

MAY AND JUNE 2009

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MAY AND JUNE 2009

Review was granted in the following case during the months of May and June:

Secretary of Labor, MSHA v. North American Drillers, LLC., Docket No. LAKE 2008-2-R, and LAKE 2008-98. (Judge Melick, April 9, 2009)

There were no cases filed in which review was denied during the months of May and June:

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 6, 2009

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

v.

MORRIS, INC.

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Docket No. CENT 2009-1
A.C. No. 39-01381-152957

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

ORDER

BY: Jordan, Young, and Cohen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On October 1, 2008, the Commission received from Morris, Inc. ("Morris") a request to reopen a penalty assessment that became 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 June 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Assessment No. 000152957 to Morris, proposing penalties for two citations that MSHA had issued to Morris on April 30, 2008. According to the Secretary, any contest of those penalties was due on July 17, 2008. However, the Secretary's records show that Morris did not file a contest until July 25, 2008, when it contested one of the two proposed penalties. The request to reopen does not explain the reason for the delay in filing. The Secretary states that she does not oppose the request.

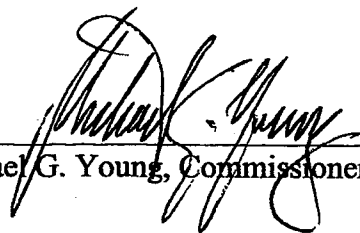
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("JWR"). In evaluating requests to

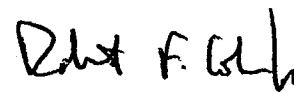
reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 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).

Because Morris’s request for relief does not explain the company’s failure to contest the proposed assessment on a timely basis, we hereby deny the request for relief without prejudice. *See Eastern Associated Coal, LLC*, 28 FMSHRC 999, 1000 (Dec. 2006). We recognize the concerns expressed in the Chairman’s dissenting opinion, and we are sympathetic to a small pro se operator which filed its notice of contest only eight days late. However, in order to justify the reopening of an order which the Mine Act deems final under its strict time limits, the record should provide an explanation, as required by Rule 60(b), for why those time limits were not met.

The words "without prejudice" mean that Morris may submit another request to reopen Assessment No. 000152957 with respect to the penalty it seeks to contest.¹


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ Morris must establish good cause for not contesting the citation and proposed penalty within 30 days from the date it received Assessment No. 000152957 from MSHA. Under Rule 60(b), the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Morris should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Morris from responding within the time limits provided in the Mine Act, as part of its request to reopen. Morris should also submit copies of supporting documents with its request to reopen.

Chairman Duffy, dissenting:

I would reopen this matter, remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, and, consistent with Rule 28, order the Secretary to file a petition for assessment of penalty within 45 days. *See* 29 C.F.R. § 2700.28.

Morris, Inc. is a very small, seasonal sand and gravel operator filing for relief *pro se* because it was eight days late in contesting the Secretary's proposed penalty of \$100.00. The Secretary does not oppose reopening the matter.

MSHA's data profile for Morris, Inc., indicates that the mine has been in operation since September of 1990. The operator's reported compliance history, dating back to 1995, shows that the mine has been cited for 35 violations, 16 of which were issued in 1995, and has had two reportable lost time injuries during that same 14-year period. Total hours of operation per year have ranged between 7,372 hours and 32,944 hours, with the average being 14,921 hours. For 2008, the year the citation in question was issued, the mine operated for 8,644 hours. The number of employees at the mine in 2007-2008 ranged from six to eight, including one office worker.

Morris, Inc. is not a very litigious operator. MSHA's records show that most of the operator's proposed penalties have been paid in full.²

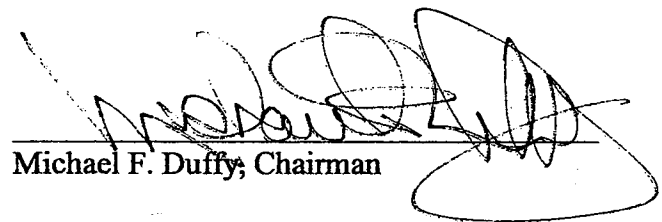
Consequently, it is fair to say that this small operator, by its limited experience, would not be intimately familiar with the procedures and deadlines associated with the contesting of proposed assessments of civil penalties before the Commission, the consequences of not contesting them on time, or the roadmap to Commission relief from final orders imposing those assessments.

Given these facts, I do not see what is to be gained, other than strict adherence to form, by forcing Morris, Inc., and the Secretary to expend additional time and trouble over an eight-day delay in contesting a \$100.00 penalty in order to obtain the Commission's approval to proceed with this case when there is no dispute between the parties on whether the matter should appropriately proceed in this forum. Except in circumstance where the prerogatives of the

² In 1999, however, the operator paid \$7,555.00 in lieu of a proposed assessment of \$14,055.00 for three violations, and in 2000 it paid \$665.00 in lieu of a proposed assessment of \$1,215.00 for five violations. MSHA's public information regarding Morris, Inc., does not indicate whether those reduced penalties were arrived at through negotiations with the Secretary alone or whether they arose from a settlement entered into before the Commission. A search of the Commission's archives does not yield any substantive cases involving Morris, Inc., although MSHA's website indicates that two citations issued in January of this year are currently under contest.

Commission are so strong as to demand otherwise, I have generally taken the position that unopposed motions to reopen uncontested assessments that have become final Commission orders should be granted as a matter of course (so long as they are filed within a year of the final orders in question). The circumstances of this case underscore the advisability of that approach. It should be sufficient for the Commission's and the Secretary's purposes to admonish Morris, Inc., that it is incumbent upon mine operators to respond to proposed penalty notices in a timely manner and that unwarranted delays in the future will not be acceptable.

I therefore dissent.



Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 6, 2009

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

v.

PRECISION DRILLING, INC.

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Docket No. SE-2009-26-M

A.C. No. 09-01112-134284 Q7X

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. (2006) (“Mine Act”). On October 14, 2008, the Commission received from Precision Drilling, Inc. (“Precision”) a request 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).

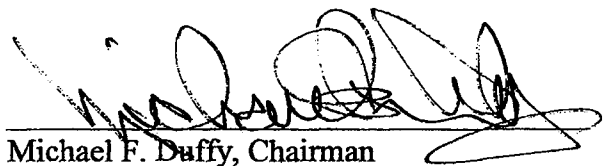
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

We have held, however, 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 mistake, inadvertence, or excusable neglect. 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

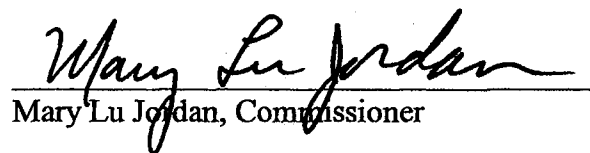
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Precision's request indicates that, upon receipt of the proposed assessment, it filed a contest of one of the two penalties proposed on the assessment. The Secretary states that she does not oppose the reopening of the proposed penalty assessment but does not address Precision's assertion that it filed a contest.

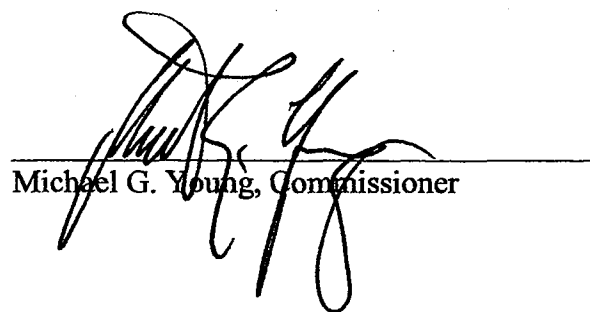
Having reviewed Precision's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Precision's apparent failure to timely contest the penalty proposal and whether relief 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.



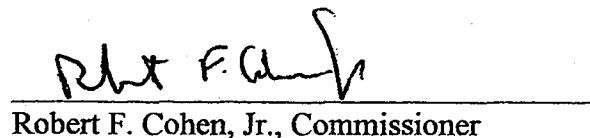
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 6, 2009

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

v.

MOSAIC PHOSPHATES COMPANY

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Docket No. SE 2009-93-M
A.C. No. 08-01117-157102

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. (2006) ("Mine Act"). On November 5, 2008, the Commission received from Mosaic Phosphates Company ("Mosaic") a motion from 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).

However, 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 mistake, inadvertence, or excusable neglect. *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

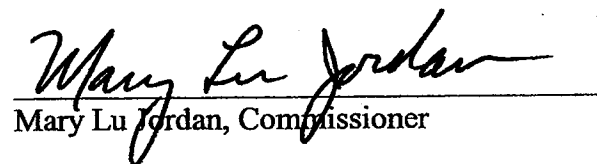
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The Secretary states that she does not oppose the reopening of the proposed penalty assessment. The record indicates that the contest form was sent too late in part due to an illness in the family of one of Mosaic's employees.

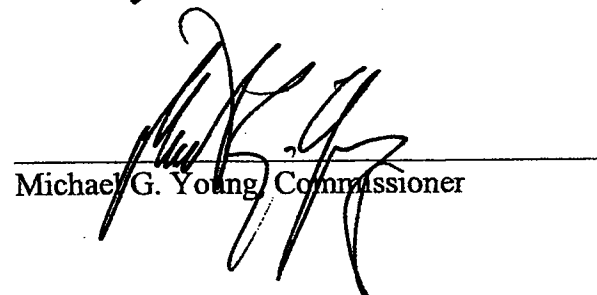
Having reviewed Mosaic's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



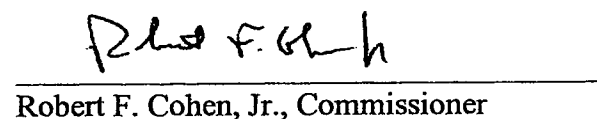
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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May 6, 2009

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

v.

DICKENSON-RUSSELL
COAL COMPANY, LLC

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Docket No. VA 2008-395
A.C. No. 44-06444-149645

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. (2006) ("Mine Act"). On August 20, 2008, the Commission received from Dickenson-Russell Coal Company, LLC ("Dickenson-Russell") a motion made 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).

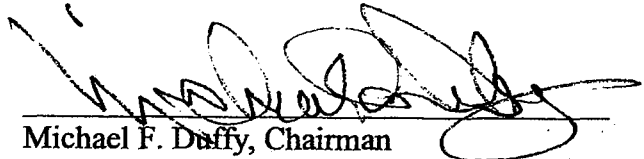
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

We have held, however, 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 mistake, inadvertence or excusable neglect. 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).

The Secretary states that she does not oppose reopening the proposed penalty assessment. The record indicates that a recently hired employee of the operator forwarded a check covering all citations covered by a proposed penalty assessment except for two citations which the operator intended to contest. However, the employee inadvertently neglected to file contests for those two penalties. When he learned of his mistake, he belatedly submitted the contest form to the Secretary.

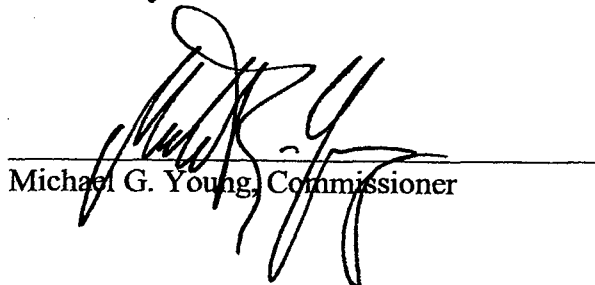
Having reviewed Dickenson-Russell's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



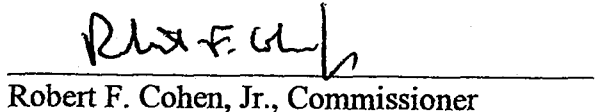
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 6, 2009

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

v.

CASTLE WOOD PRODUCTS

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Docket No. WEST 2008-1389-M
A.C. No. 10-02079-148956

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

ORDER

BY THE COMMISSION:


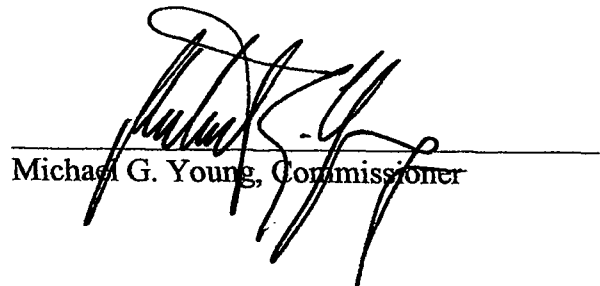
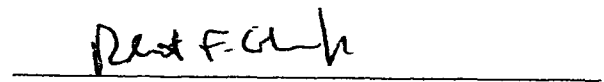
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 8, 2008, the Commission received from Castle Wood Products ("Castle Wood") a letter seeking to reopen a penalty assessment that may have become a final order of the Commission 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).

We have held, however, 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 mistake, inadvertence or excusable neglect. *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).

The Secretary states that she does not oppose the reopening of the proposed penalty assessment. The record indicates that a company official may have sent the contest form in a timely basis but that MSHA has no record of receiving it. Upon learning that the proposed assessment was delinquent, the operator promptly filed this request to reopen.

Having reviewed Castle Wood's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 6, 2009

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

v.

FISHER SAND & GRAVEL COMPANY

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Docket No. WEST 2009-132-M
A.C. No. 48-01488-155930

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. (2006) ("Mine Act"). On November 10, 2008, the Commission received from Fisher Sand & Gravel Company ("Fisher") a letter 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).

