MAY AND JUNE 2008

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MAY AND JUNE 2008

There were no cases in which REVIEW was either granted or denied.

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 1, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. KENT 2008-470
ADMINISTRATION (MSHA)	:	A.C. No. 15-17216-131881
	:	
v.	:	Docket No. KENT 2008-471
	:	A.C. No. 15-17216-129480
WARRIOR COAL, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 31, 2008, the Commission received from Warrior Coal, LLC ("Warrior") two letters seeking 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).[2]

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).

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[1] Commissioner Robert F. Cohen, Jr. assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

[2] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2008-470 and KENT 2008-471, both captioned *Warrior Coal, LLC*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

On October 18 and November 15, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment Nos. 000129480 and 000131881, respectively, to Warrior for several citations. Warrior states that on November 16, 2007, it timely sent to MSHA its contest of the proposed penalties for 17 of the citations listed in Proposed Penalty Assessment No. 000129480. The operator explains that it failed to timely contest proposed penalties listed in Proposed Assessment No. 000131881 due to the "mine Holiday shutdown" and the employment of temporary clerical help during December 2007.

As to Proposed Penalty Assessment No. 000129480, the Secretary's response does not state whether the contest of the proposed penalties were received, but she does not oppose reopening the matter. The Secretary states that she does not oppose Warrior's request to reopen Proposed Penalty Assessment No. 000131881.

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 Warrior's requests, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for granting relief from the final orders. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Kevin Vaughn
Director of Safety & Training
Warrior Coal, LLC.
57 J. E. Ellis Road
Madisonville, KY 42431

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 1, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-336-M
	:	A.C. No. 45-03455-126242
v.	:	
WASHINGTON ROCK QUARRIES, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 16, 2008, the Commission received from Washington Rock Quarries, Inc. ("Washington Rock") 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).

Washington Rock states that from December 2006 through March 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued it approximately 51 citations. The operator asserts that as it received the proposed assessments for the citations, it

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timely contested them. It states that the 11 cases involving the citations issued between December and March are currently pending before an administrative law judge. According to Washington Rock, the parties stipulated that all of those proceedings should be stayed pending the special assessment of penalties for citations 6396328 and 6396329 (which Washington Rock claims it intended to contest when they arrived). The proceedings were consolidated and stayed.

Washington Rock further states that during the last week of September 2007, one of its employees, Brittany Perkins, received proposed assessments for several citations, including citations 6396328 and 6396329. The operator asserts that Perkins was not involved in contesting the citations issued between December and March. According to Washington Rock, Perkins showed the proposed assessments to Harry Hart, the president of Washington Rock. Hart told her that Washington Rock was contesting citations 6396328 and 6396329, and not contesting the other three citations. Perkins understood Hart to mean that Washington Rock had already taken the steps necessary to contest citations 6395328 and 6396329. In late November she gave Emily Hart (who was responsible for contesting the citations) a number of documents for filing, including the proposed assessments for citations 6396328 and 6396329. The operator claims that this was the first time that Emily Hart saw that MSHA had proposed special assessments for these citations. She immediately sent a letter to MSHA to contest the assessments and request a hearing. However, Washington Rock received correspondence from MSHA stating that the proposed penalty had become a final order on November 9, 2007. The Secretary states that she does not oppose Washington Rock'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 Washington Rock'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 Washington Rock's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Paul M. Nordsletten, Esq.
Davis Grimm Payne & Marra
701 Fifth Avenue, Suite 4040
Seattle, WA 98104

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 1, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VA 2008-95
	:	A.C. No. 44-07046-122850
v.	:	
BANNER BLUE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 28, 2008, the Commission received from Banner Blue Coal Company ("Banner Blue") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On March 28, 2008, the Commission received from Banner Blue a "notice of withdrawal of motion to re-open," in which the operator asked that its motion to re-open be withdrawn and that the Commission dismiss this proceeding.

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Banner Blue's request is granted, and, accordingly, this proceeding is dismissed.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Noelle Holladay True, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
2333 Alumni Park Plaza
Suite 310
Lexington, KY 40517

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-218-M
	:	A.C. No. 16-00509-130582
v.	:	
CARGILL DEICING TECHNOLOGY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 17, 2008, the Commission received a letter from Cargill Deicing Technology ("Cargill") requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 1, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Cargill a proposed assessment (A.C. No. 000130582), proposing civil penalties for ten citations. It appears that Cargill paid the proposed penalties for

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nine of the citations and did not pay the proposed penalty for Citation No. 6240831. In its letter, Cargill requests a hearing on Citation No. 6240831. Cargill submits that it previously requested a conference with MSHA on the citation, but that it was subsequently informed that MSHA did not have a record of that request. Cargill states that "[d]ue to clerical error [MSHA] suggested that [it] re-fax the request . . . for a hearing [to the Commission]." The Secretary of Labor states that she does not oppose Cargill's request for relief. For convenience, the Secretary attached a copy of the proposed assessment, noting which penalties had been paid.

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).

We conclude that Cargill failed to provide a sufficiently detailed explanation for its failure to timely return the proposed assessment form contesting the proposed penalty for Citation No. 6240831. Accordingly, in the interests of justice, and in consideration of the unopposed nature of Cargill's request, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Cargill's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Antonde Branch
Operations Coordinator
Cargill Deicing Technology
P.O. Box 106
Avery Island, LA 70513

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-210-M
	:	A.C. No. 20-01012-133277
v.	:	
EMPIRE IRON MINING PARTNERSHIP	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 4, 2008, the Commission received from Empire Iron Mining Partnership ("Empire") a motion by counsel seeking 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 January and March 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation and order, respectively, to Empire. On December 5, 2007, MSHA issued proposed penalties for the citation and order. Empire states that it intended to contest the citation and order and the related penalties. According to Empire, because of a

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miscommunication between counsel and Empire's safety manager, the contest of the proposed assessment was never sent. The Secretary states that she does not oppose the reopening of the penalty assessments associated with either the citation or the order.[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).

[2] By letter dated March 19, 2008, Empire's counsel responded to the Secretary's letter of March 12, 2008, and clarified that Empire was requesting to reopen the penalty associated with the order, as well as the citation, and, therefore, it was amending the request for relief in its motion to explicitly include the penalty associated with the order.

Having reviewed Empire'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 Empire's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center
Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-269
	:	A.C. No. 20-00422-127318
v.	:	
TILDEN MINING COMPANY, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 14, 2008, the Commission received from Tilden Mining Company, LLC ("Tilden") a motion by counsel seeking 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 January 28, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Tilden a proposed penalty assessment relating to an order. According to Tilden, it had previously contested the order. Tilden further states that it intended to contest the penalty. However, according to Tilden, its safety manager was unable to timely contest the

[1] Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

penalty due to "overwhelming business matters." The Secretary states that she does not oppose Tilden's motion to reopen the assessment.

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 Tilden'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 Tilden's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Arthur M. Wolfson, Esq.
R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateaway Center
Suite 1340
401 Liberty Ave.
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-374-M
	:	A.C. No. 26-01089-118117
v.	:	
BARRICK GOLDSTRIKE MINES, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 31, 2008, the Commission received from Barrick Goldstrike Mines, Inc. ("Barrick") a motion by counsel seeking 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 December 30, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6394157 to Barrick. Barrick states that, subsequently, it timely filed a contest of the citation and a contest of a proposed penalty of $60 set forth in Proposed Assessment No. 000115861 related to Citation No. 6394157. Barrick

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explains that, by letter dated May 18, 2007, MSHA informed Barrick that it was removing Citation No. 6394157 from Proposed Assessment No. 000115861 and that MSHA would re-assess the penalty under a new MSHA case number. The operator submits that, subsequently, it was informed that Barrick was delinquent in paying a penalty of $5,000 for Citation No. 6394157, which was set forth in Proposed Assessment No. 000118117. Barrick states that prior to receiving the delinquency notice, it had not received Proposed Assessment No. 000118117. Upon investigating the matter, Barrick was informed by MSHA that it had postal tracking information indicating that Proposed Assessment No. 000118117 had been delivered to the operator, but that MSHA could not produce such documentation. The Secretary states that she does not oppose the reopening of the penalty assessment.

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 Barrick'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 Barrick's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Michael T. Heenan, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street NW, 5th Floor
Washington, DC 20037

Anthony J. Marcavage, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street., N. W., 5th Floor
Washington, D.C. 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. WEST 2008-475-M
v.	:	A.C. No. 05-04438-129279
	:	
POLYCOR COLORADO STONE QUARRIES	: :	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 25, 2008, the Commission received from Polycor Colorado Stone Quarries ("Polycor") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 17, 2007, the Department of Labor's Mine Safety and Health Administration issued Proposed Assessment No. 000129279 to Polycor, proposing penalties for 12 citations that had been issued to the company earlier in the year. According to Polycor, it intended to contest

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the penalties. However, Polycor states that, due to a misunderstanding between it and its counsel regarding the scope of counsel's engagement in representing Polycor in contest proceedings, a contest of the proposed assessment was not filed until January 14, 2008, well after the contest was due. The Secretary states that she does not oppose Polycor's request to reopen the proposed penalty assessment.

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 Polycor'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 Polycor's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

James J. Gonzales, Esq.
Holland & Hart, LLP
555 Seventeenth St., Suite 3200
P.O. Box 8749
Denver, CO 80201-8749

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-754-M A.C. No. 50-01642-136446
v.	:	
TECK-POGO, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 31, 2008, the Commission received from Teck-Pogo, Inc. ("Teck-Pogo") a motion by counsel seeking to reopen a penalty assessment that may have 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 January 24, 2008, Teck-Pogo received a proposed assessment from the Department of Labor's Mine Safety and Health Administration ("MSHA") as a result of 56 violations. According to Teck-Pogo, on February 25, it mailed a contest of the assessment to MSHA, which received it on February 29. Teck-Pogo further states that the MSHA's Office of Assessments

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treated the contest as untimely filed. In response to Teck-Pogo, the Secretary now states that the proposed assessment was timely contested. The Secretary further states that, because she will process the case as timely contested, the Commission should dismiss the request to reopen as moot.

Having reviewed Teck-Pogo's request and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Teck-Pogo timely contested it. We deny Teck-Pogo's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, 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 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 8, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-704
	:	A.C. No. 46-08738-127002
v.	:	
SPARTAN MINING COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 14, 2008, the Commission received from Spartan Mining Company, Inc. ("Spartan") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 12, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment to Spartan as a result of 70 violations at the Diamond Energy Mine. According to Spartan, it faxed the proposed assessment to its attorneys. However, Spartan maintains that a clerical employee at the law firm mistakenly failed

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to transmit the assessment to the attorney responsible for filing the contest. Spartan states that the contest therefore was not timely filed and that it did not learn about the problem until it received a notice of unpaid penalties. The Secretary responds by noting that she notified Spartan by letter dated December 13, 2007, that the civil penalties were delinquent but that Spartan did not file a motion to reopen until March 14, 2008, some three months later. The Secretary states that once an operator discovers that it has failed to file a notice of contest through mistake or inadvertence, it should file a notice to reopen *promptly*. The Secretary concludes by stating that she does not oppose Spartan's motion to reopen the assessment.

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 Spartan'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 Spartan's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Ramonda C. Lyons, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief.
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 16, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-347-M A.C. No. 29-01968-121878
v.	:	
JAMES HAMILTON CONSTRUCTION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 4, 2008, the Commission received from James Hamilton Construction ("Hamilton") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 18, 2007, Hamilton received Citation No. 6246489 issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Following receipt of the citation, Hamilton states that it misplaced the citation in a file in another docket and forwarded it to counsel. Hamilton further states that, upon auditing its files, its counsel determined that it failed

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to contest the proposed assessment because it misplaced the citation.

The Secretary states that she does not oppose the reopening of the assessment. However, she further notes that Hamilton has filed another request to reopen, Docket No. WEST 2008-547-M, that also involves misplacement of documents. The Secretary concludes that Hamilton should take steps to ensure that it timely contests penalty assessments in the future. The Secretary also notes that Hamilton paid the penalty at issue on February 16, 2008.

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 Hamilton's motion to reopen and the Secretary's response thereto, we conclude that Hamilton has failed to provide any specific explanation to justify its failure to timely contest the proposed penalty assessment.[2] Moreover, Hamilton has not submitted a reason why it waited four months after the delinquency letter was issued before it filed its motion seeking relief. Finally, Hamilton has failed to explain why it paid the proposed penalty in full, if it intended to contest it or the underlying citation. Accordingly, we deny without prejudice Hamilton's request. *See James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).[3]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[2] It appears from the wording of its motion that Hamilton's counsel is confused about the difference between a citation and a proposed penalty assessment. The proposed penalty assessment is the multiple page form that MSHA sends to the operator proposing penalties for alleged violations issued with the listed citation numbers. An operator may contest a proposed penalty assessment simply by indicating on the assessment form which citation numbers it chooses to contest. A citation is a document issued by an MSHA inspector to an operator describing an alleged violation that gives rise to a proposed penalty assessment.

[3] On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Hamilton chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

Distribution:

Jeffrey A. Dahl, Esq.
Keleher & McLeod, PA
P.O. Box AA
Albuquerque, NM 87103

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

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

May 16, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-375
	:	A.C. No. 05-03836-127865
v.	:	
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 31, 2008, the Commission received from Twentymile Coal Company ("Twentymile") a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 2, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000127865 to Twentymile, proposing penalties for 18 citations, including Citation No. 7620939. Twentymile states that the mine promptly processed and forwarded the assessment to Twentymile's corporate office for payment, but that

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due to a processing error, the penalties that Twentymile was not contesting were not paid until November 2007. Twentymile requests reopening so that it can contest one of the penalties set forth in Proposed Assessment No. 000127865.

The Secretary states that she does not oppose Twentymile's request to reopen and notes for clarity that the only penalty that is unpaid is for Citation No. 7620939. She submits that the operator recently filed a motion in Docket No. WEST 2008-257 that was based on the same grounds for relief as the subject request. The Secretary explains that the operator must take different actions to either pay penalties or to contest proposed penalties, and that a delay in payment should not result in the untimely contest of a proposed penalty.

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).

While Twentymile's request for relief addresses the mistake that led to the late payment of the uncontested penalties, it does not explain the company's separate failure to return the assessment form to MSHA in order to contest the penalty that it states it intended to contest. Consequently, we deny Twentymile's request without prejudice. *See Twentymile Coal Co.*, 29 FMSHRC ___, slip op. at 2, Docket No. WEST 2008-257 (April 4, 2008) (citing *Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006)).[2]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[2] On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Twentymile chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

Distribution:

Lisa French
Safety Assistant
Twentymile Coal Company
29515 Routt County Road, #27
Oak Creek, CO 80467

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 16, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-547-M A.C. No. 02-03171-121951
v.	:	
JAMES HAMILTON CONSTRUCTION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 4, 2008, the Commission received from James Hamilton Construction ("Hamilton") a motion by counsel seeking 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 March 27, 2007, Hamilton received Citation No. 6415836 issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Following receipt of the citation, Hamilton states that it intermingled the citation with other citations and failed to contest it. On November 1, 2007, Hamilton was notified that the civil penalty associated with the citation had

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become delinquent. However, Hamilton notes that the delinquency notice was incorrectly filed with other citations that have since been settled. According to Hamilton, upon review of the file, it discovered that the matter had not been resolved.

The Secretary states that she does not oppose the reopening of the assessments. However, she further notes that Hamilton has filed another request to reopen, Docket No. CENT 2008-347-M, that also involves misplacement of documents. The Secretary concludes that Hamilton should take steps to ensure that it timely contests penalty assessments in the future.

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 Hamilton's motion to reopen and the Secretary's response thereto, we conclude that Hamilton has failed to provide any specific explanation to justify its failure to timely contest the proposed penalty assessment. Hamilton has attached, as an exhibit to the motion, a notice of delinquency and in its motion provided an explanation of counsel's mishandling of that document. However, in order to lay the predicate for relief from default, Hamilton needs to explain why it failed to respond to the proposed penalty assessment, rather than addressing the delinquency notice. Accordingly, we deny without prejudice Hamilton's request. *See James Hamilton Construction*, 29 FMSHRC 569, 570 (July 2007).[2]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[2] On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Hamilton chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

Distribution:

Jeffrey A. Dahl, Esq.
Keleher & McLeod, PA
P.O. Box AA
Albuquerque, NM 87103

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 16, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2008-488
	:	A.C. No. 46-05295-133374
EASTERN ASSOCIATED COAL, LLC	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 31, 2008, the Commission received from Eastern Associated Coal, LLC ("Eastern") a motion by counsel seeking 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 December 5, 2007, the Department of Labor's Mine Safety and Health Administration issued Proposed Penalty Assessment No. 0000133374 to Eastern, which proposed civil penalties for several citations. In its request, Eastern states that it intended to contest the proposed penalties for five of those citations. It submits that "due to a clerical error," it failed to timely file

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its contest of the proposed penalties.

In response, the Secretary states that the operator failed to adequately explain its failure to timely contest the proposed penalty assessment. She requests that the Commission direct the operator to provide a detailed explanation as to why it believes that reopening is warranted.

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

Having reviewed Eastern's motion to reopen and the Secretary's response thereto, we agree with the Secretary that Eastern has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Eastern's conclusory statement that its failure to timely file was due to "clerical error" does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Eastern's request. *See James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).[2]

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

[2] On this date, we similarly deny without prejudice three other requests to reopen where operators have failed to provide meaningful explanations for their failure to timely contest proposed penalty assessments. In the event that Eastern chooses to refile its request to reopen, it should disclose with specificity its grounds for relief.

Distribution:

Eric R. Waller, Esq.
Patriot Coal Corp.
P.O. Box 1233
Charleston, WV 25324

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-3939

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

May 19, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 2008-190-M
	:	A.C. No. 36-08895-129558
v.	:	
H.B. MELLOTT ESTATE, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 8, 2008, the Commission received from H.B. Mellott Estate, Inc. ("Mellott") a letter seeking to reopen a penalty assessment that may have 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 October 18, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000129558 to Mellott, proposing penalties for seven citations that had been issued to the operator earlier in the year. The company states that it paid three of the penalties, and submits a copy of its canceled check to MSHA as proof. As for the other four penalties, Mellott contends that it indicated on the assessment form that it was contesting those penalties and includes a copy of the form showing as much. The operator states that it does "not know why the Review Commission did not receive the hearing request."

In response, the Secretary states that she does not oppose reopening the proposed assessment as to the four penalties. She points out, however, that it is not clear from Mellott's

request to reopen where it sent the penalty contest. She restates from the assessment form the different MSHA addresses to which contests and payments are to be sent.

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 Mellott's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Mellott timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

John G. Adams, SCP
Manager
H.B. Mellott Estate, Inc.
100 Mellott Drive, Suite 100
Warfordsburg, PA 17267

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-2296

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

May 20, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. CENT 2008-412-M A.C. No. 14-00894-118141
v.	:	
KAW VALLEY SAND & GRAVEL, INC.	:	Docket No. CENT 2008-413-M A.C. No. 14-01667-118250

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").[1] On March 20, 2008, the Commission received from Kaw Valley Sand and Gravel, Inc. ("Kaw Valley") a letter seeking to reopen two penalty assessments that may have 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).

Kaw Valley states that, on June 5, 2007, it submitted contests of two penalty assessments that had been issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"). The proposed penalty assessments were apparently issued to Kaw Valley on May 16, 2007. With its request for relief, Kaw Valley submitted a Federal Express tracking

[1] Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. CENT 2008-412-M and CENT 2008-413-M, as both dockets involve similar procedural issues and similar factual backgrounds.

receipt that indicates that the contests were delivered on June 6 to MSHA's Arlington, Virginia office. Kaw Valley also states that it has been receiving unwarranted collection calls. In response, the Secretary concedes that the contests were delivered to MSHA and signed for by an MSHA employee; however, the Secretary further states that MSHA's Civil Penalty Compliance Office has no record of having actually received the contest documents.

Having reviewed Kaw Valley's request and the Secretary's response, we conclude that the proposed assessments at issue have not become final orders of the Commission because Kaw Valley timely contested them. We deny Kaw Valley's motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Alan R. Teutemacher
Safety Director
Kaw Valley Companies, Inc.
5600 Kansas Ave.
Kansas City, KS 66106

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 22, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-434
	:	A.C. No. 46-08923-127245
v.	:	
ELK RUN COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 31, 2008, the Commission received from Elk Run Coal Company, Inc. ("Elk Run") a motion by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 13, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000127245 regarding Citation Nos. 7268835, 7273090, and 7273091 to Elk Run. Elk Run states that it timely sent its contest of the proposed penalties for all three citations on October 18, 2007, as indicated by an attached certified mail receipt. However, Elk Run fails to state when it received the assessment. Elk Run alleges that it intended to pay the assessment for Citation No. 7273090, but that it inadvertently failed to pay the assessment. On a date unstated, Elk Run later received a delinquency notice for payment of all three proposed penalties set forth on Proposed Assessment No. 000127245. The operator submits that, upon investigating the matter, it discovered that MSHA did not have its contest of Proposed Assessment No. 000127245. The Secretary states that she does not oppose the reopening of the penalty assessment.

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 Elk Run's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Elk Run timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Ramonda C. Lyons, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 22, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-513
	:	A.C. No. 46-01437-112645
v.	:	
MCELROY COAL COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 6, 2008, the Commission received from McElroy Coal Company ("McElroy") a motion made by counsel to reopen a penalty assessment that may have 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 May 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued six orders to McElroy, and on March 5, 2007, issued Proposed Assessment No. 000112645, which proposed penalties for each of those orders. According to McElroy, by letter dated March 16, 2007, a copy of which is attached to the motion to reopen, McElroy notified MSHA that it was contesting all of the penalties.

While the Secretary states that she does not oppose McElroy's request to reopen, she notes that she has no record of receiving McElroy's letter contesting the penalty assessment. She further notes that MSHA notified McElroy by letter dated June 22, 2007, that it was delinquent in paying the assessment. She states that McElroy sent a faxed contest to MSHA on August 31,

2007, but the Secretary does not include a copy of that fax or address whether it was a new contest or a copy of the March 16 contest letter McElroy has now submitted to the Commission. The Secretary states that it sent a second delinquency letter to McElroy on October 4, 2007, which explained that the August 31 contest was sent too late to be accepted.

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 McElroy's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether McElroy timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. Before granting such relief, the judge should require McElroy to more fully explain its communications with MSHA regarding this assessment between the time the assessment was issued in March 2007 and its filing of the request to reopen in February 2008. After that, if it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

May 27, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-383-M
v.	:	A.C. No. 45-03627-128809
AAA READY-MIX INC. II	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 1, 2008, the Commission received from AAA Ready-Mix Inc. II ("AAA") a motion by counsel seeking 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).

AAA states that it is a small operator that was first inspected by the Department of Labor's Mine Safety and Health Administration ("MSHA") over the course of three days in April 2007. As a result, MSHA issued 13 citations to AAA. The company states that it resolved to seek review of all of the citations, and anticipated that the citations would be the subject of a single case. However, only eight of the citations were the subject of the first penalty assessment, issued by MSHA on June 6, 2007. AAA contested all eight of the penalties, but those penalties became the subject of two dockets when the Secretary filed two petitions for assessment of penalties, one for six of the penalties and another for the other two penalties.

It was not until October 10, 2007, that MSHA issued Proposed Assessment No. 000128809, which proposed penalties for four of the five remaining citations. AAA states that it never received that assessment and first learned that the assessment had been issued when it received a delinquency notice with respect to those penalties in January 2008.

The Secretary states that she does not oppose the reopening of the assessment as to the four penalties. Nevertheless, the Secretary attaches to her response documentation that Proposed Assessment No. 000128809 was delivered to AAA on October 17, 2007, and signed for by "M. Hansen." On the initial proposed assessment that AAA timely contested, "Marilyn Hansen" is shown as the AAA representative to whose attention that assessment was sent.

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 AAA'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 AAA's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Michael T. Heenan, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
2400 N Street NW, 5th Floor
Washington, DC 20037

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
U.S. Department of Labor, MSHA
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

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

May 29, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-510
	:	A.C. No. 46-04387-121572
v.	:	
DANA MINING COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 6, 2008, the Commission received from Dana Mining Company, Inc. ("Dana Mining") a motion made by counsel to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 10, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000121572 to Dana, proposing penalties for 26 citations that had been issued to the company during the preceding months. Dana Mining states that on July 23, 2007, its safety director, Gary Dixon, returned the contest form to MSHA indicating its intent to contest 12 of the proposed penalties and that it paid the remainder of the penalties on August 1, 2007. However, evidence of the alleged July 23, 2007, notice of contest was not included in the motion. In addition, Dana Mining's counsel separately submitted the form to contest one of those 12 penalties, and the contest submitted by counsel is presently the subject of Docket No. WEVA 2007-662. Dana Mining states that it subsequently began receiving delinquency notices that included the 11 penalties it believes it had contested. The

Secretary's response does not state whether the initial notice of contest was received, but does not oppose reopening this matter as to the 11 penalties.

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 Dana Mining's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Dana Mining timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. Before granting such relief, the judge should require Dana Mining to provide evidence of the July 23, 2007, notice of contest by Mr. Dixon. After that, if it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Ronald M. Miller
Dana Mining Co., Inc.
308 Dents Run Road,
Morgantown, WV 26501

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

June 6, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2008-332-M
v.	:	A.C. No. 14-00413-122218
LYONS SALT COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 28, 2008, the Commission received from Lyons Salt Company ("Lyons Salt") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 17, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Lyons Salt for eight citations that had been issued to the operator in March and May of 2007. Lyons Salt states that it intended to contest three of the penalties, but that the form indicating that intent never reached MSHA's Civil Penalty Compliance Office in Arlington, Virginia, because the form was mistakenly included along with Lyons Salt's payment of the other five penalties that was sent to MSHA's Pittsburgh office.

The Secretary states that she does not oppose the reopening of the assessment as to those three penalties. The Secretary notes that she notified Lyons Salt by letter dated October 26, 2007, that it was delinquent in paying the assessment at issue in full. Lyons Salt gives no

explanation why it took four months to take action once it received the letter advising that it was delinquent in paying the penalties.

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 Lyons Salt'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 Lyons Salt's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Cole A. Wist, Esq.
Patton Boggs LLP
1801 California Street
Suite 4900
Denver, CO 80202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd.
Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

June 6, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-538
v.	:	A.C. No. 46-08582-118898
SIMMONS FORK MINING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 14, 2008, the Commission received from Simmons Fork Mining, Inc. ("Simmons Fork") a motion by counsel seeking 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 May 29, 2007, the Department of Labor's Mine Safety and Health Administration issued a proposed penalty assessment to Simmons Fork for three citations that had been issued to the operator in January and April of 2007. Simmons Fork had contested the citations, and the three contest proceedings were stayed pending the assessment of penalties. Simmons Fork states that, consequently, it expected that its counsel in the contest proceedings would be notified by the Secretary when the assessments were issued, but its counsel was not notified. Simmons Fork also states that it has no record of receiving the proposed penalty assessment.

The Secretary states that she does not oppose the reopening of the assessment. The Secretary notes that proposed penalty assessments are always mailed directly to the operator, and that it is the operator's responsibility to forward the assessment to its counsel. The Secretary also

attaches to her response documentation that the assessment was delivered on June 4, 2007, to Charleston, WV, the city shown as Simmons Fork's address on the proposed assessment. The Secretary also states that she notified Simmons Fork by letter dated August 30, 2007, that it was delinquent in paying the assessment at issue. Simmons Fork gives no explanation why it took over five months to take action once it received the letter advising that it was delinquent in paying the penalties.

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 Simmons Fork'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 Simmons Fork's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Julia K. Shreve, Esq.
Jackson Kelly PLLC
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

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

June 11, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-492
	:	A.C. No. 46-07009-127178
v.	:	
ELK RUN COAL COMPANY, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners[1]

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 28, 2008, the Commission received from Elk Run Coal Company, Inc. ("Elk Run") 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 July 24, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued citation numbers 7270248, 7270249, and 7270250 to Elk Run. On or about September 13, 2007, MSHA issued a proposed penalty assessment to Elk Run, which included proposed penalties for these citations. Elk Run states that soon after receiving the proposed

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[1] Commissioner Robert F. Cohen, Jr., assumed office after this case had been filed. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Cohen has elected not to participate in this matter.

penalty assessment, its safety director faxed the penalty assessment form to Elk Run's counsel. Elk Run explains that its counsel consulted with the mine foreman, who directed counsel to contest the assessments for these three citations. Elk Run asserts that on or about October 18, 2007, its attorney timely contested the other penalties that the operator intended to contest, but inadvertently failed to contest the penalties for these three citations, due to her clerical error.

Elk Run claims that this omission was discovered on October 22, 2007 and that it immediately reported it to MSHA's Office of Assessments. Elk Run asserts that "Citation Number 7270248 is now closed, and Citation Numbers 7270249 and 7270250 are now delinquent." The Secretary states that she does not oppose Elk Run'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 Elk Run's motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Elk Run's failure to timely contest the penalty proposal and whether relief from the final order should be granted. On remand, the judge should determine the status of the three penalties at issue (including the penalty for the citation referred to as "closed" by Elk Run's counsel). If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Distribution:

Ramonda C. Lyons, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

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

June 18, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. VA 2008-258 A.C. No. 44-06199-135474
v.	:	
RED RIVER COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 1, 2008, the Commission received from Red River Coal Company, Inc. ("Red River") a letter seeking to reopen a penalty assessment that may have 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 January 8, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000135474 to Red River, which proposed civil penalties for several citations. Red River states that it mailed its contest of the proposed assessment on February 5, 2008, but that it did not receive a response from MSHA until it received a letter from MSHA dated April 9, 2008, stating that Red River had failed to timely contest the proposed assessment. While the Secretary states that she does not oppose Red River's request to reopen, she notes that she has no record of receiving Red River's contest of the penalty assessment.

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 Red River's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Red River timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Karen L. Johnston, 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 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

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

June 18, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-997-M
v.	:	A.C. No. 04-00743-139453
U.S. BORAX, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 14, 2008, the Commission received from U.S. Borax, Inc. ("U.S. Borax") a motion by counsel seeking 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 February 12, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000139453 to U.S. Borax, which proposed civil penalties for several citations. U.S. Borax states that its safety manager timely filed a contest of the proposed assessment on approximately February 22, 2008. The operator further submits that, on approximately May 2, it called the Department of Labor's Office of the Solicitor to determine the location of the Petition for Assessment of Penalty related to the proposed penalties that it was contesting. After being informed that the Solicitor's office had no record of the matter, U.S. Borax discovered, upon further investigation, that it had inadvertently sent its contest of the

proposed assessment to "100 Wilson Boulevard," rather than to "1100 Wilson Boulevard." The Secretary states that she does not oppose U.S. Borax's request to reopen the proposed assessment.

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

William D. Humphreys, President
Red River Coal Co., Inc.
P.O. Box 668
Norton ,VA 24273

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25 Floor
Arlington, VA 22209-2296

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

June 18, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2008-425
	:	A.C. No. 46-05649-118643 C479
MASS TRANSPORT INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 18, 2008, the Commission received from "Delbarton Preparation Plant, Mass Transport Inc." a motion from counsel requesting 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 May 23, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000118643 to Mass Transport Inc. for various violations that allegedly occurred at the Delbarton Preparation Plant. The motion states that Proposed Assessment No. 000118643 was not timely contested because MSHA mailed the proposed penalty assessment to the wrong address. Although the Secretary does not oppose the request to reopen, she notes that the proposed penalty assessment and the delinquency notice were mailed to the address of record at the time of assessment. The Secretary states that Mass Transport Inc. should check the mailing address it provided to MSHA to be sure that it is up-to-date.

The motion filed by counsel sets forth conflicting and confused information identifying the movant in the motion to reopen and the facts of this case. In the caption of the motion, counsel identify the respondent as "Delbarton Preparation Plant," and identify the mine as "Mass Transport Inc."[1] (The caption is wrong in both respects.) In the motion itself, counsel state that the motion is brought by "Delbarton Preparation Plant, Mass Transport Inc. ('Delbarton')," and note that "Mass Transport Inc. is owned and operated by Logan County Mine Services, Inc., but is a contractor for Delbarton Preparation Plant and was doing work for Delbarton at the time the citation was issued." Counsel state that the proposed penalty assessment was issued to "Delbarton" on about May 23, 2007, and that the Proposed Assessment "was mailed to Mass Transport Inc." at an address "which is not, and has never been, either the mailing address or physical address of either Delbarton or Mass Transport."

According to its terms, the proposed penalty assessment was issued only to Mass Transport Inc. Thus, the request to reopen should have been filed solely by Mass Transport Inc. We deny the motion to reopen because counsels' motion is unacceptably confused and erroneous in several respects and does not even make clear what entity is actually filing the motion. In particular, counsel have not established that the movant, as identified in the motion to reopen, has standing to make this request.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

[1] Although the caption of the motion to reopen identifies the respondent as "Delbarton Preparation Plant," the Commission's Docket Office issued a docketing notice that correctly lists Mass Transport Inc. as the respondent.

Distribution

Ramonda C. Lyons, Esq.
Dinsmore & Shohl, LLP
P.O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd.
Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

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

June 18, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2008-703
v.	:	A.C. No. 46-02805-117438
U.S. SILICA COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 3, 2008, the Commission received from U.S. Silica Company ("U.S. Silica") a letter in which it requested 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 May 8, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment to U.S. Silica. According to U.S. Silica, it then checked the boxes by two of the citations listed on the assessment form and returned it to MSHA by certified mail. However, U.S. Silica states that subsequent assessments indicated that the contested citations still had outstanding penalties.

In response, the Secretary states that the tracking report from the U.S. Postal Service indicates that the notice of contest was sent to MSHA's payment processing office in Pittsburgh, Pennsylvania. The Secretary further states that all notices of contest must be sent to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The Secretary concludes by stating that she does not oppose the reopening of the assessment.

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Chris Bryan, CMSP
Safety Mngr.
U.S. Silica Company
P.O. Box 187
Berkeley Springs, WV 25411-0187

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd.
Room 2220
Arlington, VA 22209-2296

Myra James, Chief
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-2296

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

June 23, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-473-M
v.	:	A.C. No. 05-00790-131007
CLIMAX MOLYBDENUM COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 22, 2008, the Commission received from Climax Molybdenum Company ("Climax") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On November 7, 2007, the Department of Labor's Mine Safety and Health Administration issued a proposed penalty assessment to Climax for 31 citations that had been issued to the operator in June and September of 2007. Climax states that it intended to contest the penalty for Citation No. 6416449, but failed to do so in a timely manner because of mistake and inadvertence on its part.

The Secretary initially responded to the motion by noting that Climax's motion failed to explain what the "mistake and inadvertence" was or why it occurred, and also did not identify facts, which, if proven on reopening, would constitute a meritorious defense to the citation or the

penalty proposed. Climax thereupon filed a motion for extension of time to supplement its motion to reopen. That motion is hereby granted.

Climax later filed a response to the Secretary's response to the motion to reopen.[1] Therein, Climax explained, in an affidavit, that, when its Safety Specialist who processed the proposed penalty assessment was told by the Climax Safety Manager not to pay the penalty proposed for Citation No. 6416449, he believed that the Safety Manager would file the contest form for that penalty. The Safety Manager did not do so, however. Climax did not furnish evidence of why the safety manager failed to contest the penalty. The Secretary thereafter filed a letter stating that she does not oppose reopening the case as to the penalty proposed for Citation No. 6416449.

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).

[1] The Commission encourages parties seeking reopening to do as Climax has done, and provide further information in response to pertinent questions raised in the Secretary's response. Otherwise, the Commission may have no choice but to deny those motions to reopen.

Having reviewed Climax's request and the Secretary's responses, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Climax's failure to timely contest the penalty proposal and whether relief from the final order should be granted. The Chief Administrative Law Judge should obtain from Climax evidence as to the circumstances concerning why the Safety Manager did not contest the penalty assessment. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution:

Timothy R. Olson, 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., Room 2220
Arlington, VA 22209-2296

Myra James, Chief.
Office of Civil Penalty Compliance
MSHA
U.S. Department of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-2296

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

ADMINISTRATIVE LAW JUDGE DECISIONS

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

May 8, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-205-M
Petitioner	:	A.C. No. 14-01597-77364-01
	:	Plant 4
	:	
v.	:	Docket No. CENT 2006-209-M
	:	A.C. No. 14-01277-80289-01
	:	Plant 3
	:	
NELSON QUARRIES, INC.,	:	Docket No. CENT 2006-236-M
Respondent	:	A.C. No. 14-01277-80289-02
	:	Plant 3

DECISION

Appearances: Jennifer Casey, Esq, and Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Paul M. Nelson, Nelson Quarries Inc., Gas, Kansas, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Nelson Quarries, Inc. ("Nelson Quarries") 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"). The cases involve 50 citations issued under section 104(a) of the Mine Act. An evidentiary hearing was held in Topeka, Kansas. These cases were heard along with 16 other Nelson Quarries cases. My decision in the other cases was issued on April 7, 2008, 30 FMSHRC ____ (April 2008). The parties engaged in settlement discussions following the issuance of that decision. These discussions successfully resolved all remaining issues in the present cases. A discussion of the events leading up to the issuance of the citations in these cases can be found in my April 2008 decision, which is incorporated herein by reference.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CENT 2006-205-M, Plant 4.

1. On November 16, 2005, Inspector Dustan Crelly issued Citation No. 6291255 alleging a violation of section 56.14107(a). (Ex. G-57). The alternator on a Caterpillar 773B haul truck was not guarded. Inspector Crelly determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, and takeup pulleys, flywheels, coupling, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that he issued the citation because a miner could contact the fan on the alternator and other moving parts. (Tr. 921). He believed that people could enter this area when the engine were running, such as when checking for oil leaks. (Tr. 923, 991). A miner will also often perform his preshift examination with the engine running. *Id.* He admitted that a miner could look at the ground under the vehicle to see if oil were leaking.

Mine Superintendent Michael Peres testified that, during a previous inspection, Inspector Crelly told him that alternator belts on Dresser and Euclid trucks needed to be guarded but not on Caterpillar trucks because the operator does not need to place himself near the alternator when checking fluid levels. (Tr. 1025-26).

For the reasons set forth with respect to Citation No. 6317432 in Docket No. CENT 2006-203-M in my April 2008 decision, this citation is affirmed. A penalty of $60.00 is appropriate.

2. On November 16, 2005, Inspector Crelly issued Citation No. 6291256 alleging a violation of section 56.14107(a). (Ex. G-58). The alternator on a different Caterpillar 773B haul truck was not guarded. Inspector Crelly determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation. Inspector Crelly's testimony with respect to this citation is the same as with respect to the previous citation.

My findings and conclusions are the same as they were for Citation No. 6291255, above. A penalty of $60.00 is appropriate.

