 (April 2000)]²" (Georges Colliers, Inc., 26

¹ Commission Rule 105(b) (29 C.F.R. §2704.105(b)) states in part:

If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof is on the applicant to establish that the Secretary's demand was substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision.

² L&T Fabrication establishes:

a two-part test for determining whether fees should be awarded. The first prong is largely quantitative, focusing on whether . . . the Secretary has proposed a penalty that is "substantially in excess of" the penalty ultimately assessed

The Commission directed that when considering whether the proposed penalties are “substantially in excess” of the assessed penalties, I should compare the amounts proposed by the Secretary with the amounts I assessed in the underlying civil penalty cases. (“The benchmark should . . . [be] the penalties that the judge finally imposed” (26 FMSHRC at 9).) The Commission added that in making the determination I should consider the percentage the proposed penalties were reduced and whether the Secretary’s proposals were motivated to extract a speedy settlement, or for other onerous reasons (Id. at 10).

In addition, the Commission observed that the Secretary’s Program Policy Manual (PPM) sets out a procedure by which an operator may seek adjustment of a proposed penalty by submitting a written request to the District Manager for a review of the operator’s financial status and for a determination as to whether a reduction in the proposed assessment is warranted (26 FMSHRC at 12). The Commission stated that although “the record evidence and the PPM indicate that there was a procedure for submitting financial data that GCI followed in at least some cases . . . there is an absence of record evidence indicating that the Secretary ever responded to GCI’s submission” (Id. at 14). Therefore, the Commission instructed me to examine “whether the Secretary sufficiently considered GCI’s evidence of its ability to continue in business when the information was submitted” (Id. at 11); or, put another way, to “address the effect, if any, of the Secretary’s consideration of and response to GCI’s financial data after the issuance of the proposed penalties, given the procedures in the PPM” (Id. at 14).

Finally, depending on my conclusions regarding the “substantially in excess” and “reasonableness” issues, the Commission noted I might need to determine whether GCI’s actions or other circumstances made an otherwise valid award unjust (26 FMSHRC at 15).

Following the remand, I requested that the parties comment upon the issues flagged by the Commission (Order on Remand (February 6, 2004)). They have responded and, for the reasons that follow, I hold that GCI is not entitled to an award.

I. Were the proposed penalties substantially in excess of the assessed penalties?

In L&T Fabrication, the Commission stated that “substantially in excess” means “considerable in amount, value or the like; large” (22 FMSHRC at 515-516 (citation omitted)). The penalties initially proposed by the Secretary totaled \$332,701, and I assessed penalties of

by the Commission. . . . [T]he second prong is qualitative, and presents the issue of whether the Secretary has acted reasonably in proposing a particular penalty.

22 FMSHRC at 514. To recover fees, both parts of the test must be met (Id.).

\$72,298, a reduction of 78%. The percentage of the reduction was nearly as large as that in U.S. v. One 1997 Toyota Land Cruiser, 248 F.3d 899 (9th Cir. 2001). There, the Government settled the case it valued at \$40,000 for a \$1,000 fine and \$4,000 in costs, and the court found the reduction constituted a “substantial disparity” between the amount sought and the final judgment (248 F.3d at 906). Application of the Commission’s definition and case precedent at first blush suggest that the reduction of the proposed penalties to those ultimately assessed was “considerable in amount, value or the like; large” (22 FMSHRC at 515-516) and, thus, met the substantial disparity requirement. However, I am persuaded that more than the reduction and the proposed assessments must be considered.

As the Secretary persuasively points out, her proposals must be viewed in the context in which they arose and were litigated (Sec’s Response to Order on Remand 3-6). The cases involve approximately 547 citations issued between August 11, 1998, and July 18, 2000. The initial penalty proposals were calculated by MSHA’s Office of Assessments through application of the Secretary’s civil penalty assessment regulations (30 C.F.R., Part 100). However, and as discussed more fully below, the Secretary did not remain wedded to the original proposals. On June 27, 2000, after a large majority of the assessments at issue had been proposed, GCI submitted documentary data to MSHA concerning the financial status of the company.³ Based on the data, the Secretary’s counsel responded by offering to reduce all proposed assessments by 50%.⁴

When the EAJA was debated, then senator, Dale Bumpers, gave an example of what would constitute an excessive demand. He stated, “if the Government sought \$1 million to settle the case and the judge . . . awarded, for example \$1000 or \$5000, the defendant should be able to recover his fees” (142 Cong. Rec. S. 2148-04, 2156 (March 15, 1996)). Thus, it seems clear that Congress did not envision the Government’s demand as a static concept, but, rather, recognized that under some circumstances it could include an offer of settlement made after an initial proposal. Here, it is proper to treat the Secretary’s settlement offer as the Government’s demand because, as Secretary points out, a majority of the original assessments were based on information available to MSHA at the time and that information did not include the financial data the company later submitted (Sec. Response To Order on Remand 6-7).