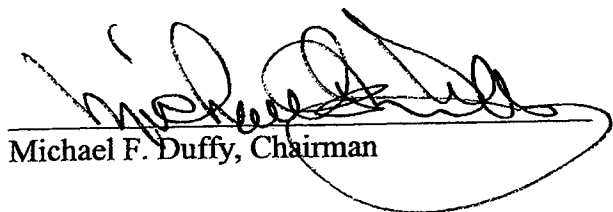
On July 3, 2008, the Department of Labor's Mine Safety and Health Administration issued a proposed penalty assessment to Fisher, proposing civil penalties for several citations. In its request, Fisher states that it would like to contest the citations.

The Secretary opposes Fisher's request to reopen. She states that the operator failed to provide any explanation as to why it did not timely contest the penalties. She requests that the Commission deny the operator's request to reopen.

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 mistake, inadvertence, or excusable neglect. *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).

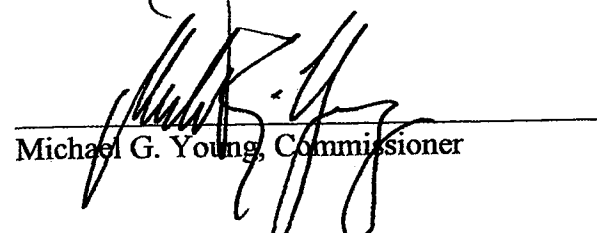
Having reviewed Fisher’s request to reopen and the Secretary’s response, we agree with the Secretary that Fisher has failed to provide any explanation for its failure to timely contest the proposed penalty assessment. Accordingly, we deny without prejudice Fisher’s request.¹ *See, e.g., Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).



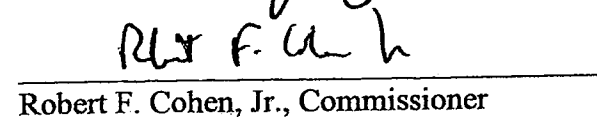
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

¹ The words “without prejudice” mean that Fisher may submit another request to reopen the case so that it can contest a penalty assessment. In the event that Fisher chooses to refile its request to reopen, it should disclose with greater specificity the reasons for its failure to contest the proposed assessment in a timely manner.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 6, 2009

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

v.

PREMIER CHEMICAL, LLC

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Docket No. WEST 2009-200-M
A.C. No. 26-00002-147595

Docket No. WEST 2009-201-M
A.C. No. 26-00002-150910

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. (2006) ("Mine Act").¹ On November 20, 2008, the Commission received from Premier Chemical, LLC ("Premier") a request from the operator seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

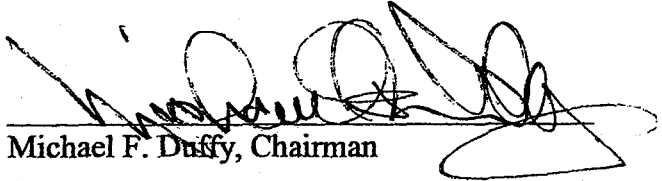
On April 17, 2008, and May 15, 2008, the Department of Labor's Mine Safety and Health Administration issued proposed penalty assessments to Premier, proposing civil penalties for 59 citations. In its request, Premier states that it paid the assessments but would like to reopen them. Premier states that "much confusion was and is still surrounding the assessment process along with factual disagreement with the related citations."

¹ Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. WEST 2009-200-M and WEST 2009-201-M, as both dockets involve similar procedural issues and similar factual backgrounds.

The Secretary opposes Premier's request to reopen. She states that the assertion of the cause for Premier's failure to timely file – "confusion . . . surrounding the assessment process" – does not constitute a showing of the exceptional circumstances warranting reopening. She requests that the Commission deny the operator's request to reopen.

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 mistake, inadvertence, or excusable neglect. *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).

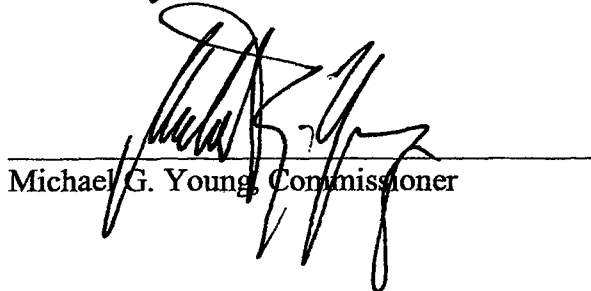
Having reviewed Premier's requests to reopen and the Secretary's response, we agree with the Secretary that Premier has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Premier's conclusory statement that its failure to timely file was due to confusion surrounding the assessment process does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Premier's request.² See, e.g., *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).



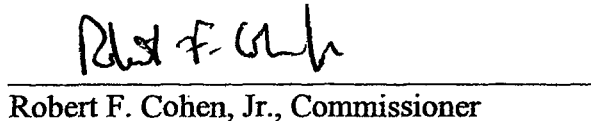
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

² The words "without prejudice" mean that Premier may submit another request to reopen the case so that it can contest a penalty assessment. In the event that Premier chooses to refile its request to reopen, it should disclose with greater specificity the reasons for its failure to contest the proposed assessment in a timely manner.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**601 NEW JERSEY AVENUE, NW
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May 7, 2009

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

v.

THOMAS J. SMITH, INC.

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Docket No. PENN 2008-102
A.C. No. 36-08065-130918

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. (2006) ("Mine Act"). On May 4, 2009, the Commission received from Thomas J. Smith, Inc. ("Smith") a letter seeking review of an order of Chief Administrative Law Judge Robert J. Lesnick entering a default judgment for the Secretary of Labor in this case.

The Chief Judge's jurisdiction in this matter terminated when his default order was issued on April 9, 2009. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). We construe the letter from Smith to be a timely filed petition for discretionary review.

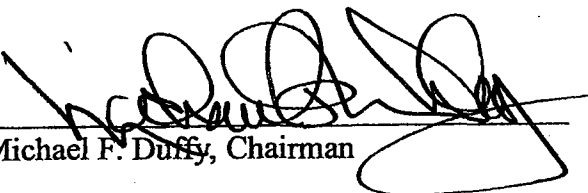
On August 26, 2008, Chief Judge Lesnick issued a show cause order to Smith stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary on January 3, 2008, and that Smith would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On April 9, 2009, Chief Judge Lesnick issued an order finding that Smith had failed to respond to the show cause order and entering a judgment by default for the Secretary.

On May 4, 2009, the Commission received a letter from L. Ray Bashline, Smith's Safety Director, seeking review of the Chief Judge's default order. The letter did not provide reasons regarding why the company had not answered the petition nor responded to the show cause order, other than stating that the show cause order had not been forwarded to the Safety Director.


Because Smith's letter does not address the validity of the Chief Judge's default order, nor provide any reasons why the default order should be vacated, we hereby deny the petition. Consequently, Smith currently stands in default in this matter.

However, we have 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). Moreover, 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993).


Consequently, if Smith can justify its failure to answer the petition for penalty assessment and its failure to respond to the judge's show cause order, it may submit a request to the Commission, with supporting documentation, asking it to reopen this case. *See Prairie Materials Sales, Inc.*, 26 FMSHRC 800, 801, & n.1 (Oct. 2004). Such a request, which must be filed within 30 days of the date of this order, should explain in detail why the operator failed to file an answer to the Secretary's penalty petition and why it failed to respond to the judge's show cause order. Smith should include a full description of the facts supporting its claim of "good cause," including why the show cause order was not transmitted to the Safety Director.



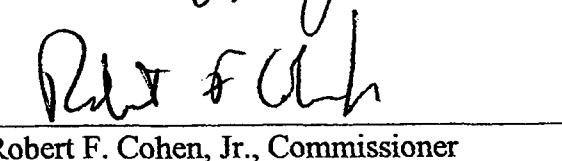
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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L. Ray Bashline, Safety Director
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 11, 2009

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

v.

XMV, INC.

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Docket No. WEVA 2008-1783

A.C. No. 46-09017-155948

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. (2006) ("Mine Act"). On September 4, 2008, the Commission received from XMV, Inc. ("XMV") a letter 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 7, 2008, the Department of Labor's Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000155948 to XMV, proposing civil penalties for a citation and several orders. In its request, XMV asserts that it did not file a timely contest due to a misunderstanding between the operator and its law firm regarding who was responsible for contesting the assessment.¹ The Secretary states that she does not oppose XMV's request to

¹ We note that XMV also failed to file a timely contest of two proposed assessments issued by MSHA on June 3, 2008. In a request to reopen these penalties, (Docket Nos. WEVA 2009-47 and 48), XMV attributed its failure to unspecified confusion among office employees. In those cases, the Commission denied the requests to reopen without prejudice because XMV had not provided a sufficiently detailed explanation. *XMV, Inc.*, 31 FMSHRC ___, slip op. at 3,

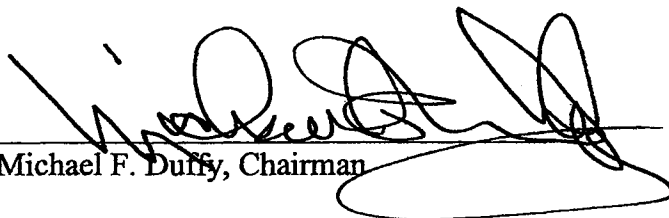
reopen the proposed penalty assessment.

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).

In a recent case involving a motion to reopen a penalty assessment, the Commission denied without prejudice an operator’s request which was based on an “unintentional error in the transfer of the Proposed Assessment from [the operator] to counsel” *Atlanta Sand & Supply Co.*, 30 FMSHRC 605, 606 (July 2008). The Commission concluded that the operator failed to “provide sufficient information to determine whether or not good cause may exist to reopen the final order.” *Id.*

Nos. WEVA 2009-47 and 48 (Mar. 18, 2009).

Similarly, XMV has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Its brief assertion that it believed the assessment would be contested by its counsel, while its counsel thought the operator would file the contest, does not provide the Commission with an adequate basis to justify reopening. Because XMV provides no specific facts justifying relief, we deny without prejudice XMV's request.² See *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).




Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

² In the event that XMV chooses to refile its request to reopen, it should state with specificity the facts and circumstances it believes would justify reopening the final order and should include any relevant documentation with the request.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

May 11, 2009

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

v.

BRAHMA GROUP, INC.

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Docket No. WEST 2009-109-M
A.C. No. 04-00011-136931 H409

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. (2006) ("Mine Act"). On November 3, 2008, the Commission received from Brahma Group, Inc. ("Brahma") a letter 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 October 3, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations to Brahma. Thereafter, on October 17, Brahma filed a notice of contest of the citations. According to Brahma's director of risk management, since the time Brahma filed the contest, it heard nothing further until it recently was informed that collections efforts had been commenced to collect penalties arising out of the citations. Brahma's director further states that Brahma had been unaware of the proposed penalty assessment and collection efforts because notices were repeatedly sent to the wrong address.

In response, the Secretary states that she does not oppose Brahma's request for relief. However, the Secretary notes that the proposed assessment and delinquency notice were mailed to the address of record. The Secretary attached to her response a copy of the Contractor

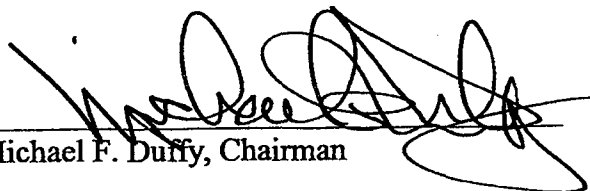
Information Report containing Brahma's name and address. The Secretary added that Brahma should take necessary steps to ensure that the address of record is accurate.


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 mistake, inadvertence, or excusable neglect. *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).

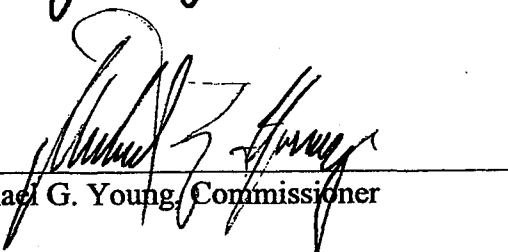
It is an operator's responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

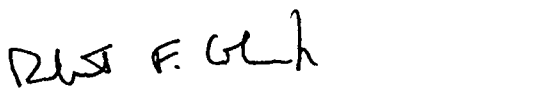
It is unclear from the record whether MSHA mailed the proposed assessment to Brahma's official address of record at the time of assessment and whether Brahma maintained its correct address with MSHA. If MSHA sent the proposed assessment to Brahma's official address of record, grounds may exist for denying Brahma's request for relief. *Mass Transport, Inc.*, 30 FMSHRC 997, 999 (Nov. 2008). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Brahma's request may be moot.

Having reviewed Brahma's request and the Secretary's response, we remand this matter to the Chief Administrative Law Judge for a determination of whether Brahma's request should be granted. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Brahma's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, 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

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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 14, 2009

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

v.

RON POWELL, employed by
OAKRIDGE SAND & GRAVEL

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Docket No. WEST 2009-344-M
A.C. No. 35-00524-156092 A

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. (2006) ("Mine Act"). On January 7, 2009, the Commission received from Ron Powell a request to reopen a penalty assessment against Powell under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

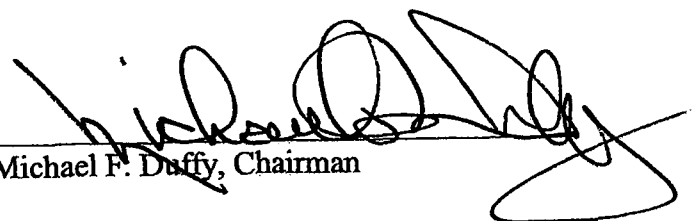
Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *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 mistake, inadvertence, or excusable neglect. *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

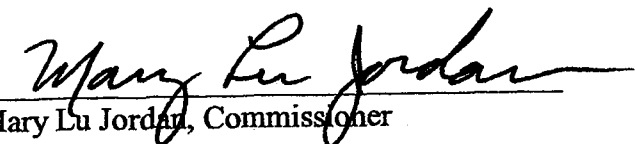
timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

The Secretary supports reopening of the proposed penalty assessment in order that the parties' agreement to settle the penalty assessment can be approved. The record indicates that there had been confusion as to which penalties were included in the settlement being negotiated among the parties and, as a result, the penalties involving Mr. Powell were not timely contested.