3. On November 16, 2005, Inspector Crelly issued Citation No. 6291258 alleging a violation of section 56.14107(a). (Ex. G-59). The citation alleges that the guard on the south side of the tail pulley on Belt 13A was not adequate. Inspector Crelly determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not

S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that the self-cleaning tail pulley was accessible through a hole on the top that was 6 inches wide and 33 inches long. The tail pulley was about 14 inches from the edge of the guard. (Tr. 928, 995). Someone could come in contact with the moving parts during maintenance, cleanup, or inspection of the area. Other areas on the equipment were adequately guarded. Peres testified that the cited area was very small and that other structures were in the way. (Tr. 1030, Ex. R-205b).

I agree with Mr. Peres that the evidence shows that the opening is small and not easily accessed. I affirm the citation but find that it was not serious and that the company's negligence was low. A penalty of $40.00 is appropriate.

4. On November 16, 2005, Inspector Crelly issued Citation No. 6291261 alleging a violation of section 56.14107(a). (Ex. G-60). The citation alleges that the tail pulley on the belt under the 602 screen was not adequately guarded. Inspector Crelly determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that the smooth tail pulley was not completely guarded. The inspector believed that the guard was not high enough to completely protect the area. (Tr. 996). Mr. Peres testified that the distance between the ground and the top of the existing guard was almost seven feet. (Tr. 1037; Ex. R-205c). He also testified that the structure surrounding the cited opening provided some guarding. Peres helped build this screen and he testified that it had been in this condition since 1995 and had been inspected by MSHA many times. (Tr. 1038). No citations have been previously issued for this condition.

I credit the testimony of Mr. Peres that the opening was not easily reached and it had not been previously cited. I affirm the citation but find that it was not serious and that the company's negligence was low. A penalty of $40.00 is appropriate.

5. On November 16, 2005, Inspector Crelly issued Citation No. 6291263 alleging a violation of section 56.14107(a). (Ex. G-61). The citation alleges that the guard on the self-cleaning tail pulley on the belt under the 611 screen was not adequately guarded. Inspector Crelly determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

He testified that the opening was about 16 inches wide and 24 inches high. The fins of the tail pulley were recessed about 15 inches from the existing guard. (Tr. 634). Peres testified that, as with the previous citation, this screen has been in service for many years without

receiving a citation for the condition cited by Inspector Crelly. (Tr. 1041-42; Ex. R-205d). The screen has not been modified since it was built and it is placed in the same configuration whenever it is moved to a new location.

I credit the testimony of Mr. Peres that the opening was not easily reached and that it had not been previously cited. I affirm the citation but find that it was not serious and that the company's negligence was low. A penalty of $40.00 is appropriate.

6. On November 16, 2005, Inspector Crelly issued Citation No. 6291265 alleging a violation of section 56.14112(b). (Ex. G-62). The citation alleges that the guard on the east side of the self-cleaning tail pulley on belt No. 7 was not secured. Inspector Crelly determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that the bolts used to secure the guard were missing. (Tr. 936). The area was 12 inches high, 16 inches long and the area was 28 inches above the ground. (Tr. 936, 997). Peres did not observe the loose guard. (Tr. 1070; Ex. R-205e).

I find that the Secretary established a violation. A penalty of $60.00 is appropriate.

7. On November 16, 2005, Inspector Crelly issued Citation No. 6332080 alleging a violation of section 56.12004. (Ex. G-63). The citation alleges that the female end of the yellow extension cord in the main generator trailer had the outer jacket pulled out exposing the inner conductors to mechanical damage. These conductors did not appear to be damaged. Inspector Crelly determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that "electrical conductors exposed to mechanical damage shall be protected." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that the extension cord was being stored in the generator trailer. It was not being used at the time of the inspection, but he believed that it had been previously used. (Tr. 938). The electrical cord was subject to mechanical damage where the outer jacket had been pulled back.

I find that the Secretary established a violation. A penalty of $60.00 is appropriate.

8. On November 16, 2005, Inspector Crelly issued Citation No. 6332081 alleging a violation of section 56.12004. (Ex. G-64). The citation alleges that the male end of the black extension cord in the main generator trailer had the outer jacket pulled out exposing the inner conductors to mechanical damage. These conductors did not appear to be damaged. Inspector

Crelly determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation. The inspector's testimony with respect to this citation is the same as above.

I find that the Secretary established a violation. A penalty of $60.00 is appropriate.

9. On November 16, 2005, Inspector Crelly issued Citation No. 6332082 alleging a violation of section 56.14107(a). (Ex. G-65). The citation alleges that the external accessory drive, alternator, and the bottom of the cooling fan on the front of the main generator engine were not guarded. People are not in the area when the generator is running. Inspector Crelly determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that only part of the cooling fan and other moving parts was guarded. (Tr. 946-48, 998). There was limited space in the generator trailer so that someone's clothing could get pulled into the moving parts. Peres estimated that the cited opening was about three to four inches wide. (Tr. 1044).

I find that the Secretary established a violation. A penalty of $60.00 is appropriate.

10. On November 16, 2005, Inspector Chrystal Dye issued Citation No. 6291658 alleging a violation of section 56.14107(a). (Ex. G-68). The citation alleges that the fan belts for Caterpillar engine No. 111 needed additional guarding on the back side and that the alternator needed a complete guard to prevent persons from becoming entangled in moving machine parts. She noted that the trailer door is kept closed during operation. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation No. 6317432 in Docket No. CENT 2006-203-M in my April 2008 decision. The exposure was not great for this engine because it was inside a trailer. Based on that evidence, I find that the Secretary established a non-serious violation. A penalty of $40.00 is appropriate.

11. On November 16, 2005, Inspector Dye issued Citation No. 6291659 alleging a violation of section 47.41(a). (Ex. G-73). The citation alleges that the diesel tank for the Caterpillar engine No. 111 was not labeled for its contents. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that a mine

"operator must ensure that each container of a hazardous chemical has a label . . . with the appropriate information." The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation Nos. 6291573, 6291636, and 6291639 in Docket Nos. CENT 2006-200-M and CENT 2006-202-M in my April 2008 decision. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. A penalty of $60.00 is appropriate.

12. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6291268, 6291661, and 6291663. After the hearing, the parties agreed to settle Citation Nos. 6291651, 6291652, 6291653, 6291656, 6291657, and 629164 for a total penalty of $252.00.

B. CENT 2006-209-M, Plant 3.

1. On November 2, 2005, Inspector Dye issued Citation No. 6291599 alleging a violation of section 56.14100(b). (Ex. G-84). The citation alleges that there were several safety defects on the Caterpillar 796C haul truck exposing persons to safety and health hazards. The tether strap for the door was not being used and the window would not roll up. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard states that damaged windows shall be replaced if the absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that the operators of this truck were exposed to dust, rain, snow, wind, noise, and flying rocks. (Tr. 1388). She asked the equipment operator to move the window up and he could not do it. (Tr. 1410). The window was fixed and a door stop was installed to abate the citation. She has observed rocks flying off belts and other equipment at other operations. MSHA has not issued citations for excessive noise at the plant. Mr. Peres testified that the windows slide up and down. (Tr. 1442). Rocks do not fly off conveyor belts or the crusher except when rock is being dumped. A truck would have to be passing by for that to happen.

I credit Inspector Dye's testimony that, when she asked the truck driver to close the window, he could not do so. The Secretary established a non-S&S violation. The driver was exposed to dust. A penalty of $60.00 is appropriate.

2. On November 2, 2005, Inspector Dye issued Citation No. 6291603 alleging a violation of section 56.12002. (Ex. G-96). The citation alleges that there were seven knock-outs missing on the distribution boxes in the electrical trailer which exposed persons to electric shock hazards. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal.

She determined that the violation was not S&S and that the negligence was moderate. The safety standard states that electric controls and switches shall be of approved design and construction and shall be properly installed. The Secretary proposes a penalty of $60.00 for this citation.

Because the knock-outs were missing there were holes in the distribution boxes. (Tr. 1393; Ex. G-96c). The boxes were in the motor control room. The knock-outs were on the top of the distribution boxes so the hazard was not great. Nevertheless, lime dust, which is corrosive, can get into the boxes and small animals can attempt to nest in the boxes. Small animals can also chew on conductors that are outside of the boxes. (Tr. 1414). Mr. Peres testified the holes created by the knock-outs were about six feet above the floor. (Tr. 1444). Any electrical components are six to eight inches inside the holes. The distribution boxes are cleaned of dust and dirt about every other month. Small animals have not built nests inside distribution boxes at the plant.

The hazard created by having holes in the top of the distribution boxes in the electrical trailer were minimal given their height. The controls in the distribution boxes were not properly installed in violation of the standard. The gravity and negligence were very low. A penalty of $10.00 is appropriate.

3. On November 2, 2005, Inspector Dye issued Citation No. 6291608 alleging a violation of section 56.11002. (Ex. G-97). The citation alleges that 10 of the 24 steps going up to the crusher shack were bent and broken, which exposed miners to trip and fall hazards. Inspector Dye determined that an injury was unlikely but that any injury would likely be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides "crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of $60.00 for this citation.

The inspector was concerned that someone could trip and fall ascending or descending the stairs. (Tr. 1397; Ex. G-97d). The staircase was sixteen feet high. The stairs were made of angle iron and expanded metal. She believed that some of the welds on the stairs had come loose. (Tr. 1416). The areas where the steps had separated had never been welded. (Tr. 1448).

The hazard created by this violation was minimal, as demonstrated by the photographs taken by the inspector. (Exs. G-97c & 97d). The gravity and negligence were low. A penalty of $10.00 is appropriate.

4. On November 7, 2005, Inspector Dye issued Citation No. 6291612 alleging a violation of section 56.12040. (Ex. G-98). The citation alleges that there were exposed energized components in the 14 distribution boxes in the electrical trailer. The citation was modified to indicate that an injury was not likely and that the violation was not S&S. The negligence was designated as moderate. The safety standard states that operating controls shall be installed so

that they can be operated without danger of contact with energized conductors. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that when the doors to the distribution boxes were opened, the components within the boxes were exposed. (Tr. 1401; Ex. G-98c). Breakers and motor starters were in these boxes. The plant was not energized at the time of the inspection. These conditions created an electrocution hazard. There may be instances where a paramedic or fireman could be required to enter the electrical trailer. (Tr. 1417). Peres testified that the power would be shut down in the event of an accident. (Tr. 1449). He also stated that the motor control center has been used for 15 years in this condition and it has never been cited. He stated that he has even discussed the distribution boxes with MSHA inspectors during previous inspections.

This citation is similar to Citation No. 6317446 issued by Inspector Thomas Barrington in Docket No. CENT 2006-203-M in my April 2008 decision. For the same reasons, I find that the Secretary established a violation. Anyone who opened the cabinets to test a circuit breaker, for example, faced a risk of an electric shock hazard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that its plants had never been subject to a rigorous electrical inspection. A penalty of $60.00 is appropriate.

5. On November 8, 2005, Inspector Dye issued Citation No. 6291628 alleging a violation of section 56.9300(a). (Ex. G-99). The citation alleges that berms on the west side of the crusher were not maintained at mid-axle height for the largest piece of equipment in the area. The citation was modified to indicate that an injury was not likely and that the violation was not S&S. The negligence was designated as moderate. The safety standard provides that "berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the road is used for mobile equipment to travel to and from the crusher and the pit. (Tr. 1404). She estimated the drop-off to be about 10 to 20 feet. The berms were between 26 and 28 inches high while some of the equipment using the road, including front end loaders, had mid-axle heights of 36 to 38 inches. (Tr. 1406). She took several measurements. (Tr. 1421). The violation was serious because, if a vehicle were to roll down the embankment, the operator could sustain serious injuries. She observed tire tracks within nine feet of the berm. Mr. Peres testified that driving nine feet away from a berm does not create a hazard. (Tr. 1452).

The safety standard applies to the cited roadway despite its width. The Secretary established a violation, but it was not serious. A penalty of $60.00 is appropriate.

6. On November 2, 2005, Inspector Dye issued Citation No. 6291600 alleging a violation of section 56.14107(a). (Ex. G-86). The citation alleges that the alternator and fan belts were not

guarded on the Caterpillar 773B haul truck to prevent persons from becoming entangled in moving machine parts. Inspector Dye determined that an injury was unlikely and that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation No. 6317432 in Docket No. CENT 2006-203-M in my April 2008 decision. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. Alternator and fan belts on trucks are required to be guarded, but the violation was not serious because the chance of accidental contact was not very great. A penalty of $60.00 is appropriate.

7. On November 2, 2005, Inspector Dye issued Citation No. 6291602 alleging a violation of section 56.12018. (Ex. G-95). The citation alleges that the distribution boxes for the crossover conveyor belts were not labeled to identify which units they control. Inspector Dye determined that an injury was unlikely and that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard requires that principal power switches be labeled to show which units they control unless identification can be made readily by location. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation No. 6317443 in Docket No. CENT 2006-228-M in my April 2008 decision. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. I credit the evidence presented by the Secretary with respect to citations alleging a violation of section 56.12018. A penalty of $60.00 is appropriate.

8. On November 8, 2005, Inspector Dye issued Citation No. 6291629 alleging a violation of section 56.4501. (Ex. G-100). The citation alleges that there was no shutoff valve on the 80-gallon diesel fuel tank on the north side of the mine road near the lake. The inspector determined that an injury was unlikely but that it could lead to a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "fuel lines shall be equipped with valves capable of stopping the flow of fuel at the source. . . ." The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation No. 6291580 in Docket No. CENT 2006-200-M in my April 2008 decision. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. A penalty of $60.00 is appropriate.

9. On November 8, 2005, Inspector Dye issued Citation No. 6291631 alleging a violation of section 56.4101. (Ex. G-101). The citation alleges that the company failed to provide a sign prohibiting smoking or an open flame at the 80-gallon diesel fuel tank at the six-inch water pump

on the north side of the mine road. The inspector determined that an injury was unlikely but that it could lead to a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation No. 6291588 in CENT 2006-200-M in my April 2008 decision. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. The safety standard is clear on its face. Because of the actions of the Kansas Fire Marshal and the fact that previous MSHA inspections had not identified the violation, I reduce the negligence to low. A penalty of $40.00 is appropriate.

10. Nelson Quarries withdrew it contest of Citation No. 6291596 at the hearing. (Tr. 1146). After the hearing, the parties agreed to settle Citation Nos. 6291598, 6291605, 6291606, 6291609, 6291616, 6291617, 6291622, 6291624, and 6291626 for a total penalty of $378.00.

C. CENT 2006-236-M, Plant 3.

1. On November 8, 2005, Inspector Dye issued Citation No. 6291627 alleging a violation of section 56.9301. (Ex. G-125). The citation alleges that the stop block at the dump site, which is 17 inches tall, had been compromised by a buildup of material, exposing truck operators to overtraveling hazards. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The safety standard provides, in part, that berms or bumper blocks shall be provided at dumping locations where there is a hazard of overtravel. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that trucks back up to dump rock into the crusher and the stop block was not effective because loose rock had filled up the area. (Tr. 1425-26; Ex. G-125c). The material that had been allowed to build up formed a little ramp. She determined that there was a danger of overtravel. The citation was abated by removing the loose rock. The trucks back up the ramp at a slow speed. (Tr. 1435). Mr. Peres testified that the purpose of the stop block was not compromised by the material on the ramp. (Tr. 1453). A truck operator could still determine that he should not back any further when he reaches the stop block.

The purpose of a stop block is to let the truck driver know that he is at the end of the ramp. Although there was an accumulation of material, an experienced driver would still be able to determine that he was at the end of the ramp. (Ex. G-125c). Although it was unlikely that a driver would travel too far, the stop block was compromised to a certain extent. I find that the Secretary established a violation but that it was not serious. A penalty of $40.00 is appropriate.

2. On November 8, 2005, Inspector Dye issued Citation No. 6291634 alleging a violation of section 56.12034. (Ex. G-128). The citation alleges that the fluorescent bulbs in the scale

house were not guarded to prevent persons from being exposed to shock and burn hazards. The lights were within seven feet of the floor. She determined that an injury was unlikely and that the negligence was moderate. The safety standard provides that portable extension lights and other lights that, by their location present a shock or burn hazard, shall be guarded. The Secretary proposes a penalty of $60.00 for this citation.

The cited fixture had two bulbs. Inspector Dye could reach up and touch them. (Tr. 1432). It was not likely that anyone would be carrying anything in the scale house that would hit or break the lights. I find that the fluorescent bulbs in the scale house did not present a shock or burn hazard. This citation is vacated.

3. On November 8, 2005, Inspector Dye issued Citation No. 6291630 alleging a violation of section 47.41(a). (Ex. G-126). The citation alleges that the 80-gallon fuel tank at the 6-inch water pump on the north side of the mine road was not labeled for its contents. Inspector Dye determined that an injury was unlikely but that any injury would likely be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision for this citation on the evidence presented with respect to Citation Nos. 6291573, 6291636, and 6291639 in Docket No. CENT 2006-200-M and CENT 2006-202-M in my April 2008 decision. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. A penalty of $60.00 is appropriate.

4. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6291601 and 6291632. Nelson Quarries agreed to withdraw its contest of Citation No. 6291633. (Tr. 1423). After the hearing, the parties agreed to settle Citation Nos. 6291613, 6291615, 6291620, 6291621, and 6291623 for a total penalty of $210.00.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Plant 3 had a history of 6 paid violations in the two years prior to June 28, 2005, Plant 4 had a history of 21 paid violations in the two years prior to November 16, 2005. (Ex. G-136). Most of these previous violations were non-S&S. Nelson Quarries is a rather small operator and its quarries are small. All of the violations were abated in good faith. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. If I did not discuss gravity or negligence with respect to a citation, then the inspector's determinations are affirmed. 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:

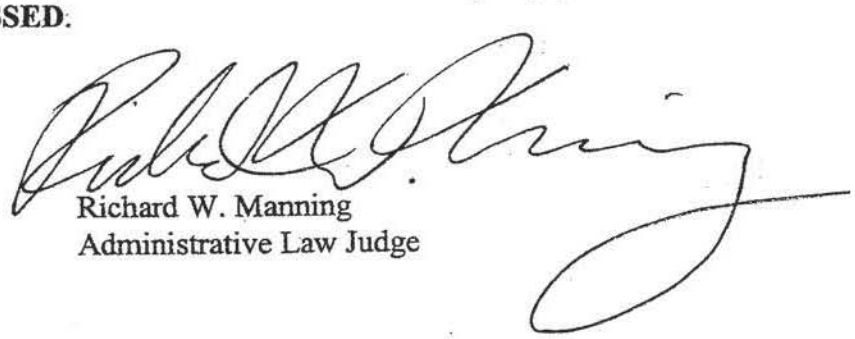
Citation No.	30 C.F.R. §	Penalty
CENT 2006-205 -M, Plant 4		
6291255	56.14107(a)	$60.00
6291256	56.14107(a)	60.00
6291258	56.14107(a)	40.00
6291261	56.14107(a)	40.00
6291263	56.14107(a)	40.00
6291265	56.14112(b)	60.00
6291268	47.44(b)	Vacated
6291651	56.14107(a)	42.00
6291652	56.14112(b)	42.00
6291653	56.14112(a)(1)	42.00
6291656	56.14112(b)	42.00
6291657	56.14107(a)	42.00
6291658	56.14107(a)	40.00
6291659	47.41(a)	60.00
6291661	47.44(b)	Vacated
6291663	56.14107(a)	Vacated
6291664	56.14107(a)	42.00
6332080	56.12004	60.00
6332081	56.12004	60.00
6332082	56.14107(a)	60.00
CENT 2006-209-M, Plant 3		
6291596	56.14100(b)	60.00
6291598	56.14107(a)	42.00
6291599	56.14100(b)	60.00
6291600	56.14107(a)	60.00
6291602	56.12018	60.00
6291603	56.12002	10.00
6291605	56.14112(b)	42.00
6291606	56.14107(a)	42.00
6291608	56.11002	10.00
6291609	56.14112(b)	42.00
6291612	56.12040	60.00

6291616	56.14107(a)	42.00
6291617	56.14107(a)	42.00
6291622	56.14107(a)	42.00
6291624	56.14107(a)	42.00
6291626	56.14107(a)	42.00
6291628	56.9300(a)	60.00
6291629	56.4501	60.00
6291631	56.4101	40.00

CENT 2006-236-M, Plant 3

6291601	47.44(b)	Vacated
6291613	56.14112(b)	42.00
6291615	56.14107(a)	42.00
6291620	56.14112(b)	42.00
6291621	56.14107(a)	42.00
6291623	56.14112(b)	42.00
6291627	56.9301	40.00
6291630	47.41(a)	60.00
6291632	56.18002(a)	Vacated
6291634	56.12034	Vacated
6291633	56.30(a)	60.00
	TOTAL PENALTY	$2,060.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $2,060.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

Jennifer Casey, Esq., and Kristi Henes, Esq, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (First Class Mail)

Paul M. Nelson, P.O. Box 334, Jasper, MO 64755 (Certified Mail)

Kenneth L. Nelson, President, Nelson Quarries, Inc., P.O. Box 100, Gas, KS 66742-0100 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 13, 2008

WEBSTER COUNTY COAL, LLC, Contestant	:	CONTEST PROCEEDING
	:	Docket No. KENT 2008-469-R
v.	:	Citation No. 6696632; 01/04/2008
SECRETARY OF LABOR, Mine Safety and Health Administration, MSHA, Respondent	:	Dotiki Mine Mine ID 15-02132

SUMMARY DECISION

On March 12, 2008, Respondent, Webster County Coal, LLC, (WCC) filed a motion for summary decision in the captioned proceeding, seeking vacation of Citation No. 6696632. The citation alleges a violation of the standard at 30 C.F.R. § 50.20(a) and charges as follows:

> The company failed to complete and submit an MSHA # 7000-1 (Mine Accident, Injury, and Illness Report) for the roof fall that occurred at crosscut #63 of the 3rd South East Sub-Mains cut through. The fall was found on December 4, 2007, by MSHA inspector.
>
> 30 C.F.R. § 50.20(a) provides, in relevant part as follows:
>
> Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. ... The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident... occurs,... shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7.

An "accident", as relevant hereto, is defined as "[a]n unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage." 30 C.F.R. § 50.20(h)(8). "Active workings" are defined by the Secretary as "[a]ny place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 75.2. WCC argues that it is entitled to summary decision because the cited roof fall was not, in any event, a reportable accident under Section § 50.20(a) since the area in question was not part of the mine's "active workings" as defined in Section 75.2.

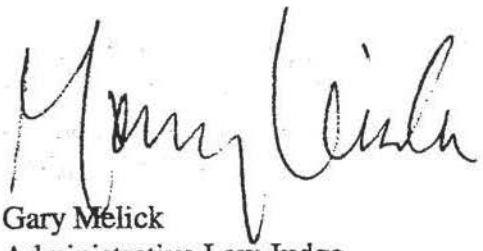
Under Commission Rule 67, 29 C.F.R. § 2700.67, a summary decision may be granted if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and declarations, shows: (1) that there is no genuine issue as to any material fact; and (2) that an that the moving party is entitled to summary decision as a matter of law. I find that WCC is entitled to summary decision because the undisputed facts do not establish as a matter of law that a violation existed as charged.

In this regard, it is undisputed that the area of the mine where the subject roof fall occurred had previously been "dangered off" by WCC on November 13, 2007, because of bad roof conditions. There is no dispute that miners were therefore not permitted as of that date to work or travel in the dangered off area. See *Cypress Empire Corporation* 12 FMSHRC 911, 917 (May 1990). Accordingly miners would not be "normally required to work or travel" in such an area. Thus, the area at issue was not, as of November 13, 2007, within the "active workings" of the mine under 30 C.F.R. § 75.2 and the roof fall that subsequently occurred was therefore not an "accident" within the meaning of 30 C.F.R. § 50.2(b)(8). Moreover the roof fall was accordingly not reportable under 30 C.F.R. § 50.20(a). There was therefore no violation of 30 C.F.R. § 50.20(a). The motion for summary decision must therefore be granted and Citation No. 6696632 must be vacated. Under the circumstances there is no need to discuss WCC's alternative argument for vacating the citation.

In reaching this conclusion I have not disregarded the Secretary's argument that, under the foregoing analysis, the operator could avoid reporting any roof fall simply by subsequently dangering off the affected area. The facts herein are distinguishable however in that it is undisputed in this case that the subject area was dangered off before, not after, the roof fall occurred.

ORDER

Contest Docket No. KENT 2008-469-R is granted and Citation No. 6696632 is hereby vacated.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

Daniel W. Wolff, Esq., Crowell & Moring LLP, 1001 Pennsylvania Avenue NW, Washington, DC 20004-2595

Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

May 19, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LAWRENCE L. PENDLEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 2006-506-D MADI CD 2006-02
v.	:	
HIGHLAND MINING COMPANY, LLC; Respondent	:	Mine ID 15-02709 Highland No. 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LAWRENCE L. PENDLEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 2007-383-D MADI CD 2007-05
v.	:	
HIGHLAND MINING COMPANY, LLC; DAVID WEBB, LARRY MILLBURG and SCOTT MAYNARD as AGENTS, Respondents	:	Mine ID 15-02709 Highland No. 9 Mine

INTERIM DECISION ON LIABILITY

Before: Judge Barbour

These consolidated cases are before me on discrimination complaints brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Lawrence Pendley. The Secretary filed the complaints against Highland Mining Company, LLC (Highland) and its alleged agents, David Webb, Larry Millburg, and Scott Maynard, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 815(c) ("Mine Act or Act"). Pendley is a miner who works in

maintenance and parts supply at the Highland No. 9 Mine.[1] Tr. 60. On December 21, 2005, Pendley was suspended from work for three days without pay (Docket No. KENT 2006-506-D). After the suspension had run its course, he returned to the mine and continued to work until March 21, 2007, when he again was suspended. He was discharged on March 24, 2007 (KENT 2007-383-D). In her complaints, the Secretary charges Pendley was suspended and discharged because of numerous safety complaints he made to mine management and to MSHA. The Secretary seeks, *inter alia*, the expungement of Pendley's employment records; Pendley's permanent reinstatement to the same position he held prior to his discharge or to a comparable position; payment to Pendley of the back wages, benefits, and expenses lost due to his discharge; payment of interest; and the assessment of an aggregate civil penalty of $60,000 against Highland.[2]

Following Pendley's discharge, the Secretary petitioned for his temporary reinstatement, which I granted. *Secretary on behalf of Lawrence Pendley v. Highland Mining Company, LLC*, 29 FMSHRC 424 (May- June 2007). Pendley has since worked at the mine. However, the Secretary alleges the company has continued to violate section 105(c) by subjecting him to ongoing harassment and disparate treatment (Docket No. KENT 2007-383-D). The Secretary requests an order directing the company to cease its unlawful actions. She also requests any agent found to have committed violations of section 105(c) be ordered to cease the same. Sec. Br. 57-60.

For its part, Highland admits Millburg and Maynard are its agents, but denies Webb is.[3] Highland acknowledges it was aware Pendley filed complaints with MSHA about various

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[1]Prior to March 2007, Pendley worked for 25 years in the mining industry, the last four years at the Highland No. 9 Mine, where he started as a roof bolter. After six months, he switched to the maintenance and supply position he has held since. Tr. 61. Pendley's position is commonly referred to as "maintenance parts runner." Tr. 62.

[2]The Secretary requests $20,000 be allocated to any violation of section 105(c) found in Docket No. KENT 2006-506-D and $40,000 be allocated to any violation found in Docket No. KENT 2007-383-D. Sec. Br. 59-60.

[3]At relevant times Larry Millburg was the superintendent of the mine and Scott Maynard was the assistant superintendent. During part of those times, David Webb was the operations manager of the mine. As such, he was the mine's highest ranking officer and the person in charge of approving disciplinary actions, although he usually "delegate[ed] out" implementation of the discipline. Tr. 605. However, after May 2006, Webb became director of Kentucky operations for Peabody Energy Company. As the director, Webb is in charge of three deep mines Peabody controls in Kentucky, one of which is the Highland Mine. With the change in jobs has come a change in duties. Since May 2006, Webb has not been involved directly in disciplinary actions at the Highland Mine, although he has been made aware of "anything . . . other than standard normal disciplines." Tr. 607-608.

conditions and incidents at the mine. It also agrees Pendley was suspended on December 21, 2005, and on March 21, 2007, and was discharged on March 24, 2007. However, it denies Pendley was suspended and discharged because he made safety-related complaints or otherwise exercised his section 105(c) rights. Rather, the company asserts it acted for legitimate business reasons.

The cases were heard in Evansville, Indiana. For the reasons set forth below, I find the Secretary has established Highland and David Webb discriminated against Pendley when they suspended him for three days on December 21, 2005 (Docket No. KENT 2006-506-D), but I also find that Pendley was properly suspended on March 21, 2007, and that his subsequent discharge did not violate the Act (Docket No. KENT 2007-383). In addition, I find the Secretary did not establish Pendley has been discriminated against since his discharge (Docket No. KENT 2007-383-D).

BACKGROUND

As indicated, the cases arise from a series of complaints filed by Pendley with the Secretary and by the Secretary with the Commission. The Secretary's first complaint, Docket No. KENT 2006-506-D, was filed on September 22, 2006. Subsequently, it was settled, and I approved the settlement and dismissed the case. However, on April 3, 2007, the Commission vacated my actions because Pendley was not a party to the settlement. The Commission returned the case to me. In the meantime, Pendley had been discharged, and the Secretary filed the application for Pendley's temporary reinstatement, which was docketed as KENT 2007-265-D. After a hearing on the merits of the temporary reinstatement proceeding. The Secretary filed the second discrimination complaint, KENT 2007-383-D. A hearing then was convened on the merits of Docket No. KENT 2006-506-D and KENT 2006-383-D. The hearing also involved the temporary reinstatement proceeding, in that the parties agreed the written record of the temporary reinstatement proceeding would be considered part of the record of the hearing on the Secretary's discrimination complaints.[4] Tr. 8-9.

Subsequent to Pendley's reinstatement and prior to the hearing on the merits of the complaints, the Secretary supplemented her allegations of discrimination in Docket No. KENT 2007-383-D by filing an amended complaint asserting Highland continued to discriminate against Pendley by shifting his work assignments, by assigning work he could not complete, by applying different overtime rules to him, and by failing to reinstate his full benefits. Not surprisingly, Highland disagreed with the Secretary's allegations.

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[4]In this decision the transcript of the hearing on the temporary reinstatement application is designated as "TRH Tr." and the transcript of the hearing on the discrimination complaints is designated as "Tr."

THE DECISION'S ANALYTICAL FRAMEWORK

The Secretary's complaints are based on various incidents, most of which involve Pendley and a fellow miner, Jack Creighton[5]; and Pendley and mine office personnel. Numerous witnesses testified about the incidents. Some of the testimony overlapped. A lot of it conflicted. The chronology of events frequently was not specific and – to my mind at least – Pendley's and the Secretary's allegations were not always clear, making it difficult to get a "handle" on the case.

This stated, a reasonable way to sort through the conflicting and overlapping record is chronologically to describe the incidents and the responses of the company and MSHA, to review the legal principles governing the resolution of discrimination allegations, to summarize the parties' arguments, to apply the principles and arguments to the record, and to determine if the record supports finding the company's reactions to the incidents violated the Act.

THE INCIDENCES OF ALLEGED DISCRIMATION AND THE COMPANY'S AND MSHA'S RESPONSES THERETO

I. THE PARTS DELIVERY INCIDENT

As a maintenance and parts runner at the mine, Pendley was responsible for stocking the underground maintenance shack with needed parts and supplies. According to Pendley, trouble with Creighton began in May 2005, when Creighton used "foul language" to tell Pendley management, not Pendley, was responsible for selecting the materials to be delivered to the underground supply shack. Tr.66. Pendley believed Creighton was angry because Creighton felt Pendley was making work for him. *Id.* Creighton maintained Pendley wanted him to load boxes of Pendley's food (cookies, potato chips and popcorn) and to send the boxes into the mine. Creighton refused. ("[I]f I send . . . [Pendley's] food in, I'd have to send 200 mens[']food in." Tr. 761.) Creighton testified he asked Pendley, "[D]o you want me to supply coal mines or do you want me to supply a snack bar?" Tr. 761.

Pendley reported the incident to supervisor Rodney Baker and to other management officials. Baker said he would talk to Creighton. Tr. 67. As Pendley recalled, the management officials emphasized it was Pendley's job to order parts and supplies, and it was Creighton's job to deliver and send them. Tr. 66-67. A few days later, Baker told Pendley he had spoken with

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[5]According to Steven Tramel, a maintenance worker who worked with both Pendley and Creighton, Creighton was "a little different." Tr. 505. Tramel described Creighton as having "a smart attitude." *Id.* He also was given to playing practical jokes on other miners – things like tying miners' boots together. Tr. 506. In addition, Bernard Alvey, who went to high school with Creighton, described him as having a "sharp tongue." Tr. 525.

Creighton.

II. THE TRUCK INCIDENT

Pendley maintained shortly after the May 2005 incident Pendley's truck was damaged in the mine parking lot. Pendley reported the incident to Highland shift foreman Steve Bockhorn and to operations' manager Scott Maynard. Tr. 74, 80. Pendley testified the truck exhibited a "very large" dent. Tr. 262. The estimated repair cost was $900. Tr. 262. Pendley recalled Maynard telling him the damage appeared to be the result of vandalism.[6] *Id.* According to Pendley, after he reported the incident, Webb told him not to take anything into his own hands and to report further incidents.

Webb testified he first met Pendley when Pendley came into Webb's office and told him about the truck. Webb asked Pendley if Pendley had any thoughts about who might have damaged it. Pendley responded he did, but he did not want to state names because he did not know for sure. Pendley just wanted Webb to be aware of what happened on mine property. Tr. 609. Webb told Pendley mine employees would "keep a lookout," and if the damage continued, the company would consider putting a security camera in the parking lot. Tr. 609-610.

III. THE BLEACH INCIDENT

Pendley testified around the same time someone opened his locker in the bathhouse and poured bleach on his clothing. Tr. 68. Pendley thought it was Creighton, a charge Creighton denied. *Id.*, 807; *see also* Tr. 261-262. Pendley testified he again complained to Baker. Creighton told fellow miners Pendley was "crying," and, according to Pendley, Creighton said, "I'll give you something to cry about." *Id.*

The incident was known to Scott Maynard, the assistant superintendent, who testified Pendley spoke with him about someone "put[ting] bleach on his clothes." Tr. 933. Maynard discussed the incident with Creighton, who told Maynard he had no idea what Maynard was talking about. Tr. 934; *see also* Tr. 955. Maynard asserted he "never could find . . . anyone to confirm the story." Tr. 934.

IV. THE DIRT INCIDENT

Subsequently, another incident occurred in the bathhouse. James Allen, the mine safety manager, testified Pendley told him dirt was swept intentionally in front of his locker. Allen believed the incident could have been safety-related if the dirt was "enough that . . . [Pendley]

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[6]There was a dispute over the extent of the "damage." Maynard testified the "damage" looked like rose bush scratches, and other witnesses supported this view. *See* Tr. 263, 932-933; *see also* Tr. 513-514, 704.

could have tripped and stumbled." Tr. 704.

According to Creighton, it was not dirt, but rather muck that was left in front of Pendley's locker. Although Creighton usually hosed down the bathhouse floor, he was sure he did not leave the muck, because on the day of the incident someone else hosed the floor. Tr. 766.

V. THE HOSE INCIDENT

Another incident followed. Steve Storm, a belt splicer, was in the bathhouse with Pendley when Creighton was hosing down the floor. According to Storm, Creighton was moving toward Pendley when Pendley walked between Creighton and a row of lockers and "got his feet and probably pants legs sprayed a little bit." Tr. 743. (In Creighton's version, Pendley had "a little [water] splashed on his boots." Tr. 762.) Creighton maintained Pendley walked toward him even though he could have gone another way.[7] Tr. 765.

VI. THE "GUN" INCIDENT

The "gun" incident came next. Creighton testified he knew Pendley had gone to Creighton's supervisor and complained. "So" said Creighton, one day in the bathhouse "after I heard [about] him complaining, I walked halfway back [to Pendley's locker] . . . thr[ew] a piece of paper towel on the floor and told him there is something to cry about . . . [and] that's when he reached up in his locker in his hard hat and pulled out what I perceived to be a weapon." Tr. 767. Creighton continued, "I told him . . . * * * * I [will] shove it down . . . [your] throat or make . . . [you] eat it, something on that order." Tr. 769. Creighton maintained Pendley "started mouthing" at him, but Creighton walked away. *Id.*

Creighton did not complain to Webb about the incident until two or three weeks after it happened. Tr. 818. When he ultimately spoke with Webb about it, Webb remembered him saying Pendley either threatened he had a gun or acted as though he had a gun in his locker. Tr. 612, 616.

VII. THE CAP LAMP INCIDENTS

Throughout the summer of 2005, Pendley testified he experienced more incidents of what

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[7]Pendley was not the only one who sometimes got wet when Creighton hosed the floor. Storm also was sprayed on occasion. He testified Creighton did not stop for anyone. Tr. 746. As Creighton saw it, if others got wet, it was because he had "a quitting time and . . . [he] want[ed] to get out." Tr. 809. Creighton denied the way he hosed down the floor lead to altercations with others, although he admitted when miners got wet, they "bark[ed] a little bit." *Id.*

he believed might be Creighton inspired harassment. Pendley had trouble with his cap lamp. At times he felt "bad" bulbs purposely were put in his lamp. Tr 72. He testified it was "very uncommon" to have as much trouble with a lamp. Tr. 230. At one point, he stored his lamp and locked it in place. Later that night or during the following day, someone cut the lock and took the lamp. Tr. 231.

VIII. THE NONSPECIFIC HOIST INCIDENTS

At the mine, men and supplies were lowered underground via the hoist. The miners rode in and out on man load cars, which usually were coupled in a series. One of the cars (the brake car) contained the brakes for the man load cars. One group of controls for the hoist was located on a control panel which was in a shed (the "slope shack") on the surface. The slope shack was some distance from the portal. Tr. 70-71. Another group was located in the hoist house, which was
uphill from the slope shack and further from the portal.

Among the controls at the slope shack and the hoist house was an "E-stop" button (an emergency stop button), which, if pushed, brought the man load cars to an abrupt halt. Tr. 70. There were other E-stop buttons in the front compartment of some man load cars and underground at the bottom of the slope. *See* Tr. 938.

Pendley maintained when Creighton was at the controls of the hoist and Pendley was waiting to board the man load to ride into the mine, Creighton sometimes would send in the cars without Pendley. Or, sometimes Creighton would stop the man load, and Pendley would have to get out and restart it. Tr. 70. Pendley did not identify the specific dates and/or times when the incidents happened; rather, he referred them as a "continuous thing." Tr. 81. Maynard confirmed Pendley spoke with him about "numerous incidents [of] the slope car being stopped and started." Tr. 933.