When the Government’s all-inclusive settlement offer is viewed as its demand, my assessments represent an approximate 43% reduction of the demand. In the context of Mine Act cases, such a reduction by a Commission judge is not uncommon and is not “considerable in amount, value or the like; large” (22 FMSHRC at 515-516), and I conclude the reduction does

³ This is the data which the Commission instructed me to consider in applying the L&T Fabrication test (26 FMSHRC at 11, 14).

⁴ GCI rejected the offer and, on August 24, 2000, GCI’s counsel advised the Secretary’s counsel of the rejection (Sec. Response to Order On Remand, Exh. C).

not establish a substantial disparity between the demand and the final assessments.⁵ This is especially true given the fact the posture of the cases required the Secretary to act solely on the basis of the written, unexplained documents.

As for the Secretary's proposing onerous penalties for a nefarious purpose -- e.g., to extract a speedy settlement -- as I previously found, MSHA did nothing other than "faithfully follow and properly apply the [assessment] regulations it was compelled to follow" (24 FMSHRC at 574-575). There is no indication the Secretary was trying to force a settlement that was unfair to CGI or that the Secretary had any other disreputable purpose in mind.

II. Were the proposed penalties reasonable?

Although a denial of GCI's EAJA application can rest solely on the conclusion the Secretary's proposed demands were not substantially in excess of the assessed penalties, I also conclude the proposed penalties were reasonable.

Congress cautioned that an EAJA determination "should not be a simple mathematical comparison." Rather, the proposed penalty must be "so far in excess of the true value of the case, as demonstrated by the final outcome, that it appears the agency's assessment . . . did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case" (142 Cong. Rec. S. 3242, S. 3244 (March 29, 1996)). The Commission stated the issue as "whether the Secretary . . . acted reasonably in proposing a particular penalty" and, like Congress, indicated that "reasonableness" must be decided within the context of the "actual facts and circumstances of the case" (L & T Fabrication, 22 FMSHRC at 514).

Here, the "facts and circumstances" include more than the mechanics of the initial assessment process. They also include the Secretary's counsel's response to the financial information submitted by GCI to the agency.

The PPM states that within 30 days of the receipt of a proposed assessment, an operator may submit a written request to an MSHA district manager for review of the operator's financial status and that, upon receipt of the request, MSHA will suspend processing the case until a determination is made as to whether the proposed penalty should be reduced (PPM, Part 100 at 46 (2001)). GCI's June 27, 2000, letter to the MSHA district manager has been referenced above. It is the letter in which GCI's attorney requested a review of the company's financial status with regard to three citations and "all other outstanding proposed assessments" (26 FMSHRC at 13 (quoting GCI Resp. to Opp'n to Appl., Ex. 4)). As has been noted, the letter was

⁵ In my initial decision, I expressed my reluctance to rely on undocumented settlement proposals (24 FMSHRC at 577 n. 1). Here, however, there is no question but that the Secretary made the offer, and GCI's rejection is documented by its own counsel's letter (Sec's Response to Order on Remand 12, Exh. C (August 24, 2000, letter of GCI's counsel rejecting "offer to settle at the rate of fifty percent (50%)").

accompanied by financial data. As has also been noted, the Commission found no evidence in the record that MSHA responded to the request as required by the PPM (Id. at 13).⁶ In other words, it found no evidence MSHA “suspended processing of the case until a final determination [was] made as to whether a financial reduction [was] warranted” and it found no evidence MSHA’s Assessment Office “notified . . . [GCI] of a final decision via certified mail” (PPM, Part 100 at 46 (2001)). This is why the Commission instructed me to “address the effect, if any, of the Secretary’s consideration of and response to GCI’s financial data after the issuance of proposed penalties, given the procedures in the PPM” (26 FMSHRC at 14).

Although GCI submitted financial data to MSHA on June 27, 2000, the data was timely with respect to only a few of the proposed assessments. GCI did not comply with the PPM by submitting timely data with respect to the vast majority of the penalty proposals (see Secretary’s Response to Order on Remand at 11). As for MSHA, it, too, did not follow the PPM, in that its Assessment Office did not notify GCI by certified mail as to whether it would reduce the few assessments to which the data actually applied. However, the Secretary maintains, and I agree, that the agency essentially followed the spirit of the PPM because, when it received the financial information, it evaluated the data and decided that, timely or not, the agency would accept the request of GCI’s counsel that the data be applied to all of the proposed assessments. As a result, the Secretary determined the data warranted a 50% reduction in all of the proposed penalties, and the Secretary so advised GCI’s counsel (Sec’s Response to Order on Remand 12).