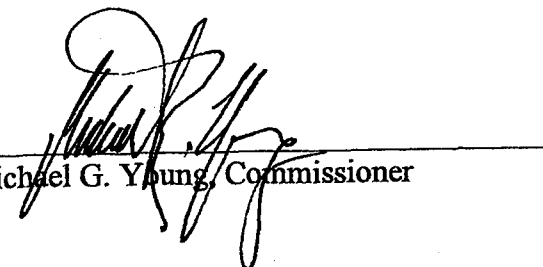
Having reviewed Mr. Powell's request and the Secretary's response, we grant reopening and hereby remand this matter to the Chief Administrative Law Judge for a ruling on the motion for approval of the settlement attached to the Secretary's response.



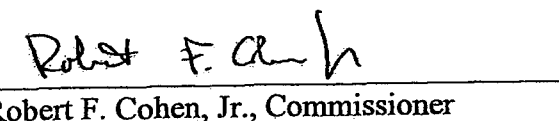
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 14, 2009

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

v.

BLACK MOUNTAIN INDUSTRIAL
MINERALS, LLC

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Docket No. WEST 2009-422-M
A.C. No. 26-02636-167226

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. (2006) ("Mine Act"). On January 27, 2009, the Commission received from Black Mountain Industrial Minerals, LLC ("Black Mountain") a letter 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).

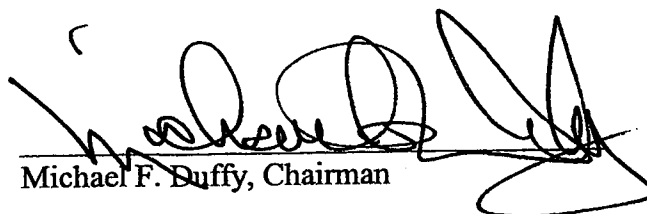
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

We have held, however, 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 mistake, inadvertence, or excusable neglect. 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

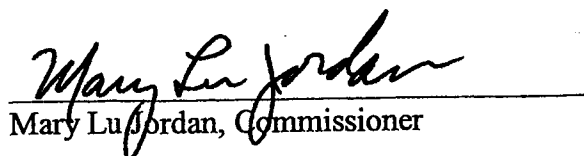
merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

In the request, the operator's Director of Operations and Environmental Health and Safety submits that the proposed penalty assessment, which was issued on October 29, 2008, was sent to his predecessor, who had left the company in October 2008. The director explains that because he recently assumed the position of director and because the operator's facility experienced a layoff, the proposed penalty assessment was not forwarded to him in a timely manner. The Secretary states that she does not oppose reopening the proposed penalty assessment.

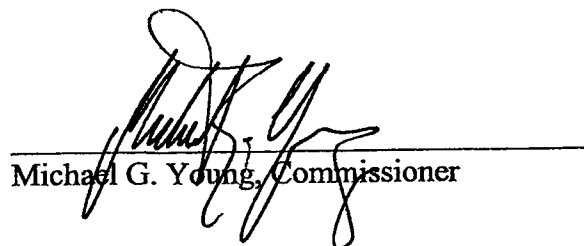
Having reviewed Black Mountain's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



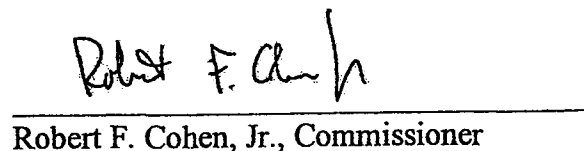
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 14, 2009

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

v.

HANCOCK MATERIALS, INC.

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Docket No. WEST 2009-423-M
A.C. No. 42-01122-150148

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 22, 2009, the Commission received a letter seeking to reopen a penalty assessment issued to Hancock Materials, Inc. ("Hancock") 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).

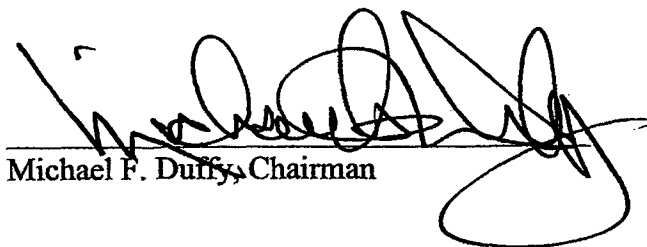
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

Hancock seeks reopening on the grounds that it became aware of Proposed Assessment No. 000150148 more than 30 days after it had been issued, at a time when the operator was no longer in business. The Secretary of Labor confirms that Hancock was no longer in business when the proposed assessment was mailed and further states that the proposed assessment was returned to the Department of Labor's Mine Safety and Health Administration ("MSHA") as undelivered. She submits that because service of the proposed assessment was not achieved, the assessment did not become a valid final order. The Secretary states that she will mail the


¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

proposed assessment to the address provided by Hancock, and Hancock will then have 30 days after receipt to either pay the proposed assessment or contest it.

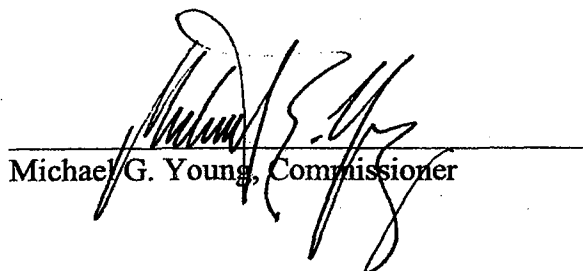
Having reviewed Hancock's request and the Secretary's response, we deny Hancock's motion as moot. The Secretary may mail the proposed assessment to Hancock at the address provided in this proceeding, and this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.² See *Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

² It appears that the Secretary has determined that the manner in which MSHA attempted service in this case was insufficient. MSHA permits operators to provide addresses other than the operator's official address for service. 30 C.F.R. § 41.30. Accordingly, the Secretary may mail the proposed assessment to the address provided by the operator in this proceeding in order to achieve service.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 20, 2009

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

v.

ALEX ENERGY, INC.

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Docket No. WEVA 2009-662
A.C. No. 46-08877-170008

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 13, 2009, the Commission received from Alex Energy, Inc. ("Alex Energy") a motion from 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).


However, 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 mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

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).

The record indicates that the contest form was sent late because the operator’s standard procedure for handling proposed penalty assessments was not followed during a key employee’s absence. Upon learning of the delinquency, the operator promptly filed its Motion to Reopen Penalty Assessment. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

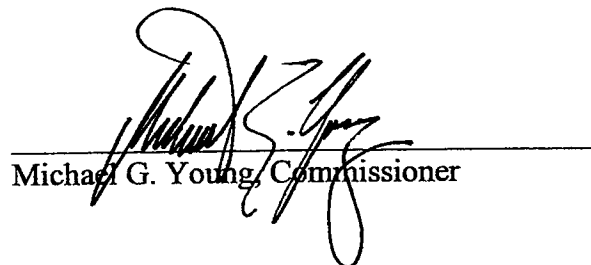
Having reviewed Alex Energy’s request and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 20, 2009

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

v.

SPARTAN MINING COMPANY, INC.

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Docket No. WEVA 2009-764
A.C. No. 46-08808-166004

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. (2006) ("Mine Act"). On January 29, 2009, 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 October 15, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment to Spartan for alleged violations at its Ruby Energy Mine. As Spartan notes in its motion, the assessment proposes \$208,985 in penalties for 163 citations and orders. Spartan alleges that it did not receive the Federal Express envelope containing the proposed assessment.¹ Spartan requests that the assessment be reopened as to the

¹ We note, however, that the Fed Ex Tracking Report appears to indicate that when Fed Ex attempted to deliver the package on October 22 and 23, 2008, the customer was not available and/or the business was closed. The full working of the "Details" in the Fed Ex Tracking Report was not provided in the attachment to Spartan's motion.

citations and orders marked on the copy of the proposed assessment it attached to the motion. However, none of the citations or orders was marked on the attached copy.

The Secretary filed a response to the motion stating that she does not oppose it, but pointing out the attached assessment lacked any indication regarding which of the penalties Spartan seeks to reopen.² Despite the Secretary pointing out this obvious flaw in the motion, Spartan did not file a reply to the Secretary's response, or submit an amended motion to reopen with a marked assessment. The Secretary also noted in her response that "the proposed assessment was mailed via Federal Express to the address of record at the time of assessment in this case. The operator has since updated its Legal ID Report to indicate a new address that was effective January 21, 2009."

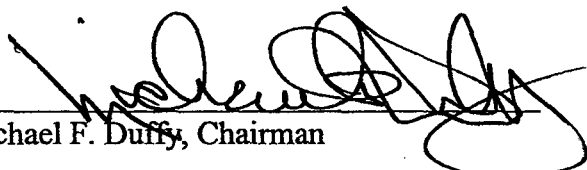
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the 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 mistake, inadvertence, or excusable neglect. *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).

Because Spartan's motion states that it seeks to reopen only some of the penalties as marked on the attached assessment form, but fails to specify which penalties those are, its motion is deficient on its face. Consequently, we deny Spartan's motion without prejudice.

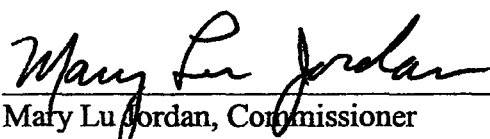
In the event that Spartan refiles this motion, it should include a complete copy of the Fed Ex Tracking Report. It should also describe any circumstances which existed on October 22 and 23, 2008, which may have interfered with delivery of the Fed Ex package containing the

² We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

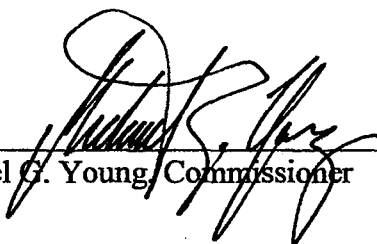
proposed assessment. Additionally, Spartan should explain the discrepancy in the address listed in the Legal ID Report noted by the Secretary.



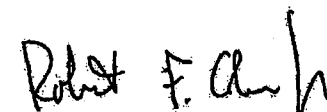
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 21, 2009

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

v.

BROOKS RUN MINING
COMPANY, LLC

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Docket No. WEVA 2008-1628
A.C. No. 46-09066-149361

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. (2006) ("Mine Act"). On August 13, 2008, the Commission received from Brooks Run Mining Company, LLC ("Brooks Run") a motion made 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).


The Secretary states that she does not oppose the reopening of the proposed penalty assessment.¹

The record indicates that the operator's receptionist failed to forward the proposed penalty assessment to the safety manager, who did not learn of the assessment until he received a delinquency notice. The motion to reopen was filed promptly.

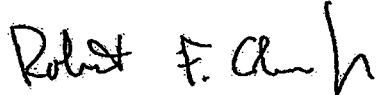
¹ We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

Having reviewed Brooks Run's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 22, 2009

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

v.

WKJ CONTRACTOR'S INC.

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Docket No. KENT 2009-624

A.C. No. 15-19116-157695 N137

BEFORE: Duffy, Chairman; Jordan, and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 8, 2009, the Commission received from WKJ Contractor's Inc. ("WKJ") 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 22, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000157695 to WKJ, proposing a civil penalty for Citation No. 7505222. In its request, WKJ states that a copy of an attached "notice of appeal" was mailed to MSHA's office in Barboursville, Kentucky, on September 2, 2008. The attached document states that it serves to appeal the citation. The Secretary states that she does not oppose reopening the proposed penalty assessment.

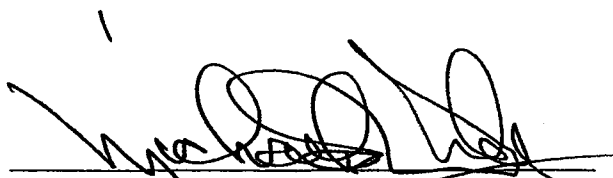
¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

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 mistake, inadvertence or excusable neglect. *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).


Although it appears that the operator may have attempted to contest Citation No. 7505222 by mailing its notice of contest to MSHA’s office in Barbourville, Kentucky (*see* 29 C.F.R. § 2700.20(b)),² the operator fails to provide an explanation for why it failed to timely contest the proposed penalty assessment by returning the completed assessment form to MSHA’s Civil Penalty Compliance Office in Arlington, Virginia, as instructed by the assessment form (*see also* 29 C.F.R. § 2700.26).

² We note that the Commission’s Docket Office was not informed that MSHA had received WKJ’s notice of contest of the citation. As a result, no contest proceeding has been docketed.

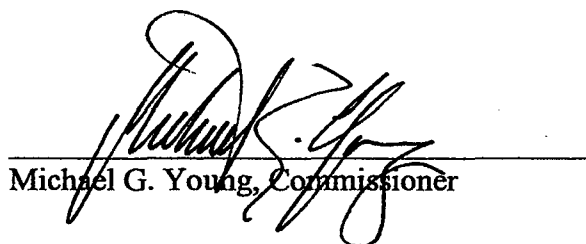
Because WKJ's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007).³



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

³ If WKJ submits another request to reopen, it must establish good cause for not contesting the proposed penalty assessment within 30 days from the date it received it from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. WKJ should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented WKJ from responding within the time limits provided in the Mine Act (30 U.S.C. § 815(a)), as part of its request to reopen. WKJ should also submit copies of supporting documents with its request to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

May 27, 2009

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

v.

LAFARGE AGGREGATES
SOUTHEAST, INC.