IX. THE MOTORIZED EQUIPMENT INCIDENTS

Pendley further asserted there were occasions when Creighton traveled close to him on a motorized cart (a "golf cart"). Pendley testified Creighton told him to watch out or he would be run over. Tr. 74; *see also* 78-79. Pendley stated he was "on guard pretty well continuously" when around Creighton. *Id.*; *see also* Tr. 78. Pendley added, once when Creighton "ran right past me real close at a pretty good speed," another miner, Lap Lewis, saw the incident and said he did not understand why management failed to do something about Creighton's "close calls." Tr. 78-79.

Maynard testified Pendley spoke with him about Creighton trying to run him over. Tr. 933. According to Maynard, he checked the complaints, but "never could find any witnesses to anything or anyone to confirm the stor[ies]." Tr. 934

X. THE FORKLIFT INCIDENT

Pendley also asserted there was a specific incident when Creighton threatened to run him over with a fork lift. The incident occurred when Creighton was operating a fork lift on the surface. There was a pallet of materials on the fork lift which had to be loaded onto one of the man load cars. Pendley stated Creighton pulled the fork lift up to the man load, and Lap Lewis stood in front of the fork lift and loaded the materials directly off the fork lift onto the man load car. Then, according to Creighton, Pendley, who was waiting to board the man load car to go underground, noticed Lewis loading the materials on one of the cars. Rather than wait at the man load area to board the man car, Pendley decided to "just . . . walk up [to where the car was being loaded] and sit down on . . . [the car] until they released [it] to go in the [mine]." Tr. 1064-65.

In Pendley's version of the incident, he "just walked up there and stopped at the edge . . . . [where Lewis] was . . . unloading [supplies from the fork lift]. When [Lewis] got done unloading . . . [Lewis] walked back up towards [Creighton]," and Pendley then walked behind Lewis. Tr. 1067-68. Pendley was adamant he only walked where Lewis walked. Tr. 290, 1087. Although he agreed he could have walked around the fork lift and entered the car from the other side, he believed it would have involved stepping over the hoist rope, something he maintained was a safety hazard. Tr. 1086-87. In any event, he "felt like either way they would have accuse[d him] . . . of going the wrong way." Tr.1090. As Pendley remembered, when he "walked through where . . . Lewis had been standing," Creighton threatened to run him over. Tr. 209.

Creighton remembered the incident differently. Creighton testified he pulled up to within a foot or two of the car and "all of a sudden here appears Pendley . . . where he ha[d] no business being." (Tr. 777), between the car and fork lift. Creighton maintained he said to Pendley, "[H]ey, get the hell out of the way before you get run over." *Id.* Pendley backed out and then again "placed himself between the forklift and . . . [another] car." *Id.* Creighton testified Pendley called him "yellow" and then "called [him] out." Tr. 777-778. Creighton stated he, "just grinned and flipped . . . [Pendley] off . . . [and] then . . . left." Tr. 778.

Creighton was certain Pendley walked between the fork lift and the car. In Creighton's view, by placing himself between the fork lift and the car, Pendley risked serious injury in the event the fork lift's brakes failed or its throttle stuck. Tr. 822; *see also* Tr. 208.

For his part, Pendley was sure Creighton said a lot more than he testified to. Pendley recalled Creighton's "open[ing] the door [of the fork lift] and . . . yelling and cussing." Tr. 1068. Pendley avoided making eye contact with Creighton. *Id.* He was "absolutely" concerned for his safety, because "whenever someone tells you . . . that would be a good way to get run over or I'm going to run over you, with all that had went on concerning the statements that he made against me in the past, it's . . . a continuous concern." Tr. 1069.

Maynard learned of the forklift incident and discussed it with Creighton, who told Maynard he had no idea what Maynard was talking about. Tr. 934; *see also* Tr. 955. Webb, then

the operations manager, also learned of the incident, although he could not recall who told him. Tr. 664. James Allen, the mine safety manager, also remembered hearing about it and speaking with Creighton and another miner, perhaps Lewis. Tr. 704, 721-722. Allen determined Pendley had passed between the forklift and the man load car. He also determined Pendley did not have to walk where he did. He could have sat in another seat in the man load and avoided passing between the forklift and the man car. Tr. 704-705. Allen remembered Creighton stating he never came "dangerously close" to Pendley. Tr. 723.

XI. HIGHLAND'S INITIAL RESPONSE

As a result of Pendley's complaints (primarily about Creighton), and Creighton's complaints about the "gun incident," management officials held a meeting at which both men were present.[8] Pendley remembered the meeting as occurring around the late summer or early fall of 2005, as did Webb. Tr. 78, 613. Maynard was present, as was Jesse O'Rourke, who was the mine superintendent before Larry Millburg took the position. The union was represented by Ron Shaffner, the president of the union local; and "Shug" Dyer, the union safety committee chairman. Tr. 76.

According to Creighton, he and Pendley were talked to separately and then were brought together. Webb testified both men were asked what was going on between them and what their problems were. The "gun incident" and others were discussed, including Pendley's assertion Creighton was trying to run him over.[9] Tr. 615, 770, 772-773.

Management officials told Pendley they would look into his complaints. They also asked Pendley if they could check his locker for a gun.[10] Tr. 76, 1206. At the close of the meeting, Webb told Pendley and Creighton he was giving each of them a written warning. Tr. 177; 199.

Webb testified, after Pendley and Creighton left, management and union officials agreed the warning should be strong and it should put Pendley and Creighton on notice that future incidents would not be tolerated and future altercations were not acceptable. Tr. 617. As a

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[8]It was not only mine management officials who knew of the conflicts involving Pendley and Creighton, mine mechanic Clarence Powell testified "everyone" at the mine knew about them. Tr. 491.

[9]According to Pendley, at some point during the discussion of the gun incident, Creighton again said he was going to "shove a gun down . . . [Pendley's] throat." Tr. 77; 205. Pendley said to Webb, "[N]ow, do you see what I'm dealing with." *Id.*

[10]Pendley's locker was checked, as was Creighton's, and no guns were found. Tr. 77, 207, 612..

result, the warning letters were issued. The letters, which were dated October 7, 2005, were identical. They stated "verbal abuse, disregard for safety rules and threatened violent behavior to a co-miner" would not be tolerated. Tr. 621; Resp. Exhs. 9 and 10. The letters also stated they were a "last and final written warning" and "[a]ny further abuse, altercations or violations of Company Safety and Work Rules may lead to . . . suspension with intent to discharge." Resp. Exhs. 9 and 10.

Pendley testified, after leaving the meeting, he went to Jesse O'Rourke's and Dave Webb's offices, shook hands with each and told them "I don't feel like I deserve this . . . warning but if that's what it takes to solve this problem I'll accept it." Tr. 201. Webb believed Pendley "just wanted to kind of reaffirm . . . that things had . . . gotten out of proportion and he just wanted everything to settle down." Tr. 618. Webb stated he told Pendley, "that's all we want, too." Tr. 618.

Creighton took a different and more pragmatic course. On October 10, Creighton met with Webb and requested his letter have a "sunset date." Tr. 623-624. Webb agreed if Creighton did not engage in any of the conduct mentioned in the letter for six months, the letter would be removed from Creighton's personnel file. *Id.*, Tr. 785; *see also* Tr. 625. Pendley made no such request of Webb, or of anyone else.

XII. THE MAN LOAD INCIDENT OF NOVEMBER 29

After the October meeting and letters, more than a month came and went without another incident, but the lull was broken on November 29, 2005. On that date, a man load car was sitting on a side track waiting to have a supply car attached before being sent into the mine. Once the cars were coupled, they were brought to the man load area, the point where miners usually got on. Tr. 83-84. Pendley, who was waiting to go underground, proceeded to the area. The cars arrived and Pendley climbed aboard. To send the cars into the mine, someone had to pull a cord adjacent to the cars. Pendley was the only miner aboard. He pulled the cord, the hoist started, and the man load cars moved down the slope into the mine. Pendley was sitting in the front seat of the middle car. Tr.1072.

Creighton was working in the yard. He had dropped a load of supplies at the slope shack. Creighton saw Pendley get onboard and go underground. Tr. 786. Asked what he did after Pendley went underground, Creighton responded, "I might have went in and ate. I might have went to the supply house. . . . I probably got on a forklift." Tr. 787. Asked if he went to the hoist house where a hoist control panel was located, Creighton said "No." *Id.* Asked if he went to the slope shack, the site of another control panel, Creighton replied, "Not that I recall." *Id.*

The particular car on which Pendley was riding did not have a radio to communicate with the surface. Tr. 1072. Therefore, when the cars came to a lurching stop a third to a half of the way down the slope, Pendley could not call for help. Tr. 210. As the cars halted, Pendley was thrown forward. He leaned to his right in order not to fall out of the car. He testified he felt

his back muscles and neck muscles "pull." Tr. 86. Then, he "gathered [himself] together" and waited. *Id.* He stated, "I didn't know when . . . [the cars] would start again or if . . . [the hoist] was broke[n] or what happened . . . so . . . I just stayed in the car." Tr. 86-87. He estimated five or ten minutes passed as he "held on in case something else . . . happen[ed]." Tr.1075. Pendley did not leave the car. Tr. 87, 98, 211. Then, the cars resumed their descent, and at the bottom they came to a slow and normal stop. Tr. 87, 218, 1074.

Pendley asked Brian Phillips, who was working at the bottom, if he stopped the cars. Phillips said, "no." Tr. 87, 318, 1074; *see also* Tr. 310. Phillips told Pendley no one at the bottom had stopped them. *Id.*, Tr. 287-288.

Whether or not the cars stopped as Pendley claimed was a subject of much conjecture. Pendley suspected Creighton caused the cars to stop by pushing an E-stop button, but Creighton denied it. In fact, Creighton did not believe the cars stopped suddenly. He thought the brakes on the brake car would have set if the cars stopped and, according to Pendley, they had not set. Tr. 788; *see also* Tr. 793.

Scott Maynard was more specific in expressing his doubts. While he conceded "[s]omeone could [have] stop[ed] the brake car from the hoist house and restart[ed] it without setting the brakes on the . . . [brake]car" (Tr. 964), he maintained there was a "roll back mechanism" on the man load cars and if the man load stoped abruptly, the hoist cable would stretch and then contract causing the cars to "spring back." Tr. 975. He maintained, "[a]ny change in direction when the car[s are] in motion will automatically set your emergency brakes. It's called a roll back safety device." Tr. 975-976. Once the brakes set, a person had to get out of the man load and release the brakes on the brake car. Like Creighton, Maynard noted Pendley stated he did not leave the car. Tr. 976.

Michael Moore, the MSHA inspector who conducted quarterly inspections of the hoist and man load mechanisms, questioned Maynard's opinion that a roll back would set the brakes on the brake car. He testified "the ability of a roll back to set the brakes on the brake car was taken out [of the system] in the early 1980s." Tr. 1045. If Pendley was traveling down the slope and someone pushed an E-stop button in the hoist house or at the slope shed, the cars would halt suddenly, but the brakes on the brake car would not necessarily be affected. Tr. 323-324; *see also* Tr. 336, 1042. Thus, Moore believed Pendley might well have been able to remain in the car afer the man load came to an abrupt stop.

Moore also explained why Pendley was thrown forward. In Moore's opinion, when the cars came to a sudden stop, "it would give you a jolt . . . and your body would try to move." Tr. 324-325. Moreover, if, as was the case, the man load contained a car carrying supplies, the added weight on the supplies would make the "jolt" even stronger. Tr. 325-326. Moore believed a stop such as that described by Pendley easily could injure a miner. Tr. 324.

After Phillips assured Pendley no one on the bottom pushed the E-stop, Pendley went to

work. Tr. 91. However, his back bothered him. Greg Moody was Pendley's supervisor that day. Pendley told Moody what happened, and he described the problem with his back. Moody said Pendley "ought to have it checked." *Id.* Pendley then noticed his left arm was "tingling." *Id.* Moody asked Pendley to help him complete an accident report, and Moody took Pendley to the surface, to the commons area room adjacent to the mine offices. Pendley again told Moody about the man load stopping abruptly, about being thrown forward and to the right, and about the subsequent pain in his back and the tingling in his arm. After Moody transcribed what Pendley said, he asked Pendley to read and sign the report if he agreed with it, which Pendley did.[11] Tr. 91-92.

Other miners were in the area when Pendley and Moody were working on the report, including Creighton and Randy Wolfe. Wolfe worked in Highland's safety department. Tr. 92-93. According to Pendley, Creighton said of Pendley, "[A]in't nothing wrong with him. He ain't hurt or nothing."[12] Tr. 93. At that point, Wolfe suggested Pendley move to the safety department, which Pendley did. Others came to the safety department and inquired how Pendley felt. Wolfe, too, asked Pendley how he felt. Tr. 93-94. Pendley maintained he told Wolfe he "pulled" his back when he was thrown forward and to the right, but he first felt back pain when he reached over to retrieve items from the car floor once the car reached the bottom of the slope.[13] Tr. 216.

A short while later Pendley was taken by ambulance to a hospital, where x-rays were taken and pain medication was administered. At the hospital, Pendley was told he should see a doctor at a specific clinic in Henderson, Kentucky. Tr. 95. Pendley did as directed. The doctor told him to take a few days off work and then go back. He also instructed Pendley to come back to the clinic if he had more back trouble. Tr. 98-99.

As a result of this advice, Pendley stayed off work for several days. Tr. 99. When he returned he asked Lap Lewis if Lewis was in the man load control area on November 29. Lewis, said he was not, but that Creighton was in the area. Lewis thought Creighton sent Pendley underground. Pendley responded, "no . . . I sent myself underground." Tr. 100. Pendley knew of no reason why Creighton was in the control area.

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[11]Pendley testified, when he later asked for a copy of the report, the mine safety manager, Jim Allen, told him the report was "company material" and Pendley could not have a copy. Tr. 96, 224. In addition, Pendley maintained Allen said more than once what Pendley said had happened could not be accurate. *Id.* Pendley stated Allen told him the hoist was checked out by "the hoist people," who concluded the accident "hadn't happened." Tr. 218, 222. According to Pendley, Allen added cryptically, "[W]e've all got good jobs here." Tr. 222, 224.

[12]Creighton did not recall saying anything. Tr. 824.

[13]He denied he told Wolfe the car "didn't rapidly stop." Tr. 216.

Webb heard about the incident the next morning. As he recalled, "one of the theories . . . being kicked around" was someone hit the E-stop button causing the incident. Tr. 628. Webb and the company decided to have the hoist inspected by contract electricians to ascertain if the hoist and its safety features had worked properly. Tr. 629, 669. The electricians tried, but were unable to find out whether an E-stop had been pushed, causing the man load cars to stop. Tr. 629. However, they found all of the hoist system's safety and other features were functioning as they should. Tr. 966. The electricians reported to mine safety manager Allen the host had not malfunctioned and, in fact, could not have malfunctioned as Pendley claimed. Tr. 692.

After the electricians reported their findings, Webb learned there was an allegation Creighton had pushed an E-stop button. Tr. 628; *see also* Tr. 669-670. He stated if he had been sure Creighton had caused the hoist to stop he would have considered Creighton's action to be a "bad safety offense" and he would "probably [have] taken very strong disciplinary action." *Id.* Webb could not recall whether or not he spoke with Creighton about it. Tr. 669-670. However, based on the electricians' report, he doubted an E-stop button had been pushed. He took no action against Creighton.

XIII. PENDLEY'S DECEMBER 2005 COMPLAINT TO MSHA

Following the incident, Pendley filed a complaint with MSHA. Kirby Smith, an MSHA senior special investigator, was assigned to investigate the complaint. Smith testified, when Pendley came to MSHA on December 15, he spoke with Smith and others about "a whole list of things."[14] Tr. 45. According to Smith, Pendley expressed concern about "the operation of the . . . hoist and . . . an accident that occurred to him on . . . [November 29]." Tr. 27. He also complained of "harassment . . . at the [mine] that he had been reporting to management with no effect." *Id.* Pendley asked for a copy of Highland's report of the November 29 incident, but MSHA officials had not received a report.[15] Tr. 47.

MSHA then sent Inspector Michael Moore to inspect the hoist. Tr. 326. Like the electricians hired by Highland, Moore found nothing wrong with it. He also found nothing wrong with the brake car. *Id.* Unlike the electricians, Moore concluded "the incident could have occurred just as . . . Pendley described." Tr. 32.

Smith, who accompanied the inspector, believed it was "common knowledge" that

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[14]Five months prior to that, Pendley started keeping detailed notes about what happened at the mine. Tr.196. He did so because of problems he was having with Creighton. Tr.198.

[15]Webb stated the company had not filed a report because Highland officials were not sure the hoist stopped suddenly and an accident "actually occurred." Tr. 629. Allen maintained the company was not neglecting its reporting duties. Rather, it was in the process of investigating the incident in order to complete the report if one was required. Tr. 684.

Pendley had gone to MSHA and, thus, had initiated Moore's inspection.[16] Tr. 48, *see also* Tr. 28, 47. However, when Pendley was asked by a miner if he had spoken with MSHA about the hoist, Pendley said he had not. He was afraid if he said he talked to MSHA, the information would be conveyed promptly to mine management. Tr. 102-103.

During the inspection, Moore asked about the November 29 incident and whether or not Highland filed an accident report. Allen produced an intra-company memo which stated the company had not yet determined if the incident was an accident. Tr. 684. Nonetheless, on December 20, MSHA cited Highland for a Part 50 violation. The citation alleged Highland failed to report the November 29 incident within 10 days of its occurrence.[17] Tr. 28; Gov't Exh.1. MSHA was concerned Highland was not reporting all accidents as required. So, the agency conducted an audit of the company's compliance with the Part 50 requirements and issued four more citations, each charging instances where accidents were not reported.

XIV. THE SIGN-IN INCIDENT AND THE SECRETARY'S FIRST DISCRIMINATON COMPLAINT

No sooner had Pendley complained to MSHA than another incident occurred, one which lead directly to Pendley's first suspension from work. Pendley testified in the latter part of 2005, he regularly worked 12-hour days, his usual eight-hour shift, plus four hours of overtime (two hours before his shift and two hours at its end). Tr. 108-109. On December 21, his shift started at 3:00 p.m, but Pendley got to the mine at approximately 12:30 p.m. because he intended to go to work at 1:00 p.m. The sign-in book was kept in the commons area room. Pendley signed in between 12:50 p.m. and 12:55 p.m., went to the bathhouse, got some materials and headed for the man load boarding area. He intended to go underground. Tr. 108, 111-112. When he signed in, Pendley indicated the time was 1:00 p.m.[18]

On the way to the man load area, Pendley saw Lap Lewis, who told Pendley the cars were underground and it would be "a few minutes" before they returned. Tr. 113-114. It was cold, and Pendley did not want to wait outside. He and Lewis walked into the commons area room to

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[16]Pendley testified a fellow miner overheard Shug Dyer and Ron Shaffner saying he had "gone to the federal about the hoist situation." Tr. 101.

[17]Mandatory reporting regulations at 30 C.F.R. Part 50 require an operator to report certain accidents within a prescribed period.

[18]The chairman of the union safety committee, Shug Dyer, explained under the company/union contract, a miner's pay began once he or she signed in. Tr. 446. According to Pendley, almost everyone rounded his or her sign-in time to the nearest hour.

wait.[19] Tr.114. Miner Joe Adamson came into the room and signed in. According to Adamson, it was around 1:00 p.m. Pendley had signed in immediately before Adamson. Tr. 368.

Prior to signing in, Adamson saw Webb walking up and down a hallway outside the room. He testified Webb "looked weird." Tr. 369. Pendley testified Adamson asked if he, Pendley, was getting ready to go underground. When Pendley stated he was, Adamson said he wanted to go underground with Pendley. Adamson left the commons area room, went to the supply area, and then returned. *Id.* Pendley was sitting in a chair against the wall, and Lewis and Adamson were in front of him, about six to eight feet away. Tr. 116. According to Adamson, if the weather was cold, miners usually waited inside the commons area room, where they could see the man load cars through a window.[20] Tr. 377. However, Pendley was sitting in such a way he could not see through the window. Tr. 243.

Pendley testified, Webb walked into the room and asked Pendley if he was paying Pendley "to sit there."[21] Tr. 245; *see also* Tr. 1062. Adamson stated he and Lewis did not speak to Webb, but Pendley testified he told Webb he was waiting for the man load so he could go underground. *Id.*, 244, 245, 374, 1062. According to Pendley, Webb responded, "Not on my time[,] you're not." Tr. 117. Then, Webb turned and walked away. *Id.*

Pendley, Lewis and Adamson left the commons area room and walked outside to the man load area. Pendley estimated the cars came up at about 1:30 p.m. Pendley and Adamson boarded, and they road underground. Tr. 117-118.

Webb had a different version of events. He testified between 1:15 p.m. and 1:30 p.m., he waked through the commons area room and saw Pendley sitting on a chair against the wall. Pendley was four or five feet away from Webb, and Webb did not recall anyone else in the room.[22] Tr. 631-632, 639; *See* Resp. Exh.11. Webb intended to go to the mine manager's office

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[19]Pendley described the commons area room as "wide open." He estimated it measured 20 feet by 30 feet. Tr. 115-116.

[20]Shug Dyer termed it "standard practice" for miners to sign in and wait in the room. Tr. 446.

[21]Adamson's description of what Webb said was somewhat different. He testified Webb told Pendley "he didn't pay . . . him to sit and drink coffee and all like that." Tr. 370. Adamson claimed he was "stunned" by Webb's remarks because Pendley was doing a normal thing by waiting in the commons area room. *Id.*

[22]As previously noted, the sign-in incident ultimately lead to Pendley's suspension by Webb. After Pendley was suspended, Webb was reminded by Ron Shaffner that other miners were in the room with Pendley. Webb told Shaffner he did not see the others, but if Shaffner would give him their names, he would suspend them too. Tr. 645. Not surprisingly, neither

to check maps, but when he saw Pendley, Webb decided to look at the sign-in book because he "wanted to see what Pendley was doing sitting there." Tr. 636. Webb maintained, it was "kind of odd to see a guy sitting there at that time of day." *Id.*

Webb testified he asked Pendley why he was sitting in the room. He said to Pendley, "I don't think you should be sitting here on my time. I think you ought to be heading towards the hoist, toward the underground." Tr. 637. Webb maintained Pendley did not respond.[23] Rather, Pendley got up and walked to the sign-in book and leaned over it. Webb assumed Pendley was changing his time. Tr .638. At that point, Webb turned and left the room to go to his office. *Id.*

Webb stayed in his office for about an hour. Then, he walked back to the commons area room where he checked the sign-in book to determine if Pendley had in fact changed his time. The book still showed Pendley signed in at 1:00 p.m. In Webb's opinion, by not changing his time, Pendley was being insubordinate. Tr. 639. He had falsified a company record. Webb called underground, and told a management official he wanted to see Pendley in his office.[24] Tr. 640.

After working up to two hours, Pendley was notified to return to the surface, where he was directed to report to Webb's office. At the office, Pendley found Webb; Shug Dyer, the safety committee chairman; Ron Shaffner, the union local president; and Scott Maynard, the assistant superintendent.

As Dyer remembered the meeting, Webb spoke with Pendley about why Pendley had not caught the man load cars to go underground. Then, he asked Pendley for his side of the story. Pendley looked at Dyer and Shaffner and told Webb he had "nothing further to say until . . . [he got] better representation." Tr. 444.

As Pendley recalled the meeting, Webb also said Pendley would be suspended for three

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Shaffner, nor anyone else, gave the names. Tr. 647. Webb admitted the room was "an open area . . . [with] no obstructions." Tr. 651. He did not know why he saw only Pendley. Tr. 650-652.

[23]On cross-examination Webb agreed Pendley might have said he was waiting for the man load cars. In any event, Webb was adamant he "told [Pendley] he need[ed] to be out . . . [at the man load area] . . . not inside the room." Tr. 655; *see also* Tr. 656.

[24]Webb agreed, as a general rule, if a miner signed in at 1:00 p.m. and waited outside for the hoist to come up, the miner would be paid for the time he waited. Tr. 653. Webb stated he "had an objection with . . . Pendley [on December 21] . . . because after he signed the book, he should have been out at the hoist. There's a shelter there to wait for the hoist . . . that's where he should have been waiting . . . not inside the building . . . . especially after 20 minutes." Tr. 654-655.

days for falsifying a company record (i.e., the sign-in book). Tr. 247. Webb then handed Pendley a suspension letter.[25] *Id.* Pendley testified far from remaining silent, he told Webb he denied the charges and that he did not falsify the sign-in book. Tr.119, 244. Dyer told Pendley he should tell Webb more. Tr. 120, 456. So, according to Pendley, he stated again he did not falsify anything and he felt he needed representation. Tr.120. Shaffner told Pendley he and Dyer were all the representation Pendley had, and Pendley responded, "I feel . . . I need better because I've denied what I've been accused of." Tr. 122.

Webb's version of the meeting was not too different from Pendley's. Webb remembered telling the group why he felt Pendley was insubordinate, and asking Pendley if he had a "different version." Tr. 641. Pendley responded, "I'm not going to talk to you or say anything until I get better representation." Tr. 641, *see also* Tr. 642. Webb explained to Pendley, under the union contract, the union representatives had to be there and had to represent him. Tr. 642-643. Webb then read to Pendley Webb's version of the events of the day and explained he was suspending Pendley because of insubordination. He added, he asked Pendley, "Am I wrong in my decision? Tell me where I'm off." Tr. 643. Pendley did not reply.

Webb then issued Pendley the suspension letter he had prepared before the meeting. Tr. 643-644; Resp. Exh. 13. Even though the letter was written before the meeting, Webb maintained Pendley "absolutely had a last chance . . . . [I]f he had any objections to . . . [the letter] he needed to respond . . . we could have either modified . . . [the] letter or thrown it away." Tr. 657. However, Pendley's only response was he wanted to know the dates when the suspension would take effect. Tr. 644.

After the meeting concluded, the union officials and Pendley left Webb's office. Dyer urged Pendley to return to return and speak with Webb about the suspension, but Pendley would not.[26] Tr. 247-248. Rather than explain why he had not, as Webb thought, falsified his time, Pendley went home. He then saw a doctor, who suggested he take a full week off. Pendley returned to work during the first week in January. Tr. 124.

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[25]As far as Pendley knew, no one had ever been suspended for waiting for the man load cars in the commons area room. Tr. 195. Pendley maintained the "real" reason he was suspended was because Webb thought he complained to MSHA about Highland's failure to report the November 29 incident. In fact, Pendley claimed a miner named Troy Cowan told him he heard Webb say he knew Pendley was the one who complained to MSHA about Highland's failure to file an accident report and that MSHA came to the mine and cited the company because of Pendley. Tr. 237-239; 283. However, Cowan, the second shift production supervisor, denied he told Pendley any such thing or said the company was going to "get" Pendley because he complained. Tr. 848.

[26]Dyer testified that Shaffner also urged Pendley to go back and speak with Webb ("[L]et's go back in there and . . . get it straightened out right now." Tr. 456).

Once back, Pendley maintained he was given different and increased duties. Tr.126. In fact, he testified, by the end of 2006, he had been assigned almost entirely different duties than those he held prior to being suspended. Tr. 136. For instance, he was asked to hand load a pallet and move it, rather than to use a fork lift. Tr. 131-132. Although he admitted moving the pallet did not create a safety issue, he felt there were "a lot of things that could have been shared with other employees that were being put on me." Tr. 132.

Pendley again went to MSHA and complained he was suspended because he requested a copy of the company's accident report. Pendley also said he intended to have the union file a grievance for him. According to Pendley, Shaffner told Pendley he would file it, but never did. Tr. 248-239. Rather, Pendley quoted Shaffner as stating Webb threatened to suspend the other miners who were in the commons area room with Pendley if Shaffner filed a grievance. Tr. 250.

On September 25, 2006, the Secretary, after having investigated Pendley's allegations, filed her first discrimination complaint on Pendley's behalf (Docket No. KENT 2006-506). The Secretary asserted Pendley was suspended "for making safety complaints." Complt. 2.

XV. THE OFFICE EMPLOYEES INCIDENT

While Docket No. KENT 2006-506-D was pending before the Commission, two incidents occurred that lead to the company's subsequent decision to suspend and discharge Pendley. One of the incidents was triggered by yet another problem with overtime.

On or just before March 19, 2007, Pendley learned Fay Hubbert, who was in charge of payroll at the mine, questioned overtime pay Pendley believed he was owed. Pendley was upset. He went to the office of Sheila Gaines, Hubbert's supervisor. Pendley and Gaines discussed the situation. Gaines described Pendley as agitated and "very upset" because of what he perceived to be Faye Hubbert's unauthorized questioning of his pay.[27] TRH Tr. 232. As it turned out, Hubbert was doing her job. Gaines, Hubbert's supervisor, explained, among Hubbert's duties was a requirement to review all claims for overtime and make sure they were accurate. TRH Tr. 232-233, 246. According to Gaines, Pendley argued Hubbert had no such right. TRH Tr. 234. He told Gaines, Hubbert was doing things that were not "right," that Gaines would be held accountable. *Id.*; *see also* TRH Tr. 235. Gaines remembered Pendley saying, "You're going to take the fall." TRH Tr. 235. What Pendley said and the way he said it made Gaines feel "very nervous." TRH Tr. 235. An employee who worked down the hall told Gaines she was ready to bring in another miner because Pendley was "getting so loud" the employee thought Gaines "might need some help." TRH Tr. 236. Pendley left, but Gaines "felt like [the discussion] wasn't over." TRH 235. Gaines was right.

Two days later Pendley returned to continue the discussion. Gaines heard "loud voices,

[27]Pendley was, in fact, subsequently paid for the subject overtime. Tr. 235.

in the payroll office." TRH Tr. 239. She heard Hubbert tell Pendley he needed to speak with Millburg. Millburg now was handling all questions regarding overtime pay.[28] Tr. 239. She described the conversation as "heated." Id. It was just before 1:00 p.m., and Pendley had not yet signed in. Tr. 144. Pendley then appeared at the door of Gaines's office. He wanted to speak with her, but Gaines explained she was busy. TRH Tr. 239-240. Pendley entered the office anyway. He was carrying a copy of a mine sign-in sheet and his pay stub. Pendley told Gaines he was not being paid properly. Gaines told him if he would leave the sheet and stub she would look into the matter, but Pendley kept insisting his pay was inaccurate. He finally left when Gaines received a telephone call. TRH Tr. 240.

Pendley then looked for Millburg. Millburg was unavailable, and Pendley headed for the bathhouse to get ready to go to work. Pendley got dressed, donned his hard hat and light, and traveled toward the man load area. The man load cars were moving toward the area, and Pendley waited for them. However, instead of stopping for Pendley, the cars continued past him into the mine. Tr. 150-151. Lewis explained the cars did not stop because "the federal people have been called to go . . . in the [mine]" for a section 103(g) inspection.[29] Tr. 152.

Pendley noticed an MSHA inspector, as well as union and company personnel, sitting in one of the cars.[30] Tr. 152. Pendley maintained Lewis told him he would have to wait for the next

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[28]Millburg testified, after he began working at the mine in March 2006, he limited miners to one hour of overtime at the beginning of the shift and one hour at the end of the shift. He did so because miners were coming and going at all hours and the company needed to keep better track of the hours worked. Millburg described the situation at the mine as one in which overtime was "being abused," and "everybody was doing whatever they wanted." Tr. 1025.

[29]Under section 103(g) of the Act, a miner who believes a particular condition at a mine violates the Act or regulations may request an inspection, and the inspector is required to keep confidential the miner's name. 30 U.S.C. § 813(g).

[30]The MSHA inspector was Anthony Fazzolare. Tr. 344. He testified the section 103(g) complaint that triggered the inspection concerned allegedly hazardous accumulations of combustible materials along a belt line. Tr. 344. Fazzolare learned of the complaint after he completed a regular inspection of the mine. He notified mine safety supervisor Randy Duncan and union safety committee chairman Shug Dyer, and he went to the man load area with Duncan and Dyer. Tr. 2 347. It was around 1:00 p.m. Tr. 355; *see also* Tr. 458. Dyer did not recall anyone being around when Fazzolare told him about the complaint. Tr. 459. Nor did Fazzolare recall seeing Pendley near the man load area, although Dyer did. Tr. 459. Dyer thought Pendley could have gotten on their man car if he had wanted to. Certainly, no one told Pendley not to board the car. Tr. 460-461. Lap Lewis lowered the inspection party underground, and the three men traveled to the subject belt line, where Fazzolare found what he believed were prohibited accumulations of combustible coal and coal dust. He orally issued a citation to the company for

man load. Tr.1050. Rather than wait, Pendley walked to the office area to again look for Millburg. Tr. 152; 1053. (Pendley knew it would be 15 to 20 minutes before the man load returned and he could board a car. *Id.*)

In the meantime, Gaines had called Hubbert and asked her to come to Gaines's office. TRH Tr. 140. Hubbert arrived, and a short time later so did mine office employee Roger Wise. TRH Tr. 240-241. Suddenly, Pendley reappeared, and began discussing the company's rules for overtime pay and how they should be applied. TRH Tr. 241, 264. Gaines described Pendley as "agitated" and "very loud." Tr. 241. Hubbert agreed he was "loud." TRH Tr. 264. Wise testified Pendley "kept getting louder and louder and louder." TRH Tr. 278. Hubbert stated she, Gaines and Wise "kept trying to explain [the overtime rules] to [Pendley] . . . and he . . . questioned it. And of course, he was told we didn't make the rules, that Larry Millburg [did] – [and] he needed to go to see Larry Millburg." TRH Tr. 264-265. But, according to Gaines, Pendley insisted over and over the rules were "illegal." TRH Tr. 242. As the situation continued, everyone began speaking at once. TRH Tr. 281. According to Hubbert, Pendley "just kept on and on." TRH Tr. 265; *see also* TRH Tr. 278. Gaines stated, "it just didn't appear like we were getting through to him, and I thought it was going to go on forever . . . . it was just out of control." *Id.* Wise described Pendley as not being able to "listen to reason." TRH Tr. 278. Pendley came over to Wise and "got in [Wise's] face." TRH Tr. 279. Hubbert felt very uncomfortable. TRH Tr. 265. Gaines finally said, "that's enough. We don't have time for this conversation anymore. You need to talk to Larry [Millburg] if you've got a problem . . . [T]his is over." TRH Tr. 242; *see also* TRH Tr. 265. Hubbert then left the office. Pendley pressed the discussion with Wise, who told Pendley he was not "going to stand . . . and listen to [it]." TRH Tr. 242. Then, Wise left. His intention was to find Millburg and have him handle the situation. TRH Tr. 280. As Wise explained, "Normally, we don't have that type of aggression . . . in the office." *Id.*

Left alone with Pendley, Gaines testified, although she did not believe he would hit her, she felt intimidated. Pendley was "mad" and "upset." TRH Tr. 243. He continued to talk to her about his pay situation, and Gaines continued to tell him he should speak with Millburg. She then turned her back on Pendley, and he finally left. *Id.*

Wise and Hubbert returned to Gaines' office, and they locked the doors. Hubbert stated, "[W]e didn't want him coming back." TRH Tr. 266. Wise told the others he would get Millburg and have Millburg "take control of the situation." TRH Tr. 244. However, Millburg was underground. *Id.* Later that afternoon Gaines reported the incident to Millburg. TRH Tr. 280.

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a violation of 30 C.F.R. § 75.400, which prohibits accumulations of combustible materials.

XVI. THE FINAL RUN-IN WITH CREIGHTON

After the incident, Pendley returned to the man load area to go underground. Lap Lewis was waiting to "hook a car up." Tr. 156. The man load in which Pendley was supposed to ride was located at the charger, above the spot where Pendley was waiting. Creighton was sitting on a golf cart in the slope shack where controls to the man load were located on an electrical control panel.[31] The cart was parked very close to the controls. Rather than walk up to where Creighton was, Pendley testified he "just stood there waiting for . . . [Creighton] to bring the car[s] down." Tr. 156.

Pendley waited for "quite a period of time." Tr. 157. When the cars didn't come, Pendley walked toward Creighton. Pendley intended to use the controls to send the cars to the man load area because he believed Creighton had no intention of sending them to him. *Id.*

Pendley testified, as he walked toward the slope shack, he had one hand up. Tr. 1054. Pendley reached the shack and leaned into the narrow space between the cart and the controls. He intended to push the man load button and send the cars to the man load. Pendley stated, "I leaned over . . . to where the control panel was . . . . and there was no alarm on it . . . or no tag or anything, so . . . . I punched the man load [button]. . . [and] Creighton . . . . put his arm against me pushing my [right] arm away from . . . where I had punched [the button]."[32] Tr. 159-160; *see also* Tr. 1054-55, 1070. Pendley stated, "When he put his arm against me, I just took my arm and raised his arm up away from me." Tr. 160. Pendley added, Creighton "started hollering. . . . for [foreman] Rodney Baker." Tr. 160-161; *see also* Tr. 1055. Pendley maintained he did not contact Creighton except to touch his arm. He did not "even make eye contact" with him. Tr. 160. Pendley also testified, after he punched the man load button, Creighton said to him there

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[31]The slope shack was open-ended. The hoist control panel contained about 15 buttons, including an E-stop button and call buttons that could send the cars to the charger or to the man load area. Tr. 556, 579. The control panel was on the wall closest to the mine opening and adjacent to the shack opening furthest from the hoist house. Tr. 556. To push the man load call button, a person had to be in front of the control panel. Tr. 556-557. In addition to the control panel, the shack usually contained a golf cart, which was primarily used to transport supplies. Tr. 554, 572. There was a man load call button outside the slope shack and a person did not have to go inside the shack to hit the call button unless the man load cars were at the charger, which they were when Pendley was waiting for them. Tr. 571, 586-587.

[32]By looking for an alarm indicator or a tag, Pendley maintained he was checking to see if a test of the hoist was underway. Tr. 1093. There was conflicting testimony as to whether these indicators always were used to indicate a test. Outside maintenance man Joseph Courtney testified, normally they were. Tr. 295. MSHA Inspector Michael Moore testified he had conducted an examination of the hoist system with Courtney when they were not. Tr. 329; *see also* Tr. 330.

was a hoist test going on. Tr. 1055.

Creighton offered a different version of the events. He testified he was in the slope shack looking at the control panel. The cab of the golf cart was aligned with the panel. Tr. 796. There was a distance of approximately two feet between the cart and the wall of the shack. According to Creighton, the man load was underground when the surface foreman and the outside mechanic came to the slope shack to tell him they were on their way to the hoist house. They added when the man load came out of the mine, they would conduct a safety test of the hoist. Tr. 797. After they left, the only other miner in the area was Lap Lewis. Lewis was at the switch about 30 to 35 feet from Creighton. Upon completion of the hoist test, Lewis, who, according to Creighton, knew about the test, was going to hook up another man load to drop supplies into the mine. Tr. 798-799. Creighton's role in the test was to monitor the slope shack control pannel.