In view of the Commission’s instruction to address “the effect, i[f] any, of the Secretary’s consideration of and response to GCI’s financial data after issuance of the proposed penalties” (26 FMSHRC at 14) and given the law that the Secretary must make a “reasonable effort to match the penalty to the actual facts and circumstances of the case” (L & T Fabrication, 22 FMSHRC at 515-516, quoting Join Statement at S. 3244), I conclude that the Secretary’s response to the financial information submitted to her by GCI – that is the Secretary’s offer to settle the matters by reducing all proposed penalties by 50% – represented a reasonable effort to match the penalties to the facts and circumstances. While the Secretary did not comply with the procedures set forth in the PPM, neither, in most instances, did GCI. Still, when presented with documentary evidence of GCI’s fiscal condition and the effect the proposed penalties would have on the company, the Secretary responded in the way the PPM contemplates, in that she considered the data and offered to effectively lower the proposed penalties. Since at the point the offer was made the vast majority of the assessments already had been contested, the offer was a logical and efficient way for the Secretary to proceed.

While the proposed reduction was not as large as the reduction I ultimately found was warranted, it is important to remember it was based, as it had to be, solely on the documents. The Secretary did not – indeed, could not – rely as I did on Jackson’s sworn testimony (see 24

⁶ The Commission observed that “GCI’s president, Craig Jackson, testified at trial that GCI had submitted to MSHA the financial documents that were exhibits at trial and heard nothing in response” (26 FMSHRC at 13, citing to Tr. 579-80).

FMSHRC at 577). She acted on the only information she had and, in so doing, she acted reasonably. The fact that she offered a 50% reduction rather than the 78% reduction I ultimately imposed should not make her liable for attorney's fees. This is especially true when it is recalled that consideration of an operator's ability to continue in business is but one of the civil penalty criteria and that the weight accorded it in assessing and proposing penalties is not fixed (see 30 C.F.R. § 100.3(h)).

For these reasons I conclude that the penalties the Secretary effectively proposed were reasonable.⁷

The application is **DENIED** and the proceeding is **DISMISSED**.


David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution:

Elizabeth M. Christian, Esq., 7229 Nohl Ranch Road, Fort Worth, TX 76133

Robin A. Rosenbluth, Esq., Office of the Solicitor, U. S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

⁷ Given my conclusions regarding the prongs of the L&T Fabrication test, I need not reach the issue of whether GCI should be denied an award because it committed willful violations, acted in bad faith, or because of special circumstances. However, were I required to rule, I would reject the Secretary's argument that the stipulated number of violations found to be unwarrantable and significant and substantial contributions of mine safety hazards (S&S), as well as GCI's history of previous violations, evidence GCI's "willful . . . bad faith actions" (Sec's Response To Order on Remand 19, citing 142 Cong. Rec. §§ 331 & 332 (March 29, 1996) (statement of Senators Bond and Bumpers)). The finding of large numbers of unwarrantable and S&S violations is not necessarily indicative that an operator has acted in bad faith or flagrantly violated the act; nor is a large history of previous violations. In addition, I am not persuaded that the conduct of GCI's counsel throughout the litigation would make an award unjust. In effect, what counsel did was use the hearing process to make her case that GCI's financial condition warranted larger penalty reductions than the Secretary was prepared to offer. Counsel was well within her right to pursue the trial option to resolve the matter and her conduct was not such as to bar an otherwise valid award.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 26, 2004

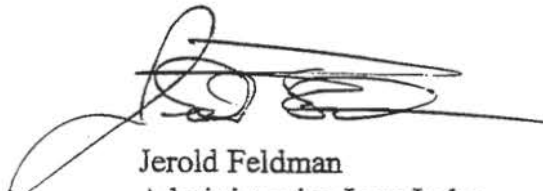
SECRETARY OF LABOR, MSHA, on	:	TEMPORARY REINSTATEMENT
behalf of CHRISTOPHER WRIGHT,	:	PROCEEDING
Complainant	:	
	:	Docket No. CENT 2004-110-DM
	:	RM MD 2004-07
v.	:	
	:	
AMERICOLD LOGISTICS LLC.,	:	Mine 14-00159
Respondent	:	Inland Quarries

DISMISSAL ORDER

Before: Judge Feldman

The Secretary filed her Application for Temporary Reinstatement on March 29, 2004. The Respondent filed its request for a hearing in this matter on April 7, 2004. During the course of an April 6, 2004, telephone conference, the parties requested that the hearing be continued without date in anticipation of settling this matter. Consequently, this matter was continued without date on April 15, 2004, with the stipulation that the parties inform me, on or before April 20, 2004, whether an agreement had been reached.

On April 20, 2004, the Secretary filed a Motion to Dismiss. In support of her motion the Secretary avers that she is withdrawing her temporary reinstatement application on behalf of Christopher Wright because the parties have settled the underlying discrimination complaint. The respondent, Americold Logistics, LLC, authorized the Secretary to move for dismissal. In view of the parties' agreement, upon performance of the settlement terms, the temporary reinstatement proceeding in Docket No. CENT 2004-110-DM **IS DISMISSED** with prejudice.


Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Edward Falkowski Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway,
Suite 1600, Denver, CO 80201

Karen L. Johnston, Esq., Jackson & Kelly, PLLC, 1099 18th Street, Suite 2150,
Denver, CO 80202

/hs