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Docket No. SE 2008-707-M
A.C. No. 09-00023-139485

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. (2006) ("Mine Act"). On August 26, 2008, the Commission received from Lafarge Aggregates Southeast, Inc. ("Lafarge") 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 Penalty Assessment No. 000139485 to Lafarge, proposing a civil penalty for Citation No. 7794610, which arose from a May 2007 inspection. Lafarge subsequently received a letter dated May 7, 2008, from MSHA, informing Lafarge that the proposed penalty assessment had become a final order of the Commission. On May 21, 2008, the Commission received from Lafarge a request to reopen the final order. In its request, Lafarge stated that it intended to timely contest the proposed penalty but that it had failed to do so due to "administrative error."

The Secretary responded that Lafarge's conclusory assertion of the cause for its failure to timely file did not constitute a showing of the circumstances required to obtain reopening under

Federal Rules of Civil Procedure 60(b). She requested that the Commission provide the operator with an opportunity to satisfy the requirements for reopening. The Secretary stated that once the operator submitted a response, she would indicate whether she believed that reopening was warranted.

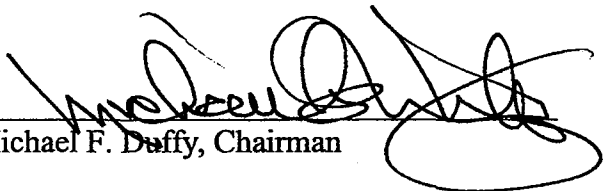
On July 25, 2008, we issued an order denying Lafarge's request without prejudice. *Lafarge Aggregates Southeast, Inc.*, 30 FMSHRC 633 (July 2008). We explained that Lafarge had failed to provide a sufficiently detailed explanation for its failure to contest the proposed penalty assessment, and that its conclusory statement that its failure to timely file was due to "administrative error" did not provide an adequate basis to justify reopening.

On August 26, 2008, the Commission received from Lafarge a second motion to reopen. In its request, the operator alleges that its safety manager did not receive the subject proposed penalty assessment, although he did receive two other proposed penalty assessments arising from the same May 2007 inspection. Lafarge explains that its intent to contest the subject proposed penalty is evident from its actions in timely contesting the two proposed penalty assessments that arose from the same inspection, participating in conferences with MSHA, and denying related allegations at issue in an MSHA special investigation. Lafarge's Safety Manager states that he mistakenly believed that MSHA was planning to modify Citation No. 7794610 and, as a result, he was not concerned by the significant amount of time that passed without notification by MSHA of a proposed penalty assessment. Lafarge concludes that the subject proposed penalty assessment must have been mistakenly misplaced or misdirected within its office.

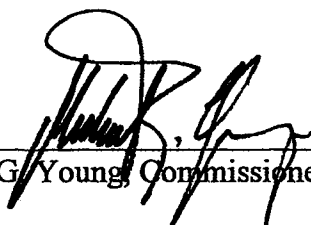
The Secretary responds that, after reviewing Lafarge's explanation for its late filing, she does not oppose reopening the final order.

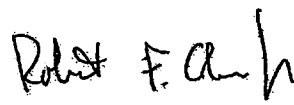
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the 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 mistake, inadvertence, or excusable neglect. *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 Lafarge's motion to reopen and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 27, 2009

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

v.

RANDY PACK

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Docket No. KENT 2009-517
A.C. No. 15-17110-159591 A

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 9, 2009, the Commission received a motion by counsel seeking to reopen a penalty assessment against Randy Pack under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), 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 the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

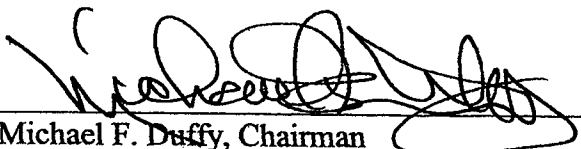
On August 7, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") apparently issued Proposed Assessment No. 00159591A to Pack relating to Citation No. 6648616, which had been issued on September 14, 2007. Pack states that, since a conference on the citation in February 2008, neither he nor his counsel received any correspondence regarding the citation or a related proposed penalty assessment. Pack further states that they were unaware that a civil penalty had been proposed until he received a notice of delinquency from MSHA, dated November 14, 2008. In a letter dated February 3, 2009, the

¹ Commissioner Cohen did not participate in this matter.

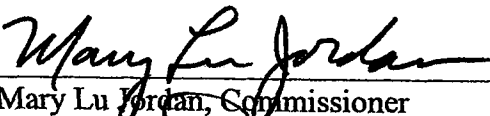
Secretary states that she does not oppose reopening the proposed penalty assessment. The Secretary served her response on Pack's counsel and attached a copy of the proposed assessment.

Here, Pack never received notification of the proposed penalty assessment as required under Commission Procedural Rule 25.² Under the circumstances of this case, we conclude that Pack was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, until sometime after February 3, 2009, when he received a copy of the assessment form from MSHA. Pack, through his attorney, notified MSHA of his intent to contest the proposed penalty assessment by his motion to reopen. We conclude that Pack has timely notified the Secretary that he wished to contest the proposed penalty, once he had actual notice of the proposed assessment. *See Cline*, 31 FMSHRC 354, 355 (Mar. 2009).

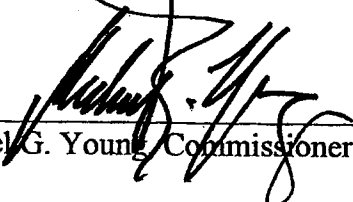
Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

² Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25. Here, the Secretary was required to send the penalty proposal at issue to Pack at his home address or "in care of" counsel at counsel's address.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 28, 2009

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

v.

SIDNEY COAL COMPANY

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Docket No. KENT 2008-862
A.C. No. 15-09724-135356

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. (2006) ("Mine Act"). On April 17, 2008, the Commission received from Sidney Coal Company ("Sidney Coal") 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 January 8, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000135356 to Sidney Coal, proposing penalties for eleven citations and orders that had been issued to the company in September and December 2007. According to Sidney Coal, it contested four of the violations in a notice of contest docketed as Nos. KENT 2008-52 through KENT 2008-55, which have been stayed pending the assessment of a proposed penalty. Sidney Coal asserts that the company's safety director faxed the proposed assessment to its attorneys but that they have no record of having received the document. It explains that due to an undetected mechanical failure beyond its control, the proposed assessment was not contested. Sidney Coal states that it always intended to contest the

proposed assessments associated with the four orders it previously contested and requests the Commission to grant its request to reopen the proposed assessment.¹

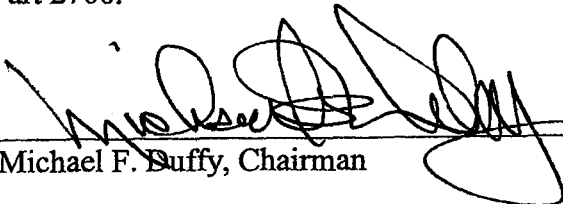
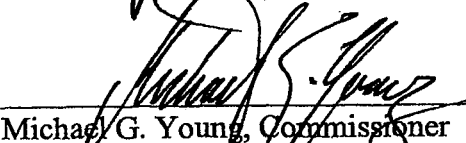
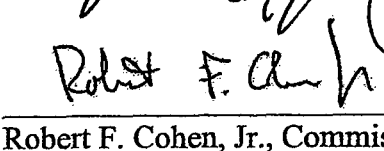
The Secretary states that she does not oppose Sidney Coal's request to reopen the proposed penalty assessment.²

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).

¹ We note that the boxes for *six* citations/orders were checked on the proposed assessment form.

² We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006 ("Informal Agreement"). Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

Having reviewed Sidney Coal'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 Sidney Coal's failure to timely contest the penalty proposal and whether relief from the final order should be granted. We also direct the judge to determine what, if any, backup system Sidney Coal and its counsel had in case of a mechanical or other failure in faxing a document³ and whether the operator intended to contest four or six proposed penalties. 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

³ Sidney Coal states in an affidavit that it faxed the proposed assessment to its attorneys for contest on January 17, 2008. We note that in three recent cases involving the reopening of uncontested proposed assessments which had become final, the same law firm mishandled faxes from its clients requesting that the firm contest proposed penalties. *See Road Fork Development Co.*, 30 FMSHRC 220 (Apr. 2008); *Clean Energy Mining Co.*, 30 FMSHRC 224 (Apr. 2008); *Long Fork Coal Co.*, 30 FMSHRC 228 (Apr. 2008). In each of these cases, which involved total assessments of \$89,666, technical or mechanical failures involving office equipment were also cited as the reason why the proposed assessments were not contested. This case involves assessments totaling \$90,598. Given the amount of penalties at stake, the existence, or non-existence, of systems to prevent chronic or recurring errors of this nature is relevant to the Chief Administrative Law judge's determination of whether the neglect in this case was excusable. We note that courts have held in Rule 60(b) cases that mistakes resulting from institutionalized procedures, or lack of "quality control" type of procedures, are not excusable. *See Rogers v. Hartford Life & Accident Ins. Co.*, 167 F.3d 933, 938-939 (5th Cir. 1999).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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June 1, 2009

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

v.

HOPKINS COUNTY COAL, LLC

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Docket No. KENT 2009-740
A.C. No. 15-18826-171552

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 23, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Hopkins County Coal, LLC (“HCC”) 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 16, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000171552 to HCC, proposing penalties for 80 citations that had been issued to the operator for alleged violations at its Elk Creek mine. According to affidavits from the mine’s general manager and safety director included with the motion, the assessment was received on December 29, 2008, and marked with the intent to contest 38 of the proposed penalties. However, an ice storm led to a week-long

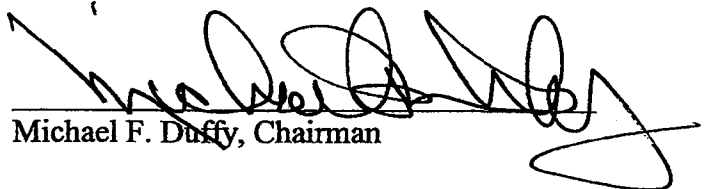
¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

power outage at the mine in late January and early February 2009 that prevented the timely submission of the contest form.

The Secretary states that she does not oppose the reopening of the assessment, but notes and provides documentation that the proposed assessment form was received by HCC on December 22, 2008, and thus was already late by the time the ice storm hit on January 27, 2009.

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 mistake, inadvertence, or excusable neglect. 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).

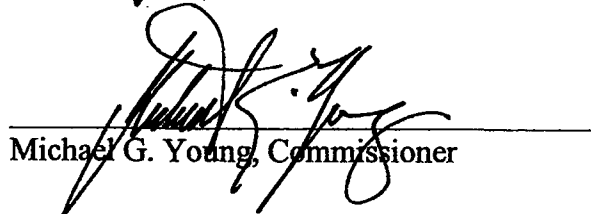
Having reviewed HCC’s motion and the Secretary’s response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for HCC’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. On remand, the Chief Judge should obtain from HCC an explanation for the discrepancy between the December 22, 2008, date the Secretary says the assessment was received by HCC, and the December 29, 2008, date HCC states in its motion that it received the assessment. 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

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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 1, 2009

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

v.

ABC GRAVEL, INC.

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Docket No. WEST 2009-468-M
A.C. No. 24-02250-162526

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 28, 2009, the Commission received a letter regarding a penalty assessment issued to ABC Gravel, Inc. ("ABC") 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).



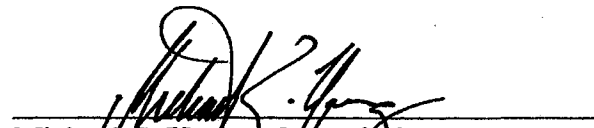
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

ABC states that the assessment at issue, No. 000162526, was not received because there was no one at its address to receive the Federal Express delivery of the assessment. The Secretary confirms that the package was returned undelivered, and states that she will again mail the assessment to ABC, this time by US Postal Service certified mail, and that ABC will then have 30 days after receipt to either pay the proposed assessment or contest it.²

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

² The Secretary further explains that, if there is no one at ABC's address of record, ABC will have to pick up the certified mailing at the local post office. The Secretary states that, if

Having reviewed ABC's letter and the Secretary's response, we deny ABC's request to reopen as moot. The Secretary may proceed as she has outlined in her response, and, if any of the proposed penalties are contested by ABC, this case shall proceed 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

ABC has another address at which someone would be available to receive and sign for mail, ABC should change its address of record to that address on its Legal Identity Report on file with MSHA.

Distribution:

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

June 1, 2009

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

v.

LAPP & SONS

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Docket No. WEST 2009-533-M
A.C. No. 50-01571-159284

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On February 20, 2009, the Commission received a request to reopen a penalty assessment issued to Lapp & Sons (“Lapp”) 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).

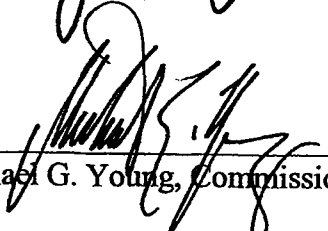
On August 5, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000159284 to Lapp, proposing penalties for two citations and an order that had been issued to Lapp. After receiving no response, MSHA sent Lapp a delinquency notification on or around November 4, 2008, for the assessment. Lapp states that it had faxed a letter contesting the citations and order to the MSHA inspector shortly after receiving them in accordance with his instructions, but never heard anything further until it received the delinquency notice on December 11, 2008.

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

The Secretary states that she does not oppose the reopening of the assessment, but notes that the proposed assessment and delinquency notice were mailed to the operator's address of record.

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 mistake, inadvertence, or excusable neglect. 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).