The man load came out from underground and the test commenced. Creighton waited for a call from the hoist house to tell him the test was completed. Tr. 801-802, 829. Creighton described what happened next: "Here comes Pendley . . . . I'm at the controls. The test is going on. . . . . I'm leaning against the golf cart." Tr. 803. According to Creighton, Pendley stood five to eight feet from him, Pendley waited a minute and twenty seconds, then he "charge[d] in . . . and shoved me out of the way."[33] Tr. 804. Creighton maintained Pendley used both arms.

Creighton testified he yelled, "[H]ey, G_d damn it. They're doing a test at the hoist house. They're doing a test." Tr. 805. Pendley, having pushed Creighton beyond the end of the golf cart, did not respond. He just stood in front of the control box. Creighton stated he could tell Pendley was not going to let him back in front of the controls, so Creighton went to the telephone next to the control box and called the surface foreman and reported what had happened. *Id.*, Tr. 806.

Rodney Barker, the foreman, came in his truck. As Creighton described it, Barker stopped, got out and tried to reason with Pendley, but Pendley, in Creighton's opinion was "not going to listen to anybody." Tr. 806. Barker asked the men to separate. *Id.*

Lewis confirmed Creighton's assertion a hoist test was underway when the confrontation occurred. Tr. 543. "[T]he test . . . was still in process . . . then Pendley turned around and shoved [Creighton] out of the way and scootched his self in there where Jack couldn't get to the controls. So Jack started hollering for Barker . . . and Barker . . . [came] over there and talked to [them]." *Id.*; *see also* Tr. 552, 580. [34]

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[33]Creighton knew exactly how long Pendley waited, because Creighton reviewed Highland's surveillance tape. Tr. 804.

[34]Lewis's version of events also was informed by watching the video surveillance tape. He did so at Millburg's direction and with Millburg. Tr. 494; *see also* Tr. 495. Lewis stated he

After Barker arrived, Pendley testified, he told Barker his version of what happened. Creighton told Barker that Pendley interfered with the hoist and put miners in danger. Tr. 163; *see also* Tr.174. According to Pendley, several times Creighton put his finger in Pendley's face. Pendley asked Barker to tell him to stop. Tr. 163-164.

Meanwhile, the man load cars had come down to the man load area. Creighton continued to point at Pendley, and Pendley again asked Barker to instruct him not to. Barker said Pendley should get on a car and Creighton should move away. He also again instructed both to stay away from one another. Tr. 166. Pendley boarded a car as directed and proceeded underground. Tr. 166.

Millburg, who had been underground, came out of the mine. It was 2:01 p.m. (Millburg knew the time from viewing the surveillance tape.) Tr. 1004-05, 1013. As soon as he was on the surface, Creighton saw him and motioned to him. Millburg asked Creighton what he wanted. Creighton was "upset," according to Millburg. Tr.1005. Creighton told Millburg "they [were] making a safety check on the hoist and [Pendley came] out . . . and just pushed me out of the way . . . He just shoved me out of the way and tried to take control of the hoist." Tr. 1005-06.

To Millburg, the important thing was Pendley shoved Creighton and interfered with the test. Tr. 1007. Millburg then spoke with Lap Lewis, who confirmed what Creighton said. *Id.* Millburg also spoke with Barker, who told him the test was just finishing when the incident happened. Tr.1029-30. Millburg went to his office. There, Sheila Gaines told him about the incident with the office employees. Millburg drafted a letter suspending Pendley, subject to discharge. Tr. 1010, Resp. Exh. 26.

While this was happening on the surface, Pendley was working underground. Shortly after beginning work, he received a call from Steve Bockhorn, his foreman, instructing him to come out of the mine and report to Millburg's office. It was between 3:00 p.m. and 4:00 p.m, Pendley met Shaffner and Dyer who told him they were going with him.[35] Tr. 170.

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and Millburg reviewed the tape "a week or two" after the incident. Tr. 563. The pertinent portion of the video was played in the courtroom as Lewis watched. Lewis described the scene depicted on the video. It showed Pendley standing some distance from the shack and then advancing toward the slope shack. Although Lewis maintained the video showed Pendley pushing Creighton, I found it to be inconclusive as to who pushed first. Tr. 561.

[35]Prior to this, Millburg consulted with Webb and explained to Webb what he believed Pendley had done. Because of the argument with the office staff, because of the altercation with Creighton and because Pendley interfered with the hoist test, Millburg told Webb "he was going to discharge [Pendley]." Tr. 674. Webb agreed discharge was an appropriate discipline. *Id.*

When the three reached the office, in addition to Millburg, they found assistant superintendent Scott Maynard and union safety committee member David Acker. According to Pendley, Millburg told him he would be given a letter of suspension with intent to discharge, and then Millburg handed him the letter. Tr. 171; Gov't Exh. 4. Pendley testified he responded by denying the accusations. Tr. 172; *see also* Tr. 3.

However, Millburg testified Pendley did not say anything.

> Q.: [W]hen you saw . . . Pendley at 3:45 [p.m.] and gave him the letter, you didn't talk to him about what happened, did you?
>
> A: No. I read him exactly what the charges [were] on the letter, and then . . . I gave him a copy of the letter and then I sat there and waited for him to make his statement and anything he wanted to say. He got up and walked out of the room.

Tr. 1015.

Millburg also testified that at the close of the meeting Shaffner asked Pendley if he had anything to say, and Pendley did not respond. After Pendley walked out, Acker asked if Pendley could come back and say something later. (Acker speculated Pendley had gone to call his lawyer.) Millburg said Pendley could return.

Once Pendley, Shaffner, and Dyer left Millburg's office, they headed for the bathhouse. Shaffner told Pendley he should go back and speak with Millburg, which Pendley did. Tr.176-177. Pendley maintained he fully discussed the "accusations" with Millburg and Maynard. (Maynard was still in the office.) With regard to harassing the office staff, he emphasized the meeting in the mine office earlier in the day involved a discussion of his pay. With regard to interfering with the hoist safety check, he emphasized he looked for indicators a test was in progress and there were none. With regard to assaulting Creighton, he denied it happened. Tr.177; *see also* Tr. 1032-33. Pendley left Millburg's office, changed his clothes, and went home. Tr. 178.

Prior to and during all of this, Fazzolare had conducted the section 103(g) inspection and found conditions he believed violated section 75.400.[36] Fazzolare did not come up from

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Webb told Millburg, "You do what you need to do . . . . I'm leaving it up to you." Tr. 1029.

[36]Contrary to MSHA's usual practice, before going underground Fazzolare did not give Highland management officials a copy of the section 103(g) complaint. Smith explained Fazzolare had inadvertently written the complainant's name on the complaint, and he did not

underground until 2:40 p.m (Tr. 1013), after which he reduced the orally issued citation to writing. Millburg gave Pendley the letter stating he was suspended, with intent to discharge, at about 3:45 p.m. or 3:50 p.m. Tr. 1014; Gov't Exh. 4. Millburg stated he was given the citation Fazzolare had written around 4:45 p.m. *Id.* Thus, at the time he decided to suspend and discharge Pendley, he did not know Fazzolare had issued a citation to Highland. However, MSHA investigator Smith believed the section 103(g) complaint, inspection, and subsequent citation of Highland were a reason for Pendley's suspension and subsequent discharge, because the "time line of events" were "just too close to be coincidental." Tr. 39.

The day following his suspension, Pendley filed a complaint with MSHA. As previously mentioned, the complaint lead to MSHA's filing of a second complaint of discrimination (KENT 2007-265-D). Pendley's suspension and discharge also lead to the Secretary's successful petition to temporarily reinstate Pendley (KENT 2007-383-D). However, far from putting an end to Pendley's and the Secretary's complaints, Pendley's reinstatement triggered more Secretarial allegations of discrimination.

XVII. THE EVENTS SUBSEQUENT TO REINSTATEMENT

According to Smith, following his reinstatement Pendley complained to the Secretary about numerous incidences of discrimination. He charged his supervisors were "bird-dogging" him, in that he was being "supervised real close . . . to see that he [was] actually doing what . . . [mine management] told him to do." Tr. 40. He also charged he was given work assignments that differed from those he held before he was suspended and discharged and that his workload had increased to the point he could not complete his assigned tasks.[37] Tr. 184. He further complained his job duties were posted on a mine bulletin board for all to see. *See* Tr. 189-190.

Mechanic Clarence Powell agreed Pendley was closely supervised. He stated, "[A] lot of times when you . . . see . . . Pendley pull in for parts or deliver us parts, it wouldn't be just a few minutes, mine foreman would come in . . . and that didn't happen . . . like that before." Tr. 486. According to Powell, the "bird-dogging" was carried out mainly by Steve Bockhorn, the foreman on Pendley's shift. Tr. 487.

Bockhorn, however, maintained it was his job to ensure everyone on the shift did his or her job so the mine operated smoothly. Tr. 855. Prior to Pendley's suspension, Bockhorn testified Pendley "did his job well." Tr. 858. But, according to Bockhorn, Pendley did not feel he was getting support from anyone at the mine concerning his problems with Creighton. Bockhorn and Pendley discussed "everything that was supposedly happening to . . . [Pendley

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want to breach the complainant's confidentiality. Tr. 37-38, 52, 53-54

[37]Smith maintained, "if you want to fire somebody, you give them more than they can do and watch them close." Tr. 40.

because of] . . . Creighton," but Bockhorn could not substantiate any of the incidents. Tr. 860. Therefore, he tried to keep Pendley focused on his job. *Id.*

With regard to his job assignments, Pendley pointed out he was assigned to wash equipment and to take oil to each unit. Tr. 184. Prior to his reinstatement he only occasionally had to wash equipment. After, it was a daily task. Tr. 258. He admitted, however, that Steve Bockhorn "possibly could have" told him if he didn't have time to do his washing duties it was "okay." Tr. 259-260. James Baxter, Pendley's maintenance supervisor, noted "a lot" of other miners also had to wash equipment. *Id.*

Pendley also maintained the duty to supply oil "absolutely" affected his ability to fulfill his other responsibilities. Tr. 186. When a miner asked Pendley why he was not getting supplies delivered, Pendley replied, "I've got an oil ride and I've got a parts ride. I've got two vehicles. When I'm gone on an oil ride, then I cannot be delivering parts." Tr. 255.

Pendley believed the "added" duties were outside those allowed by the union contract. He testified he complained to union president Ron Shaffner about it, and Shaffner told him there "ought to be at least two people doing what you're doing." Tr. 1082. However, Pendley agreed the duties are not written in the contract and that all were within his job classification. He also agreed management could tell a miner what he or she should do within a job classification "as long as they do it in an appropriate way and everybody is treated the same." Tr. 1083.

Bockhorn testified Pendley never complained to him about being overloaded with work. Tr. 875. Bockhorn also noted that prior to being suspended and discharged, Pendley regularly chose to work overtime hours (10 to 12 hour days). *See* Tr. 291. Consequently, he had more time to accomplish his tasks. After he was reinstated, Pendley chose not to work overtime.[38] *Id.*

Bockhorn also maintained, after Pendley was reinstated he did not do his job as he had prior to his discharge. He was much slower. *See* Tr. 887. Assistant superintendent Scott Maynard testified he had complaints from all of the shift managers about the slow nature of Pendley's work. Tr. 931. Maynard stated he told the managers to just have Pendley do his job. He never gave orders for them to be tough on Pendley. Tr. 931-932.

Bockhorn's assessment of Pendley's post-reinstatement work ethic was shared by David Howell, a shift foreman who worked with Pendley before and after his discharge. Howell described Pendley after his reinstatement as "a completely different employee as far as work habits." Tr. 899. He offered to help Pendley, but Pendley did not accept the offer. For example,

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[38]Pendley testified he was afraid if he worked overtime, he would be assigned even more duties. Tr. 291.

Howell, after referencing his contemporaneous notes (*see* Resp. Exh. 20), cited an instance on June 14, 2007, when needed parts were not delivered by Pendley. Tr. 901. Howell described a discussion that ensured the following day:

> I called [Pendley] to come down to the fuel station. I was down there, and I had a discussion with him . . . . I just wanted to say . . . hey, are you having any problems . . . . Well, as soon as I started to say something . . . he got kind of excited with me. I said, now hold it just a minute . . . . I want to have a professional conversation here . . . . because if you have an issue, I want to help you out . . . . I want to try to help get these parts delivered. What are the problems we're having. And he stated to me he didn't have time to do all the jobs that he had been assigned to do. And I told him . . . if you don't have time at the end of the shift to get something done . . . let me know . . . so I have an idea of what . . . the problem is so we don't have to have a discussion on it. I can get someone else to do it . . . but we've still go to get the work done, and to this day, he never called me.

Tr. 902-903.

Howell also observed, since his reinstatement Pendley drove his equipment "extremely slow like he's got no urgency whatsoever to get anything delivered." Tr. 906. Howell believed Pendley needed to better manage his time. "He [did] it in the past. And that's what I requested [he] do." Tr. 908. Howell added, "I was . . . try[ing] to help him . . . get the job done." Tr. 918. Howell noted those who performed Pendley's job between his discharge and reinstatement completed their assignments. Tr. 916.

With regard to the posting of his job duties on the bulletin board, Pendley maintained he never had a list of duties given to him before; nor had his duties been posted previously. *See* Tr. 189-190, Gov't Exh. 5. The bulletin board was located where everyone coming in and out of the commons area room could see the list. Tr.190.

Bockhorn believed the job duties letter was put up because on the first day Pendley was back at work Pendley questioned a task he was assigned to do. Millburg testified Maynard told him there was confusion about Pendley's exact duties and Maynard felt he needed "to just lay it out exactly what [Pendley's] duties [were] so there [would] be no questions." Tr. 992. Therefore, Pendley and the other parts runners who did jobs the same or similar to Pendley's were given letters describing their duties. Tr. 871-872. Pendley's letter was the only one posted

on the bulletin board. Bockhorn had no idea who put the letter on the board. Tr. 876. However, when Pendley complained to Bockhorn, Bockhorn immediately took it down. Tr. 877; *see also* Tr. 191. ("I felt if it was supposed to be posted, it would have been on the inside of the board, not taped . . . outside." Tr. 877.)[39]

THE LAW

In part because it recognized cases arising under the discrimination provisions of the Mine Act often involve conflicting allegations of discriminatory conduct based on disputed facts and inferences, the Commission long ago set out principles and guidelines to help parties and judges analyze whether there has been compliance with section 105(c)(1). It began by noting section 105(c)(1) provides a miner, or representative of miners, cannot be discharged, discriminated against or interfered with in the exercise of his or her statutory rights because: the miner or miners representative (1) "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) "is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101;" (3) "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) has exercised "on behalf of himself or others . . . any statutory right afforded by this Act." 30 U.S.C. § 815(c)(1). The Commission then set forth in detail what the complainant must do to establish a *prima facie* case of discrimination under section 105(c)(1). The miner or miner's representative must show: (1) he or she engaged in a protected activity; and (2) the adverse action of which he or she complains 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 1080), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cr. 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 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 817-818; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission also recognized the complainant might not be able to offer direct evidence adverse action taken against him or her was motivated in any part by protected activity. In *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), it stated "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is

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[39]James Baxter, Pendley's maintenance foreman, testified, "[A]s soon as . . . [Bockhorn] saw it, he took it down realizing . . . that it wasn't supposed to be there." Tr. 434.

indirect." The Commission then articulated circumstantial items from which discriminatory intent might be inferred: for example, knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. *Id.*

Finally, the Commission cautioned its judges that their analysis of an operator's business justification for adverse action should be restrained, stating: "Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. . . . [J]udges should not substitute for the operator's business judgement [their] views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.' *Cf. NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979). The proper focus . . . is whether a credible justification figured into motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. . . . [T]he question is whether the reason was enough to have legitimately moved [the] operator to have disciplined the miner." *Cf. R-W Service System Inc.*, 243 NLRB 1202, 1203-04 (1979) (articulating an analogous standard). *Chacon* at 2516-17.

Applying these principles and instructions in a straightforward manner can help to organize, simplify and (hopefully) make intelligible this record, which is rife with numerous charges, testimonial conflict, and innuendo. In sorting through the record, it helps to keep in mind the case arises directly out of: (1) personal animosity between Creighton, a work-yard bully; and Pendley, his passive-aggressive nemesis; (2) Highland's managerial failure to put an effective end to the miners' clashes; and (3) Pendley's and Creighton's aggressive oral and physical posturing.[40] It also helps to remember, although Highland's failure at conflict resolution fell seriously short of managerial "best practices," it did not necessarily violate the Mine Act. Rather, and as previously stated, the question of whether violations of section 105(c) of the Act occurred must be answered within the context of the analytical structure set forth by the Commission.

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[40]The Secretary, not surprisingly, places all blame for the various conflicts on Creighton's "provocative and oftentimes dangerous behaviors." Sec. Br. 6. The Secretary overreaches. As the saying goes, "it takes two," and the record amply demonstrates that while not always the actual initiator of the incidents, Pendley often played the role of provocateur, by voluntarily placing himself in situations where he knew his presence was likely to provoke trouble.

THE SECRETARY'S ARGUMENTS

Counsel for the Secretary argues Pendley engaged in protected behavior by complaining to management and MSHA "about a number of things." Tr.1097. Counsel cites complaints about the hoist stopping repeatedly, Pendley's cap lamp being tampered with, and physical threats. Counsel also maintains Pendley "clearly communicated these complaints to management, not once, not twice, but a number of times." *Id.* Counsel asserts management was aware of the complaints and knew Pendley might continue complaining to MSHA in the future. *Id.*

Counsel argues the first adverse action Pendley suffered due to his protected activity was his three-day suspension from work in December 2005. According to counsel, he was suspended because MSHA issued a citation to Highland the day before (the Part 50 citation) based on what Webb believed to be Pendley's complaint. Tr. 1098.

Counsel also makes general allegations regarding "a long line of harassing conduct against Pendley" that became worse after each complaint he filed. Tr.1098. Counsel cites continual harassments and physical threats from Creighton and terms it, "a pattern of behavior which . . . [Highland] at least implicitly encouraged by its inaction and which certainly constitute[d] a safety hazard or safety concern." *Id.* Counsel implies Pendley was subject to disparate treatment because Creighton never was "substantially disciplined." *Id.*

The second adverse actions suffered by Pendley were his suspension and discharge. Counsel states the reasons given for the actions – the incident in the office and the altercation with Creighton while an alleged hoist test was ongoing – were "just an excuse." Tr. 1098. Counsel argues they were not "enough to give mine management a reason to fire . . . Pendley." Tr. 1098. Counsel asserts other miners had "issues" with Fay Hubbert, and the run-in with Creighton was not solely caused by Pendley. Tr. 1098-99.

In counsel's opinion, if the company had really investigated the incident involving Creighton and Pendley at the slope shack, it would have found "a portioning of the fault was not simple . . . and . . . Pendley alone was . . . not responsible for the incident. Tr. 1099. Yet, "he alone was discharged and he alone was punished." Id. The company's quick decision to suspend and fire Pendley – a decision made shortly after finding out about the two incidents -- did not leave time for even a minimal investigation. Tr. 1099. Moreover, the company did not consider disciplining Creighton even though Creighton had a history of conflicts with Pendley and even though Creighton "didn't seem . . . completely innocent." Tr. 1100.

Counsel further asserts, prior to deciding to suspend and discharge Pendley, Millburg knew about the citation issued that day as a result of the section 103(g) complaint and inspection. Tr. 1098.

Finally, counsel argues, following Pendley's reinstatement, management has engaged in

continuing adverse action against Pendley by changing his job assignments and "bird-dogging" him. Tr. 1100. In sum, counsel states Pendley "was discriminated against and . . . retaliated against and . . . was treated disparately . . . because he made safety concerns known to management . . . . [I]f . . . Pendley had not made his complaints to MSHA, he wouldn't have been suspended in December of 2005 and he would not have been discharged in March of 2007." Tr. 1101. In other words, "Highland officials suspended and fired Pendley because of his participation in protected activity." Tr. 1101.

HIGHLAND'S COUNTER ARGUMENTS

Counsel for Highland counters the Secretary has the burden of proof regarding Pendley's three- day suspension, and she has presented no evidence Webb, the person who decided to suspend Pendley, had any knowledge Pendley complained to MSHA. Rather, counsel maintains Webb had a "legitimate business reason" for the suspension, in that Pendley refused to explain why he was waiting in the commons area room, and Webb, therefore, made his decision to suspend on the knowledge he had at the time. Tr. 1102.

As for harassment by Creighton, counsel argues the claim is not cognizable under the Mine Act. In any event, the company did not treat Pendley and Creighton the same, because it had insufficient proof to discharge or suspend Creighton for actions he allegedly took against Pendley. In the instance where it had proof, the company issued a written warning to Creighton (as well as to Pendley). Tr. 1103.

As for Pendley's suspension and discharge, there were numerous witnesses to the incidents of March 19 and March 21. The witnesses confirmed Pendley was abusive to the office personnel, shoved Creighton and potentially interfered with the hoist test. These episodes of unacceptable behavior constituted sufficient business reasons to suspend and discharge Pendley. Tr. 1104. Counsel further notes there was no evidence Millburg knew of the section 103(g) complaint when he made his decision to suspend and discharge Pendley. Moreover, while Millburg knew of Pendley's prior discrimination complaints, the Secretary did not show they played a role in Millburg's decision. Tr. 1104.

As for alleged adverse action taken against Pendley since his reinstatement, counsel argues the company is permitted to direct its work force as it sees fit, and there is no evidence Pendley's job assignments were given in a discriminatory manner. Tr. 1105.

THE RECORD AND ANALYSIS

KENT 2006-506-D

The essence of the Secretary's complaint is that Pendley was suspended for three days "for making safety complaints to MSHA." Sec's Discrim. Compl't 2; *see also* Sec. Br. 27. I agree, with the caveat I also conclude he was suspended for making protected complaints to

management.

On December 20, 2005, Pendley's regular shift began at 3:00 p.m. As was then the custom at the mine, his pay began when he signed in. Tr. 446. On December 20, 2005, Pendley signed in at 1:00 p.m. (Pendley testified the actual time he signed the book was between 12:50 p.m. and 12:55 p.m., but, as was common, he rounded the time to the nearest hour. Tr. 108.) Pendley, like other miners, regularly worked 12-hour days – his eight-hour shift, plus two hours of overtime before the shift and two hours after. Tr. 108-109. Because the man load cars were underground and it was cold, Pendley and Lewis waited in the commons area room for the cars to come up. Tr. 114. (Adamson and safety committee chairman Shug Dyer credibly testified it was a usual practice for miners to wait in the room. Tr. 337, 446.) They were soon joined by Adamson, who signed in shortly after Pendley, and who also indicated his starting time was 1:00 p.m. Tr. 369

Having evaluated the testimony, I conclude Webb had to know why Pendley was waiting in the room. As the mine's operations manager, it is reasonable to conclude he was aware of the practice of miners to wait there for the man load, especially when it was cold. He also had to be aware it was common for miners to work two hours of overtime before the start of their shifts and to round the time when they signed in. Even though Pendley was sitting where he could not see the man load cars when they came up, there were at least two other miners in the room who could, one of whom (Adamson) also signed in at 1:00 p.m. Webb's testimony he did not see Lewis and/or Adamson simply defies belief. The room was open. There as nothing to obstruct Webb's view.

Webb's assertion that he concluded Pendley was trying to be paid for time he did not work also is not credible. Nor is Webb's assertion Pendley falsified a company record. There was no basis for Webb to assume Pendley changed the time he signed in. While I credit Webb's testimony that Pendley walked over to the sign-in book and leaned over it after Webb spoke with him, Webb's assumption Pendley changed his time when he returned to the book was not a reasonable one to make. Tr. 638. As Webb well knew, Pendley had signed in the way he usually did when he worked overtime. Since on the afternoon of December 20, Pendley had done nothing out of the ordinary, there was no reason for him to change anything. Rather than change his time, it was more likely Pendley was checking to make sure he signed in as usual and/or to see when Adamson signed in. Thus, Webb's assertion Pendley was suspended for falsifying a company record rings hollow.

Moreover, the fact no others were disciplined, especially Adamson, who signed in shortly after Pendley, strongly suggests Pendley was treated differently than the other miners. While Pendley initially was not forthcoming at the subsequent meeting he had with Webb, Dyer, and Shaffner, I credit his testimony that he at least denied Webb's charges. Tr. 119, 244. I further find Pendley's obvious unhappiness with his union representatives is beside the point. Tr. 122, 641-642. The issue is not Pendley's differences with the union (which apparently were considerable), but whether Webb's business justification for suspending Pendley was legitimate.

Given the lack of any credible business reason for Pendley's suspension, I conclude the record supports inferring some incidences of protected activity in fact motivated Webb and the justification Highland offered was a pretext.

This is not to say, however, all of the incidents the Secretary alludes to or offered testimony about rise to the level of protected activity. Several do not involve complaints about alleged dangers or about safety or health violations. Rather, they reflect work allocation disputes, unexplained property damage, ongoing animosity between Pendley and Creighton, or a combination of two of the three. In this regard, the parts delivery dispute was clearly a confrontation about job duties. The truck incident, while obviously upsetting to Pendley, was, as Maynard properly observed, vandalism (Tr. 262) with no connection to a safety complaint or to an alleged regulatory violation. The dirt incident was a case of petty harassment, as were the bleaching and hose incidents. (Allen's observation the dirt incident could have been safety-related if the dirt was "swept up enough that . . . [Pendley] could have tripped and stumbled" is totally speculative, and even if the dirt or muck by Pendley's locker was enough to have tripped him, finding the incident to be safety related would stretch the meaning of protected activity beyond reasonable boundaries (Tr. 704), and the same is true of the hose incident, which, while annoying to Pendley, hardly can be found to have posed a hazard.

I also conclude the cap lamp incidents were not related to protected activity. In the first place, Pendley's testimony was very vague regarding specific incidents involving his cap lamps; and although he testified about a specific incident when his cap lamp apparently was stolen, he did not (and presumably could not) testify he ever lacked a functioning lamp when he traveled and worked underground. Tr. 390-392; *see* Tr. 230. The evidence supports finding Highland's miners checked their lights before proceeding underground and needed replacements or repairs always were made then and there. Tr. 50.

Other incidents raised by the Secretary were safety related. The gun incident was a serious incident and one that certainly had safety ramifications. However, it cannot be found to have played a part in Webb's motivation. Rather, the record fully supports finding management recognized the serious safety issues it posed and dealt with them when it addressed the incident (and others), by meeting with both men and issuing written warnings to both. Tr. 177, 199; Resp's Exhs. 9 and 10. Moreover, it was Creighton, not Pendley, who reported the incident, and, thus, it was Creighton, not Pendley, who engaged in protected activity.

Complaints involving the abrupt halting of man load cars were protected. Abruptly stopping the cars on their descent into the mine endangered the safety of anyone aboard, as the incident of November 29, 2005, showed. Mine management was aware of Pendley's complaints in this regard. *See, e.g.*, Tr. 933. Given the discrediting of Webb's ostensible reason for suspending Pendley, it is reasonable to infer these safety complaints played a part in Webb's decision.

I find the same is true regarding the motorized equipment incidents. The operation of

motorized equipment in dangerous proximity to a miner is an obvious safety hazard. Complaints about such incidents were protected. Management knew of Pendley's concerns (Tr. 933), and I do not credit Maynard's assertion he "never could find any witnesses or anything or anyone to confirm the stor[ies]." Tr. 934. The record does not reflect he discussed the matters with Lap Lewis, an employee Maynard knew, and an employee who, according to Pendley, was an eyewitness to at least one such incident. Tr. 78-79. In the face of the company's failure to establish a legitimate business reason to suspend Pendley, it is reasonable to infer Pendley's complaints in this regard were a motivational factor.

I also find Pendley's complaints regarding the specific fork lift incident were protected. Creighton maintained Pendley purposely placed himself in a possible pinch point (Tr. 777), and I find this was so. Although Pendley testified walking over the hoist cable to get to the other side of the man load car was a safety hazard, he could have walked a longer way around and safely reached the other side, or he could have waited and sat in another car. Tr. 1086-87. Pendley claimed he only walked where Lewis had (*see* Tr. 290,1087); but, even if true, it was no excuse for Pendley to enter the dangerous area. Pendley was wrong to be there, but his conduct was perfectly in keeping with his propensity to voluntarily go where an incident with Creighton was likely to occur.

Nonetheless, Creighton was wrong as well; for I find Creighton threatened to run Pendley over. Creighton's claim he told Pendley "get the hell out of the way before you get run over" (Tr. 777) was not as consistent with Creighton's character as the more direct threat alleged by Pendley. Moreover, Pendley's response as described by Creighton – calling Creighton "yellow" and "calling [him] out"– is a response that has the ring of truth if Pendley's version of Creighton's threat is credited. I find it reasonable to infer Pendley's complaints about Creighton's threat played a role in Webb's decision to suspend Pendley. It was a way to punish Pendley for continually complaining about Creighton's unsafe practices.

Pendley's testimony regarding the specific hoist incident was compelling and credible, and I find on November 29, 2005, the man load cars came to an abrupt halt while Pendley proceeded underground and that Pendley was thrown forward. Pendley suspected it was Creighton who punched the E-stop, causing the cars to come to halt. Creighton denied it (Tr. 791); and because the brakes on the brake car did not set and because a post-event evaluation of the hoist revealed nothing wrong with the system, Highland's management doubted Pendley's story. I find the doubts were genuine. The testimony revealed a lack of full understanding by Highland's employees concerning whether brakes on the brake car locked if the E-stop button was pushed and the man load cars came to a sudden halt. (If the brakes locked, the man load cars could not have continued to the bottom of the slope without some one – presumably Pendley – releasing the brakes on the brake car, which he did not do.) Both Highland's management employees and its rank-and-file employees believed activation of the E-stop would cause the brakes to lock, as Lap Lewis testified, "most of the time." Tr. 566-568; *see, e.g.*, Tr. 301 (Joseph Courtney); 453-454 (Bob Perry); 960–961; 964; 975-976 (Scott Maynard) 418. However, Inspector Michael Moore's explanation of the hoist's braking and stopping mechanisms was

more persuasive, and I find, as he testified, pushing the E-stop could have caused the man load cars to come to a sudden stop without locking the brakes on the brake car. Tr. 323-324; 1042, 1044-46. In other words, I find it reasonable to conclude the accident occurred as Pendley explained and management's legitimate doubts do not undermine Pendley's credibility.[41]

Thus, Pendley's complaints about the incident were protected. Highland's business justification for subsequently suspending Pendley was not credible and, lacking any other reasonable explanation, I find Pendley's protected complaints about the incident played a motivational role in Webb's decision to suspend Pendley.

Finally, there is no doubt Pendley's complaints to MSHA caused Highland to receive five citations for violations of the mandatory Part 50 reporting requirements. The first citation related to the November 29 hoist incident. The incident involved Pendley. Pendley already had asked Highland for, and been denied, a copy of the accident report he filled out. Tr. 96, 224. Suddenly, MSHA also was asking for a report of the incident and then was auditing the company for Part 50 compliance. Webb must have been at least annoyed, if not more. He also must certainly have put "two and two together" and concluded Pendley had gone to MSHA about the report. There being no credible business justification or other reasonable explanation for Pendley's suspension, I conclude Pendley's protected complaints to MSHA over the report played a role in Webb's decision.[42]

For these reasons, I conclude Webb and the company discriminated against Pendley when Highland suspended him for three days on December 21, 2005. I also conclude at the time he suspended Pendley, Webb was an agent of Highland. Webb took part in the decision to

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[41]There is no question that the sudden stopping of the hoist car endangered Pendley. There also is no question given Pendley's suspicion Creighton caused the stoppage, Highland failed to deal effectively with the situation. From an employee relations standpoint, Webb's response was wanting, to say the least. He knew Pendley suspected Creighton, but Webb did not remember speaking to Creighton about the incident, and I infer he did not. Tr. 669-670. Webb stated he only would take "very strong disciplinary action" against Creighton if he was certain Creighton caused the incident. Tr. 628. Since certainty was virtually impossible to establish, it meant Webb effectively did nothing with regard to the Creighton. However, while Highland was guilty of bad management, its failure did not violate the Act. Section 105(c) was not designed to remedy work-force disputes and smooth employee relations. As the Commission long ago recognized, the Act is not an employment statute. *See, e.g., Chacon v. Phelps Dodge*, 3 FMSHRC at 2517.

[42]The Secretary also offered testimony about two incidents whose relevance and import totally escapes me and about which I make no findings – a nighttime inquiry to Pendley from an unidentified person regarding a storage trailer (Tr. 272-274) and Pendley's alleged discovery of a dummy with a noose around its neck. Tr. 194; *see also* Tr. 849.

implement the suspension and Webb carried out the decision. He was then the operations manager of the mine. He was the mine's highest ranking officer. He was in charge of approving disciplinary actions. Tr. 605. These factors establish Webb was acting on behalf of the company and as its agent.

KENT 2007-265-D

The Secretary maintains Highland suspended and discharged Pendley after Pendley pursued and litigated his earlier complaint before the Commission. She also points out March 21 – the day he was suspended with intent to discharge – Fazzolare investigated the section 103(g) complaint and issued the citation for accumulations of combustible material. In addition, by March 21, Highland management knew Pendley had moved the Commission to reopen KENT 2006-506-D, which I had dismissed, believing it settled. *See* Sec. Br. 2-3. Knowledge of these factors, plus knowledge of Pendley's many complaints, motivated Highland to act adversely against Pendley. I disagree.

Pendley's confrontations with members of the mine office staff on March 19 and March 21 were credibly (and vividly) described by Gaines, Hubbert and Wise. The picture that emerged from their description is of an emotional employee utterly lacking in self control, to the point of disrupting their work and making them nervous for their own well being. Gaines credibly described Pendley on March 19 as "very upset" because of what he perceived to be Faye Hubbert's unauthorized questioning of his pay. TRH Tr. 232. Although she explained Hubbert was only doing what her job required, Pendley would not accept the answer. TRH 234. He suggested Gaines, Hubbert's supervisor, would be held accountable for Hubbert's "misdeeds," and he did so in such a loud voice another employee who worked some distance from Gaines thought she might need help. TRH Tr. 236. Gaines described Pendley as making her feel "very nervous," and I believed her. Pendley's raised voice, his observations regarding Hubbert and his threatening of Gaines by innuendo were not acceptable office behavior. Gaines's apprehension was a reasonable reaction.

All of this was bad enough, but worse followed. Two days later, Pendley again confronted the staff about his overtime pay. He began by again raising his voice with Hubbert. TRH 239. Later he continued in the same vein with Gaines, Hubbert, and Wise. According to the highly credible Gaines, he was "agitated" and "very loud." TRH Tr. 278. Wise and Hubbert agreed. TRH Tr. 264, 278. Gaines described Pendley's participation as "out of control." TRH Tr. 242. He was "mad" and "upset." TRH Tr. 243. Hubbert was very uncomfortable, and Wise felt Pendley's behavior to be aggressive and unusual. TRH Tr. 280. To prevent another incident, the employees locked the office. TRH Tr. 266.

The office incidents of March 19 and March 21 played critical roles in Millburg's decision to suspend Pendley with an intent to discharge, and well they should. Pendley was disruptive, irrational, and orally aggressive. An employer need not tolerate an employee raising his or her voice to other employees and totally disrupting their work. Nor should an employer

brook a situation where a group of employees rationally believe they need to lock their doors against an unreasonable fellow employee. After the incident of March 19, Pendley knew Hubbert and Gaines did not have the authority to resolve overtime pay issues. He knew he needed to speak with Millburg. Yet, on March 21, he persisted in raising the matter again and again in a loud, agitated and irrational way.

On October 7, 2005, Pendley was warned in writing "verbal abuse" on his part might lead to his suspension with intent to discharge. Resp. Exh. 10. Although he was on notice of the consequences, he persisted in the very behavior about which he was warned. Perhaps he just could not help himself, but he certainly knew his behavior could lead to the discipline he ultimately received. Pendley acted at his peril, and it was proper for Millburg to consider Pendley's office confrontations as a basis for suspension with intent to discharge.

Of course, Millburg had another compelling reason to act, because fresh from the confrontation with Gaines, Hubbert, and Wise, Pendley had yet another run-in with his long-time antagonist, Creighton. Pendley maintained, after he rushed up and into the slope shack, he did not shove Creighton, that Creighton first touched him. Tr. 160. However, Lap Lewis testified it was Pendley who pushed Creighton, a contention Creighton echoed. Tr. 543, 580, 804. While the testimony is in conflict as to who first pushed whom, there is no doubt the altercation would have been avoided if Pendley had not chosen to place himself in a situation where he was toe to toe with Creighton. Pendley did not have to charge the slope shack. He could have waited and asked a supervisor to instruct Creighton to send the man load to him. Given his past history with Creighton, he had to know by entering the shack he was putting himself in a situation where an altercation was all but certain to occur. He entered anyway, and with predictable results. He also entered despite the fact he had been warned further altercations could lead to his suspension with an intent to discharge. Resp. Exh. 10.

Regardless of who "started it," the fact Millburg knew Pendley facilitated the altercation by advancing upon Creighton, coupled with the fact Millburg knew of Pendley's oral confrontation with Hubbert, Gaines, and Wise was enough to institute the discipline about which Pendley had been warned. Pendley already had been given a "last and final . . . warning." Resp. Exh. 10. Another was not required.[43]

In upholding Pendley's suspension and termination, I also find the Secretary failed to

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[43]Although Millburg also based his decision to suspend and discharge Pendley in part on Pendley's interference with a hoist test, I do not find this reason crucial to the validity of the disciplinary action. It was enough, in my view, that Pendley was involved in the oral altercation with the office employees and the physical altercation with Creighton. Moreover, I credit Pendley's testimony there was no alarm indicator or tag to indicate a hoist test was underway. Tr. 159, 162, 1054-55, 1070, 1093. Also, Creighton did not advise Pendley of the test until after they were in physical contact. Tr. 804-805.

establish the 103(g) inspection taking place on March 21 had anything to do with management's decision. As Highland accurately points out, Millburg did not know about the section103(g) inspection and the resulting citation until after he made the decision to suspend Pendley. *See* Resp. Br. 26-29. Moreover, the Secretary did not show Millburg knew who actually requested the inspection and, with approximately 70 miners working underground, there are too many "suspects" for knowledge to be implied. *See* Resp. Br. 27 n. 15. When I reinstated Pendley, I noted the Secretary's evidence regarding Highland's alleged section 103(g) motivation could "charitably be described as 'weak.'" 29 FMSHRC at 428. Time did not improve the Secretary's case.