Lapp includes with its request to reopen a copy of its Legal Identity Report dated June 18, 2008, that shows a different address from the August 5, 2008, Proposed Assessment issued by MSHA. From the record, it thus appears that MSHA did not update Lapp's address of record, which would explain why Lapp did not receive the assessment. There is thus no final order in this case to reopen. Accordingly, we deny Lapp's request to reopen 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). Because Lapp's request indicates it wishes to contest both citations and the order, its request can serve as the operator's notice of contest of all three penalties. Consequently, and consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 1, 2009

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

v.

MINGO LOGAN COAL COMPANY

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Docket No. WEVA 2009-835
A.C. No. 46-09029-167319

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 11, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Mingo Logan Coal Company ("Mingo Logan") 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 29, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000167319 to Mingo Logan, proposing penalties for 60 citations that had been issued to the operator for alleged violations at its Mountaineer II mine. According to the affidavit from that mine's safety manager included with the motion, on November 12, 2008, he had sent MSHA a contest form indicating Mingo Logan's desire to contest 16 of the proposed penalties. Attached to the affidavit is a copy of the contest form with


¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

certain boxes checked and a handwritten note allegedly indicating when the form was mailed. The affidavit further states that on the following day Mingo Logan sent MSHA a check for the uncontested penalties. Nevertheless, on January 29, 2009, Mingo Logan received a delinquency notice from MSHA regarding the penalties on the assessment form that Mingo Logan claimed it had contested.

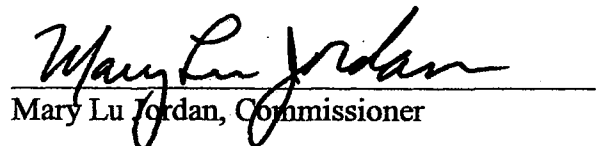
The Secretary states that she does not oppose the reopening of the assessment, but notes that there is no record of MSHA having received the contest form.

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 mistake, inadvertence, or excusable neglect. *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).

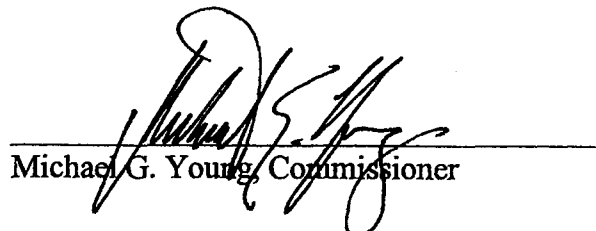
Having reviewed Mingo Logan’s motion and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 2, 2009

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

v.

LEHIGH SOUTHWEST CEMENT
COMPANY

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Docket No. WEST 2009-512-M
A.C. No. 04-00034-168884

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners¹

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 17, 2009, the Commission received a request to reopen a penalty assessment issued to Lehigh Southwest Cement Company ("Lehigh Southwest") 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).

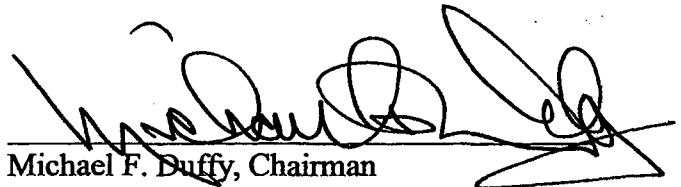
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), the Commission has delegated the power to rule on this reopening request to a three-member panel.

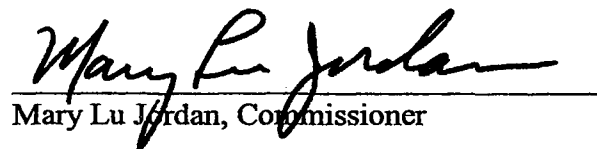
from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is 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).

The record indicates that the operator sent the contest form to the St. Louis, MO address for penalty payments to the Department of Labor’s Mine Safety and Health Administration (“MSHA”), instead of to MSHA’s Arlington, VA address for notices of contests. The record also indicates that the contest form had been forwarded to and received by the proper MSHA office four days after the 30-day deadline. The Secretary states that she does not oppose the reopening of the assessment.

Having reviewed Lehigh Southwest’s request and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28. In the future, Lehigh Southwest should take care that it submits any contest form to the address MSHA has specified on the form.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 10, 2009

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

v.

OXFORD MINING CO., LLC

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Docket No. LAKE 2009-381-M
A.C. No. 33-04213-171304

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

ORDER

BY THE COMMISSION:

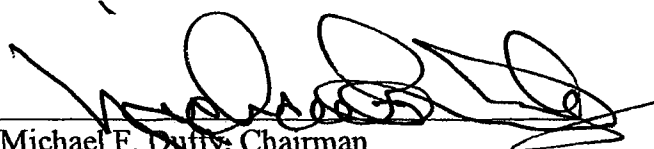
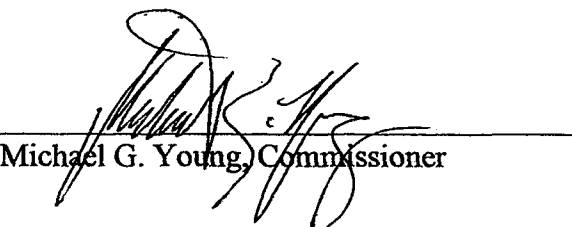
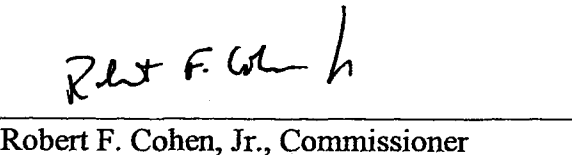
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 19, 2009, the Commission received from Oxford Mining Co., LLC ("Oxford") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

Oxford's general counsel states that Oxford timely mailed its contest along with its payment for uncontested penalties to MSHA's office in St. Louis, rather than to the Civil Penalty Compliance Office in Arlington, Virginia. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Oxford's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 10, 2009

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

v.

UNIMIN CORPORATION

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Docket No. SE 2009-362-M

A.C. No. 31-01518-171602

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

ORDER

BY THE COMMISSION:

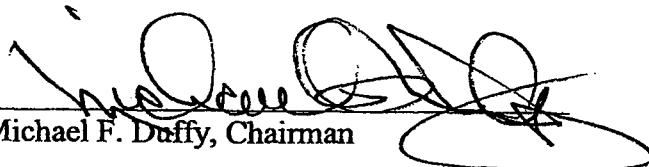
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 26, 2009, the Commission received from Unimin Corporation ("Unimin") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

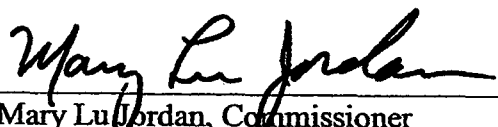
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

Unimin states that it sent a letter to MSHA requesting a conference on one of the citations underlying the proposed assessment, and MSHA did not respond. According to Unimin, this caused it to miss "the next step" in contesting this citation. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

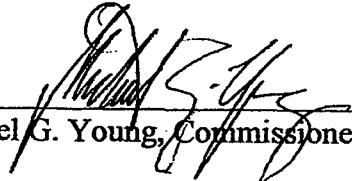
Having reviewed Unimin's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Unimin's failure to timely contest the penalty and whether relief from the final order should be granted. 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. § 2700.



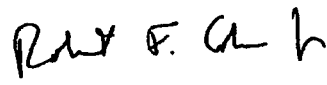
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 10, 2009

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

v.

DICKENSON-RUSSELL COAL COMPANY :

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Docket No. VA 2009-175
A.C. No. 44-02277-170766

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. (2006) ("Mine Act"). On February 13, 2009, the Commission received from Dickenson-Russell Coal Company ("Dickenson-Russell") a motion from 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).

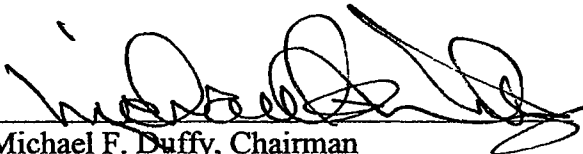
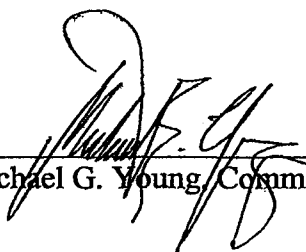
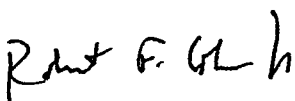
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

However, 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 mistake, inadvertence, or excusable neglect. *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).

The record indicates that operator inadvertently sent the form contesting five of the proposed penalties, as well as a check for the six uncontested penalties, one day late. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Dickenson-Russell's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 10, 2009

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

v.

LONG BRANCH ENERGY

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Docket No. WEVA 2009-43
A.C. No. 46-08429-152382

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. (2006) ("Mine Act"). On October 2, 2008, the Commission received from Long Branch Energy ("Long Branch") a motion 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).

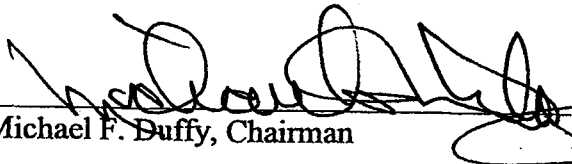
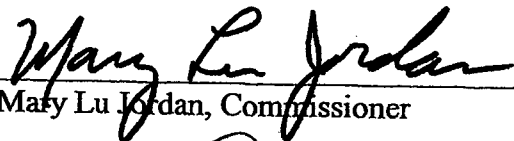
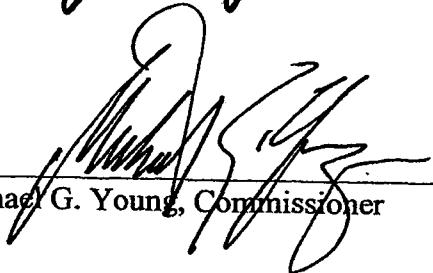

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

Long Branch states that it did not send the contest form for the proposed penalty assessment in question to the Mine Safety and Health Administration but instead inadvertently paid the penalties for the two citations covered by the proposed penalty assessment. Long Branch also states that the two citations are for alleged violations that later were the subject of failure to abate orders which the operator timely contested pursuant to section 105(d) of the Mine Act. *See* 30 U.S.C. §§ 814(b), 815(d). The Secretary states that she does not oppose the reopening of 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 mistake, inadvertence, or excusable neglect. *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 Long Branch's request and the Secretary's response, given the operator's previous timely challenge to the related orders and the pendency of those contest proceedings, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 15, 2009

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

v.

FREEDOM ENERGY MINING
COMPANY

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Docket No. KENT 2009-705
A.C. No. 15-07082-128255

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. (2006) ("Mine Act"). On February 12, 2009, the Commission received from Freedom Energy Mining Company ("Freedom Energy") a motion from 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).

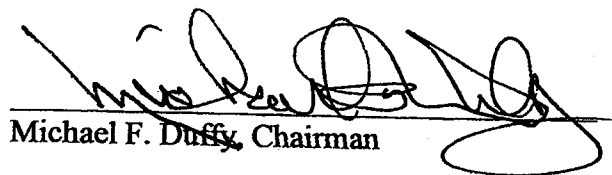
The proposed penalty assessment at issue, No. 000128255, was issued to Freedom Energy by the Department of Labor's Mine Safety and Health Administration ("MSHA") on October 4, 2007. Freedom Energy states that it intended to file a contest as demonstrated by the cover letter which its counsel drafted at that time¹ but that through inadvertence of counsel, the contest was not filed with MSHA.

¹ Freedom Energy purports to have attached a copy of the cover letter to its motion to reopen as an exhibit. However, the exhibit was not attached to the copy of the motion which the Commission received.

In response, the Secretary states that the assessment at issue cannot be reopened because it became a final order of the Commission on November 14, 2007, which is more than one year before Freedom Energy filed its reopening request.

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).

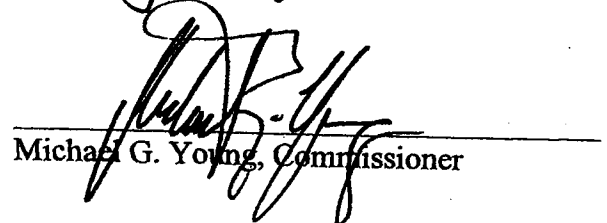
We have been presented with Freedom Energy’s failure to timely contest the proposed penalty assessment. Under Rule 60(b), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect, not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Because Freedom Energy did not seek relief from the final order until more than one year had passed, its request is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, Freedom Energy’s request is denied.



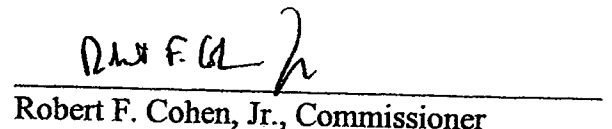
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

June 15, 2009

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

v.

LEHIGH SOUTHWEST CEMENT
COMPANY

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Docket No. WEST 2009-505-M
A.C. No. 04-04075-171970

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. (2006) ("Mine Act"). On February 10, 2009, the Commission received a request to reopen a penalty assessment issued to Lehigh Southwest Cement Company ("Lehigh Southwest") that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

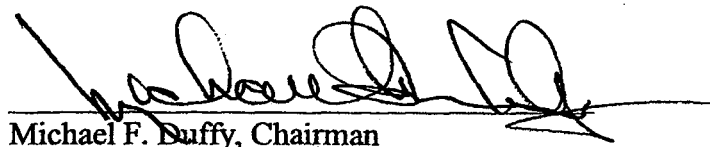
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On December 18, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty Assessment No. 000171970 to Lehigh Southwest. The operator's request to reopen does not address any attempt on its part to file a contest with MSHA or to pay any of the 22 penalties proposed by the assessment. Rather, Lehigh Southwest filed with the Commission a contest form marked to indicate its intent to contest eight of the penalties, and a letter it previously filed with MSHA contesting, shortly after their issuance, the eight citations associated with those penalties, and a ninth citation for which a penalty is not included in Assessment No. 000171970.

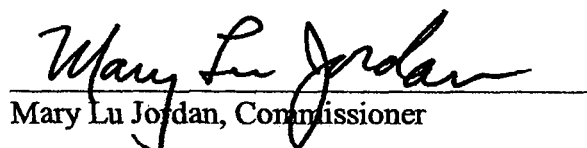
In response, the Secretary states that the request to reopen is deficient in that it includes no explanation for why the contest form was not timely filed, and thus the request should be denied.

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 mistake, inadvertence or excusable neglect. *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).

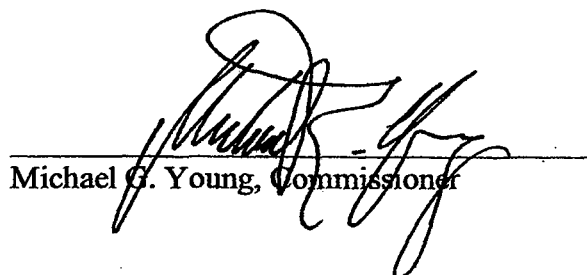
Because Lehigh Southwest's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007). The words "without prejudice" mean that Lehigh Southwest may submit another request to reopen the assessment.¹



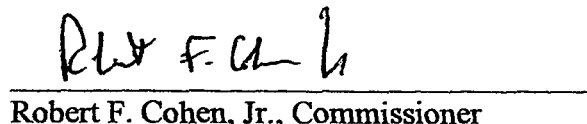
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

¹ If Lehigh Southwest submits another request to reopen, it must establish good cause for not contesting the eight citations and proposed penalties within 30 days from the date it received the assessment from MSHA, and state that it has paid the other 14 penalties. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Lehigh Southwest should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Lehigh Southwest should also submit copies of supporting documents with its request to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 15, 2009

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

v.

WEST VIRGINIA MINE POWER, INC.

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Docket No. WEVA 2009-934

A.C. No. 46-09210-173699

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

ORDER

BY THE COMMISSION:

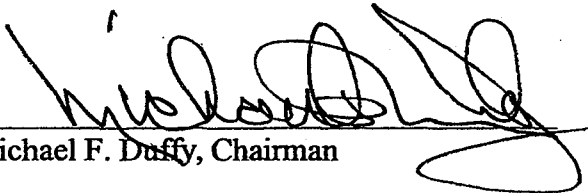
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 6, 2009, the Commission received from West Virginia Mine Power, Inc. ("Mine Power") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

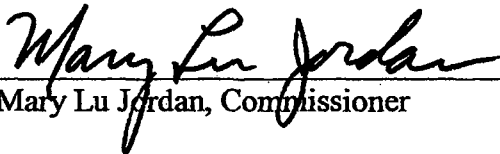
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

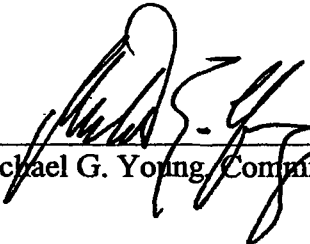
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

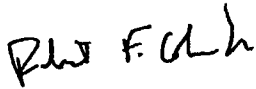
MSHA sent the proposed assessment on January 8, 2009, and claims that it was delivered to the operator on January 13, 2009. Mine Power states that its safety consultant was absent from the mine on a trip and did not know the precise date that the proposed assessment form was delivered because the document had not been date-stamped upon receipt. It further states that on February 12, 2009, the safety consultant forwarded the form to its counsel for filing, and that the contest was filed the next day, which was one day late. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Mine Power's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 16, 2009

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

v.

DENNIS DEMERS TRUCKING

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Docket No. YORK 2009-44-M
A.C. No. 43-00692-156127

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. (2006) ("Mine Act"). On December 1, 2008, the Commission received from Dennis Demers Trucking ("Demers") a letter 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).

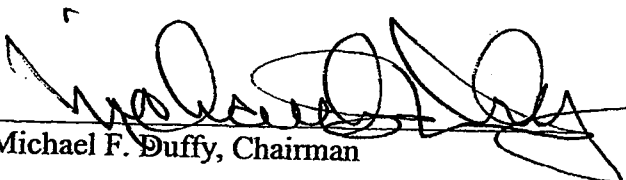
However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

On July 8, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000156127 to Demers. The record indicates that Federal Express was unable to deliver the proposed penalty assessment on July 22, 2008, to the operator's location of record. According to Demers, the reason for the non-delivery was that the owner's daughter passed away unexpectedly the day before, on July 21, and no employee was at the office location. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

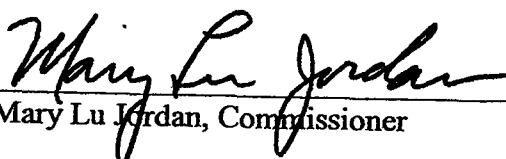
Here, Demers never received notification of the proposed penalty assessment as required under Commission Procedural Rule 25.¹ Under the circumstances of this case, we conclude that Demers was not notified of the penalty assessment, within the meaning of the Commission's Procedural Rules, and the proposed penalty assessment has not become a final order of the Commission. We also conclude that Demers received a copy of the proposed penalty assessment when it received the Secretary's letter of December 8, 2008, addressed to the Commission, with a copy of the proposed assessment attached.

¹ Commission Procedural Rule 25 states that the "Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment." 29 C.F.R. § 2700.25.

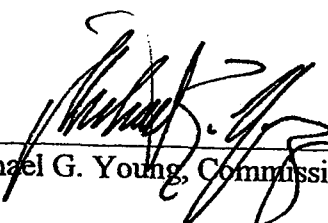
Having reviewed Demers' request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If the operator has not already done so, it should submit the proposed assessment form to MSHA, indicating which penalties it wishes to contest, within 30 days of the date of this order. See 29 C.F.R. § 2700.26.



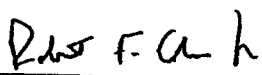
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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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

June 17, 2009

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

v.

MORaine MATERIALS COMPANY

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Docket No. LAKE 2009-271-M
A.C. No. 33-01695-165924

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

ORDER

BY THE COMMISSION:

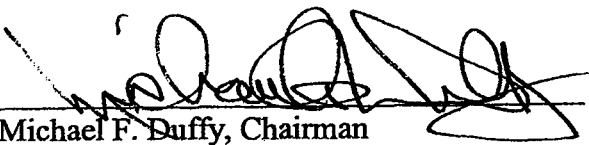
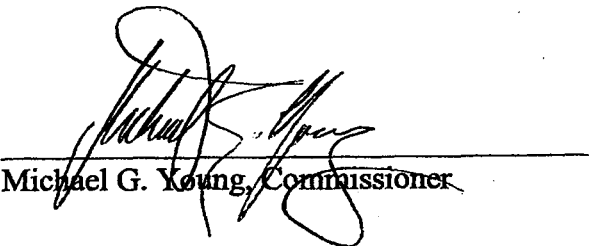
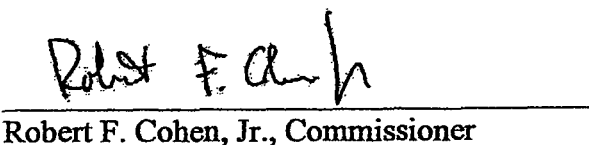
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On February 3, 2009, the Commission received from Moraine Materials Company ("Moraine") a motion by counsel to reopen a penalty assessment that had become a final order of the Commission 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).

However, 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 mistake, inadvertence, or excusable neglect. *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).

Moraine states that the penalty assessment is for a citation that it timely contested pursuant to section 105(d) of the Mine Act. 30 U.S.C. § 815(d). Moraine explains that it failed to later contest the penalty assessment because its counsel mistook the assessment for a duplicate of another assessment in a related case, an assessment which counsel did contest. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Moraine's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

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Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 24, 2009

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

v.

YOUNGMAN ROCK, INC.

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Docket No. CENT 2009-347-M
A.C. No. 34-00569-170725

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

ORDER

BY THE COMMISSION:

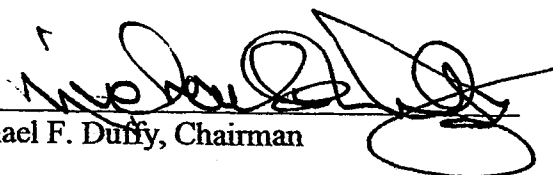

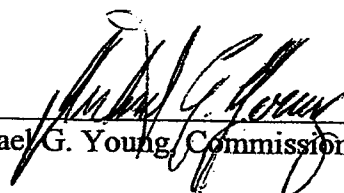
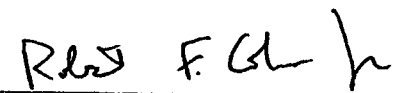
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 26, 2009, the Commission received from Youngman Rock, Inc. ("Youngman") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

Youngman states that it had never previously received citations from MSHA and that it attempted to contact an MSHA official on several occasions, either by telephone or fax, to indicate that it wanted to contest the citations and penalties. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Youngman's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman
Mary Lu Jordan, Commissioner
Michael G. Young, Commissioner
Robert F. Cohen, Jr., Commissioner

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**W. Christian Schumann, Esq.
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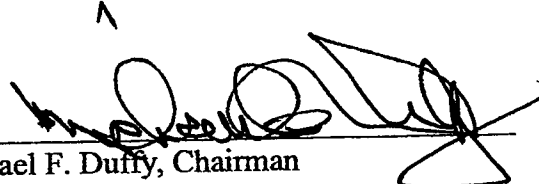
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Federal Mine Safety & Health Review Commission
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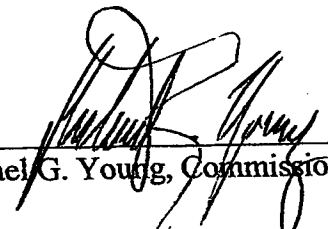
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal 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).

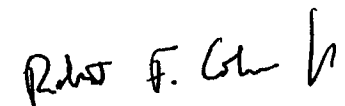
KWV states that its vice president received the assessments and marked the citations that he intended to contest and then forwarded them to KWV's corporate office. KWV further asserts that through "inadvertence or mistake" the assessments were not timely returned to MSHA. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed KWV's motions and the Secretary's response, we conclude that KWV has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. KWV's conclusory statement that its corporate office failed to timely file the contests because of "mistake or inadvertence" does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny the requests for relief without prejudice.² See *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

² If KWV submits another request to reopen, it should include a full description of facts supporting its claim of "mistake" or "inadvertence," including how the mistake or other problems prevented KWV from responding within the time limits provided in the Mine Act, 30 U.S.C. § 815(a), as part of its request to reopen.

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Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 29, 2009

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

v.

CANYON FUEL COMPANY, LLC

:
:
:
:
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Docket No. WEST 2009-232

A.C. No. 42-01566-161872

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

ORDER

BY THE COMMISSION:

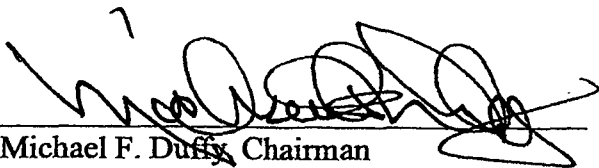
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 2, 2008, the Commission received a motion by counsel to reopen a penalty assessment issued to Canyon Fuel Company LLC ("Canyon Fuel") that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

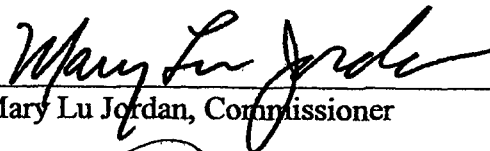
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

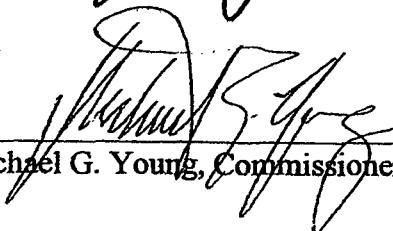
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

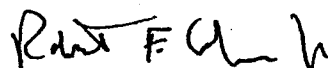
The record indicates that the safety manager for the operator intended to contest one penalty contained on a proposed assessment form and instructed his administrative assistant to pay all the other penalties on the assessment form but that one penalty. According to the operator, the administrative assistant, who was new at the time, inadvertently failed to mail in the assessment form contesting the one penalty. The Secretary states that she does not oppose the reopening of the assessment.

Having reviewed Canyon Fuel's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28



Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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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

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

May 12, 2009

TRI-STAR MINING, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. YORK 2007-76-R
v.	:	Citation No. 6604148; 07/09/2007
	:	
	:	Docket No. YORK 2007-77-R
SECRETARY OF LABOR,	:	Citation No. 6604149; 07/09/2007
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2007-78-R
Respondent	:	Citation No. 6604150; 07/09/2007
	:	
	:	Docket No. YORK 2007-79-R
	:	Citation No. 6604621; 07/09/2007
	:	
	:	Docket No. YORK 2007-80-R
	:	Order No. 6604622; 07/09/2007
	:	
	:	Docket No. YORK 2007-81-R
	:	Order No. 7146873; 07/09/2007
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2007-101
Petitioner	:	A.C. No. 18-00713-125178
	:	
v.	:	Docket No. YORK 2008-52
	:	A.C. No. 18-00713-131071
	:	
TRI-STAR MINING, INC.,	:	Docket No. YORK 2008-108
Respondent	:	A.C. No. 18-00713-138815
	:	
	:	Job # 3

DECISION APPROVING SETTLEMENT

Before: Judge Feldman

The captioned civil penalty and contest cases are before me based upon Petitions for Assessment of Civil Penalties filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) ("Mine Act"). These proceedings concern six alleged violations of the Secretary's mandatory safety standards of Part 77, 30 C.F.R. Part 77, governing surface coal mines. The citations and orders citing the subject violations were issued as a result of a Mine Safety and Health Administration (MSHA) investigation of an April 17,

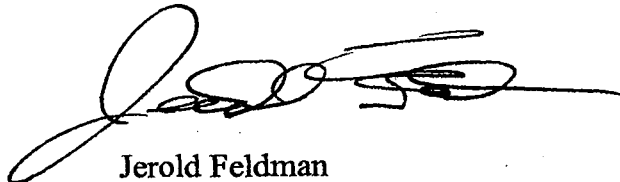
2007, highwall accident at Tri-Staring Mining, Inc.'s ("Tri-Star's") surface facility. As a result of the accident, Dale Jones and Michael Wilt were fatally injured when they were exposed to a highwall collapse that occurred while they were operating equipment at the bottom of the pit.