POST-REINSTATEMENT COMPLAINTS

The Secretary amended her last filed discrimination complaint (Docket No. KENT 2007-265-D) to charge more discrimination, interference and disparate treatment as a result of Pendley's reinstatement.[44]

The Secretary alleged Pendley was assigned additional duties, was "bird-dogged" by management officials, and had his job assignments posted on the mine bulletin board. Sec. Br. 4. She argued the additional assignments made it difficult for him to complete all of his duties, and his treatment was disparate in that "no other miners were treated in this manner, with the exception of other miners who also had complained about safety issues at the mine." *Id.*

Highland responded the Secretary failed to offer any evidence of adverse action. Resp. Br. 32-33. According to Highland, Pendley did not suffer any disciplinary action as a result of his post-reinstatement job performance. *Id.* 33. Rather, Pendley was treated with "kid gloves" after his return. *Id.* I agree with Highland, and find the Secretary has not established any actionable adverse action against Pendley since his reinstatement.

Inspector Smith testified following reinstatement, Pendley complained about his workload. The essence of Pendley's complaints, like those made by the Secretary, was he had too many work assignments to complete his duties and he was being followed and closely supervised ("bird-dogged"). Tr. 40. However, the record reveals, after Pendley was reassigned Highland only did what it was entitled to do when assigning him work and when supervising

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[44]Highland objected to taking evidence on what it correctly characterized as "new acts of discrimination after the temporary reinstatement." Tr. 20. Counsel noted the complaints had not been investigated by the Secretary, and the Secretary had not filed a formal complaint with the Commission as the Act requires. Tr. 20-21. I overruled the objection and allowed the evidence. I stated, "It seems to me . . . from a pragmatic standpoint, all of us .. . are facing . . . a never-ending stream of allegations and . . . this is one way to put an end to it . . . I would like to hear as much of the evidence as I can . . . with regard to the allegations and hopefully issue a decision that will bring this matter to a close." Tr. 22-23.

him. An operator can direct its work force as it sees fit within the terms of the Act and its labor contracts. Here, none of the duties assigned Pendley upon his return were outside the Act, the company/union contract or Pendley's job classification. Some of the tasks may have been different from those he had before his suspension and termination, but, as even Pendley agreed, they were proper duties to assign him.[45] Tr. 1081.

While an assignment of duties outside the labor agreement or an assignment of more tasks than can be accomplished in a normal work period conceivably can constitute adverse actions, in this instance the Secretary has not been able to overcome two problems. First, as noted, the evidence establishes the tasks Pendley was assigned fit squarely within the labor agreement. Second, the record does not support finding Pendley was assigned more tasks than he reasonably could accomplish in an eight-hour work day.[46] Even if this was not the case, the evidence offers no support for finding Pendley's job assignments were designed to punish him for seeking reinstatement or for other protected activity. Nor was he ever punished for failing to complete the assignments. On the contrary, the evidence suggests no adverse consequence attached to his unfilled duties. *See, e.g.,* Tr. 255, 259-260.

As for being "bird-dogged," the allegations seem to involve the supervision of the pace of Pendley's work. There was a significant amount of testimony offered concerning management's concerns about the time it took Pendley to do this work after he was reinstated, and it is fair to conclude Pendley worked at a slower pace when he returned to the mine. Tr. 867-869, 906. On the whole, the testimony supports finding the company's concerns about the Pendley's work pace were legitimate and, therefore, Pendley's post-reinstatement supervision was not improper.

Finally, although the posting of Pendley's job duties on the mine bulletin board was unprecedented, the "duties letter" was removed as soon as Pendley complained to his supervisor, Steve Bockhorn. Tr. 190, 261. It would be a stretch indeed to find this mistake, which was quickly and fully rectified, constituted adverse action.

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[45]Actually, more than the assignment of specific tasks, Pendley seemed to believe the jobs were not evenly distributed between him and other mechanics. ("[T]here was no reason it all should have been put on me." Tr. 1081). The proper balance of job distributions is a matter for union and management to debate and, if need be, to resolve. It is not a matter for the Commission and its judges.

[46]One basis for finding what reasonably could be accomplished in a standard workday would have been to compare Pendley's pre-reinstatement work with his work following reinstatement. However, such a comparison is not possible given the fact Pendley was assigned different tasks and, more importantly, given the fact Pendley regularly worked overtime prior to his reinstatement and chose not to work overtime following his reinstatement. Tr. 291.

For these reasons, I find the Secretary did not establish Pendley was discriminated against following his reinstatement.

ORDER

Based on my conclusion Highland and Webb discriminated against Pendley when he was suspended from work on December 20, 2005, the discrimination complaint docketed as KENT 2006-506-D **IS GRANTED.** Within ten days of the date of this decision counsel for the Secretary **IS ORDERED** to confer with counsel for Highland to determine the appropriate back pay and interest to be awarded Pendley for the days he missed work as a result of his illegal suspension. The parties shall also confer and agree regarding any other relief required to make Pendley whole for the time he was illegally suspended. Within 15 days of the date of this decision counsels shall report the results of their discussions to me jointly in writing, and I will issue a decision and order awarding the agreed-upon relief If counsels are unable to agree, they shall jointly advise me in writing within 15 days of the date of this decision, and I will issue an order regarding the taking of additional evidence on the issue of relief.

Within 30 days of this decision becoming final, Highland **IS ORDERED** to pay a civil penalty of $5,000 for its violation of section 105(c) (Docket No. KENT 2006-506-D). In assessing this civil penalty, I find Highland is large in size and the penalty will not affect Highland's ability to continue in business.[47] While I find the violation was serious, I do not agree with the Secretary that Highland's "actions . . . should . . . support the highest finding of gravity." Sec. Br. 60. There is no evidence Pendley's suspension affected the safety of other miners or "chilled" the exercise of the statutory rights by other miners, as claimed by the Secretary. *Id.* I also find, while Webb's decision to suspend Pendley was based on his failure to take full regard of Pendley's section 105(c) rights, it was not an action whose sole motivation was to punish Pendley for his protected activity. Rather, while Pendley's continuing protected complaints were a factor in Webb's overall motivation, I conclude Webb also was genuinely annoyed by what he perceived to be Pendley's "sitting on company time." *See* Tr. 370. Finally, I do not find the Secretary's assertion regarding the company's history of previous violations ("According to MSHA records, since December 2005, Highland has four outstanding [s]ection 105(c) complaints pending against it in addition to . . . [the subject] complaints relating to . . . Pendley" (Sec. Br. 60)) warrants increasing the penalty to more than $5,000.

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[47]On March 6, 2006, I denied Highland's motion to strike Quarterly Mine Employment and Coal Production Reports the Secretary submitted with her brief. Order Denying Highland's Mot'n to Strike. The Secretary argued the reports were submitted merely to assist in determining the size of the operator as appropriate for civil penalty assessment purposes. I advised Highland it would have an opportunity to comment on the relevance of the reports if I held the company violated the Act. In assessing this civil penalty I have not sought Highland's comments because the record, even without the reports, establishes Highland is large in size. The mine has an underground workforce of approximately 70. More importantly, the mine is controlled by Peabody Energy. Thus, Highland's large size cannot be seriously questioned. Tr. 607.

Further, and effective immediately, David Webb **IS ORDERED** to cease and desist from interfering with the section 105(c) rights of Pendley while he remains in Highland's employ, and to desist from interfering with the same rights of all other miners employed by Highland.

Finally, based on my conclusion Highland and its agents did not discriminate against Pendley when he was suspended on March 21, 2007, and when he subsequently was discharged, the discrimination complaint docketed as KENT 2007-383-D **IS DENIED AND DISMISSED**. The Secretary's allegations of post-reinstatement discrimination lodged in connection with Docket No. KENT 2007-383-D **ARE FOUND TO BE TOTALLY LACKING IN MERIT.**

Pendley's reinstatement **WILL REMAIN IN EFFECT** until this decision **BECOMES FINAL.**

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

Distribution:

James B. Crawford, Esq., Jonathan R. Hammer, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Melanie J. Kilpatrick, Esq., Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001
June 5, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LAWRENCE L. PENDLEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 2006-506-D MADI CD 2006-02
v.	:	
HIGHLAND MINING COMPANY, LLC; Respondent	:	Mine ID 15-02709 Highland No. 9 Mine
SECRETARY OF LABOR, MSHA, on behalf of LAWRENCE PENDLEY, Complainant	:	TEMPORARY REINSTATEMENT Docket No. KENT 2007-265-D MADI CD 2007-05
v.	:	
HIGHLAND MINING COMPANY, LLC, Respondent	:	Mine ID 15-02709 Highland 9 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LAWRENCE L. PENDLEY, Complainant	:	DISCRIMINATION PROCEEDING Docket No. KENT 2007-383-D MADI CD 2007-05
v.	:	
HIGHLAND MINING COMPANY, LLC; DAVID WEBB, LARRY MILLBURG and SCOTT MAYNARD as AGENTS, Respondents	:	Mine ID 15-02709 Highland No. 9 Mine

DECISION

Appearances: James Brooks Crawford, Esq., Jonathan R. Hammer, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of the Complainant
Marco M. Rajkovich, Jr., Esq., Melanie J. Kilpatrick, Esq., Lexington, Kentucky, on behalf of the Respondents

Before: Judge Barbour

These cases are before me on discrimination complaints brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Lawrence Pendley and upon an application for temporary reinstatement filed by the Secretary for Pendley. The complaints asserted Highland and its agents, David Webb, Larry Millburg, and Scott Maynard, illegally suspended Pendley and terminated his employment in violation of section105(c) of the Federal Mine Safety and Health Act of 1977, as amended. 30 U.S.C. § 815(c). The application, which was filed pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), sought Pendley's temporary reinstatement to the position he held prior to his suspension and termination.

On May 30, 2007, I granted the application and temporarily reinstated Pendley. 29 FMSHRC 424 (May-June 2007). On May 19, 2008, I issued an interim decision on liability, a decision incorporated herein by reference. 30 FMSHRC ____ (May-June 2008). In the interim decision I ruled Highland Mining Company, LLC (Highland) and its agent, David Webb, unlawfully discriminated against Pendley, when Highland suspended Pendley from work in December 2006, and I granted the Secretary's and Pendley's complaint of discrimination (Docket No. KENT 2006-506). I ordered counsels to confer to determine the appropriate back pay and interest to be awarded Pendley and to agree on any other relief required to make Pendley whole for the time he was illegally suspended.

In compliance with the order, counsels and Pendley have agreed as follows:

1. The total wages lost for the time of suspension from the afternoon of December 21, 2005 and three days amount to $1186.53. This total amount is based upon an average of 12.5 working hours per day including 27.75 hours of regular pay at $19.215 per hour and 20 hours of overtime at $28.823 per hour pay and a 4 hour holiday correction of 4 hours at $19.215 per hour pay for a total of 51.75 hours and a total pay amount of $1186.53.

2. Interest in the total amount of $219.[95] [[1]] was calculated as summarized in Exhibit A up to June 6, 2008, using the OPM guidelines for backpay annual interest rates by quarter that are based on IRS official rates pursuant

[1] The parties' Statement of Damages lists the total interest amount as $219.46. Statement of Damages 1. The parties' attached calculations sheet (Exhibit A) lists the interest amount as $219.95. Counsel for the Secretary has orally advised me $219.95 is the correct amount.

to 5 U.S.C. [§] 5596 and 5 CFR [§] 550.801-808. *See also Secretary v. Arkansas-[Carbona] Company*, 5 FMSHRC 2042 (December 1983). The interest is to accrue up to the day of payment.

3. The parties, including Mr. Pendley, have further reviewed these matters and no other damages or cost amounts have been claimed or incurred during or because of the December 21, 2005 suspension.

Statement of Damages 1-2.

ORDER

In view of the parties' agreement, within 30 days of the date of this decision, Highland **IS ORDERED** to pay Pendley a total amount of $1406.48. If payment is made after June 6, 2008, Highland also **IS ORDERED** to pay any additional interest that has accrued between June 6 and the actual date of payment.

In addition, and as set forth in the interim decision, Highland **IS ORDERED** to pay a civil penalty of $5,000 for its violation of section 105(c). Upon payment of the damages and interest to Pendley and upon payment of the civil penalty, Docket No. KENT 2006-506-D **IS DISMISSED.**

Further, David Webb, Highland's agent, is reminded he **HAS BEEN ORDERED** to cease and desist from interfering with the section105(c) rights of Pendley while he remains in Highland's employ and to cease and desist from interfering with the same rights of all other miners employed by Highland.

In the interim decision I also found Highland had not discriminated against Pendley when it suspended him from work on March 21, 2007, and when it subsequently terminated his employment. Therefore, I **DENIED AND DISMISSED** Docket No. KENT 2008-383-D.

Finally, I noted Pendley's reinstatement (KENT 2007-265-D) would **REMAIN IN EFFECT** until this decision, of which the interim decision has become a part, **BECOMES FINAL**. When that happens, KENT 2007-265-D also is **DISMISSED**.

David F. Barbour

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

Distribution:

James B. Crawford, Esq., Jonathan R. Hammer, Esq., U.S. Department of Labor, Office of the Solicitor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

Melanie J. Kilpatrick, Esq., Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 2333 Alumni Park Plaza, Suite 310, Lexington, KY 40517

/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

June 9, 2008

HAINES & KIBBLEHOUSE, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. PENN 2006-143-R
v.	:	Citation No. 6029599; 03/01/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Pyramid Materials Mine ID 36-08977
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. PENN 2006-288-M
	:	A. C. No. 36-08977-94161
v.	:	
PYRAMID MATERIALS-DIV/HAINES & KIBBLEHOUSE, INC., Respondent	:	Pyramid Materials

DECISION

Appearances: Linda Thomasson, Esq. and Paul Marone, Esq., U.S. Department of Labor, Philadelphia, PA, on behalf of the Secretary

John Austin, Jr., Esq., Patton Boggs, LLC, Washington, DC, on behalf of Haines & Kibblehouse, Inc.

Before: Judge Barbour

These are consolidated contest and civil penalty proceedings brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act") (30 U.S.C. §§ 815, 820). In the contest proceeding (Docket No. PENN 2006-143-R) the company, Haines and Kibblehouse, Inc. (H&K), contests the validity of Citation No. 6029599, issued pursuant to section 104(a) of the Act (30 U.S.C. § 814(a)).[1] The citation, which was issued on

[1]Section 104(a) states in pertinent part:

March 1, 2006, charges the company with a violation of 30 C.F.R. § 56.16009, a mandatory safety standard for metal and non-metal surface mines stating: "Persons shall stay clear of suspended loads." The citation also charges the violation was a significant and substantial (S&S) contribution to a mine safety hazard, in that it resulted in a fatal injury. Further, it asserts the violation was caused by the company's high negligence. H&K contends the citation does not set forth a violation of section 56.16009, or, if it does, the citation's allegations of gravity and negligence are erroneous.

In the civil penalty proceeding (Docket No. PENN 2006-288-M), the Secretary petitions for the assessment of a penalty of $42,000 for the alleged violation of section 56.16009. The Secretary asserts the violation not only occurred and contributed to the death of one miner, but was reasonably likely to fatally injure two others. The company denies the allegations.

Following docketing of the cases, answers were filed. The matters were assigned to me and I consolidated them for trial. I heard them in Westchester, Pennsylvania.

STIPULATIONS

At the hearing the parties agreed to the following stipulations:

1. H&K is an operator as defined in Section 3(d) of . . . [the Act] at the Pyramid Materials Quarry [(the Quarry)] where the [citation] . . . at issue in this proceeding were issued.

2. The operations of the . . . [q]uarry are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the . . . Commission and its designated Administrative Law Judge pursuant to Sections 104 and 113 of the Mine Act.

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

4. Inspectors from the Mine Safety and Health Administration [(MSHA)] were acting as representatives of the Secretary of Labor [(Secretary)] when they issued the citation . . . to [H&K].

5. The [citation] . . . [was] properly served by a duly authorized representative of the Secretary . . . upon the agents of [H&K].

6. True copies of the citation . . . were served upon H&K, or its agents, as required by the Mine Act.

7. The Assessed Violation History report reflecting the history of violations of H&K is an authentic copy and may be admitted as a business record of . . . [MSHA].

8. The imposition of the proposed civil penalty of $42,000 will have no effect on H&K's ability to remain in business.

9. The appropriateness of the penalty, if any, to the size of [H&K's] business should be based on the fact that in 2005, Pyramid Materials Mine had 13,176 hours worked and H&K had [473,375] hours worked.[2]

10. H&K was assessed a total of 21 citations based on 13 inspection days in the 24 months immediately preceding the issuance of the [citation] . . . in this case.

11. The . . . [citation and continuations] issued to H&K, contained in Government Exhibits 5 through 8, are authentic copies of the . . . [citation and continuations] at issue in this proceeding, and may be admitted into evidence for the purpose of establishing their issuance.

12. [H & K] stipulate[s] to the authenticity of all the

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[2]Counsel for the Secretary stated she initially erred in reporting the number of hours worked at H&K's facilities. The actual number was 473,375, not 226,753 as she first stated. Tr. 372. Stipulation No. 9 was amended on the record to conform to the actual number. Tr. 373-374.

government exhibits and to the admissibility of government Exhibits 1 through 17 and 34 through 45.

13. On February 13, 2006, Charles R. Davis, III was the victim of a fatal accident that occurred at the . . . [q]uarry.

14. The accident occurred on the catwalk platform of the Gator jaw crushers A and B, located at the secondary plant at the . . . [q]uarry.

15. The handrail of the lower crushing section was approximately four feet tall, and had a gap approximately four feet wide to allow access to the flight of metal stairs.

16. At all relevant times herein, Mr. Davis was a supervisory employee of [H&K] at the . . . [q]uarry.

17. On the day of the accident, Mr. Davis reported to work at 7:00 a.m., his normal starting time.

18. Mr. Davis' planned work for the day included dismantling the . . . [B] crusher . . . for repairs.

19. Mr. Davis discussed this task with [H&K] employees Michael S. Yorden, a loader operator; and David A. Velas, a mechanic.

20. Prior to the accident, Mr. Davis, Mr. Yorden, and Mr. Velas removed snow and ice from the lower crushing section catwalk platform, and removed guards from the . . . [B] crusher in preparation for the work.

21. The pitman assembly body was constructed of heavy cast metal with an assembly weight of 7,100 pounds.[3]

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[3]A "pitman" is defined as "the vertical member linking the eccentric shaft with the toggles between the frame and the lower end of the movable jaw" of a jaw crusher. American

22. A single . . . lifting lug was . . . on top of the pitman assembly [*see* Gov't. Exh. 43].

23. Thomas Heenan was the operator of the crane involved in the accident.

24. At the time of the accident, Mr. Heenan had worked as a crane operator for 18 years. [4]

25. Mr. Heenan ha[d] several crane operator certifications.

26. On the day of the accident, Mr. Heenan arrived at the crane at approximately 10:00 a.m.

27. After the crane was set up to perform the work, five crane picks were made. [5]

28. The first pick was to remove a ladder that provided access to the screen deck above the crusher; the second pick was to remove a steel plate at the crusher; the third and fourth picks were to remove the bearing caps on the pitman assembly; and the fifth and final pick was [to remove] the pitman assembly.

29. At the time of the accident, as the pitman assembly was being lifted, it swung and struck Mr. Davis.

30. Mr. Davis died . . . as a result of the . . . accident.

31. Mr. Davis' death was caused by crushing

Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* (2d ed. 2006) 409 (*D.M.M.T.*). The pitman at issue was between four to five feet long. Tr. 239.

[4] The crane was owned by AmQuip Corporation. *See* **RELATIONSHIP BETWEEN H&K AND AMQUIP**, *infra*. Heenan had been employed by Amquip for 13 years. Tr. 169.

[5] A "crane pick" involves the crane operator positioning the crane boom over and above an object, the crane operator lowering the hoist line to the object, a miner attaching the hoist line to the object, and the crane operator activating the hoist to lift and move the object. The crane's "boom" is essentially a "beam attached to [the crane]." *D.M.M.T.* at 60. It allows a crane to lift distant and elevated objects.

blunt force trauma due to being struck by the pitman assembly.

Joint Exh. 1; Tr. 31-36.

RELATIONSHIP BETWEEN H & K AND AMQUIP

H&K hired AmQuip Corporation (AmQuip) to provide the crane and crane operator at the quarry. As a result of its investigation of the accident, MSHA issued citations to AmQuip, charging violations of various safety standards. These citations were contested by Amquip in Dockets No. PENN 2006-293-M and PENN 2007-11-M. The cases were at one time consolidated with the subject cases. However, prior to the hearing, the Secretary and AmQuip settled Dockets No. PENN 2006-293-M and PENN 2007-11-M, and the AmQuip dockets were dismissed. AmQuip is not a party to the present proceeding.

THE EVENTS OF FEBRUARY 13, 2006

On February 13, 2006, Michael Yorden and Charles Davis arrived at the mine at 7:00 a.m. Davis, the foreman and supervisor, instructed Yorden on the job duties for the day. He told Yorden a crane was coming to remove the pitman from the Gator B crusher, and the area should be made ready. Although he never had removed a pitman before, Yorden was trained and experienced in the operation and maintenance of the crusher. Tr. 146, 151; *see also* Tr. 307-308. The first task was to clear snow and ice from the work area, including the base of the steps leading to the crusher platform, the steps, and the work platform (a deck that measured approximately 10 feet by 15 feet (Tr. 196)). Tr. 130. Removing the snow and ice took approximately an hour.

While Yorden and Davis were cleaning the work area, or shortly after they finished, mechanic David Velas arrived to assist in changing out the pitman. The men gathered the necessary tools, brought them to the platform, and began to remove parts of the crusher so the pitman could be lifted. They were able to take off the shims, tension rods, toggle plates, guards over the flywheels, and a catwalk in front of the box containing the pitman (the "stone box"). Tr. 134. They also had to remove a ladder going to the primary screen platform, two bearing caps, and two pieces of the stone box. *Id.* Because these items could not be removed without using the crane, the men waited for the crane to arrive. Tr. 134-135.

After the crane reached the area, it was positioned to lift the items. Yorden testified, when facing the crusher, the crane was located to the crusher's right. Tr. 136; *see* Gov't Exh. 38. The stairway from the ground to the work deck was between the crusher and the crane. Tr. 137. The boom of the crane extended from the crane over the stairway to a point above the crusher. *Id.*; Tr.159-161.

As stated in Stipulation 28, the crane's first pick was the ladder leading to the platform on the primary screener. Yorden testified the hoist cable was attached to the ladder by a sling or

chain (he did not remember which), and the ladder was burned free of the crusher structure with an acetylene torch. Heenan then was given a hand signal to hoist.[6] Heenan lifted and swung the boom, which in turn lifted and swung the ladder off the crusher structure. Heenan lowered the ladder to the ground. Tr. 137-138.

The next pick was the front of the stone box.[7] The front was bolted into the sides of the box. Yorden attached the hoist cable to the front, and the men proceeded to remove the bolts. A hand signal was given to Heenan, who lifted the front and set it on the ground. Tr. 139, 279

There still was another piece of the box that had to be removed before the pitman could be lifted. Again, the bolts holding the piece to the remaining parts of the box were loosened, the hoist cable was attached to the piece, and it was lifted, swung away from the crusher, and set on the ground. Tr. 140.

Next, the bolts holding the bearing caps in place were removed. The hoist cable was hooked to the caps, which were picked up by the crane and set down on the platform. Tr. 144-145. All of the lifts by Heenan required a number of hand signals. Tr. 279. Davis and Yorden gave some of those signals, and Velas also gave some. *Id.* Heenan followed all of the signals, and he did so shortly after they were given to him. Tr. 189. Yorden had worked with Heenan on prior occasions and never found him to work unsafely. Tr. 164. Heenan testified none of H&K's employees complained about the way he did his job. Tr. 189.

Once the bearing caps were removed, the pitman was ready to be lifted. The deck was not entirely clear of other equipment. In addition to the bearing caps, it contained shims for the crusher, a bucket holding an impact gun, and equipment that either was a part of a guard for a flywheel or a part of the crusher. Tr. 142-145; Gov't Exh. 34.

To lift the pitman, the men first attached the hoist cable to the pitman's lifting lug. Tr. 145. The operation and maintenance manual for the crusher contained an illustration titled "Pitman Removal and Replacement." Gov't Exh. 3 at 29/58. Yorden described the illustration as "recommended rigging for removing a pitman." Tr. 150. The pitman was not rigged as

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[6]Hoisting means "the raising or lowering of the boom." *D.M.M.T.* 263. Velas did not recall who gave the signal to hoist (Tr. 278), but he explained signals were necessary so the crane operator would "know what to do." Tr. 225.

[7]Velas thought the next pick was "possibly the guards." Tr. 279. It seems likely Velas was referring to the front of the box. (The stipulation describes it as "a steel plate." Stip. 28.) Whatever the object was, it weighed between 50 and 70 pounds. It was about four feet long and two feet wide. Tr. 289.

depicted in the illustration.[8] Tr. 151.

From the operator's compartment of the crane, Heenan could see the platform where Davis, Yorden, and Velas were working. Tr. 164. Upon being signaled, Heenan hoisted the pitman approximately ten inches. The lift was slightly off vertical because the cable was deflected about a foot by the end of the upper catwalk for the primary screener.[9] Tr. 151-152. Because the deflection of the hoist cable was visible, Yorden thought Davis was aware the pitman could not be lifted in a completely vertical manner. Tr. 152.

After being lifted about ten inches, the base of the pitman was still not freed of the crusher. Its lower part was jammed against the toggle seats. Heenan estimated the pitman was stuck for a little more than an hour. Tr. 193-194. During that time, Heenan was given "multiple signals" ("it was up and down, it was traveling, it was swinging") as Davis, Yorden and Velas worked to free the pitman. *Id.* Heenan could see the H&K employees trying to pry the pitman loose. Tr. 194; *see also* Tr. 153-154, 243-247, 280. At one point, Heenan saw Davis throw his pry bar to the deck. Tr. 195.

Finally, one of the lifts freed the pitman. Heenan raised it several inches. Tr. 154; *see also* Tr. 155. Although the pitman was hanging free and three-fourths of it was above the upper edge of the crusher frame, one-fourth of it remained inside the frame, the practical effect of which was confinement of the pitman by the frame. Tr. 253-254.

According to Velas, the cable continued to contact the outside edge of the overhead catwalk, and because, as he stated, it "never [was] good to have a crane cable on an object," the men agreed to have Heenan move the boom of the crane (to have him "boom up") and, thus, to have him move the cable away from the edge of the overhead walkway. Tr. 254-255. Yorden stated he had no reason to believe Heenan would actually move the pitman while the miners were on the platform. Tr. 165.

At this point, Velas, who was standing against the handrail of the deck, gave Heenan the signal to boom up.[10] Tr. 255-256. Heenan responded, and Velas stayed on the deck to make sure

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[8]This fact was not amplified on by the parties and apparently was not a significant causal factor in the events that followed.

[9]Yorden was not sure the deflection was caused by the cable touching the upper catwalk platform. Tr.153. He testified, the cable could be "an inch off that catwalk so your cable isn't rubbing and still not be a vertical pick." Tr. 152-153. However, Velas was sure. He maintained that during the entire time the men were conducting the lifts, the crane's cable was contacting the outside edge of the upper catwalk. Tr. 242. Velas also testified he told Davis about it. Tr. 243.

[10]According to Heenan, Davis gave the signal, but Velas's testimony was more detailed and persuasive regarding the events of February 13, and I credit his account. Tr. 207.

the pitman was coming out of the crusher frame. The pitman rose a few inches and Velas started to head for the stairs.[11] Tr. 258-259; *see also* Tr. 297.

Heenan raised the boom, which caused the pitman to rise above its restraints. Freed from them, the pitman started to swing in a pendulum-like motion. Tr. 208; 216-217. Heenan saw the men "scattering," and he tried to lift the load above their heads. Tr. 197.

Prior to the pitman being lifted, Yorden, like Velas, started walking toward the stairs. He intended to get off the platform. Just before he reached the stairs, he turned and saw the pitman coming toward him. He dropped to the platform. The pitman grazed his ear and moved on. Tr. 155-156.

Davis was standing at the top of the stairs. Velas moved toward him to go down. Davis allowed Velas to go first. Tr. 259. When Velas was at the first step, the pitman pushed him, and he was thrown about three-fourths of the way down the stairs. Tr. 259-260. He landed a few steps from the bottom. Tr. 261. Velas looked back and saw Davis, who was near the top of the stairs, falling toward him. Tr. 262. Velas also saw Yorden lying on the deck. Tr. 263. Velas caught Davis and carried him to the ground. Davis was unconscious. Tr. 263. Yorden got up and rushed to help Velas. Velas and Yorden waited for an ambulance to arrive. Davis was taken to a hospital, where he was pronounced dead.

Davis, as the company's supervisor, was "in charge . . . for safety, for production, for maintenance. Everything." Tr. 305. He was responsible for training miners. He took refresher training classes like everyone else, including Yorden and Velas. Tr. 313, 317; Gov't Exh's. 18 at 2, 25, 26, 27. One of the topics of their training was "Crane Safety." Tr. 323; Gov't Exh. 19 at 53. The instructional booklet for the training listed "safe work practices [that] should be followed to prevent accidents when using an overhead crane." Gov't Exh. 19 at 55. Among the practices was "[p]osition hoists directly over the load to keep lines vertical and to prevent loads

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[11]Velas described the critical moments of the final lift as follows:

> After we had cabled up the last time, I saw everything looked good, I believe I turned to the crane operator and gave him the signal to boom up. Then we had all started walking towards the steps.

Tr. 285.

Velas thought he had started for the steps shortly before he gave the signal to boom up. *Id.*

from swinging when hoisted." *Id.* All three miners had taken the training a few weeks before the accident.

MSHA'S INVESTIGATION

MSHA assigned Inspector James Logan to lead its investigation of the accident. Tr. 42-43. Logan arrived at the mine on February 14, 2006, between 7:00 and 7:30 a.m. Upon his arrival he met with John Dagner and Tom Shilling, two other MSHA employees, who briefed him on the accident. Tr. 43-44. Other MSHA employees, Robert Carter, Phil McCabe, and Mike Shaughnessy, soon arrived to assist with the investigation. In addition, two persons from MSHA's Education Field Services Department came to review the company's training records. Tr. 44, 47.

During the course of the investigation, Logan and the other MSHA personnel interviewed those involved in the accident and management officials. MSHA officials also asked Heenan to place the boom and the cable in the same positions they had been in at the time of the accident. *See* Tr. 199-200. In addition, McCabe, a mechanical engineer employed by MSHA's Mine Equipment Safety Division, examined the equipment involved. He found no mechanical defects. Tr. 337-338.

Logan met with Frank Bardonaro, the general manager of AmQuip. Bardonaro told Logan it was not possible for the pitman to have "popped loose" from the frame in which it was lodged. Had it done so, as the hoist line took the load "it would have overloaded the 9,000 pound capacity and put the crane into an overload situation."[12] Tr. 329; *see also* Gov 't Exh. 13 at 11-12. Since loads can only be lowered in an overload situation, it would have been impossible for Heenan to have hoisted and swung the pitman after the accident, something he did.[13] Tr. 329; *see also* Tr. 332.

Logan concluded the accident occurred because the location of the upper catwalk above the crusher did not allow a vertical pick. Therefore, when the load was lifted, the deflection of the cable caused the pitman to travel horizontally. *See* Tr. 72-73; Gov't Exh. 1. Logan also concluded a violation of section 56.16009 occurred because the workers had not cleared the work area prior to signaling the crane operator to move the pitman. As a result, they "expos[ed]

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[12]Although the pitman weighed 7,100 pounds, Logan believed the combined weight of the pitman, "the rigging pieces, the hook of the crane, and the . . . portion of the crane cable between the pitman and the top of the boom" had to be near the crane's 9,000-pound capacity. Tr. 330.

[13]Logan explained, "From my understanding of cranes . . . when a crane goes into an overload situation, the only thing that the system in the crane will allow the operator to do is lower it to the ground to make it safe. It will not allow . . . [the operator] to hoist . . . [the load], to swing it, [or] do any other motions with it." Tr. 332.

themselves to the suspended load."[14] Tr. 68.

Logan believed the violation was caused by the company's high negligence. Davis, a properly trained supervisor, allowed workers to be in harm's way because once lifted and freed of restraint, the pitman had to travel across the work platform towards the stairway the employees were required to use to exit. Tr. 78. Davis failed to ensure that the employees were clear of the area before the signal was given to lift the pitman. Logan believed Davis and the others should have known the direction the pitman would travel once the boom up signal was given. Tr. 80-81.

THE ISSUES

The primary issues are whether H&K violated section 56.16009, and, if so, the amount of the civil penalty that must be assessed. The penalty must be based on the statutory civil penalty criteria. While the parties have stipulated to some of the criteria, the gravity of the violation and the negligence of H&K remain at issue and must be determined. I n addition, a finding must be made as to the S&S nature of the violation.

THE VIOLATION

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6029599	03/01/2006	56.16009	$42,000

Citation No. 6029599 states:

> A fatal accident occurred at this mine on February 13, 2006, while workers were dismantling the crusher at the secondary plant. A crane was being used to lift the pitman assembly from the crusher. As the pitman assembly was being lifted, it swung,

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[14]Robert Carter, a supervisory inspector for MSHA, sat in on some of the interviews MSHA conducted during the investigation. He also reviewed and commented upon MSHA's draft accident report. Tr. 354-355. Carter, who at the time of the hearing had 29 years of experience with MSHA, also believed the cause of the accident was "the result of the crane operator moving the pitman prior to the employees leaving the platform." Tr. 356. In Carter's opinion, if an experienced crane operator received a signal to move equipment while people were in the area, he or she should not do so while people were present. *Id.* Moreover, Carter believed Davis had not met his responsibility to make sure procedures were in place keeping persons clear of suspended loads, and he did not ensure the platform was clear of persons before the hoisting of the pitman commenced. Tr. 358-360.

> and struck the supervisor. The task proceeded although the supervisor and two co-workers were not clear of the suspended load.

Gov't Exh. 5.

The Secretary maintains the facts squarely fit the words of the standard. She begins by noting those words: "Persons shall stay clear of suspended loads." She argues the definitions of "load" and "suspended" clearly encompass the pitman. Sec. Br. 17. She then notes the Commission's judges in applying the words "stay clear of" have looked to whether employees are located in an unsafe area, and argues "the path which a suspended load would necessarily travel would be an unsafe area." *Id.* at 15. She further asserts the record contains "ample evidence" Davis, Yorden, and Velas failed to stay clear of a suspended load as the pitman swung along the deck. *Id.*, Sec. Br. 17-19.

H&K argues the Secretary did not meet her burden of proving the violation by a preponderance of the evidence. Rather, the Secretary presented "contradictory evidence" regarding how the accident occurred, first by maintaining the load suddenly broke free and swung, striking and killing Davis, and second by maintaining the load was hanging free and loose when H&K's employee gave a hand signal to move it. H&K Br. 4. H&K continues: "Because in the first instance [(*i.e.*, the load suddenly broke free)] there would be no violation of [section 56.16009], the Secretary has not proven it is more likely than not that a violation occurred." *Id.* In H&K's view, "[t]he case . . . is not about a matter of evidence presented by the Secretary being opposed by . . . [H&K], but rather is one in which the evidence offered by the Secretary was in stark contradiction to other evidence also introduced by the Secretary," and "[w]hen the Secretary's evidence is contradictory, the Secretary has failed to show that it is more likely than not that one of the versions is correct and the citation should be vacated." *Id.* at 4-5; *see also* H&K Br. 7. Put another way, "[t]he Secretary has the burden of proving by a preponderance of the evidence that a violation of the cited standard occurred . . . . [and] when the Secretary presents conflicting testimony on the existence of a violation, the Secretary has not carried her burden." *Id.* at 5.

H&K also states, "[j]ust prior to the accident, the crane operator freed the pitman from the housing so that it was hanging freely, but it was still between the side panels of the crusher housing." H&K Br. 8. Because it was then "within the confines of the two side walls of the housing" it was "clearly not 'suspended' within the meaning of the 30 C.F.R. § 56.16009." *Id.* Thus, at the time the employees turned to leave the platform, there was no suspended load. Finally, even were it decided the Secretary could prove by a preponderance of the evidence the pitman was a "suspended load," the Secretary did not prove that Davis, Yorden, and Velas failed to stay clear of the load to the extent required by the regulation, because persons working around a load when it becomes suspended have a reasonable amount of time to move away before they can be said to not be clear of the load. *Id.* at 10. "Being near a suspended load during the brief

period of time it takes to move from the area does not constitute a violation of 30 C.F.R. § 56.16009." *Id.* Rather, the regulation requires the miners to clear the area once a load becomes suspended, which is what Davis, Yorden and Velas were doing when the accident occurred. *Id.* at 11. In H&K's view, the accident was the result of Heenan's "unfortunate choice to exercise poor judgment at a critical moment." *Id.*

ANALYSIS

I agree with H&K that analysis of whether a violation occurred should begin with the words of the regulation, but that is where our agreement ends, for I conclude the Secretary has successfully established a violation of the standard, and that she has done so on two equally plausible bases.

THE FIRST BASIS

When confronting a matter involving regulatory interpretation, judges begin with the words of the regulation and, unless the words are otherwise defined, interpret them "as taking their ordinary contemporary common meaning." *Perrin v. United States*, 444 U.S. 37, 100 S. Ct. 311 (1979); see 2A Sutherland, *Statutory Construction* §§ 47.01, 47.28. If the meaning is unambiguous, the language is usually conclusive. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This is not to say the practical effects of the interpretation are ignored. When those effects conform to and further the purpose of the regulation, the results bolster the regulation's plain meaning. When the practical effects do not further the purpose, judges must carefully consider whether the evidence compels a conclusion the words do not mean what they seem to say.

Section 56.16009 is straightforward. "Persons shall stay clear of suspended loads." A "load" is defined as "a mass or weight supported by something." *Webster's Third New International Dictionary* (2002) at 1325. The noun "load" is modified by the adjective "suspended," and when used as an adjective "suspended" is defined as being "held in suspension." *Id.* at 2303. Thus, a "suspended load" is a mass or weight supported by something that is being held in suspension. To be held in suspension is to be in the "state of being hung." *Id.* "Hung" is the past tense of "hang," which is defined as "to fasten so as to allow free motion within given limits on a point of suspension." *Id.* at 1029. Thus, I conclude a "suspended load" is a mass or weight fastened to allow free motion within the given limits of its point of suspension or support, and this is the same meaning I would reach if I interpreted the standard by applying "suspend" as a verb instead of "suspended" as an adjective.[15]

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[15] As the parties point out, the verb "suspend" is defined as "[t]o hang so as to be free on all sides except at the point of support." Sec. Br. 14-15 (*citing to Webster's* at 2303); H&K Br. 7 (*citing to Webster's* at 2303).

This grammatical exegesis no doubt makes turgid reading, but behind it is a clear salutary purpose. Hanging loads having free motion can swing within a specific arc or radius. The standard's goal is to prevent persons from being hit by such loads through barring persons from locating within a hanging load's possible arc or radius. The logic is simple and irrefutable. When persons are outside the limits of a load's point of suspension, they will not be struck and injured or struck and killed when the load moves freely.

In my view, to find a violation of the standard, I need look no further than Stipulation 28, which states: "[a]t the time of the accident, as the pitman assembly was being lifted, it swung and struck . . . Davis. The pitman was a "load," the fact it was being lifted and swung means it was "suspended," and the fact it struck Davis means he was not "clear" of the load.

THE SECOND BASIS

Alternatively, if I look beyond the plain words of the standard, I find an implied obligation on the part of the operator that Davis, H&K's agent, did not meet, and I conclude his failure in this regard violated the standard.

Here, the testimony establishes the load – the pitman – was lifted approximately ten inches, but then jammed against the toggle seats. Velas and Yorden worked to free it with pry bars. Tr. 153-154. The pitman was lifted by Heenan in conjunction with their efforts, and the pitman came loose. However, Heenan stopped lifting before the pitman was free of the sides of the frame containing it. Tr. 154-155. At that point the pitman was suspended within the meaning of the standard. It was not touching the toggle seats or the sides of the frame. It was hanging fee. But the extent of the pitman's possible swing was severely restrained by the frame. The men on the deck were outside the arc or radius of the possible swing. Thus, H&K was at that point in time in compliance with the standard. But when Heenan subsequently "boomed up" he raised the pitman above the sides of the frame, and Davis, Yorden, and Velas were no longer outside of the possible swing of the suspended pitman. They were not clear of the load, as the unsuccessful scramble to avoid the pitman showed.

I conclude section 56.16009, like many of the standards promulgated under the Mine Act, contains the *sub silentio* requirement the operator ascertain the specific prohibition of the standard and determine whether a hazard exists. Since it is clear the hazard against which the standard is directed is that of a person being struck by a hanging load, the question is whether a reasonably prudent person familiar with the industry and the protective purposes of the standard would have recognized that under the circumstances then existing on the platform, H&K was required to ensure Davis, Yorden and Velas stayed clear of the arc or radius of the pitman's possible swing. In short, as the pitman moved outside the confines of the frame, was H&K required to ensure the men stayed clear of the load? To put the question another way, would a reasonably prudent mine operator familiar with the operation of a crane and the conditions under which the pitman was lifted ensure the men were off the platform when the pitman cleared the frame? I conclude the answer is "yes."

The testimony establishes the boom up signal was given to Heenan by Velas. Tr. 256. The three men were on the platform when this was done. Heenan responded by raising the pitman, an action that resulted in Davis's death. Tr. 258-259; *see also* Tr. 356. The standard is meant to prevent just this kind of accident. H&K maintains "Heenan could clearly see the platform and the individuals on the platform . . . [Therefore, H&K's] employees could not reasonably be expected to anticipate that the crane operator would move the pitman while they were still standing on the platform." H&K Br. 11. However, the pitman was attached to the cable and although the goal was to move the cable away from the upper catwalk, moving the cable necessarily meant the pitman would also move.

Davis was in charge of the crew. He was acting on behalf of H&K. He had a duty to ensure the pitman's removal was carried out safely. As Yorden testified, hand signals were necessary for all of the picks (Tr. 335), and the record supports finding that during the course of the procedure to replace the pitman, signals were repeatedly given to Heenan, and he quickly responded. Tr.139, 154, 188, 192, 193, 236, 237, 251-252, 279. H& K's assertion Heenan "knew not to move the load while . . . [H&K's] employees were on the platform" is not supported by the record. It seems certain prior to the fatal pick, loads were moved many times in response to hand signals while employees were on the platform. Given these work practices, given the fact the pitman was sure to move when Heenan "boomed up," and given the fact the movement could possibly free the pitman from its restraints, in my opinion a reasonable supervisor would have anticipated: (1) that Heenan would have responded promptly when the signal was given, and; (2) that the pitman might thus be liberated.

I accept Velas's testimony the hoist cable was deflected by the overhead catwalk and that it was pointed out to Davis. Tr. 243. The deflection also was visibly obvious. Tr. 152. A reasonably prudent supervisor familiar with the lifting of loads would have anticipated the deflection might prevent a straight lift when Heenan boomed up and might cause the load to swing horizontally. This is especially true of a supervisor like Davis, whose recent refresher training included a reminder of the potential hazards of just such a situation. Tr. 313, 317, 323, Gov't Exh. 19 at 55, Gov't Exh. 25.

In sum, given all of the circumstances involving the lift, I find a reasonably prudent supervisor would have made sure everyone on the platform was off and out of the way of the possible swing of the load as it was lifted.[16] I am aware the same logic might compel a conclusion the men should have been removed from the platform during some of the prior lifts as well. But, H&K was cited for a violation of section 56.16009 solely for the lift involving the accident, and I can only decide the case before me. In failing to ensure he and his men were out

[16]Practically, this means Davis probably should have removed himself and the others from the possible path of the load before the signal was given.

of the way, Davis and, thus, H&K violated the standard.[17]

S&S AND GRAVITY

An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S, "if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec'y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The Secretary established the violation was S&S. She proved H&K violated section 56.16009. She also proved there was a measure of danger to safety, in that failing to ensure the men were outside the path of the suspended 7,100 pound pitman subjected them to the danger of being hit. Moreover, she established there was a reasonable likelihood the hazard contributed to (that of being hit) would result in the type of accident that occurred. Removal and replacement

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[17]In reaching this conclusion, I specifically reject H&K's "contradictory evidence" argument. H&K Br. 4-7. It is my responsibility to evaluate the totality of the evidence offered and determine if a preponderance of it supports finding the violation occurred. Here, I have found it does, that the Secretary has met her burden of proof and established H&K violated the standard.

of the pitman required numerous lifts. It was easy, as the accident showed, for Heenan either to misread the signals he was given or to lift the pitman too far out of its constraints. Failing to guard against these mistakes by moving the men outside the pitman's possible path made the resulting accident reasonably likely. Further, given the weight of the pitman, the Secretary established it was reasonably likely the nature of any resulting injury would be serious, if not fatal.

In assessing the gravity of the violation, I note its effect – Davis's death – and find it was very serious.

NEGLIGENCE

Inspector Logan found the violation was the result of H&K's high negligence. Gov't Exh. 5; Tr. 77. As the inspector explained, Davis "allowed workers to be in harm's way when they started to actually hoist the pitman . . . to remove it from the platform" and he "failed to ensure . . . all the employees were clear of the area before the signal was . . . given to remove the pitman." Tr. 77. The Secretary argues, by failing to ensure he and the others were not out of the pitman's possible path when it was lifted, Davis failed to exercise reasonable care. Sec. Br. 2. I agree. Davis was the supervisor. He was in charge of the removal and replacement operation. Reasonable care required him to contemplate what would happen if the lift Heenan was signaled to undertake carried the pitman fully out of its constraints. Reasonable care required him to remove himself and his men from the path the pitman might take under those circumstances.

However, I also recognize the lack of care was not restricted to Davis. As H&K points out, Heenan could clearly see the platform and the people on it. He knew, or he should have known, not to lift the pitman while the men were in its possible path. Thus, both men failed to exercise the care required by the circumstances, and their joint failures cost Davis his life.

CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

With regard to the history of previous violations, the parties stipulated in the 24 months before the issuance of the citation there were 21 citations issued in 13 inspection days. Stip.17; Gov't Exh. 11; Tr. 367. I view this as a medium history of previous violations.

SIZE

With regard to the size of the mine, the parties stipulated in the last full year before the citation was issued (2005), there were 13,176 hours worked at the mine. Stip. 8; Tr. 368. Counsel for the Secretary described this as a "relatively small mine." Tr. 368. (Counsel for H&K described it as "very small." Tr. 371.) With regard to the controlling entity, H&K, the parties agreed it had 473,375 hours worked. *See* Stip. 8, Tr. 372, 373-374, 369. Counsel for the

Secretary described H&K as of a "medium size." Tr. 369. Given the stipulations and explanations, I find that H&K's business is of a medium size.

ABILITY TO CONTINUE IN BUSINESS

With regard to the effect of the penalty on H&K's ability to continue in business, the parties stipulated imposition of the proposed penalty will have no effect. Stip. 7.

GOOD FAITH IN ACHIEVING COMPLIANCE

Following issuance of the citation, H&K provided all mine employees with crane safety training. In addition, it reviewed the requirements of section 56.16009 with them. It did these things in a timely manner. Gov't Exh. 7. I find the company demonstrated good faith in achieving rapid compliance.

CIVIL PENALTY ASSESSMENT

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6029599	03/01/2006	56.16009	$42,000

I have found the violation was very serious. I also have found it was the result of Davis's and, thus, the company's, lack of care. These findings, and the findings regarding the other civil penalty criteria, would warrant assessment of the penalty proposed by the Secretary, but for another factor that must be considered – Heenan's negligence. As I have found, the fatal consequences of the violation were not solely due to Davis's and H&K's lack of care, Heenan was jointly responsible, and his inexplicable co-negligence, in my view, calls for a lesser penalty than that proposed. Given these findings and considerations, I conclude a civil penalty of $30,000 is appropriate.

ORDER

The secretary has proven the violation of section 56.16009 alleged in Citation No. 6029599. H&K's notice of contest of the citation **IS DENIED** and Docket No. PENN 2006-143-R **IS DISMISSED.** H&K **SHALL PAY** a civil penalty of $30,000 for the violation within 40 days of the date of this decision. Upon payment of the penalty, Docket No. PENN 2006-288-M also **IS DISMISSED**.

David F. Barbour

David F. Barbour
Administrative Law Judge

Distribution: (Certified)

Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Linda Thomasson, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

John D. Austin, Jr., Esq., Patton Boggs, LLP, 2550 M Street NW, Washington, DC 20037

/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
FAX: 202-434-9949

June 13, 2008

MICHAEL A. FULMER	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. YORK 2007-52-D
v.	:	MORG CD 2007-01
	:	
METTIKI COAL CORPORATION,	:	Mettiki Mine
Respondent	:	Mine ID 18-00621

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DECISION

This case is before me on a complaint of discrimination filed by Michael A. Fulmer ("Fulmer") pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 815(c)(3). Fulmer alleges that Mettiki Coal Corporation ("Mettiki") subjected him to adverse work assignments as a result of his election to receive protection from dusty work environments under 30 C.F.R. § 90.100 ("Part 90"). Mettiki moved for summary decision on several grounds. Mettiki's arguments were rejected, except for its charge that Fulmer's discrimination complaint was not timely filed with the Secretary. Fulmer was ordered to show justifiable circumstances for his late filing, and Mettiki responded. For the reasons that follow, I find that Fulmer has failed to establish justifiable circumstances for his failure to timely file his discrimination complaint, that Mettiki has suffered prejudice as a result, and that Mettiki is entitled to judgment as a matter of law.

Facts[1]

On August 25, 2003, after being placed on a production shift, Fulmer notified MSHA that he intended to exercise his right under Part 90 to work in area(s) of the mine that complied with Part 90 respirable dust limitations. MSHA notified Mettiki and, on October 8, 2003, Fulmer was reassigned to work as an outby foreman in areas of the mine where sampling established that respirable dust concentrations were in compliance with Part 90 requirements.

From October 8, 2003 to May 7, 2006, Fulmer's work shifts/assignments were continuously changed. In addition to his weekend outby shift, he worked production, longwall, conveyor belt and the return airways – areas where he believed that he was exposed to high levels of respirable dust. On May 8, 2006, Fulmer ceased working in the mine due to a decline in his

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[1] The facts are considered in the light most favorable to Fulmer, the party opposing the motion. The statement of facts is based upon several submissions by Fulmer, chiefly the Affidavit of Michael A. Fulmer, dated February 14, 2008, and his December 26, 2007, response to the Show Cause Order directing him to show justifiable circumstances for the delay in filing.

health, and went on short-term disability. Fulmer did not return to work. In October 2006, he filed for Long Term Disability ("LTD"), which became effective on November 8, 2006, officially ending his employment with Mettiki Coal.

After he stopped working in May 2006, Fulmer phoned the local MSHA office and made an appointment to meet and "see if [he] had any remedy" for the way he had been treated. On July 3, 2006, he visited the MSHA field office in Oakland, Maryland, and met with inspector Phillip "Bud" Wilt. He explained what had happened, and that he "felt what [he] went through was discrimination." Wilt took a book out of his desk, and showed him that he could file a complaint of discrimination pursuant to section 105(c) of the Act. There was no discussion of a deadline for filing a complaint. Fulmer "decided to take time to think about his options," and did not file a complaint at that time. Had he been informed of the 60-day deadline, he would have filed a complaint immediately.

He subsequently decided to file a complaint, and made an appointment to meet with Wilt and his supervisor, Jerry Johnson, in September of 2006.[2] However, Wilt called and rescheduled the appointment, first to October, and then to November 7, 2006. At that time, Fulmer met with Wilt and Johnson and executed a discrimination complaint form. When Fulmer inquired when the investigation would start, Johnson requested that it be put off until after hunting season and the holidays, to which Fulmer agreed. On January 3, 2007, Fulmer again met with Wilt, who he understood had been assigned to investigate his complaint. He then signed another discrimination complaint form, reciting the same or similar facts as in the previous complaint. The November 2006 complaint apparently was not treated as officially filed by MSHA. The January 3, 2007, complaint was assigned "Case Number MORG-CD-2007-1."

By letter dated March 2, 2007, MSHA informed Fulmer that it found no violation of the Act and advised him of his right to file a complaint with the Commission pursuant to section 105(c)(3). Fulmer then filed the instant complaint.

Analysis

Commission Procedural Rule 67, 29 C.F.R. § 2700.67, provides that a motion for summary decision shall be granted only if the entire record shows that there is "no genuine issue as to any material fact" and that "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b).

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[2] Fulmer has made inconsistent claims regarding the scheduling of the meeting. He asserted in his response to the Show Cause Order that it was initially scheduled for October 2006. He states in his February 14, 2008, Affidavit that the original appointment was in September 2006.

Section 105(c)(2) of the Act states that:

> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

The Commission has held that the 60 day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances. *Hollis v. Consol. Coal Co.*, 6 FMSHRC 21 (Jan. 1984); *Herman v. IMCO Serv.*, 4 FMSHRC 2135 (Dec. 1982). As the Commission stated in *Herman*, 4 FMSHRC at 2138-39:

> The placement of limitations on the time-periods during which a plaintiff may institute legal proceedings is primarily designed to assure fairness to the opposing party by:
>
> > Preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witness have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.
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> *Burnett v. N.Y. Central R.R. Co.*, 380 U.S. 424, 428 (1965), *quoting R.R. Telegraphers v. REA*, 321 U.S. 342, 348-49 (1944).

The cases dealing with justification for delays in filing identify several factors that may be considered, and include but are not limited to, complainant's capacity or ability to initiate and pursue such a remedy,[3] complainant's awareness of his rights under the Act,[4] and, the length of the delay and whether it has resulted in prejudice to a respondent. If a respondent can demonstrate that critical evidence, e.g., a witness or document, is no longer available because of the delay, a complaint may be dismissed even if justifiable circumstances can be established.

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[3] *Sinnott v. Jim Walter Res., Inc.*, 6 FMSHRC 2445 (Dec. 1994) (ALJ).

[4] *Sinnott; Hollis; Sec'y of Labor on behalf of Franco v. W.A. Morris Sand & Gravel, Inc.*, 18 FMSHRC 278 (Feb. 1996) (ALJ) (delay of 107 days justified by prompt filing after complainant first became aware of rights under the Act); *Sec'y of Labor on behalf of Smith v. Jim Walter Res., Inc.*, 21 FMSHRC 359 (Mar. 1999) (ALJ) (10 month delay excused by filing within 65 days of first learning of rights under section 105(c)); *Sec'y of Labor on behalf of Gay v. Ikerd-Bandy Co.*, 18 FMSHRC 341 (Mar. 1996) (ALJ) (3 month delay excused by filing 1 day after first learning of section 105(c) rights).

Prejudice is also inherent in any delay, because witnesses' recollections fade. *See Sinnott, supra* (delay of over 3 years "inherently prejudicial"). Consequently, the lengthier the delay, the stronger the justification required to overcome it. *See Avilucea v. Phelps Dodge Corp.*, 19 FMSHRC 1064, 1067 (June 1997) (ALJ) ("very special circumstances" required to justify delay of over 2 years). All such factors must be weighed to reach the ultimate determination of whether, on the facts of the particular case, the delay was justified. *Hollis, supra; Herman, supra.*

Justifiable Circumstances

The essence of Fulmer's complaint is that Mettiki retaliated against him because of his filing for Part 90 status, and that the discrimination began when Mettiki was notified of his Part 90 election on October 8, 2003, and continued until he went on short-term disability on May 8, 2006.[5] Accordingly, any actionable adverse actions would have occurred between those dates.

Under section 105(c)(2), Fulmer should have filed a complaint within 60 days of the first act of discrimination. Although he has not specifically itemized the dates upon which discriminatory work assignments were made, if the first one occurred on October 8, 2003, he should have filed a discrimination complaint on or before December 7, 2003. He also should have filed a discrimination complaint within 60 days of any subsequent discriminatory act. A complaint for discrimination occurring on May 8, 2006, when he stopped working for Mettiki, should have been filed on or before July 7, 2006. His November 7, 2006, complaint was submitted to MSHA almost three years after the first, and four months after the last, filing deadline.

His claim of justifiable circumstances is based, virtually exclusively, on a claimed lack of knowledge of his rights under the Act.[6] As he stated in his December 26, 2007, response to the

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[5] Fulmer's allegations have been inconsistent. His November 7, 2006, MSHA complaint states that the discrimination started when he returned to work on March 10, 2003, after a period of short-term disability to receive treatment for a recurrence of cancer. Resp. Mot. Att. 9. His January 3, 2007, complaint states that the discrimination began after he opted for Part 90 status on August 25, 2003. Resp. Mot. Att 10. In an Affidavit, dated November 8, 2007, responding to Mettiki's motion, he asserted that his shifts were changed from October 8, 2003 to May 7, 2006.

[6] Fulmer does not claim any incapacity or inability to have timely filed a discrimination complaint. He worked for many years as a foreman, and exhibited an awareness and ability to pursue rights related to his employment. He was very knowledgeable about his rights under Part 90. He initially deferred his election of Part 90 status because he was able to change work assignments to an outby weekend shift job. When he was reassigned to a production shift, he promptly notified MSHA of his decision to seek Part 90 status, and successfully achieved that goal. He also has pursued a claim for black lung benefits, on which a hearing was scheduled for June 12, 2008, before a Department of Labor Administrative Law Judge. In conjunction with his

Show Cause Order directing him to show justifiable circumstances for his delay in filing, "To be truthful . . ., I did not know exactly what my rights were." His February 14, 2008, Affidavit, provided after he had obtained counsel, is more explicit. He disclaims knowledge that discrimination based upon Part 90 status was illegal, knowledge about the process for filing a complaint, knowledge of a filing deadline, and that he ever had "particular training or job assignment dealing with miners' rights."

As directed in the December 13, 2007, Show Cause Order, Fulmer must "establish justifiable circumstances for failing to file his MSHA discrimination complaint within 60 days of any alleged act of discrimination upon which he bases his claims." Fulmer was fully aware of his Part 90 rights, and understood at the time of each work assignment that he believed subjected him to excessive respirable dust that his rights had been violated. He claims that, had he known about his rights under section 105(c), he would have timely made a complaint to MSHA after each instance of discrimination.

His earlier statements, however, contradict that assertion. Documents attached to his response to a July 16, 2007, Show Cause Order demonstrate that he deliberately chose not to take any action to challenge what he believed were Mettiki's violations. A letter attached to his response states:[7]

> Due to my chemo/radiation treatments, I had to miss a lot of work and each time my cancer returned I had to miss even more. I felt I owed that company, so I did not complain the way I should have.
>
> . . .
>
> . . . I was a supervisor for 25 years and I always said, "if you make waves, you will sink your own boat" and now I'm being told by your office because I didn't make them I still sunk my boat. Is that fair?

While Fulmer was most likely referring to his decisions not to complain to Mettiki or MSHA about violations of his Part 90 rights, it is clear that in addition to taking no steps to address those violations, he also made no attempt to determine whether he could pursue some other remedy, e.g., a complaint of discrimination, a right that he should have been aware of.

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securing disability benefits from Mettiki, he has pursued a claim for Social Security disability benefits. It is apparent that Fulmer had the capacity to initiate a claim for discrimination throughout the pertinent time period.

[7] April 9, 2007, letter from Fulmer, in response to a March 2, 2007, letter from MSHA advising him that it did not find discrimination as alleged in his complaint. Copies of both letters were submitted in response to a July 16, 2007, Order to Show Cause.

Mettiki generally provided instruction on miners' rights in its annual refresher training sessions.[8] Fulmer attended those sessions every year from at least 1994, through 2006, with the exception of 2005. Instructions on miners' rights were definitely included in the sessions from 1996 through 2001, and most likely in other years. The training included references to an MSHA pamphlet entitled "A Guide to Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act of 1977." The pamphlet was distributed at the training sessions or made available in the safety office. Pamphlet excerpts, including the 60-day filing time limit were presented as transparencies during the training sessions. The time limits related to claims of discrimination under section 105(c) of the Act are highlighted in the pamphlet.

It is clear that Fulmer should have been aware of his right to file a discrimination complaint with respect to the adverse action that he believed were taken because of his exercise of Mine Act rights. He had been specifically advised of his right to file a discrimination complaint, and the associated time limits for doing so, during annual refresher training sessions.[9] Materials explaining the process were readily at hand. He had many opportunities to speak to MSHA inspectors in private regarding actions he believed were unlawful.

In a similar case, a fellow Administrative Law Judge held that a miner asserting lack of knowledge of his Mine Act rights as justifiable circumstances for a delay in filing is under an obligation to make meaningful and good faith efforts to ascertain such rights. *Gross v. Leeco, Inc.*, 7 FMSHRC 219, 229 (Feb. 1985) (ALJ).

> Is a miner who believes he has been discriminated against entitled to remain in long-term ignorance of his rights and remedies because of inaction, lack of initiative, or reasonable good-faith effort? I conclude that in the situation such as that involved here, where a miner's filing delay is not occasioned by a specific justification such as – or similar to – those enumerated in the Act's legislative history, and is explained primarily by lack of knowledge of the rights provided for in the Act, there exists an obligation to make meaningful and good faith efforts to ascertain such rights. Such efforts should be of a nature to create a realistic opportunity for finding out one's rights, should commence within a reasonable time after the employer's alleged discriminatory action, and be continuing until the miner is informed one way or the other.

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[8] Facts related to training on miners' rights are based on the March 28, 2008, Affidavit of Horace J. Theriot. Mettiki's Resp. to Comp. Supp. Brief. Ex. 1.

[9] While Fulmer asserts in his February 14, 2008, Affidavit, that he never had any "particular" training dealing with miners' rights, I do not find that assertion sufficient to create a genuine issue with respect to whether he received such training. Mettiki has provided records of training, signed by Fulmer.

While this decision is not binding precedent, I agree with the rationale, which is consistent with principles generally applicable in the context of equitable tolling of limitations periods.[10] This case does not involve a latent injury, or later-disclosed wrongful conduct. Fulmer was aware, at the time of each allegedly wrongful work assignment, that he was the victim of illegal conduct, and was concerned for his health because of his medical history. He knew that the assignments violated his rights under Part 90, and that he could have notified MSHA of those violations. He had ample opportunity to do so. He also should have been aware of his right to pursue a discrimination claim, including the 60-day time limit for filing a complaint. If he did not recall the specifics of his training, he could have easily obtained all of the pertinent information, the MSHA pamphlet was readily available and he had many opportunities to discuss his concerns with MSHA inspectors.

It was not until July 7, 2006, sixty days after he stopped working at Mettiki, that he took the step of bringing his concerns to MSHA, and was specifically advised that he could file a claim of discrimination under section 105(c)(2) of the Act. While he claims that he was not told, and had no knowledge, of the 60-day filing deadline, that information was also readily available. He stated that he was shown a book that stated that he could file a discrimination claim. In the Act, the 60-day time limit is contained in the same sentence that provides for the filing of a claim of discrimination. The limitation period is highlighted in the MSHA pamphlet. Any reasonable inquiry by Fulmer would have disclosed the limitations period. Neither party has cited precedent on the issue of whether lack of knowledge of the limitation period for the filing of a claim, as opposed to lack of knowledge of Mine Act rights, can toll the limitations period, i.e., amount to justifiable circumstances. Assuming that it could, I find that Fulmer should have known of the filing limitation well before he visited MSHA. In the exercise of due diligence, he should easily have been able to ascertain his rights under the Act, including the filing deadline, within weeks of August 23, 2003, when the allegedly adverse actions began. By January of 2004, at the latest, he is charged with knowledge of his Mine Act rights.

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[10] *See, e.g., E.E.O.C. v. O'Grady*, 857 F.2d 383, 393-94 (7th Cir. 1988) (appropriate to toll limitations period applicable to Age Discrimination in Employment Act claim until reasonable plaintiff should have known of facts that would support charge of discrimination); *Demars v. General Dynamics Corp.*, 779 F.2d 95, 97, 99 (1st Cir. 1985) (six-month limitations period in National Labor Relations Act may be tolled for fraudulent concealment, if plaintiff fails to timely discover facts despite exercise of due diligence – summary judgment for defendant affirmed where plaintiff made no meaningful inquiry for nearly three years); *Price v. United States*, 775 F.2d 1491, 1494 (11th Cir. 1985) (cause of action under Federal Tort Claims Act accrues when plaintiff, in exercise of reasonable diligence, should be aware that injury is connected to some act of defendant); *Weger v. Shell Oil Co.*, 966 F.2d 216, 218 (7th Cir. 1992) (under Illinois law, limitations period tolled until plaintiff reasonably should know injury was wrongfully caused, burden then on plaintiff to inquire further as to existence of cause of action).

Prejudice

Mettiki claims that, because the mine closed in October 2006, it is "unlikely" that it will be able to locate witnesses and records necessary to rebut Fulmer's claims. It also asserts, in the Affidavit of Horace J. Theriot, its manager of human resources and safety, that it does not have records documenting precisely what area of the mine Fulmer was assigned to, or whom he worked with, during the time of the alleged discrimination. It does not assert that the unavailability of such records is attributable to any delay in the filing of Fulmer's discrimination complaint.[11] Undoubtedly, recollections about routine events such as work assignments and conditions will have faded. However, Mettiki has not shown concrete prejudice attributable to delays chargeable to Fulmer.

While Mettiki has not, at this time, demonstrated the kind of material prejudice that might defeat a showing of justifiable circumstances, the considerable delays chargeable to Fulmer would most likely result in prejudice due to faded recollections of events, such as Fulmer's work assignments and the conditions he was subjected to. Fulmer asserts, for example, that he was not the subject of any dust sampling during his allegedly discriminatory assignments. Consequently, in the absence of records quantifying respirable dust levels at such locations and times, available evidence as of November 2006, when Fulmer executed the first complaint form, would most likely have been limited to workers' recollections of events ranging from more than three years to six months in the past.

Conclusion

Fulmer alleges that he was subjected to discriminatory work assignments that were illegal, both under Part 90 and section 105(c) of the Act, beginning on October 8, 2003, and ending on May 8, 2006. He made an informed and considered decision not to complain or to ascertain the existence of any other remedy for actions which he knew at the time violated his Part 90 rights. He had received training on miners' rights under the Act and, with very little effort, could have ascertained that he could file a complaint of discrimination pursuant to section 105(c) of the Act. He waited for nearly three years after the first adverse action, and some sixty days after the last one, to inquire about his Mine Act rights. After being advised that he had a right to file a discrimination complaint, he continued to defer, considering his options, and allowed another 60 days to pass before a scheduled appointment with MSHA, ostensibly to file a

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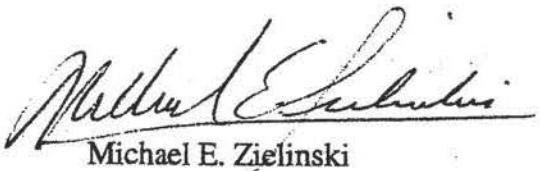
[11] Delays chargeable to Fulmer run from January 2004, when he should have been aware of his right to file a complaint, and from sixty days after any subsequent discriminatory work assignment, to November 7, 2006. While Mettiki apparently was not notified of Fulmer's complaint until sometime after January 3, 2007, it appears to accept that Fulmer cannot be charged with MSHA's failure to accept and act on the complaint he executed on November 7, 2006, assuming that it was tendered to MSHA at that time. *See Sec'y of Labor on behalf of Bennett v. Kaiser Aluminum and Chem. Corp.*, 3 FMSHRC 1539 (June 1981) (ALJ); *Franks v. Bowman Trans. Co.*, 495 F.2d 398, 404-05 (5th Cir.) *cert. den.* 419 U.S. 1050 (1974).

complaint. While, he could have walked in to any MSHA office and filed a claim at any time, he allowed another 60 days to go by while the appointment was rescheduled, and finally executed a complaint form on November 7, 2006.

Through the exercise of due diligence, he should have been aware of his Mine Act rights, including the filing limitations period, as of January 2004, at the latest. He chose to take no action. He has failed to establish justifiable circumstances for the late filing of his discrimination complaint. In addition, Mettiki has suffered some prejudice to its ability to defend, especially as to the older claims.

ORDER

Based upon the foregoing, I find that there exists no genuine issue as to any material fact, and that Mettiki Coal is entitled to judgment as a matter of law. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

Michael Fulmer, 2039 Maryland Highway, Mountain Lake Park, MD 21550

Timothy M. Biddle, Esq., Crowell & Moring LLP, 1001 Pennsylvania Ave., N.W., Washington, D.C. 20004-2595

Nathan J. Fetty, Esq., Appalachian Center for the Economy and the Environment, P.O. Box 2260, Buckhannon, WV 26201

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
202-434-9981/Tele 202-434-9949/Fax

June 20, 2008

EMERALD COAL RESOURCES, LP	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2007-257-R
	:	Citation No. 7020004;05/25/2007
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Emerald No. 1 Mine
ADMINISTRATION, (MSHA),	:	Mine ID 36-05466
Respondent	:	
	:	
CUMBERLAND COAL RESOURCES, LP,:		
Contestant	:	
	:	Docket No. PENN 2007-258-R
	:	Citation No. 7020005;05/25/2007
	:	
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Cumberland Mine
ADMINISTRATION, (MSHA),	:	Mine ID 36-05018
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2008-71
Petitioner	:	A.C. No. 36-05466-130159
	:	
v.	:	
	:	
EMERALD COAL RESOURCES, LP,	:	
Respondent	:	No. 1
	:	

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2008-72
Petitioner	:	A.C. No. 36-05018-130158
	:	
v.	:	
	:	
CUMBERLAND COAL RESOURCES LP,	:	
Respondent	:	Cumberland Mine

DECISION APPROVING SETTLEMENT

Before: Judge Zielinski

These cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The subject citations were issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Emerald Coal Resources, LP, and Cumberland Coal Resources, LP, pursuant to section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 876(b)(2)(G). The validity of the citations was affirmed in Emergency Response Plan Dispute Proceedings before the Commission. 29 FMSHRC 956 (Dec. 2007), *affirming* 29 FMSHRC 542 (June 2007) (ALJ). Civil penalties in the amount of $250.00 were later assessed for each citation, and were timely contested by the operators.

The parties have negotiated an agreed resolution of the cases and, by motion, seek approval of the settlement agreement. The Secretary has agreed to modify the citations to specify that there was "no likelihood" of injury, "no lost workdays" would be expected, and that no miners were exposed to a hazard as a result of the violations. I addition the Secretary has agreed to modify the citations to specify that the violations were not significant and substantial and that there was no negligence associated with the circumstances underlying the citations. The operators have agreed to pay the originally assessed penalties in the amount of $250.00 each. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the citations are hereby amended as proposed in the motion and that Respondents, Emerald Coal Resources, LP, and Cumberland Coal Resources, LP, each pay a penalty of $250.00 within 30 days.

Michael E. Zielinski
Administrative Law Judge

Distribution:

Stephen Turow, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22209-2296

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

June 20, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2007-327 A. C. No. 46-08365-109357
v.	:	
WHITE BUCK COAL COMPANY, Respondent	:	Grassy Creek No. 1

DECISION

Appearances: Karen M. Torre, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against White Buck Coal Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of $5,272.00. A trial was held in Beckley, West Virginia. For the reasons set forth below, I affirm the citations, modifying one, and assess a penalty of $4,848.00.

Background

The Grassy Creek No. 1 Mine is an underground coal mine operated by White Buck Coal Company in Nicholas County, West Virginia. MSHA Inspector James A. Starcher conducted a quarterly inspection of the mine in August 2006. On August 2, the inspector issued two citations concerning the trailing cables on two shuttle cars in the mine. On August 8, he issued a citation pertaining to the trailing cable on a roof bolting machine.

On November 15, 2006, MSHA Inspector Roger Bennett conducted a spot inspection at the mine. As part of the inspection he issued a citation regarding the dust collection system on a roof bolting machine. Coincidentally, the operator had collected a respirable dust sample on the same roof bolter the day before.

When tested, the dust sample showed that the level of respirable dust was 7.233 mg/m^3, considerably over the limit of 1.5 mg/m^3. As a result, the operator was required to submit five additional dust samples for the roof bolting machine. The samples were collected on December 4, 5 and 6, 2006. They also exceeded the applicable limit. Consequently, a citation alleging a violation of the respirable dust standards was issued on December 21, 2006.

To abate the violation, the operator was to submit five more samples which complied with the standard. When the operator failed to submit any additional samples by the deadline set, a 104(b) order, 30 U.S.C. § 814(b), was issued on January 9, 2007. The citation was subsequently abated and the order terminated on January 24, 2007.

The Respondent contested the five citations and the order and the matter was set for trial. Prior to the trial, the Petitioner filed an Motion for Partial Summary decision. The motion was granted to the extent the operator was found to have committed all of the violations. (Tr. 5.)

In addition, prior to the taking of evidence, the Respondent withdrew its contest of Citation No. 9967903, the respirable dust citation, as well as the attendant 104(b) order. (Tr. 6-7.) By withdrawing the contest, the citation and order became affirmable without the presentation of evidence by the Secretary.

Therefore, the issues contested at the trial, and which will be discussed in this decision, are whether the four remaining violations were "significant and substantial," the level of negligence involved in the four violations and the appropriate penalty for each of the five violations. The violations will be discussed in the order issued.

Findings of Fact and Conclusions of Law

Citation No. 7251446

This citation alleges a violation of section 75.517, 30 C.F.R. § 75.517, in that: "The 480 volt cable provided for the No. 2 Joy shuttle car s/n ET 17495 in service in the 002-0 MMU, contained 2 damaged places in the outer jacket exposing insulated power and ground wires." (Jt. Ex. 1.) Section 75.517 requires that: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected."

Inspector Starcher testified that during his August 2, 2006, inspection of the mine, he observed that the outer jacket of the cable from the No. 2 Joy shuttle car was damaged in two places, exposing insulated power and ground wires. (Tr. 14-16.) He said that he was able to observe this condition while he was standing over the cable that had been laid out on the mine floor. (Tr. 56.) He further related that at least one of the damaged areas had been previously repaired with tape. (Tr. 56-57.) The Respondent does not contest that this condition violated the regulation. (Resp. Br. at 2.) In addition, as noted above, I have already found that the violation existed.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission enumerated four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

The inspector testified that he found the violation to be S&S because the 480 volts conducted by the cable, if contacted by a miner, would cause permanently disabling injuries such as nerve damage or loss of fingers, if it were not fatal. (Tr. 22.) He stated that the insulation on the inner wires in the cable is softer and weaker than the outer jacket which is designed to protect the inner wires that actually conduct the electricity. (Tr. 17.) He opined that even a pinhole size hole in the inner insulation would be sufficient to shock a miner if he handled it. (Tr. 18-19.) In this connection, he said that the cable is regularly contacted by miners in either handling it to move it, to hang it for the passage of other equipment or by stepping on it to pass over it. (Tr. 19-21, 49, 53.) Finally, Inspector Starcher testified that the roadways were wet, increasing the danger to those handling the cable and that, although provided by the operator, the miners did not wear rubber gloves, which would have protected them, while working in the mine. (Tr. 18-20, 59.)

The Respondent argues that the Secretary has not shown a reasonable likelihood that this violation would result in an injury of a reasonably serious nature. The operator points out the following factors to support this assertion: (1) The inspector did not check the inner insulation for any holes or damage and, therefore, cannot prove that there were any; (2) There was a ground fault breaker at the power center which would knock the circuit breaker if a miner came in contact with an exposed wire and reduce the likelihood of shock; (3) Shuttle car cables are handled less frequently than continuous miner cables or roof bolter cables; (4) If the damaged area of the cable were on the reel, a miner could not come in contact with it; and (5) The cable was de-energized at

the time the inspector wrote the citation.

In *U.S. Steel*, the operator similarly argued that there was no likelihood of serious injury when the outer jacket of a cable was torn, but there was no evidence that the inner insulation had been compromised. 6 FMSHRC at 1574. The Commission held that because "the mining environment is harsh," the "damage to the outer layer of insulation weakened the protection afforded by the inner layer," thus the "case properly was designated 'significant and substantial' in that there was a reasonable likelihood that the condition of the trailing cable could contribute, significantly and substantially, to the cause and effect of a safety hazard." *Id.* at 1575.

The operator also asserted that a ground fault system in the cable made an injury unlikely. Holding that "[t]he ground fault system is designed to deenergize the trailing cable if a power wire comes in contact with the ground wire," the Commission approved the judge's finding that despite such a system an "electrical shock of some degree could occur." *Id.* at 1574 n.2.

Citing *U.S. Steel*, the Commission has subsequently reaffirmed that the "argument that reasonable likelihood of injury cannot be established if the record lacks direct evidence of damaged interior conductors or proof of the existence of exposed, uninsulated wire is inconsistent with Commission precedent." *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1287 (Dec. 1998). Attempting to distinguish these cases, the Respondent notes that *U.S. Steel* involved the trailing cable of a continuous miner and *Harlan Cumberland* involved the trailing cable of a roof bolter, while this case involves the trailing cable of a shuttle car. According to the Respondent, this is important because "it is well known that roof bolter cables and continuous miner cables are handled far more frequently than shuttle car cables." (Resp. Br. at 5.) This does not mean, however, that energized shuttle car cables are not handled in the normal course of mining operations.

In this case, continued normal mining operations would have been expected for at least several more shifts. The company had a policy of inspecting the cables for damage on Tuesday and Thursday evenings. (Tr. 126.) The violation occurred on a Wednesday. (Tr. 156.) At least one shift had occurred since the most recent inspection. None of the company employees had apparently noticed the damage to the cable, as it was lying on the mine floor, when the inspector saw it. Finally, the cable would not have been inspected before it was reeled up and put into use at the beginning of the next shift. (Tr. 169.)