The citations and orders in issue allege violations of 30 C.F.R. § 77.1000 that requires the mine operator to establish a plan to insure highwall bank stability; 30 C.F.R. § 77.1006(a) that prohibits men from working near dangerous highwalls; 30 C.F.R. § 77.1713(a) that requires on-shift inspections for hazardous conditions; 30 C.F.R. § 77.1713(c) that requires the mine operator to maintain an inspection book noting the remedial action taken with respect to hazardous conditions noted during on-shift inspections; 30 C.F.R. § 77.1003 that requires the width and height of benches to be determined by the type of equipment in use; and 30 C.F.R. § 77.1004(a) that requires highwalls to be examined for hazards after every rain, freeze or thaw.

These proceedings were scheduled for hearing on July 21, 2009. On May 6, 2009, the Secretary filed a motion to approve a settlement agreement and to dismiss these proceedings. A reduction in civil penalty from \$185,324.00 to \$105,324 is proposed. The significant reduction in penalty apparently is based on the vagaries of litigation with respect to the extent that dangerous highwall conditions were foreseeable. In this regard, the parties have agreed that Order No. 6604622 concerning exposing miners to dangerous highwall conditions, and Order No. 6604148 concerning Tri-Star's failure to record hazardous highwall conditions in an on-shift examination book, shall be modified to 104(a) citations reflecting that the cited violations were not attributable to Tri-Star's unwarrantable failure.

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act, 30 U.S.C. § 820(i). **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** that the respondent pay a total civil penalty of \$105,324.00 in satisfaction of the six cited violations. Pursuant to the parties agreement, the \$105,324.00 civil penalty will be paid in twelve (12) monthly installments. The first monthly payment of \$8,777.00 is due on July 1, 2009, and shall be followed by monthly payments of \$8,777.00 on the first of each subsequent month, until the full amount of \$105,324.00 has been paid and received.

Payment shall be sent to the U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, Missouri, 63179. Each check shall be made payable to the U.S. Department of Labor/MSHA. Failure to make any installment payment within 30 days of the due date will result in the remaining balance of the \$105,324.00 civil penalty becoming due and payable immediately. Upon timely receipt of the entire \$105,324.00 civil penalty, the captioned contest and civil penalty matters **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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/rps

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, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-537
Petitioner	:	A.C. No. 15-17651-135834-02
	:	
v.	:	
	:	
ROCKHOUSE ENERGY MINING	:	Mine No. 1
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Brian W. Dougherty, Esq., Vicki L. Mullins, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner
Carol Ann Marunich, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of the Respondent

Before: Judge Barbour

This case is before me on a Petition for the Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") against Rockhouse Energy Mining Co., ("Rockhouse"). The matter arises under sections 105(a) and 110(a) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act"). 30 U.S.C. §§ 815(a), 820(a). In the petition, the Secretary alleges Rockhouse, in three instances, violated safety standards for underground coal mines, standards that are set forth in Part 75, Title 30, Code of Federal Regulations. 30 C.F.R., Part 75. She further alleges each of the violations was a significant and substantial contribution to a mine safety hazard ("S&S"). She proposes a total assessment of \$5,160 for the alleged violations.

After the Secretary's petition was filed, Rockhouse answered, asserting it did not violate the standards, or, if it did, that the violations were not S&S. Rockhouse also took issue with the gravity and negligence findings MSHA's inspector made with regard to each alleged violation.

After the matter was assigned to me, I scheduled it to be heard in Pikeville, Kentucky. Due to difficulties in finding a hearing site in Pikeville, the location was changed to Hazard,

Kentucky.¹ At the hearing the parties presented testimonial and documentary evidence regarding the alleged violations. Also at the hearing, but prior to going on the record, I asked counsels if they objected to my issuing a bench decision with regard to each of the alleged violations. Counsels stated they did not. Rather than submitting post-hearing briefs, counsels were given, and accepted, the opportunity to summarize their parties' positions at the close of evidence. Tr. 11-12.

My findings follow. Editorial changes have been made for clarity's sake.

CITATION NO.
66576439

DATE
12/13/07

30 CFR §
75.202(A)

The citation states in part:

Additional roof support is needed in the 010-0 MMU left return [N]o. 1 entry starting at x-cut 4 of the No. 7 belt and extending inby to x-cut 11, a distance of approximately 560 feet. A roof fall has occurred in the [N]o. 12 x-cut and the entry outby. This show[s] signs of adverse conditions in that there are cutters along each rib line, large pieces of draw rock are hanging ready to fall, and visible cracks [are] running with the entry.

This airway is required to be traveled by the weekly mine examiner once per week.

Gov't. Exh. 1.

In pertinent part, section 75.202(a) requires "[t]he roof . . . of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards relating to falls of the roof."

Regarding Citation No. 66576439, I stated:

I find the violation existed as [set forth] in the citation and as testified to by [MSHA] Inspector David Stepp. In making this finding[,] I [do not] discredit the testimony of . . . [Rockhouse's weekly examiner, Mike] Muncy[;] I simply believe Mr. Stepp's testimony reflects a more complete and . . . full [recollection] of

¹Hazard was not as convenient as Pikeville for the witnesses and counsels, and I thank them for their willingness to accommodate me.

the conditions that existed [in the No. 1 entry] on December 13. I find that Inspector Stepp's description of the draw rock that existed in the cited 560-foot area of the . . . [No. 1] entry, . . . [and in particular] the channeling that existed on both sides of the entry, ranging from hairline cracks to . . . [cracks] up to two to three inches wide, to be indicative of an entry that was taking weight and that was showing marked signs of progressive deterioration. The cited roof required either additional support, or needed to be removed from access to miners, something Rockhouse did [later] by endangering it off.

I further find the condition was . . . [S&S]. The hanging draw rock, as Mr. Stepp testified, posed a visually obvious danger to Mr. Muncy as he traveled the area [during the weekly examinations he conducted]. And the channeling and cracks indicated[,] as mining continued[,] rock was reasonably likely to fall. Indeed, Mr. Stepp's believable testimony that he noted fallen pieces of rock in the cited area of the entry . . . is persuasive to me that the progression of the deterioration had reached the point where falling rock could be expected.

Mr. Muncy traveled the area weekly. Had the citation not been issued, it is reasonably likely he would [have] continued . . . [making the examinations and] . . . he would have been a moving target as he rode through the cited area. I recognize [a] rock or roof fall would have had to coincide with his passage . . . to injure him, but I cannot base a [non-S&S] conclusion on the fact he would have had. . . to . . . [be] at the wrong place at the wrong time to . . . [be] struck. It is enough that the roof was reasonably likely to fall and that Mr. Muncy was required regularly to travel where . . . falls were reasonably likely to occur. Had Mr. Muncy been hit, he most likely would have suffered a serious injury or worse. [T]hus, I find the violation was both S&S and serious.

[However,] I do not believe the Secretary has established anything more than moderate negligence on Rockhouse's part. The roof's condition was progressive. While I infer . . . [the condition of the roof] constituted a violation on December [6, when the entry was last examined] . . . I cannot find, based on the evidence, [the roof's condition was so serious . . . on December 6 . . . [it then] constitut[ed] an

S&S violation. [T]herefore, I cannot conclude the roof's condition was so glaringly obvious [on December 6] that the failure of Rockhouse to [additionally] support . . . [the roof] or to danger it off at that time constituted high negligence. [In addition,] . . . the Secretary has not [otherwise] shown between December [6] and December [13] that Rockhouse['s] management [should have] been aware of the condition of the roof as it existed on December [13].

Tr. 330-333.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>
66576443	12/13/07	75.400

The citation states:

Accumulations of loose coal have been allowed to accumulate in the roadway of the 010-0 MMU right return airway starting at ss# 30526 and extending inby 4 x-cuts to the section feeder line. This loose coal ranged in depth from 1 to 6 inches and was deposited along the entire length of this area.

[The] area is the immediate return for the right side of the 010-0 MMU that produces coal 2 shifts per day and has a dead work crew that works 3rd shift.

Gov't Exh. 6.

In pertinent part, section 75.400 requires "[c]oal dust, . . . loose coal, and other combustible materials . . . [to be] cleaned up and not be permitted to accumulate in active workings."

Regarding Citation No. 66576443, I stated:

[The] Secretary has alleged a violation of section 74.400 [and] Rockhouse has conceded the violation. [See Tr. 315.]

[Regarding the Secretary's S&S allegation,] Rockhouse's counsel has established there were no ignition sources present on December [13,] . . . when the violation was cited. There were no equipment permissibility violations. There were no face ignitions. There was no methane. Does the record establish . . . an

injury-causing event could have occurred? Yes, it does. But the Secretary's evidence is simply too speculative to conclude one was reasonably likely. Basically[,] the Secretary has established . . . [only] that . . . accumulations [of combustible materials] were present and that potential ignition sources might come into existence in the future [- a]nd I emphasize the word might – but i]f this were enough to establish an S&S violation, then virtually every accumulation [violation] . . . would be S&S, something . . . the Act does not contemplate.

However, the fact an ignition source could occur . . . establishes . . . the violation was serious. Clearly, had the accumulations ignited – and I'm fully persuaded by the testimony the Secretary . . . presented . . . [including] Mr. Stepp's testimony – that the loose coal could have ignited, and that the finely ground coal dust [could have] propagated a methane explosion. If these things had happened, then all miners on the section would have been subject to serious injury . . . [or] death. [T]his is enough to make the violation serious.

[I am] further persuaded . . . the extent of the accumulations was such . . . they should have been observed and corrected during more than one preshift examination, and certainly during at least one on-shift examination. Inspector Stepp found Rockhouse was moderately negligent, which means . . . [the company] did not meet the standard of care required . . . and I agree.

Tr. 333-335.

CITATION NO.
66576447

DATE
12/13/07

30 CFR §
75.1403-6(b)(3)

The citation states in part:

None of the 4 sanding devices installed on the . . . diesel mantrip would work when tested. [The] mantrip was parked [underground] at the end of the track near the 010-0 MMU when inspected with no sand available on the [mantrip.] [The] mine has many hairpin curves and steep hills that must be maneuvered to exit the mine.

Gov't Exh. 10.

Section 75.1403 permits an inspector to issue safeguards “to minimize hazards with respect to transportation of men and materials.” Sections 74-1403-2 through 75.1403-11, of which 75.1403-6(b)(3) is a part, set out the criteria by which MSHA inspectors are guided in requiring safeguards on a mine-to-mine basis. MSHA issued a safeguard to Rockhouse on February 27, 1996, that required mantrips at the mine to be equipped with “properly installed and well-maintained sanding devices.” See Citation No. 6656447. The subject citation alleges Rockhouse did not comply with the safeguard notice’s requirement.

Prior to the Secretary’s presenting evidence with regard to the alleged violation, counsel for Rockhouse moved for partial summary decision on the S&S issue. Counsel argued an S&S finding could not be made for a safeguard violation, citing the ruling of Commission Administrative Law Judge Michael Zielinski in *Big Ridge Incorporated*, 30 FMSHRC 1172 (November 2008).² The Secretary’s counsel opposed the motion based on the same arguments the Secretary made to Judge Zielinski in *Big Ridge* and to Commission Administrative Law Judge Jerold Feldman in *Wolf Run Mining Co.*, 30 FMSHRC 1189 (December 2008) (*review granted* March 31, 2009). In *Wolf Run* Judge Feldman held, contrary to Judge Zielinski, that an S&S finding could be made for a safeguard violation. Because decisions in Judge Zielinski’s cases are pending, his holdings in *Big Ridge* and *Cumberland* are not yet final for review purposes. However, Judge Feldman’s ruling became ripe for review after Judge Feldman issued a decision in *Wolf Run* (February 26, 2009). Subsequently, *Wolf Run* appealed, the Commission granted review, and the issue of whether a valid S&S finding may be made by an inspector when he or she cites a safeguard is presently before the Commission.

After counsels stated their positions, I explained that I agreed with Judge Zielinski in all respects and that I would grant counsel for Rockhouse’s motion based on Judge Zielinski’s reasoning. Tr. 240-241. Nonetheless, counsels and I agreed evidence should be presented on the S&S issue so that if my ruling were reversed, an S&S finding could be made on the record. Tr. 241.

Regarding Citation No. 66576447, I stated:

I am persuaded by Inspector Stepp’s testimony a violation existed. The safeguard [criteria] cited[, section 75.1403-6(b)(3), requires] sanding devices to be operative at all times when being used at the mine.

[T]o me this clearly means [the devices on the mantrip must be operative when the mantrip is] capable of being used as well as [when] the equipment actually is in use.

²Judge Zielinski also made an identical ruling in *Cumberland Coal Co.*, 30 FMSRHC 1180 (December 2008).

The [subject] mantrip was capable of being used. It was parked at the end of the track, true. But it was not dangered off or otherwise placed out of service. And as Inspector Stepp rightly noted, it only required a flick of . . . [a] switch to start it up and use it.