Taking all of these factors into consideration, and giving particular weight to the inspector's testimony, I find that the Secretary has established a reasonable likelihood that a serious injury would have resulted from this violation. Accordingly, the violation is "significant and substantial."

Citation No. 7251448

This citation alleges a violation of section 75.605, 30 C.F.R. § 75.605, because:

> The 480 volt cable provided for the No. 1 shuttle car s/n ET 17501 in service in the 001-0 MMU was not clamped to the cable reel of the machine to protect the cable from damage and to prevent strain on the electrical connections. The cable[']s outer jacket had been pulled thru the restraining clamp exposing insulated power and ground wires.

(Jt. Ex. 2.) Section 75.605 requires that: "Trailing cables shall be clamped to machines in a manner to protect the cables from damage and to prevent strain on the electrical connections."

Inspector Starcher testified that the trailing cable is connected to the shuttle car by threading the cable through a guide, known as a "doughnut," on the cable reel to the inside of the reel where it is spliced to wires from the shuttle car. (Tr. 34.) The "doughnut" slides back and forth on the reel to insure that the cable is wound evenly on the reel. (Tr. 35-36.) The protected cable is attached to the reel by a restraining clamp to protect the cable from damage and to prevent strain on the spliced connection. (Tr. 34-36.) During his inspection, the inspector noticed that the restraining clamp was not attached to the reel and the cable's outer jacket had been pulled through the clamp, exposing the inner insulated power and ground wires. (Tr. 33, 36.) That this was a violation of the regulation is not contested by the Respondent. (Resp. Br. at 9.)

Significant and Substantial

Inspector Starcher testified that the violation was S&S because if the cable was not clamped to the reel, strain would be placed on the wire connections when the cable was reeled in, possibly severing the spliced connections and creating a shock hazard. (Tr. 40, 79.) In addition, if there was damage to the inner insulation it could result in electricity being conducted through the shuttle car so that "the individual that could be walking by that could touch it and be shocked. The individual that would be sitting on the shuttle car and getting off of it could also be shocked." (Tr. 65.)

The Respondent points out that the clamp is insulated by a rubber covering or insulated paint and is located inside the reel which is inside a reel box. (Tr. 64, 140.) Further, if the wires were completely pulled out of the splice the shuttle car would de-energize. (Tr. 66.) Therefore, the company argues, there is little likelihood that a miner would come in contact with the bare wires or that the shuttle could become energized by coming in contact with the bare wires.

In this instance, I find that the operator has the better argument. The Secretary has failed to demonstrate that the confluence of events necessary to result in a serious injury is likely.

Accordingly, I find that this violation was not "significant and substantial" and will modify the citation appropriately.

Citation No. 7251449

This citation alleges a violation of section 75.517 in that: "The energized trailing cable on the Fletcher twin head roof bolting machine s/n 97029, operating in the face of the No. 9 entry on the 003-0 MMU had the outer protective jacket damaged and the inner insulated conductors were exposed. The roadways were wet." (Jt. Ex. 3.) Inspector Starcher discovered the damage to the cable, which was on the left side of the dust box, while it was lying on the floor. (Tr. 45, 72.) As with the previous citations, the violation is not contested. (Resp. Br. at 13.)

Significant and Substantial

In addition to the previously stated reasons he gave for all of the cable violations being S&S, the inspector testified that the roof bolting machine cable is frequently handled by miners, either to hang it from the roof during use or to allow for the passage of other equipment. (Tr. 43-44.) He noted that roof bolter operators are under pressure to perform their function rapidly and are, therefore, less likely to notice damage to the cable, which could also be obscured by the dirt and dust in the area. (Tr. 74, 146.)

The Respondent gave essentially the same arguments for this violation not being S&S as it did for Citation No. 7251446. For the same reasons that I found that citation to be S&S, I find that this violation was "significant and substantial." Indeed, the evidence is stronger with regard to this violation in view of the fact that the roof bolting machine cable is handled more frequently than the shuttle car cable.

Citation No. 7260338

This citation sets out a violation of section 72.630(b), 30 C.F.R. § 72.630(b), because:

> The dust collection system provided for the Fletcher roof bolting machine, serial no. 96044-2005332, in service on the operating 001-0 MMU, was not being properly maintained. The roof bolting machine was installing bolts in the No. 4 face and drill dust visible to the eye was exhausting from the rear of the machine into the last open crosscut. When examined, there was fine white powdery dust located on the clean side of the filtering system.

(Jt. Ex. 4.) Section 72.630(b) provides that: "Dust collectors shall be maintained in permissible and operating condition."

While conducting a spot inspection of the mine on November 15, 2006, Inspector Roger Bennett observed a Fletcher roof bolting machine installing roof bolts in the No. 4 face. Drill dust was "blowing out of the back of the mufflers" of the machine. (Tr. 88.) The dust was blowing away from the operator and toward the No. 3 left entry where a miner operator and a shuttle car operator were working with the bits on the continuous miner. (Tr. 94.) This led the inspector to

believe that the dust collection system was not operating properly, so he had the machine stopped so he could inspect it. On closer inspection, he found a white, powdery dust behind the dust filters in an area that was supposed to be clean. (Tr. 89.) The Respondent does not contest that this was a violation of section 72.630(b). (Resp. Br. at 16.)

Significant and Substantial

Inspector Bennett testified that the roof bolter was a designated area for respirable dust testing in the mine. (Tr. 91.) He further stated that the area was on a lower respirable dust standard of 1.5 milligrams per cubic meter, rather than the baseline standard of 2 milligrams per cubic meter, because there was silica from quartz present. (Tr. 91-2.) Finally, he testified that drill dust was blowing out of the back of the machine and miners were working down wind of it. (Tr. 94.) The inspector said that the fact that the inhalation of respirable dust, over time, causes pneumoconiosis (black lung) or silicosis, incurable lung diseases which result in permanently disabling conditions, lend him to conclude that the violation was S&S. (Tr. 93.)

In further support of finding this violation to be S&S, the Secretary points out that the dust samples taken on the same machine the day before turned out to be considerably above the permissible standard; that the samples taken three weeks later were also out of compliance; and that it was not until samples taken in the middle of January 2007 that the area was shown to be in compliance. Therefore, she argues, "since bimonthly samples are to be considered representative of exposure levels for the sampling period, it is appropriate to presume that the area was out of compliance for the entire bimonthly period and that the violative condition of the roof bolter filter cited in Citation 7260338 contributed to that hazard." (Sec. Br. at 25.)

On the other hand, the Respondent asserts that violation was not S&S because the roof bolter's ineffective condition could had happened as it was moved from one area to another and water, designed to absorb dust, splashed out of the box. Or the water could have evaporated. Further, the operator argues, the miners down wind of the bolter were 120 to 140 feet away and the mine did not have low air readings at the time, decreasing the likelihood of suspension of the dust in the air. In all of these scenarios, the Respondent asserts, the exposure to the dust would have been limited. Finally, the operator notes that inspector did not test the dust blowing out of the roof bolter for respirable dust.

There is no doubt that a violation of the respirable dust standards, sections 70.100 or 70.101, 30 C.F.R. §§ 70.100 or 70.101, is presumed to be "significant and substantial." *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). This citation, however, does not involve a violation of a respirable dust standard. Therefore, nothing can be presumed.

Nevertheless, like the dust standards, section 72.630 was promulgated by the Secretary to protect miners from exposure to harmful respirable dust. Thus, in the introduction to the promulgation of this rule, the Secretary noted that during drilling, "there is the potential for extremely high exposures in short periods of time to both miners doing the . . . drilling and to

other miners in the immediate areas. Air Quality Standards for Abrasive Blasting and Drill Dust Control, 59 Fed. Reg. 8318 (February 18, 1994). The Secretary went on to state that: "The development of silicosis and pneumoconiosis among underground coal miners has been well documented, *particularly among roof bolters* and transportation workers." *Id.* at 8322 (emphasis added). Finally, the Secretary set out that "§ 72.630 is a work practice standard that does not require sampling." *Id.*

Based on this, I find the company's arguments unavailing. I find that the violation contributed to a discrete health hazard, silicosis or pneumoconiosis. I further find that, in the context of continued normal mining operations, it was reasonably likely that this would contribute to the development of lung disease no matter how short the exposure. Finally, I find that the seriousness of these diseases is beyond question. Accordingly, I find that the violation was "significant and substantial."[1]

Civil Penalty Assessment

The Secretary has proposed penalties of $5,272.00 for these five violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In this connection, I find that the Grassy Creek No. 1 mine is a medium size mine and its controlling entity, Massey Energy Co., is a medium size company. (Govt. Ex. 10, Pet. Ex. A.) I further find that the operator has an average history of previous violations. (Govt. Ex. 10, Pet. Ex. A.) There is no evidence that payment of these penalties will adversely affect the company's ability to remain in business and I so find. Likewise, there is no evidence that the operator did not demonstrate good faith in attempting to abate the violations, with the exception of Citation No. 9967903, so I find that the company did demonstrate good faith. With regard to Citation No. 9967903, it appears that a 104(b) order, 30 U.S.C. § 814(b), had to be issued shutting down the roof bolter before the operator brought it into compliance.

Turning to gravity, I find that Citation Nos. 7251446, 7251449, 7260338 and 9967903 are serious violations that they could have resulted in serious injuries or life threatening illnesses. Citation No. 7251448, however, was not so serious. Finally, I agree with the inspectors that these violations were the result of "moderate" negligence on the part of the operator. The violations were readily apparent to the inspectors, but obviously had not been observed by the company's employees. On the other hand, it is clear that the operator was making additional efforts in an attempt to reduce the number of cable violations.

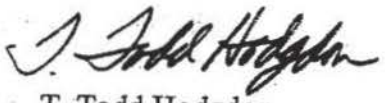
---

[1] While not necessary to reach this finding, the problems with this particular roof bolting machine evidenced by Citation No. 9967903, which occurred before and after this violation, certainly strongly support it.

Taking all of these factors into consideration, I conclude that the following penalties are appropriate: (1) Citation No. 7251446, $524.00; (2) Citation No. 7251448, $100.00; (3) Citation No. 7251449, $524.00; (4) Citation No. 7260338, $614.00; and (5) Citation No. 9967903, $3,086.00.

Order

In view of the above, Citation Nos. 7251446, 7251449, 7260338 and 9967903 are **AFFIRMED**; Citation No. 7251448 is **MODIFIED**, by deleting the "significant and substantial" designation, and is **AFFIRMED** as modified. White Buck Coal Company is **ORDERED TO PAY** a civil penalty of **$4,848.00** within 30 days of the date of this decision.



T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Karen M. Torre, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Arlington, VA 22209-2247

Carol Ann Marunich, Esq., Dinsmore & Shohl LLP, 215 Don Knotts Blvd, Suite 310, Morgantown, WV 26501

/sr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 24, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-148-M
Petitioner	:	A.C. No. 40-03268-80642
	:	
v.	:	Docket No. SE 2006-163-M
	:	A.C. No. 40-03268-82949
SCP INVESTMENTS, LLC,	:	
Respondent	:	Old County Quarry

DISMISSAL ORDER

These matters concern 12 citations that were issued as a result of an inspection of the Old County Quarry conducted by Mine Safety and Health Inspector (MSHA) Jeffrey Phillips on December 14, 2005. The Secretary of Labor ("the Secretary") proposes a $1,087.00 civil penalty for these citations. The Secretary is represented by counsel. The respondent, SCP Investments, LLC ("SCP"), is appearing *pro se*.

I. Background

The Old County Quarry is a rock crushing facility operated by SCP. Pat Stone is the managing partner of SCP. According to Stone, the mine commenced operations in September 2005. Section 109(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act"), requires a mine operator to file with the Secretary the name and address of the mine, as well as the name and address of the person who controls the mine. 30 U.S.C. § 819(d). Consistent with the statutory provisions of section 109(d), Part 41 of the Secretary's regulations requires mine operators to file a Legal Identity Report Form within 30 days of the opening of a new mine. 30 C.F.R. §§ 41.10, 41.11(a).

Section 103(f) of the Mine Act, 30 U.S.C. § 813(f), provides both the miner operator, and a miners' representative, with the opportunity to accompany a mine inspector during a mine inspection. At the time of Phillips' December 14, 2005, inspection, SCP had not filed the required Legal Identity Report Form registering the facility as an active mine. Consequently, Phillips ordered Stone to leave the mine property rather than allow Stone to accompany him during the mine inspection.

Before a miner begins working at a mine, section 46.5(b) of the Secretary's regulations requires not less than 4 hours new miner training, including instruction addressing site-specific hazards. 30 C.F.R. § 46.5(b). However, miners who have not completed new miner training

may work at the mine if an experienced miner can observe the new miner performing his work in a safe manner. 30 C.F.R. § 46.5(a). Phillips reportedly ordered Stone off of mine property because Stone had not received Part 46.5 new miner training. Stone, on behalf of SCP, objects to not being allowed to remain on mine property during the inspection.[1]

As a threshold matter, "[t]he right to accompany an inspector on all 103 inspections has been consistently recognized by the Commission and the courts." *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994). The failure to comply with MSHA filing requirements is not a basis for denying section 103(f) "walkaround rights." *Emery Mining Corporation*, 10 FMSHRC 276, 277 (Mar. 1988) (failure of a non-employee miners' representative to file identifying information required by 30 C.F.R. Part 40 does not permit an operator to refuse the representative entry to its mine for purposes of exercising section 103(f) walkaround rights). Nor is a general good faith belief that an area to be inspected is too dangerous an adequate justification for denying walkaround rights. *Consol. Coal,* 16 FMSHRC at 718-19.

II. Show Cause Orders

To determine whether Stone's statutory walkaround right was properly denied, on March 31, 2008, a Show Cause Order was issued requiring the Secretary to identify any regulation that warranted Phillips' denial of Stone's right to observe the inspection.[2] 30 FMSHRC 341. Specifically, the Secretary was requested to identify any regulation that supported the denial of Stone's walkaround rights. In addition, the Secretary was asked to provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f) that justified the denial of Stone's participation. The Secretary was also requested to identify, by specific reference to her regulations, the requisite training that must be completed by a miners' representative, or a mine operator, before he is allowed to be present during an inspection. Finally, the Secretary was ordered to identify, with specificity, the hazards that Stone would have been exposed to if he had observed Phillips' December 14, 2005, inspection of this surface mine facility.

---

[1] As discussed herein, Part 46 new miner training is not material because the issue is not whether Stone was qualified to engage in mining. Rather, the issue is whether Stone was eligible to accompany Phillips on the inspection. Nevertheless, even individuals who have not completed new miner training are allowed to remain at a mine site if accompanied by an experienced miner. 30 C.F.R. § 46.5(a). As an authorized MSHA inspector, Phillips possesses the skills of an experienced miner.

[2] An Order to Show Cause and a Further Order to Show Cause were issued in this matter. The Secretary's response to the initial Order is cited as "*Sec'y Resp.*" The Secretary's response to the further Order is cited as "*Sec'y Resp. II.*"

The Secretary's response to the Order to Show Cause was filed on April 21, 2008. However, the Secretary did not provide the specific information requested. Instead, the Secretary relied on an inspector's broad discretion to preclude walkaround rights when necessary to protect the safety of miners. *Sec'y Resp.* at 7.

Stone's reply to the Secretary's initial response to the Order to Show Cause was filed on May 5, 2008. Stone related that Phillips denied his request to observe the inspection, that Phillips escorted him off of mine property, and that he was denied the opportunity to re-enter the mine site to retrieve keys that were left in several loaders.

Given the lack of specifics in the Secretary's response to the Order to Show Cause, a Further Order to Show Cause was issued on May 8, 2008, requiring the Secretary to specifically respond to the requested information in order to determine if the denial of Stone's right to observe the inspection was an abuse of discretion. 30 FMSHRC __. A response was filed by the Secretary on May 29, 2008. The Secretary's response to the requested information is summarized below:

> (1) The Secretary should identify the regulations that support Phillips' denial of Stone's right to observe the inspection.
>
> > The Secretary responded that she is relying on the training requirements set forth in 30 C.F.R. § 46.5 (new miner training) and 30 C.F.R. § 46.11 (site-specific hazard awareness training).

Sec'y Resp. II at 1.

> (2) The Secretary should provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f) that justifies the denial of Stone's right to be present during the inspection.
>
> > The Secretary responded that she is relying on the Interpretive Bulletin set forth at 43 Fed. Reg. 17546 (April 25, 1978). That bulletin interprets Section 103(f) of the Mine Act, 30 U.S.C. § 813(f), and states, in pertinent part, as follows:
> >
> > Considerable discretion must be vested in inspectors in dealing with the different situations that can occur during an inspection. While *every reasonable effort will be made in a given situation to provide opportunity for full participation in an inspection* by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. The inspector's primary duty is to carry out a thorough, detailed, and orderly inspection.

Sec'y Resp. II at 1-2 (emphasis added).

(3) The Secretary should state whether or not a person who is not a miner, that is selected by miners as their authorized representative, is entitled to section 103(f) walkaround rights.

> The Secretary noted that her regulations regarding representatives of miners, which implement Section 103(f) of the Act, are set forth in 30 C.F.R. Part 40. Section 40.1(b)(1) defines "representative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act[.]" The Secretary conceded that section 103(f) of the Mine Act and section 40.1(b)(1) of her regulations traditionally have been interpreted to mean that a non-miner may be a representative of miners and may participate in an inspection. See *Thunder Basin Coal Co. v. FMSHRC,* 56.F.3d 1275, 1278-81 (10th Cir. 1995); *Kerr-McGee Coal Corp. v. FMSHRC,* 40 F.3d 1257, 1262-65 (D.C. Cir. 1994); *Utah Power & Light Co. v. Secretary of Labor,* 897 F.2d 447, 449-52 (10th Cir. 1990).

Sec'y Resp. II at 2.

(4) The Secretary should specify, by specific reference to her regulations, the requisite training that must be completed before a miners' representative, or a mine operator, is allowed to be present during an inspection.

> The Secretary responded that Section 46.11 requires site-specific hazard awareness training "for any person who is not a miner as defined by § 46.2 . . . but is present at a mine site[.]" MSHA can and normally does require that a miners' representative receive hazard training under Section 46.11 before being allowed to participate in an inspection.

Sec'y Resp. II at 2.

(5) The Secretary should identify, *with specificity*, the hazards that Stone would have been exposed to if he had accompanied Phillips during this surface mine inspection.

> The Secretary responded that the specific hazards to which Stone would have been exposed to if he had been allowed to participate in the inspection are irrelevant because Phillips was required to act before he began the inspection.
>
> Assuming, for the sake of argument, that the specific hazards to which Stone would have been exposed are relevant, the Secretary relied generally on the hazards posed by the cited violations such as inadequate toilet facilities and a lack of traffic signs and signs prohibiting smoking. The Secretary did not cite any meaningful risk of exposure to hazards.

Sec'y Resp. II at 4-5.

(6) Noting that dismissal is a harsh sanction, the Secretary was requested to suggest what sanction should be imposed, other than vacating the citations and dismissal of this proceeding, if Phillips abused his discretion and Stone's section 103(f) rights were violated.

> The Secretary responded that even if Inspector Phillips' action with respect to Stone was an abuse of discretion, dismissal is an impermissible sanction. The Secretary did not suggest any meaningful alternative sanctions.

Sec'y Resp. II at 5.

III. Discussion and Evaluation

a. The Secretary's Regulations and Interpretive Bulletin

Resolution of whether Stone's section 103(f) statutory right was unjustifiably denied is found in the language of the statute. Section 103(f) of the Mine Act provides, in pertinent part, "*[s]ubject to regulations issued by the Secretary*, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany" an MSHA inspector during an inspection.[3] 30 U.S.C. § 813(f) (emphasis added). Consistent with this statutory provision, the Commission has recognized that the walkaround right is a qualified right that may only be curtailed by the Secretary's regulations. *Consol. Coal*, 16 FMSHRC at 718.

However, the Secretary has not proffered any regulation that supports the denial of Stone's section 103(f) right of accompaniment. In this regard, the Secretary's reliance on Stone's lack of section 46.5 new miner training, and section 46.11 hazard training, is misplaced. With respect to section 46.5, significantly, the Secretary concedes miner training is not a prerequisite for observing an inspection. The Secretary admits non-miners, who are designated as representatives of miners, are entitled to section 103(f) walkaround rights. Moreover, the issue of miner training is not material as the issue is not Stone's qualifications to perform mining activities. Rather, the issue is Stone's right to observe an inspection.

---

[3] Section 103(f) does not mandate that an inspector must be accompanied by a mine operator during an inspection. Thus, I am cognizant that the failure of a mine operator to accompany an inspector is not a jurisdictional bar to the issuance of citations for violations of the Secretary's mandatory safety standards observed during the inspection. *See Emery Mining*, 10 FMSHRC at 289. However, section 103(f) provides the "opportunity" for the mine operator to exercise its right to be present during an inspection. This right cannot arbitrarily be denied. In other words, the jurisdiction to enforce does not provide a license to abuse.

Similarly, the Secretary cannot find support for Phillips' actions in her hazard training regulation. Section 46.11(f) provides:

> *Site-specific hazard awareness training is not required for any person who is accompanied at all times by an experienced miner* who is familiar with hazards specific to the mine site.

30 C.F.R. § 46.11(f) (emphasis added).

Surely, Inspector Phillips is a qualified, "experienced" mining official who is well aware of mine safety issues. Thus, contrary to the Secretary's assertion, hazard training *is not required* if the walkaround person is accompanied by an experienced miner. In reaching this conclusion, I am not trivializing the importance of training. However, Stone's lack of training under these circumstances did not justify the denial of his right to accompany the inspector.

Finally, the Secretary's relevant publicized interpretive memorandum states that "every reasonable effort" to provide the opportunity for "full participation in an inspection" shall be afforded to section 103(f) walkaround participants. *See* 43 Fed. Reg. 17546. Contrary to the Secretary's policy, the denial of Stone's right to observe the inspection under the circumstances in this case lacked a concerted effort to encourage full participation.

b. Specific Hazards

The Commission has noted that Congress did not curtail walkaround rights in dangerous situations, even during inspections seeking to determine if an imminent danger exists. *Consol. Coal,* 16 FMSHRC at 718. Thus, a general belief that an area to be inspected is too dangerous is not an adequate justification for denying walkaround rights. *Id.* at 718-19. However, in extraordinary circumstances, the Secretary retains the right to preclude participation in inspections "where necessary to protect the safety of miners" because of discrete safety hazards. *Id.* at 719.

The hazards associated with the cited conditions in the subject citations, that are relied on by the Secretary to justify Phillips' action, posed no significant danger to Stone. For example, the health and safety hazards created by no on-site toilet facilities, inadequate guarding, an absence of traffic signs, a lack of "no smoking" signs, and fire extinguishers that were not periodically tested, clearly did not present any walkaround dangers. In the absence of any extraordinarily hazardous conditions, the Secretary has not presented a rational basis for the denial of Stone's walkaround right. Rather, it is apparent that the denial of Stone's walkaround right primarily was predicated on SCP's failure to timely file a Legal Identity Report, rather than dictated by a concern for Stone's safety. Accordingly, there are no adequate safety concerns that support the denial of Stone's walkaround right.

c. Abuse of Discretion

The broad discretion accorded inspectors with respect to how they conduct inspections must be balanced with the fundamental right of a mine operator to be present during an inspection. While the decision to allow walkaround rights is committed to the broad discretion of an inspector, his discretion is not unfettered and may not be abused. The Commission has noted that an "abuse of discretion" occurs when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co.*, 18 FMSHRC 565, 569 (April 1996) (citations omitted).

Phillips' reported belief that Stone's lack of section 46.5 new miner training rendered him ineligible to observe the inspection is a misunderstanding of the law. As the Secretary concedes, even non-miners have section 103(f) walkaround rights. Moreover, the Secretary's reliance on Stone's lack of site-specific hazard training is undermined by the provisions of section 46.11(f) that allow Stone to participate in the inspection without hazard training if he is accompanied by a qualified and experienced person.

Finally, contrary to the Secretary's assertion, the fact that a mine inspector may not have knowledge of site-specific hazards prior to an inspection is not a basis for denying walkaround rights to representatives of miners or mine operators. Although Phillips may not have been familiar with the site-specific hazards at the Old County Quarry rock crushing facility before he began his inspection, he is a qualified mine inspector with the expertise to identify and avoid exposure to mine hazards. Any other conclusion would disqualify mine inspectors from conducting inspections when they are unfamiliar with mine specific hazards before entering a mine. Thus, site-specific hazard awareness was not a prerequisite for Stone to accompany Phillips during the inspection.

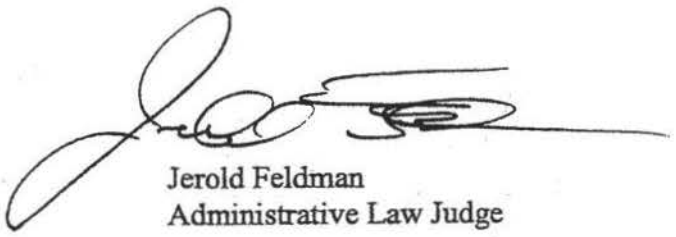
d. Appropriate Sanction

The cited violative conditions have been corrected and the subject citations have been terminated. Consequently, there are no unresolved continuing safety issues. I believe this is a matter of first impression. I am cognizant that dismissal is a harsh sanction. However, a mine operator's right to accompany an inspector must not arbitrarily be denied. The mine inspector's abuse of discretion in this matter requires my exercise of discretion. For to do nothing would be an abuse of my discretion.

Commission Rule 55(h) authorizes the judge to make decisions in the proceedings before him. 29 C.F.R. § 2700.55(h). Under these circumstances, vacating the subject citations and dismissing these proceedings is an appropriate sanction. Dismissal should deter future unwarranted denial of a mine operator's walkaround right. Consequently, the subject 104(g)(1) order and 104(a) citations will be vacated without prejudice. The Secretary may reissue the citations if the actions taken to abate the citations are rescinded, or, if the cited conditions otherwise remain unabated.

ORDER

In view of the above, **IT IS ORDERED** that 104(g)(1) Order No. 6122908 and 104(a) Citation Nos. 6122909, 6122910, 6122911, 6122912, 6122913, 6122914, 6122916, 6122917, 6122918 and 6122919 in Docket No. SE 2006-148, and, 104(a) Citation No. 6122915 in Docket No. SE 2006-163 **ARE VACATED without prejudice. IT IS FURTHER ORDERED** that the captioned civil penalty proceedings **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Pat Stone, SCP Investments, LLC, P.O. Box 82, Crab Orchard, TN 37723

/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

June 25, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DANIEL R. BRUSCA, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEST 2008-1099-D MSHA No. DENV 2008-07
v.	:	Foidel Creek Mine
TWENTYMILE COAL COMPANY, Respondent	:	Mine I.D. 05-03836

DECISION AND ORDER DENYING TEMPORARY REINSTATEMENT

Appearances: Lydia Tzagoloff., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Applicant;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on an application for temporary reinstatement brought by the Secretary of Labor on behalf of Daniel R. Brusca against Twentymile Coal Company ("Twentymile") under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Mine Act"). The application was filed on or about May 30, 2008 and Twentymile requested a hearing within ten days of receipt of the application. The application alleges that Twentymile discriminated against Brusca when he was terminated from his employment on March 20, 2008. The application states that the Secretary determined that the underlying discrimination complaint filed by Brusca was not frivolously brought. A hearing in this temporary reinstatement proceeding was held on June 17, 2008, in Denver, Colorado. For the reasons set forth below, I find that the applicant did not establish that Brusca's discrimination complaint was not frivolously brought.

I. SUMMARY OF THE EVIDENCE

Twentymile's Foidel Creek Mine is a large, underground coal mine in Routt County, Colorado. Daniel Brusca started working at Twentymile in June 1997 as a mechanic on the longwall crew. He eventually became a belt maintenance lead man with the responsibility to supervise a belt maintenance crew. He received work assignments from his supervisor and gave

those assignments to the members of his crew. He also worked with the crew and was responsible for their safety. The belt maintenance crew repaired rollers, maintained motors and performed other tasks. As a lead man, Brusca performed much of the maintenance himself. Brusca's immediate supervisor was Shawn Brown who was responsible for all of the belt maintenance crews. Brown's supervisor was Ed Brady, the conveyance manager.

Brusca testified that in early March 2008, Brown asked him to perform a dangerous task. His crew was asked to change out a 500 horsepower motor for the drive belt. He was told to take a Ford tractor and open the equipment doors in the roadway, put the tractor in between the equipment doors and a stopping, close the doors behind the tractor, and tear out enough of the stopping to pull the motor with the winch on the tractor out of the drive area into the crosscut between the belt line and the roadway. Brusca asked Brown how he was to provide ventilation to operate a piece of diesel equipment in the crosscut with the doors closed behind it and only part of the stopping removed. According to Brusca, Brown replied, "I know what I would do, but I can't tell you." (Tr. 20). Brusca took that to mean that Brown wanted him to "just do whatever he had to, illegal or not, to get this job done." *Id.* Brusca then told Brown that there would be no ventilation in the crosscut with the doors closed behind it, even with the stopping partially removed, because there would not be enough air in the belt line as it passes by the tractor. When he asked Brown how he was supposed to provide ventilation for the tractor, Brown again replied that he knew what he would do. Brusca admitted that he assumed that Brown was implying that he should do something illegal. (Tr. 50).

Because Brusca believed that operating the tractor between the equipment doors and the stopping would fill the air with exhaust fumes, he kept the tractor in the roadway, put the motor on a skid and used cables to pull it out. His crew could not complete the job before the end of the shift. Brusca believes that Brown was "aggravated" by his actions. (Tr. 21). According to Brusca, Brown "acted like, here we go again, here is Brusca refusing to do something again, bringing up safety issues." When Brusca returned to the mine on his next scheduled shift, the motor had been replaced but he believes that someone had operated the tractor between the partial stopping and equipment doors to complete the job.

Brusca also testified that in late February 2008, he was holding a safety meeting with his crew at the beginning of the shift. It was a required meeting under company policy. The meeting was being held in the break room on the second floor of the weld shop. Brusca testified that Brady came into the weld shop and told everyone "to get up from the table and get to work." (Tr. 22). Brusca said that Brady did not come over to see what they were doing, he just told them to get to work. From Brady's position, he would not have been able to tell what they were doing. (Tr. 59). The crew finished the safety meeting before getting up and getting their tools to start their maintenance duties.

Brusca testified that sometime in February 2008 his crew was working in the area of the Two North Main Belt when crew member Nate Weesner got rock dust in his eye. On the way out, Brusca and his crew went to the main surface building at the mine, known as the "operations

center," so that Weesner could wash out his eye. While he was doing that, Brusca and crew member Rupard Carnahan had a cup of coffee in the operations center. Ed Brady came by and told Brusca to get to work. When Brusca told Brady that they were there because Weesner got rock dust in his eye, Brady "acted like he didn't believe that, that we were out there goofing off." (Tr. 24). Brusca said that he waited for Weesner rather than return to the weld shop because it would not take very long for Weesner to wash out his eye. (Tr. 61-62).

Later in February 2008, Brusca was called into Brown's office for a "pre-evaluation meeting." Brown told Brusca that the company was thinking of replacing him as the lead man and asked him if he wanted to continue as the lead man. Brusca replied that he did. According to Brusca, Brown told him that he should not be holding safety meetings at the start of the shift because they were a waste of time. He told Brusca that these meetings were "just an opportunity for people to have a snack out of their lunch box, and that also my crew didn't need to be out in the operations center taking a break." (Tr. 24). Brusca testified that his safety meetings usually lasted about ten minutes and that Twentymile's safety director encouraged such meetings. (Tr. 24, 66-67). Some of the men cooked up breakfast during the meeting as well. Brusca believes that other crews do the same thing. (Tr. 69). Ron Spangler, the human resources director at the mine, testified that pre-evaluation meetings are often held when an employee is being asked to improve his performance so that he can try to change his behavior before the actual performance evaluation. (Tr. 94-95).

Brusca told Brown that, according to the poster in the hallway at the operations center, employees are entitled to a ten-minute break between the start of shift and their lunch period and again between the lunch period and the end of the shift. Brown replied that the company does not have such a policy. Brusca assumed that the information on the poster applied to the company's operations. Spangler stated that the language of the poster in the hallway that relates to mid-morning and mid-afternoon breaks does not apply to mining and the poster specifically lists those industries that it covers. (Tr. 95-96).

Brusca also testified about safety issues that had arisen in prior years. During one incident that occurred about three years earlier, his crew was assigned to fabricate new guards for a conveyor drive. He went into the weld shop and, when he saw that it was unusually messy, assigned his crew to work on getting the shop in better condition. The back door was falling off its hinges and a large, heavy cooling skid was sitting on top of two saw horses. He had his crew work to secure the skid and Brusca was planning to fix the back door. Brady arrived and asked Brusca why the crew was not fabricating new guards for the conveyor, as assigned. (Tr. 28). Brusca responded that he had to get the weld shop in better shape first and that the cooling skid was in such a precarious position that it could fall and injure someone. The shop was about 60 feet wide and 100 feet long. (Tr. 58). Brusca testified that Brady got very angry and accused Brusca of always doing whatever he wanted to do and ignoring job assignments given to his crew. Brusca responded that the crew would work on the guards as soon as they took steps to make the workplace safe. He also told Brady that the crew used wire to hold the existing guards in place so there was no immediate safety hazard. (Tr. 54-56). Brusca attends the foreman's

meeting every morning and he brought up the unsafe condition of the cooling skid at the meeting the following morning. Several managers went over to the shop to look at the cooling skid after the meeting and "nobody was denying that these were safety issues." (Tr. 30). Brusca said that he was told that he should not have brought up the issue at the foreman's meeting. Brusca testified that his relationship with Brady deteriorated after this incident.

About a year later, as Brusca's crew was finishing up replacing a hydraulic motor, a shift foreman stopped by and asked Brusca to look at a solenoid valve at the Four Main North head roller. Brusca got a replacement solenoid valve and the crew went to that area. Brusca's message light flashed and, when he returned the call to Brady, Brady became angry because the crew was replacing the solenoid rather than working on the antifreeze system on the top of the coal belt, as assigned. Brusca explained that the antifreeze system could not be worked on while the belts were operating. (Tr. 32). Later, Brady called back and asked why the crew was taking so long to change out the solenoid switch. Brusca explained that it would not be safe to rush the job. Apparently, Brady had been watching the crew from a monitor in the control room. A camera had been installed in the area to monitor the conveyor system. It bothered Brusca that Brady had been watching him to make sure he was not goofing off. It took his crew a few hours to change the solenoid. (Tr. 52). Brusca said that he was trying to finish the job before the crew went to lunch. *Id.* Brusca complained to Mike Ludlow, the mine manager, that it was a dangerous practice for Brady to call people on the mine phone to try to rush them on a job. Although Ludlow said he would look into the matter, Brusca never heard back from Ludlow.

Dean Moore, who was a member of Brusca's crew, was out on medical leave because of a hernia operation. On the evening of March 13, Moore drove to the mine with his brother, who was not a Twentymile employee. He walked into the weld shop and started talking to Brusca. Brusca testified that he asked Moore if he was working that night and he replied that he was there to get his dirty clothes from the bath house. Brusca also testified that he was about to tell Moore that he could not be in the shop without his personal protective equipment ("PPE") when Pat Sollars walked in and ordered Moore and his brother to leave the property. Sollars is the maintenance manager for Twentymile. Brusca was not concerned for the immediate safety of Moore and his brother because no work was being performed in the shop, but he was aware that they were not wearing any PPE, including a hard hat. Brusca knew that PPE must be worn in the shop. Moore was wearing his street clothes. Brusca testified that he has seen Brady in the weld shop without a hard hat on several occasions. (Tr. 69).

On March 15, Sollars asked Brusca to go to the conference room with him and Brown. Sollars asked Brusca what Moore was doing at the weld shop on the evening of the 13th. Brusca said that he had just started talking to Moore when Sollars came in and ordered Moore to leave. Brusca testified that Sollars acted like he did not believe him and that Brusca knew more than he was telling. (Tr. 39). Sollars became angry and told Brusca that he was not doing an "adequate job and that people don't like to work around [him] and [his] crew." *Id.* The conversation continued with Sollars asking more about Moore's presence at the mine. Brusca told Sollars that Weesner saw Moore soon after he arrived at the mine and told Weesner that Brusca was in the

shop. Sollars then asked Brusca, "has Nate [Weesner] been infected with the cancer yet?" *Id.* Brusca did not like being referred to as a "cancer" and he did not reply. Sollars told Brusca that the company wanted to find another lead man for his crew but that it would not be easy because nobody wanted to work with him.

The following Monday, March 17, Brusca talked to Ludlow about the meeting with Sollars. Ludlow said that he would talk to Sollars when he returned to work. Ludlow then asked Brusca if he had clocked in at the mine when he drove to the town of Craig to attend annual refresher training on March 12. He replied that he did and that he had the right to be compensated for any additional costs he incurred in attending a training session that was not held at the mine. (Tr. 41). Brusca testified that he had clocked in under similar circumstances the previous year and so had Carnahan and Moore. Brusca testified that he did not know how to ask for a mileage allowance for the trip to Craig. Carnahan rode with him to Craig on March 12 and he also clocked in at the mine. Other miners were paid for ten hours of work while attending the training class, but Brusca and Carnahan sought pay for an extra two hours and fifteen minutes that day. A payroll clerk noticed the discrepancy. Brusca's pay was $29.50 an hour. He made two dollars an hour more that he otherwise would have because he was a lead man.

Mr. Spangler testified that Sollars told him that he was working late one evening when he saw a personal vehicle traveling at a high rate of speed entering a restricted area of the mine. He looked for another supervisor and went to investigate. Sollars told Spangler that he found Moore in the weld shop talking to Brusca and he saw that neither Moore nor the person with him was wearing PPE. Sollars told both men to immediately leave the mine. Mr. Moore was subsequently terminated from his employment in part because he had been in the weld shop without PPE. (Tr. 85). Spangler also testified that a payroll clerk showed him Brusca's time records for March 12 because everyone else worked ten hours that day. Brusca and Carnahan had logged two and a quarter more hours than everyone else without authorization. (Tr. 85).

A little later on March 17, Brusca was asked to attend a meeting with Ludlow, Brown, and Spangler. He was told that the company was not pleased with his performance, especially with respect to two recent incidents. In the first incident, the company alleged that, as a supervisor, Brusca should not have allowed two people to enter the weld shop on March 13 without wearing PPE. He replied that he had not yet had the time to address the issue concerning the lack of PPE with Moore. (Tr. 86). Spangler did not believe Brusca on this issue and he felt that Brusca had more than enough time to tell Moore to leave or put on PPE. As the lead man, it was Brusca's responsibility to make sure that anyone who was obviously not wearing PPE either left the area or went to get PPE. (Tr. 104).

With respect to the incident involving the time card, Brusca told Spangler that he should have been paid mileage for the trip to Craig. Spangler testified that Brusca figured that he would try to get more hours instead "to see if I got caught." (Tr. 86). Spangler's impression is that Brusca knew that he was not entitled to the extra hours and he was "trying to slip something through." *Id.* Brusca would have been reimbursed for mileage if he had asked for it. (Tr. 112).

Over the previous few years a number of people at the mine had told Spangler that Brusca "took advantage of the company" and he was difficult to work with. (Tr. 78-79). Spangler considered Brusca's actions to be stealing from the company and he testified that he has terminated other people for misrepresenting their hours on their time cards. Spangler checked the payroll records and discovered that Brusca took an extra 45 minutes to attend a meeting in Craig the previous year. Mr. Carnahan, who also claimed over two extra hours for attending the March 12, 2008, meeting, was disciplined for the incident but he was not terminated because he merely followed the lead of Brusca, his supervisor, and he was scheduled to retire in June 2008. (Tr. 89).

Spangler testified that following the meeting on March 17, he determined that Brusca should be terminated from his employment. Before Spangler told his boss of this decision, he talked to other supervisors and managers to gather their thoughts as to Brusca's overall job performance so he could develop a "balanced view" of Brusca. (Tr. 91). Brady was not available because he was on vacation.

He also reviewed Brusca's personnel files. There had been an incident a few years earlier in which people were placing derogatory and obscene graffiti on equipment at the mine. Tom Bulger's belt crew was attacked in this graffiti. Bulger told Spangler that he was convinced that Brusca and his crew were the culprits. (Tr. 77). Although Spangler could never establish that Brusca was directly involved, Brusca was counseled about the matter and the graffiti stopped. (Tr. 78-81, 105-06). Spangler believed that Brusca misrepresented what had happened. (Tr. 107-08). During the investigation of this incident, two miners told him that they were available to work overtime unless they had to work with Brusca. (Tr. 79).

Spangler testified that he made the ultimate decision to terminate Mr. Brusca based on the two incidents, discussed above. (Tr. 92). Brusca failed to address the obvious PPE issue in the weld shop and he falsified his time sheet. Spangler also considered the "marginal performance over time that Mr. Brusca had demonstrated." (Tr. 93). Spangler testified that he did not know that Brusca had complained about safety or that a supervisor told Brusca that morning safety talks are a waste of time. In addition, Spangler did not know about the incidents involving the tractor in the airway or the repair of the solenoid on a head roller. He was also not aware of the incident in which Brady came into the weld shop while the crew was having a safety meeting and told everyone to get to work. (Tr. 97-98). Finally, Spangler testified that he knew nothing about the earlier incident in which Brusca delayed fabricating new guards for the conveyor system until he took steps to make the weld shop safer to work in. (Tr. 98). "There was never an issue brought to my attention as to any of the safety elements that have been talked about today [at the hearing]. . . ." (Tr. 94, 100). Spangler was only told that Brusca was taking advantage of the company and that he was difficult to work with. (Tr. 93-94, 101-02).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Section 105(c)(2) provides, in pertinent part, that the Secretary shall investigate each complaint of discrimination "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission established a procedure for making this determination at 29 C.F.R. § 2700.45. Subsection (d) provides that the "scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought."

"The scope of a temporary reinstatement proceeding is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Courts and the Commission have equated the "not frivolously brought" standard contained in section105(c)(2) of the Mine Act with the "reasonable cause to believe standard" at issue in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987). It has also been equated with "not insubstantial." *Jim Walter Resources*, 920 F.2d at 747. Congress indicated that a complaint is not frivolously brought if it "appears to have merit." (*Legis. Hist.* at 624-25).

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

It is rare to find that the link between an adverse action and the protected activity can be established exclusively by direct evidence. Usually the administrative law judge must look for

circumstantial evidence to draw an inference regarding the operator's motivation for the adverse action. The Commission has set out some guidelines for determining motivation.

> 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." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

Sec'y of Labor on behalf of Baier v. Durango Gravel, 21 FMSHRC 953, 957 (Sept. 1999).

Applicant provided many examples of what he considered to be protected activity. About three years ago, Brusca and his crew attempted to make the weld shop safer before fabricating new guards for a conveyor drive. Although Brady became angry when he entered the shop because the crew had not started working on the new guards, there was no adverse action taken against Brusca. Although comments were made by management, he suffered no disciplinary actions. In addition, there was no coincidence in time between the alleged protected activity and Brusca's termination from employment.

About two years ago, Brusca and his crew were working to replace a solenoid valve on a head roller. When Brady found out that Brusca was taking what he considered to be a long time on this work, he became angry and he apparently kept an eye on Brusca with the camera that had been installed in the area. Again there was no adverse action taken and there was no coincidence in time. Moreover, it does not appear that protected activity was involved in this incident.

As described above, Brusca was holding a safety meeting at the beginning of the shift sometime in February 2008, when Brady came into the weld shop and told everyone to get to work. There is no direct evidence that Brady knew that the crew was discussing safety issues. He just saw that the crew was sitting around a table. It can be inferred that Brady knew that Brusca often talked about safety at the beginning of the shift. Brady exhibited some animus toward this protected activity, but it appears that Brady believed that the crew was goofing off rather than discussing safety issues. Brusca completed the safety meeting before the crew started their assigned tasks. The training materials that Brusca used during the meeting were provided by Twentymile's safety director. (Tr.24, 66-67).

The incident involving Brusca and Carnahan getting a cup of coffee in the operations center sometime in February 2008 while Mr. Weesner washed his eye out does not involve protected activity. Brady apparently believed that the entire crew did not have to follow Weesner around while he took care of his eye.

Brusca alleges that during his pre-evaluation meeting with Brown sometime in late February 2008, Brown criticized him for holding safety meetings at the start of his shift because they were a waste of time. Brown characterized these meetings as an opportunity for the crew to take a break. Holding legitimate safety meetings at the start of a shift can be characterized as protected activity. If the meetings are in reality a sham then they would not be protected. For purposes of this temporary reinstatement case, I assume that the meetings were legitimate and were protected under the Mine Act. Brown displayed hostility or animus toward these meetings during Brusca's pre-evaluation. There was also a coincidence in time between the pre-evaluation meeting and Brusca's termination.

The final incident that the Applicant relies upon to make a case arose in early March 2008 when Brusca was told to change out a motor for a drive belt. He removed the motor in a manner that was different from what Brown had instructed. He removed the motor in a manner that did not expose the crew to diesel exhaust. Brusca testified that he believed that Brown was angry that he did not follow his explicit instructions when he removed the motor. For the purposes of this temporary reinstatement proceeding, I assume that Brusca was concerned with the health of his crew when he removed the motor using cables rather than placing the tractor between the equipment doors and the stopping. Such activity would arguably be protected under the Mine Act. I also accept Brusca's testimony that Brown displayed some hostility toward his actions. There was a coincidence in time between this event and his discharge from employment.

The record makes clear that the company's human resources director made the decision to terminate Brusca. Spangler based his decision on three factors. First, he accepted the chronology of events that Sollars described to him for the incident that occurred in the weld shop. Sollars advised Spangler that Brusca had allowed Moore and Moore's brother to remain in the weld shop without any PPE, including a hard hat. Sollars believed that Moore and his brother had been in the shop for some length of time before he arrived. Spangler did not believe Brusca's rendition of the events because it was inconsistent with what Sollars had told him. As a lead man, Brusca was a supervisor and he should not have been holding a conversation in the weld shop with people who were not wearing any PPE.

The second factor Spangler relied upon was Brusca's misrepresentation on his time sheet that he worked more than twelve hours on March 12, the date of the annual refresher training in Craig, Colorado. Spangler believed that Brusca's attitude showed that he had tried to slip the extra time through without getting caught. This misrepresentation was consistent with the information Spangler had previously received that Brusca was often not totally honest. Brusca never asked if he could add the extra time to attend the training and he did not ask how he could be reimbursed for the mileage to Craig. Craig is about 40 miles from the mine. The Secretary's

training regulations require mine operators to pay for miscellaneous expenses, including mileage, when training is held away from the mine. 30 C.F.R. §48.10(b). Spangler determined that Brusca had deliberately falsified his time sheet and this action amounted to a theft of company property. Other miners have been terminated for similar actions.

Finally, as discussed above, Spangler took into consideration Brusca's perceived reputation for being difficult to work with and for not being forthright. Spangler remembered the problems with graffiti at the mine and thought that Brusca had been directly involved. Spangler concluded that Brusca's behavior with respect to the two incidents that led to his dismissal was consistent with his past behavior at the mine.

The evidence presented at the hearing clearly demonstrates that Twentymile's stated reasons for terminating Brusca were not pretextual. Spangler considered Brusca's falsifying of his time sheet to be a very serious matter. Spangler also credited the statements of Sollars that Brusca allowed Moore and his brother to remain in the weld shop while wearing street clothes without any PPE. Spangler explicitly denied that he had any knowledge of the safety issues raised by Brusca that were described in this temporary reinstatement case. Spangler's testimony was entirely credible. It is important to note that Carnahan was also disciplined for the time sheet incident and Moore was discharged in part for being in the weld shop without PPE.

As stated above, Brusca testified that Brown and Brady displayed hostility toward the safety meetings, but the evidence shows that this hostility arose out of their frustration that he was slow to get his assigned work completed rather than hostility toward legitimate safety meetings. There is no evidence that Twentymile discourages safety discussions. Indeed, the evidence shows that safety meetings are encouraged. More importantly, Spangler testified that he had no knowledge of these events when he made the decision to terminate Brusca from his employment at Twentymile. I recognize that a mine operator may try to deliberately insulate the person making the decision to terminate an employee in order to mask the true, discriminatory reason for the discharge, but I can draw no inference from the evidence, including circumstantial evidence, that there was a hidden motive in this case or that Brusca was terminated for activities protected under the Mine Act.

Based on the above, I find that the Secretary did not meet her burden to establish that there is reasonable cause to believe that Brusca was terminated for protected activities. This case does not appear to have merit and was therefore "frivolously brought."

III. ORDER

The Secretary of Labor's application for the temporary reinstatement of Daniel R. Brusca is **DENIED** and this temporary reinstatement proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Lydia Tzagoloff, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Fax 303-844-1753 and Certified Mail)

R. Henry Moore, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1340, 401 Liberty Avenue, Pittsburgh, PA 15222 (Fax 412-434-8062 and Certified Mail).

RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-148-M
Petitioner	:	A.C. No. 40-03268-80642
	:	
v.	:	Docket No. SE 2006-163-M
	:	A.C. No. 40-03268-82949
SCP INVESTMENTS, LLC,	:	
Respondent	:	Old County Quarry

FURTHER ORDER TO SHOW CAUSE

These matters concern 12 citations that were issued as a result of an inspection of the Old County Quarry conducted by Mine Safety and Health Inspector (MSHA) Jeffrey Phillips on December 14, 2005. The cited violative conditions have been corrected and the subject citations have been terminated.

The Old County Quarry is a rock crushing facility operated by SCP Investments, LLC ("SCP"). Pat Stone is the managing partner of SCP. According to Stone, the mine commenced operations in September 2005. Section 109(d) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), requires a mine operator to file with the Secretary of Labor ("the Secretary") the name and address of the mine, as well as the name and address of the person who controls the mine. 30 U.S.C. § 819(d). Consistent with the statutory provisions of section 109(d), Part 41 of the Secretary's regulations requires mine operators to file a Legal Identity Report Form within 30 days of the opening of a new mine. 30 C.F.R. §§ 41.10, 41.11(a).

At the time of Phillips' inspection, SCP had not filed the required Legal Identity Report Form registering the facility as an active mine. Consequently, on December 14, 2005, Phillips ordered Stone to leave the mine property rather than allow Stone to accompany him during the mine inspection, reportedly because it was too dangerous given Stone's lack of Part 46 miner training. *See* 30 C.F.R. Part 46. Stone, on behalf of SCP, objects to not being allowed to remain on mine property during the inspection.

Section 103(f) of the Mine Act provides, in pertinent part, "*[s]ubject to regulations issued by the Secretary*, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany" an MSHA inspector during an inspection. 30 U.S.C. § 813(f) (emphasis added). "The right to accompany an inspector on all 103 inspections has been consistently recognized by the Commission and the courts." *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994). This fundamental right is a qualified right that

may only be curtailed by the Secretary's regulations. *Id.* at 718. In extraordinary circumstances, the Secretary may preclude the right to accompany an inspector "where necessary to protect the safety of miners." *Id.* at 719.

On March 31, 2007, the Secretary was ordered to show cause, in writing, why the subject citations should not be vacated because MSHA's mine inspection violated the provisions of section 103(f) of the Mine Act. Specifically, the Secretary was requested to identify any regulation that describes the circumstances that warranted Phillips' denial of Stone's right to observe the inspection. In addition, the Secretary was requested to provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f) that justified the denial of Stone's participation. The Secretary was also requested to specify, by specific reference to her regulations, the requisite training that must be completed by a miners' representative, or a mine operator, before he is allowed to be present during an inspection. Finally, the Secretary was ordered to identify, with specificity, the hazards that Stone would have been exposed to if he had accompanied Phillips on December 14, 2005, during this surface mine inspection.

The Secretary's response to the Order to Show Cause was filed on April 21, 2008. However, the Secretary did not provide the specific information requested. Instead, the Secretary relied on an inspector's broad discretion to preclude walkaround rights when necessary to protect the safety of miners. *Sec'y's Resp.* at 7.

Stone's reply to the Secretary's April 21, 2008, response to the Order to Show Cause was filed on May 5, 2008. Stone related that Phillips denied his request to observe the inspection, that Phillips escorted him off of mine property, and that he was denied the opportunity to re-enter the mine site to retrieve keys that were left in several loaders.

As a threshold matter, the wide discretion that must be afforded inspectors with respect to how they conduct inspections must be balanced with the fundamental right of a mine operator to be present during an inspection. While the decision to allow walkaround rights is committed to the broad discretion of an inspector, his discretion is not unfettered and may not be abused. The Commission has noted that an "abuse of discretion" occurs when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Energy West Mining Co.*, 18 FMSHRC 565, 569 (April 1996) (citations omitted).

Phillips' reliance on Stone's lack of miner training as a basis for denying his section 103 walkaround rights appears to be an "improper understanding of the law." Miner training is a prerequisite for performing mining activities. Miner training is not required to observe an inspection. Although hazard training may be required prior to the exercise of walkaround rights, despite having been ordered to do so, the Secretary has yet to identify any hazard to support Phillips' refusal to allow Stone to observe the inspection.

Accordingly, in order to determine if Phillips' denial of Stone's walkaround right was an abuse of discretion and a violation of section 103(f), the Secretary **IS ORDERED** to provide the following:

(1) The Secretary should state whether or not she is relying on her regulations to support Phillips' denial of Stone's right to observe the inspection. If she is relying on her regulations, the Secretary should provide a copy of the pertinent regulatory provisions.

(2) The Secretary should provide any Interpretive Bulletin or Memorandum addressing her implementation of the walkaround rights in section 103(f) that justifies the denial of Stone's right to be present during the inspection. If she is not relying on an Interpretive Bulletin or Memorandum she should so state.

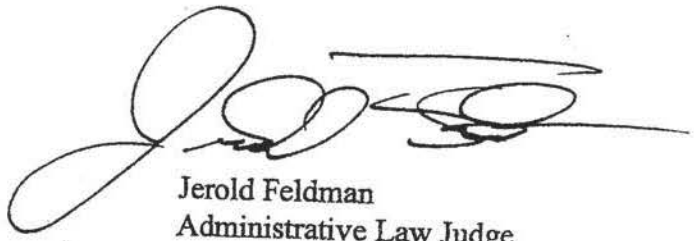
(3) The Secretary should state whether or not a person who is not a miner, that is selected by miners as their authorized representative, is entitled to section 103(f) walkaround rights. The Secretary should identify the statutory and/or regulatory provisions, if any, to support her position.

(4) The Secretary should specify, by specific reference to her regulations, the requisite training that must be completed before a miners' representative, or a mine operator, is allowed to be present during an inspection. If the Secretary believes a miner's representative must have Part 46 new miner training prior to accompanying an inspector during an inspection she should identify the statutory and/or regulatory provisions, if any, to support such a position.

(5) The Secretary should identify, **with specificity**, the hazards that Stone would have been exposed to if he had accompanied Phillips during this surface mine inspection.

(6) Dismissal is a harsh sanction. Assuming, for the sake of argument, that Phillips abused his discretion and Stone's section 103(f) rights were violated, what sanction, short of vacating the citations and dismissal of this proceeding, does the Secretary suggest be imposed in this matter.

IT IS FURTHER ORDERED that above information should be provided by the Secretary within 21 days of the date of this Order. Failure to provide a timely response that directly addresses the information requested may result in the dismissal of this civil penalty matter.



Jerold Feldman
Administrative Law Judge
(202)434-9967

Distribution: (Certified Mail)

Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219

Pat Stone, SCP Investments, LLC, P.O. Box 82, Crab Orchard, TN 37723

/rps

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

May 30, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-229-M
Petitioner	:	A.C. No. 26-02556-75931
	:	
	:	Docket No. WEST 2006-275-M
	:	A.C. No. 26-02556-78850
	:	
	:	Red Rock
v.	:	
	:	Docket No. WEST 2006-226-M
	:	A.C. No. 26-02400-75744
	:	
	:	Docket No. WEST 2006-306-M
	:	A.C. No. 26-02400-81378
SOUTHERN NEVADA PAVING,	:	
Respondent	:	Towncenter/Flamingo #9
	:	
	:	Docket No. WEST 2006-100-M
	:	A.C. No. 26-02478-68079
	:	
	:	Charleston #7

ORDER GRANTING THE SECRETARY'S MOTION FOR SUMMARY DECISION ON MINE ACT JURISDICTION

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Mine Act"). They involve 21 citations issued to Southern Nevada Paving ("SNP") at three facilities in Clark County, Nevada. The Secretary has moved for summary decision on the issue of the jurisdiction of the Department of Labor's Mine Safety and Health Administration ("MSHA") to inspect SNP's operations at Red Rock, Towncenter/Flamingo #9, and Charleston #7. The Secretary contends that SNP engaged in the milling of minerals at these facilities with the result that they fall within the jurisdictional definition of a "coal or other mine" in section 3(h)(1) of the Mine Act. SNP opposes the motion and contends that no mining or milling took place at any of the three facilities cited by MSHA.

The parties entered into detailed stipulations of fact. The relevant stipulations are set forth below. I have not included the stipulations that merely describe the attachments to the stipulations.

The Secretary of Labor . . . , hereinafter referred to as the "Secretary" or "MSHA" and Southern Nevada Paving, hereinafter referred to as "Respondent" or "SNP," by and through their attorneys, stipulate and agree as a matter of fact, solely for the purpose of proceedings related to determining jurisdiction under the [Mine Act] concerning SNP facilities known as Red Rock, Towncenter/Flamingo #9, and Charleston #7 (jointly and severally referred to by the parties, solely for ease of reference, as the "Summerlin Facilities") that, at all material times, the statements set forth below are true.

. . .

1. Since in or about 1994, Howard Hughes Properties, LP ["Howard Hughes"] has engaged in an extensive construction project in Summerlin, Nevada, west of Las Vegas, Nevada, consisting of excavating, landscaping, filling, grading, and preparing construction sites for residential buildings, commercial buildings, utilities, Beltway 215, and other roadways.

2. Howard Hughes Summerlin construction projects included scraping, excavating, loading, moving, and depositing spoil materials ("construction spoil material" or "construction waste material") consisting of soils, shrubs, roots, trash, and organic and non-organic materials. Several construction contractors performed these construction services, including but not limited to Acme, Contri, Summit Sand & Gravel, Pools-by-Grube, SNP, Regency Landscaping, and Sunstate. The excavation construction work throughout developments in Summerlin produced a large amount of construction waste/spoil material.

3. Contractors removed and trucked such excavation waste/spoil material to sites designated by Howard Hughes within Summerlin. Construction contractors paid SNP a fee to deposit construction excavation waste/spoil at sites including the [Summerlin Facilities]. Excavation spoil was deposited in piles at [these Summerlin Facilities]. The excavation waste/spoil material contained no known mineral of value and was not excavated for the purpose of mining or milling.

4. SNP performed services under contract with Howard Hughes concerning such construction activity. SNP provided these services at various locations and sites owned by Howard Hughes Properties, including the [Summerlin Facilities]. These facilities and services were co-located with ongoing construction projects within Summerlin.

5. The excavation, mining and milling of minerals at the [Summerlin Facilities] is prohibited by agreement between SNP and Howard Hughes, as referenced and attached [to these stipulations]. SNP did not excavate, extract or

quarry minerals at these sites. The existence of any mineral contained in construction excavation spoil material deposited at [the Summerlin Facilities] was incidental to and not the primary purpose of construction excavations in Summerlin.

6. OSHA safety standards apply to excavation and construction activities throughout Summerlin.

7. Piles of construction spoil materials at [the Summerlin Facilities] included materials from various Summerlin construction contractors and construction sites. Spoil or waste materials that originated from different contractors or different construction sites were not kept separate at [the Summerlin Facilities] but were deposited in several piles.

8. [The Summerlin Facilities] were not open pit or strip mines. [These facilities] were situated on residential and commercial development property in Summerlin, Nevada. [They] did not extract or process coal and did not extract any other mineral.

9. For purposes of these stipulations, "excavation" includes any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal within the meaning of 29 C.F.R. 1926.650(b), "soil" includes excavated material withing the meaning of 29 C.F.R. 1926.652, Appendix A, "earthmoving equipment" includes scrapers and other equipment within the meaning of 29 C.F.R. 1926.602(a), and "spoil" includes excavated soil materials within the meaning of 29 C.F.R. 1926.651(j).

10. MSHA mine identification number 2602556 had been obtained in or about 1995 by a predecessor owner concerning Red Rock.

11. MSHA mine identification number 2602400 had been obtained in or about 1999 by a predecessor owner concerning Towncenter/Flamingo #9.

12. MSHA mine identification number 2602478 had been obtained at an unknown date by a predecessor owner concerning Charleston #7.

13. Prior to 2004, MSHA had issued citations related to MSHA mine identification numbers associated with Red Rock, Towncenter/Flamingo #9, and Charleston #7 facilities.

14. In 2004, SNP became a wholly-owned subsidiary of Bardon U.S. Corp., operating since that date under different ownership and management.

15. SNP has managed [the Summerlin Facilities] sites pursuant to its construction agreement with [Howard Hughes]. SNP disputes being a mine operator under the [Mine Act] at those facilities, and since 2006 has consistently asserted that the subject facilities are not mines within the meaning of the [Mine Act].

16. SNP notified MSHA in 2005 that MSHA mine ID numbers and regulations should not apply to facilities such as Red Rock, Towncenter/Flamingo #9, Charleston #7, and Summerlin #8, that citations concerning these facilities should be vacated for lack of jurisdiction, and that related MSHA mine ID numbers should be deactivated.

17. Since 2005, SNP has observed MSHA requirements under protest at these facilities pending the resolution of these proceedings after receipt of correspondence from the Secretary's counsel in 2005, a copy of which is attached as Exhibit A [to these stipulations].

18. Nevada OSHA, a state plan agency under the Occupational Safety and Health Act pursuant to 29 U.S.C. 667 and 29 C.F.R. 1952.290 - 1952.297, has not cited SNP's facilities at Towncenter/Flamingo #9 and Charleston #7, but has cited the Regal Ready-Mix Concrete Plant at the Red Rock facility. Regal Ready-Mix is a corporate affiliate of SNP. The Regal Ready-Mix concrete plant is subject to regulation by Nevada OSHA pursuant to 29 C.F.R. 1952.290 - 1952.297 and is not subject to regulation by MSHA.

19. Red Rock is located adjacent to the Summerlin Red Rock Casino construction site.

20. SNP's [Summerlin Facilities] have been closed and the sites at these locations have been prepared for residential, commercial, and road construction. A concrete plant operated by Regal Ready-Mix is still located at Red Rock. Residential buildings, commercial buildings, and streets in various stages of construction now and/or will occupy the sites where Charleston #7 and Towncenter/Flamingo #9 facilities once were located.

21. SNP did not blast, heat, press, or wash the excavation spoil material at these facilities. SNP screened the piles of excavation waste or spoil material using a grizzly to remove trash, shrubbery, organic material, and expandable soil. SNP then crushed the screened material into Type II fill material. The Type II material was described by the DOT specifications set forth in section 704-03.03 of the Nevada Administrative Code. Type II material was used primarily for leveling and filling purposes.

22. The content of the Type II material was not assayed to determine its composition. The Type II material was not crushed, screened, and /or washed to obtain a uniform size or consistency, but contained non-expandable soil and hard materials of different sizes and shapes. No other material was crushed at these facilities.

23. SNP did not use hydraulic shovels or haul trucks at [the Summerlin Facilities]. At different times in the past, these facilities used a scraper, loader, and other earthmoving equipment, small cone crusher, small VSI crusher, and a crew of 2 to 4 employees at [each Summerlin Facility]. At different times in the past, the storage trailer and control trailer with electrical equipment were located at these sites. SNP used its own equipment at [the Summerlin Facilities]. Construction contractors that deposited excavation spoil or picked up Type II material at these sites used their own equipment.

24. SNP delivered some of this Type II material to construction sites in Summerlin for grading, filling, and leveling purposes. Contractors also picked up Type II material from [the Summerlin Facilities] for filling, leveling, and grading construction sites. SNP was compensated by the ton for such Type II material.

25. The Regal Ready-Mix Concrete Plant at Red Rock used some of the finer material crushed at Red Rock to manufacture concrete.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that there can be no dispute that, at the time the citations were issued, the Summerlin Facilities were subject to Mine Act jurisdiction. SNP screened stockpiled material that was previously excavated from the ground at various excavation sites in Summerlin. After SNP screened the material, it crushed it in a small cone crusher or a VSI crusher. SNP produced what it calls Type II material, which in reality is a type of gravel. Indeed, SNP's contract with Howard Hughes provides in Exhibit C to the agreement ("Excavations and Operations Plan") as follows:

> [SNP] will, for the purposes of producing sand and gravel products, excavate soils from various locations within the Subject Property.
>
> . . . .
>
> Crushing operations shall be portable, self-contained set-ups energized by a generator housed in a trailer and shall be comprised of jaws, cone crushers, stacking conveyors, screens and belts configured to result in certain gravel products. The crusher will be fed either by scrapers dumping over a hopper, a dozer pushing soils into a grizzly or fed directly by the loader.

(Ex. B to Stipulations).

The Secretary contends that while some of the crushed aggregate produced by SNP at the Summerlin Facilities is used at the site, many tons of crushed aggregate are sold by SNP to sand and gravel customers. (Ex. K to Stipulations). Exhibit K consists of customer tickets for product purchased from SNP. The Secretary maintains that these tickets show that SNP sells sand and gravel to such customers as Randy's Aggregate Sales, DW Iron Gravel, Karen I. Lamb Middle School, South Coast Casino, and Mtn. Edge Paving.

The Secretary argues that SNP's operations, as described in the stipulations, is entirely indistinguishable in fact and law from the many other sand and gravel crushing operations inspected by MSHA as mineral milling operations under the Mine Act. Material is excavated from the ground, transported to a dump site to be screened and crushed to produce gravel and sand products. Each of SNP's crushers engages in mineral milling and is therefore a mine as that term is used in section 103(h)(1) of the Mine Act. Stone, rock, gravel, and sand are "minerals" as that term is used in the Mine Act and mineral milling includes any crushing, grinding, or screening of minerals. MSHA has been inspecting these crushers for many years and the change of ownership of the company does not alter the fact that mineral milling occurs at the facilities.

Finally, mineral milling need not involve the separation of a valuable ore from undesired contaminants. The only support for this interpretation of the term mineral milling is in the Interagency Agreement, as discussed below. While mineral milling often involves such separation, nothing in the language of the Mine Act suggests that such separation of materials must occur in order for milling to occur.

B. Southern Nevada Paving

SNP argues that the stipulations do not support the Secretary's motion for summary decision. SNP's construction-related activities on commercial and residential development property within Summerlin do not establish jurisdiction under the Mine Act. SNP was engaged in a large scale construction project to build the commercial and residential community of Summerlin, Nevada. SNP contracted with Howard Hughes to provide essential services as part of this huge construction project. The Secretary "dwells" almost exclusively on the operation of crushers. (SNP Response 9.) SNP argues that operating a crusher as an integral part of the Summerlin construction process does not convert construction to mining. The material was not screened and crushed to obtain a uniform size or consistency. The finished product contained non-expandable soil and "hard materials of different sizes and shapes." *Id.* The crushing that occurred is not the type of crushing that can be regarded as mining. The stipulations only support "the fact that SNP screens and crushes excavation spoil material containing no known mineral of value for reuse in filling and grading commercial and residential construction developments." (SNP Response 9-10). The contract between SNP and Howard Hughes specifically prohibited SNP from operating a mine or carrying on mining, milling, or processing operations at Summerlin.

The Secretary argues that because SNP used a crusher, it was engaged in mining. The stipulations show that SNP was not screening or crushing in connection with an excavation or for purposes related to mining but that it screened and crushed spoil material as part of the construction of roads, commercial properties, and housing for Summerlin, Nevada. SNP's operations did not separate worthless spoil from valuable minerals. It simply screened out trash, vegetation, and expandable soils. Crushing, for purposes of MSHA jurisdiction, occurs when rock is crushed into smaller usable sizes. At Summerlin, only excavation spoil was crushed as part of the construction process and no mineral extraction or processing occurred. In addition, SNP did not engage in sizing sufficient to confer MSHA jurisdiction because products of a uniform size or consistency were not produced.

II. DISCUSSION AND ANALYSIS OF THE ISSUES

The Commission's Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting summary decision, as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

For the reasons set forth below, I find that there are no genuine issues as to any material fact, with respect the jurisdictional issues raised by the parties, and that the Secretary is entitled to summary decision as a matter of law. SNP took material that had been excavated from the earth and crushed this material into an aggregate product that was used by other contractors during the construction of the community of Summerlin, Nevada. The cases involve 21 citations issued for conditions related to SNP's crushing operations such as citations alleging violations of machine guarding standards and other equipment standards.

Section 3(h)(1) of the Mine Act defines "coal or other mine" as "(A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals. . . ." 30 U.S.C. § 802(h)(1). The Commission set forth the framework to follow when analyzing jurisdictional disputes with respect to issues surrounding the milling of minerals in *Watkins Engineers & Constructors*, 24 FMSHRC 669, 672-77 (July 2002). Based on the Commission's analysis, I believe it is fair to conclude that the phrase "facilities . . . used in . . . the milling of . . . minerals" in section 3(h)(1) of the Mine Act is to be construed broadly. The term milling is not defined in the Mine Act. As used in the mining industry, the term "milling" can be defined as "[t]he grinding or crushing of ore" and it "may

include the operation of removing valueless or harmful constituents. . . ." Am. Geological Institute, Dictionary of Mining, Mineral, and Related Terms 344 (2d ed. 1997) ("DMMRT").

The Secretary provided interpretative guidance on this issue in an interagency agreement between MSHA and the Occupational Safety and Health Administration ("OSHA") (the "Interagency Agreement"). 44 Fed. Reg. 22827 (April 17, 1979) (http://www.msha.gov/regs/1979mshaoshammu.HTM). The Interagency Agreement attempts to draw a line between milling operations that are subject to MSHA inspection from other facilities that are subject to OSHA inspection. Appendix A of the Interagency Agreement sets forth a list of "milling processes" that are subject to MSHA inspection. This list includes "crushing," which is defined as the "process used to reduce the size of mined materials into smaller, relatively course particles."

The parties agreed that SNP "crushed the screened material into Type II fill material." (Stip. 21). The Nevada Department of Transportation sets standards for Type I and Type II fill material in a document entitled "Standard Specifications for Road and Bridge Construction." (Attachment to the Secretary's Memorandum; http://www.nevadadot.com/business/contractor/standards/documents/2001StandardSpecifications.pdf, pp. 492-93). This material is described as "Aggregate Base" and the document sets forth the requirements for this type of aggregate. Other sections of the document set forth requirements for other types of aggregate, such as aggregate used to make concrete. *Id.* at 499. The term "aggregate" can be defined as "any of several, hard, inert materials, such as sand, gravel, slag, or crushed stone, mixed with cement or bituminous material to form concrete, mortar, or plaster, or used alone as in railroad ballast or graded fill." (DMMRT at 8-9). The material produced by SNP fits into this definition of aggregate. The parties stipulated that the material that was screened and crushed at the Summerlin Facilities was used for "filling, leveling, and grading construction sites." (Stip. 24). Material used as an aggregate base does not have to meet the same standards as aggregate used to produce concrete. The parties stipulated that the end product contained non-expandable soil and rock. Although this material was not of a uniform size, it met the criteria for Type II fill material under standards developed by the Nevada Department of Transportation. I hold that the crushing of material to make aggregate base is mineral milling under the Mine Act.

SNP argues that, although it used crushers at the cited locations, it did not separate one or more valuable desired constituents from the undesired contaminates with which it is associated. As a consequence, it did not engage in "milling" as that term has been defined by the Secretary in Appendix A to the Interagency Agreement. I reject SNP's argument. First, it stipulated that some of the finer material crushed at Red Rock was used to manufacture concrete. Thus, in at least one location, SNP separated the crushed material into different classifications for different uses. More importantly, in *Watkins Engineers* the Commission made clear that the separation of valuable material from that which is not valuable or useful is not a prerequisite to a finding that mineral milling is occurring. (24 FMSHRC at 674-76). In spite of the referenced language in Appendix A, the Secretary has consistently interpreted the term milling to include milling operations in which the separation of valuable from valueless materials does not occur. In *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552-53 & n. 10 (D.C. Cir. 1984), the court of

appeals determined that milling can include operations that do not separate valuable constituents from undesired contaminants.

The primary theme of SNP's arguments in these cases is that because it was engaged in construction rather than mining, the Summerlin Facilities should be subject to inspection by OSHA. It states that the Summerlin Facilities "were situated on and within a large residential and commercial construction development in Summerlin." (SNP Response at 10). SNP maintains that the Secretary's arguments ignore "the inherent nature and purpose of the activities that occurred at the three sites. . . ." *Id.* at 2. I find SNP's arguments to be unpersuasive. The sand, gravel, crushed stone/aggregate industry is always directly related to the construction industry. The products produced by sand, gravel, and crushed stone operations are used to make concrete, build roads, construct commercial and residential buildings, provide fill material, and otherwise support construction activities. There is nothing unique about SNP's relationship to construction except the fact that the crushing was being performed on some of the land that was being developed by Howard Hughes. Whether screening and crushing of excavated material occurs on the site of the construction activity or at another location does not change the nature of the operations being performed. I find that the stipulations establish that SNP was screening and crushing material that had been excavated from the earth. SNP was producing a product that was used in the construction of Summerlin. I hold that the stipulations establish that SNP's screening and crushing operations at the Summerlin Facilities was mineral milling and, as a consequence, these operations were subject to the jurisdiction of MSHA.

SNP also contends that the spoil material that was screened and crushed was not "mined" but was simply excavated during the construction process. This spoil material had no known mineral value and its contract with Howard Hughes prohibited it from mining, milling, or processing any minerals at Summerlin. I disagree. The stipulations establish that, once the spoil material was screened and crushed, it did have value to the contractors working at Summerlin. Contractors purchased this "Type II gravel" for use at Summerlin. (Stips., Exhibit K). If these contractors had not purchased this crushed material, they would have had to purchase similar material on the open market. Thus, the crushed spoil had intrinsic value to those who purchased it. (*See Richard E. Seiffert Resources*, 23 FMSHRC 426, 427 (April 2001) (ALJ)). The fact that the material that was screened and crushed was excavated as part of the construction process does not change the result. (*Drillex, Inc.*, 16 FMSHRC 2391 (Dec. 1994)). In *Drillex*, the respondent argued that the material was not extracted and crushed for its intrinsic properties but merely as an incidental operation during the construction of roads. *Id.* at 2394. The Commission determined that its crushing operation was subject to MSHA jurisdiction.

SNP argues that the Summerlin Facilities functioned as borrow pits because the material was used by contractors "as fill and grade material based on its bulk and not used for its intrinsic properties." (SNP Response at 9). In section B(7) of the Interagency Agreement, the following definition is provided:

> "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

It is clear that the Summerlin Facilities were not borrow pits. The excavation was not performed by SNP at the cited facilities. Moreover, as discussed in this order, mineral milling was occurring at the Summerlin Facilities. After trash, organic matter, and expandable soils were removed, the material was crushed to meet the specifications for Type II material.

Section 3(h)(1) of the Mine Act mandates that, in making a determination of what constitutes mineral milling, the "Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." This provision makes clear that the Secretary has wide discretion to determine what constitutes mineral milling and that her determination on this issue is to be reviewed with deference by the Commission and courts. This language provides guidance with respect to one factor to be considered by the Secretary in exercising this discretion. It is clear that the excavation of the material by contractors of Howard Hughes was part of the construction process and is subject to OSHA jurisdiction. Likewise, once the material crushed by SNP was removed by contractors, the activities surrounding the use of the crushed material was subject to OSHA jurisdiction. A case can be made that "convenience of administration" would dictate that the entire construction process should be inspected by OSHA and that interjecting MSHA in the middle of this process is illogical and inconvenient. Although this argument has merit, I find that the Secretary did not abuse her discretion when she determined that the cited activities conducted by SNP were subject to Mine Act jurisdiction. Although the Secretary must give consideration to the convenience of administration, it is only one factor that the Secretary is authorized to consider. In this instance, it is clear that the Secretary put great weight on the nature of the work being performed by SNP at the Summerlin Facilities. The Secretary did not abuse her authority in determining that this work was mineral milling subject to Mine Act jurisdiction.

In summary, I find that there is no genuine issue as to any material fact. SNP was screening and crushing material that was dug from the earth. After SNP crushed the material, the

resulting produce met the requirements of Type II fill material, generally known as aggregate base. As explained above, this aggregate base was used during the construction of Summerlin. The stipulations, including Exhibit K, demonstrate that this aggregate base had commercial value. I also find that the Secretary is entitled to summary decision as a matter of law. Although the phrase "the milling of such minerals" in section 3(h)(1) of the Mine Act is not defined, the Secretary has consistently taken the position that the term milling includes the crushing of rock. The Commission and the courts have upheld the Secretary's position on this issue. I hold that the crushing conducted by SNP at Summerlin was mineral milling under the Mine Act. As a consequence, the Secretary had the authority to inspect SNP's Summerlin Facilities.

III. ORDER

For the reasons set forth above, the Secretary's motion for summary decision on the issue of jurisdiction is **GRANTED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Jan Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Suite 3-700, San Francisco, CO 94103-6704

James J. Gonzales, Esq., Holland & Hart, P.O. Box 8749, Denver, CO 80201-8749

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GPO U.S. GOVERNMENT PRINTING OFFICE: 2008—340-005/62703