With . . . [regard to the inspector's S&S finding,] even if I had not concluded the S&S finding ha[s] to be vacated because . . . [an S&S finding] cannot be made with regard to [a] safeguard [violation], I would . . . [invalidate] the finding in any event. I am persuaded by Mr. Adams' testimony an accident due to the mantrip's non-functioning [sanders] was not reasonably likely. First, I believe Mr. Adams' testimony established the mantrip was not reasonably likely to be used before the condition of the sanders was likely to be found and corrected. In this regard I note that other mantrips were available and were more likely to be used [than the cited mantrip.] And I also note that had the [cited] mantrip been used in the regular course of . . . [mining], its operator would have been specifically asked about its sanders. Moreover, even if an emergency arose, and the emergency required use of the cited mantrip, Mr. Adams persuaded me that [the] non-functioning sanders would [have been unlikely] . . . to cause an accident.

This is unlike a previous citation involving non-working sanders at this mine [(See *Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1154-56 (December 2008),] because there [is] no testimony in [the] situation under consideration today that the tracks were wet. [A]s Mr. Stepp explained, the mine is dry during the winter[, and t]he previous violation was cited during the . . . early days of September when, I'll take judicial notice, it is [still] hot in Pike County.

* * *

Moreover, unlike the previous citation, in this particular instance Rockhouse persuasively offered testimony from an experienced miner who had ridden numerous times on a rail mounted mantrip and who had never . . . found the need to use the [sanders] on his rides.

Because I conclude the violation was unlikely to result in an accident, I find it was only moderately serious I further find Rockhouse's negligence was moderate. As Inspector Stepp initially concluded, the most likely inference from me to draw is

that the sanders were brought into the mine in . . . non-working condition. But given the fact Rockhouse knew the mantrip was unlikely to be used prior to it being examined, and . . . [that when it was] examined, the condition was likely to be found and corrected, the existence of the condition [does] not show a high lack of care.

Tr. 335-338.

CIVIL PENALTY ASSESSMENTS

Having found the alleged violations exist, I must assess civil penalties taking into account the civil penalty criteria set forth in section 110(i) of the Act. 30 U.S.C. § 820(i). With regard to the company's history of prior violations, the Secretary offered a computer printout showing those violations cited from December 15, 2007, through December 14, 2008, for which civil penalties had been paid. Gov't Exh. 12, Tr. 292-295. The printout indicates a total of 626 paid violations. This is a large history. In addition, the parties stipulated that Rockhouse is a large operator and that the proposed penalties would not affect Rockhouse's ability to continue in business. Tr. 292. Moreover, each of the citations indicates the violations were abated within a time MSHA found to be adequate. From this, I infer the company exhibited good faith in its abatement efforts.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
66576439	12/13/07	75.202(a)	\$2106

I stated at the hearing:

The Secretary has petitioned for the assessment of a civil penalty of \$2106 for the violation. Given the serious nature of the violation, the moderate negligence of Rockhouse and considering all of the other civil penalty criteria, I find the proposed penalty to be appropriate.

Tr. 333.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
66576443	12/13/07	75.400	\$2106

I stated at the hearing:

The Secretary has petitioned for the assessment of a civil penalty of \$2106 for the violation. Given the serious nature of the violation . . . [and] taking into consideration [Rockhouse's failure] to meet . . . [its] standard of care and the other civil penalty criteria,

I conclude a penalty of \$1,500 is appropriate.

Tr. 335.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 CFR §</u>	<u>PROPOSED ASSESSMENT</u>
66576447	12/13/07	75.1403-6(b)(3)	\$1304

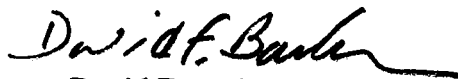
I stated at the hearing:

The Secretary has petitioned for [the assessment of a civil penalty] of \$1304. Given the moderate seriousness of the violation[,] . . . Rockhouse's moderate negligence, [and taking into consideration the other civil penalty criteria,] I conclude [a penalty of \$800 is] appropriate.

Tr. 338.

ORDER

Within 40 days of the date of this decision, the Secretary **IS ORDERED** to modify Citations No. 66576443 and 66576447 by deleting the S&S findings and by changing line 10(A) from "reasonably likely" to "unlikely." In addition, Rockhouse **IS ORDERED** to pay civil penalties totaling \$4,406 in satisfaction of the violations in question. Upon modification of the citations and payment of the penalties, this proceeding **IS DISMISSED**.



David F. Barbour
Administrative Law Judge

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

May 29, 2009

VURNUN EDWURD JAXUN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEST 2007-811-DM
	:	RM MD 2006-06
	:	
ASARCO, LLC,	:	
Respondent.	:	San Mission Mine
	:	Mine ID 02-00135

DECISION

Appearances: Vurnun Edwurd Jaxun, 5357 N. Fort Yuma Trail, Tucson, AZ 85750-5930,
Complainant;
Mark Savit, Esq., Hugh C. Thatcher, Esq., Patton Boggs LLP, 1801 California St.,
Suite 4900, Denver, CO 80202, for Respondent.

Before: Chief Administrative Law Judge Robert J. Lesnick

Introduction

This case is before me on a complaint for discrimination filed by Complainant Vurnun Edwurd Jaxun pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (2000) (hereinafter the "Mine Act" or "the Act").¹ Jaxun alleges that

¹ Section 105(c)(3) states:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1).

30 U.S.C. § 815(c)(3).

Respondent, Asarco Inc., discriminated against him in violation of Section 105(c)(1) of the Act when the company terminated his employment on February 23, 2006, allegedly for safety complaints he alleges he made before Asarco terminated him. I held a hearing in Tucson, Arizona on April 29–30, 2008. The parties submitted post-hearing and reply briefs. For the reasons stated below, I find that Jaxun engaged in protected activity within the meaning of the Mine Act; however, I find that Asarco did not discharge him in full or in part on that basis.

Background

This case has a long history. It was originally assigned to Administrative Law Judge Jacqueline Bulluck who dismissed the proceedings because of Jaxun's refusal to obtain counsel due to, in the judge's assessment, the lack of clarity in Jaxun's representation of himself. Jaxun appealed to the Commission, and in an August 12, 2007, decision, the Commission, while recognizing the judge's frustration with the lack of coherence in Jaxun's presentation of his case, held that the judge did not have authority to dismiss the case based upon Jaxun's refusal to obtain legal counsel. The Commission granted Jaxun's request that the dismissal order be set aside.

As Chief Judge, I reassigned this case to Judge Bulluck. Mr. Jaxun filed motions to reassign the case, which I denied. For reasons unconnected to those motions, I decided to reassign the case to myself and held a hearing.

At the hearing, I directed the parties to file post-hearing briefs by July 14, 2008. On May 22, 2008, Jaxun filed a Motion to Reopen the Record, which Asarco opposed on June 3, 2008. I issued an order on July 9, 2008 denying the motion. Considering Jaxun's *pro se* status and his filing of a motion, I granted the parties additional time to file briefs until August 8, 2008, with reply briefs being due by August 22, 2008. Asarco filed its brief on July 14, 2008. Jaxun then filed a motion for extension of time to file his brief, which I granted, giving Jaxun until August 22, 2008 to file a brief, and extending the time period for the filing of reply briefs until September 12, 2008. On August 8, 2008, Jaxun filed another request to reopen the record, which I denied on August 22, 2008. Jaxun filed another request for an extension of time to file a brief, which I granted, allowing Jaxun to file his brief by September 5, 2008, and extending the time for reply briefs to be filed to September 26, 2008. Jaxun filed his brief on September 5, 2008, and he filed a reply brief on September 30, 2008.

Since the filing of the final briefs at the end of September, Jaxun has filed several pleadings even as late as February 9, 2009, when he moved to strike the use of the word "muck," and April 13, 2009, when he raised an issue of a pre-employment physical examination. The large amount of post-hearing motions and document submissions delayed the issuance of this decision.

Findings of Fact

Asarco's Mission Complex and the Slurry Spill

Asarco Mission Complex in Sahuarita, Arizona produces copper and concentrate containing copper and silver. Two specific areas of the mine are at issue in this case: the pit and the mill. Copper is produced at the mill. The milling process begins when the Engineering Department lays out a drill pattern. (Tr. 433.) Once the pattern is complete, the blasting crew loads the pattern with blasting agent, the blast is initiated, and the rock mass is broken into smaller pieces. The broken pieces are loaded onto either 320-ton haul trucks or 240-ton haul trucks. The pieces are designated as either ore, which goes to the concentrators, or as waste. The cut-off for determining whether a rock is considered waste is three-tenths of one percent of copper content. The rock is dumped into a primary crusher and is broken down to six inches or smaller. The smaller rock then travels up a belt and is dumped into an ore stockpile. The rock is then drawn into a crusher where it is crushed to a half inch or smaller. The rock goes into the mill in fine ore bins where it is crushed even more by rod mills and then exits the rod mill to the ball mill. There, the material is ground to an even finer consistency. Once the material is finely ground, it is pumped to flotation tanks in which chemicals cause copper particles to adhere to bubbles that rise to the top of the tanks, enabling the copper to be skimmed off. The remaining material falls to the bottom of the tanks and is disposed of. The skimmed copper material is pumped to a filter plant where all but approximately ten percent of the moisture in the copper material is removed. The material is then hauled to the smelter. (Tr. 433–36.) The final product, called copper concentrate, is 25 to 29 percent copper. (Tr. 242.) Miners do not come into direct contact with the copper concentrate. (Tr. 275–76.)

In February 2006, there were a series of bumps or power outages at the mill that caused material – called “slurry” – in the ball mills to spill onto the mill floor. Slurry consists of water, copper bearing material, and waste rock. (Tr. 240–42.) The material that comes out of the ball mill when there is a bump is not copper concentrate. (Tr. 243.)

On February 21, 2006, the Mine Safety and Health Administration (“MSHA”) issued Asarco a citation for the spill and gave the company one week to abate the spill by cleaning it up. Asarco assigned probationary employees to assist with the cleanup. (Tr. 142–43.) The company used a combination of high-pressure water hoses, skid steers, and shovels and wheelbarrows in the cleanup process. (Tr. 332.)

Jaxun's Employment at Mission Complex

Vurnun Jaxun submitted an application to be a haul truck driver at Asarco's Mission Complex in December of 2005. (Tr. 99; Jaxun Trial Ex. 2.) He had less than one year of experience driving a truck. (Tr. 99.) Jaxun had never before worked at a mine. (Tr. 99.) After interviewing with Sheila Sweech, an Asarco human resources employee, and John Garcia, Senior Mine Supervisor at the time of the events in question, Jaxun was hired and commenced MSHA training on February 14, 2006. (Tr. 101, 489, 102, 407, 104.) He completed three days of newly

employed, inexperienced miner safety training, which was conducted by Robert Jordan, Asarco's Safety Administrator. (Tr. 104, 106, 235–36.) When Jaxun first arrived at the mine site, he again met with Sheila Sweech, and she provided Jaxun with several documents, including Rules of Conduct and the 2001 to 2004 Mission Complex Labor Agreement. (Tr. 110–11.) Jaxun understood that once he commenced employment, he would be a probationary employee for the first seventy-five days. He understood “probationary employee” to mean his employment was on a trial basis and dependent upon his behavior and work performance. (Tr. 114–15, 121–22.) He also completed four hours of environmental training on Friday, February 17, 2006, that included a mine tour with Garcia. (Tr. 129–30.) During the course of the environmental training, Garcia discussed hazard recognition and instructed the trainees to be careful. (Tr. 131.) On February 20, 2006, Jaxun commenced training on how to conduct a pre-shift examination of a haul truck. (Tr. 133.) On February 21, 2006, he began truck driver training. (Tr. 136.)

On February 22, 2006, Jaxun started the shift driving a truck, but during the shift, Jaxun and other probationary employees were picked up and taken to the mine office. (Tr. 143, 145–46.) There, they were informed by Garcia that they would be assigned to the mill to assist in the cleanup of the slurry spill. (Tr. 147, 150.) Jaxun mentioned his concern about working in the spilled material in his orthopedic boots to Garcia; however, there were no rubber boots in Jaxun's size available. (Tr. 61, 67, 336–37.) Garcia took the probationary employees to the mill for a tour which was conducted by Kenneth David, Operations Supervisor for the Mission concentrator. (Tr. 327, 412.) Due to the noise level, the employees wore ear plugs during the tour. David told the employees to be careful with electrical components and high pressure hoses, and to be mindful of slipping on the spilled material, which Jaxun assumed was copper concentrate. (Tr. 151–52, 154–57, 334.) Jaxun also assumed that the material was hazardous, stating that he believed he had to wear galoshes, hand protection, eye protection, and head protection, and to use a respirator. (Tr. 155–57.)

As David commenced to give Jaxun his cleanup instructions, Jaxun again expressed a concern about his orthopedic boots. David requested a pair of galoshes from the warehouse, which he did not immediately receive because Jaxun's size was not available. (Tr. 334–336.) Consequently, on February 22, 2006, Jaxun wore his own boots to perform cleanup. David left the crew, but returned to observe the workers before lunch. (Tr. 342.) Jaxun received a pair of galoshes on the morning of the February 23, 2006. (Tr. 69.)

On February 23, 2006, Jaxun asked to speak to the Operations Manager. (Tr. 168.) Ron Allum, Mine Manager at the time of these events, took Jaxun to speak to Mark Kalmi, who was General Manager. (Tr. 171, 433, 438.) In a sworn statement, Allum mentioned that he did not know whether a supervisor was present while the employees performed cleanup. (Tr. 176; Asarco Trial Ex. C.) Jaxun told Kalmi that the company should have hired a contractor to do the cleanup. (Tr. 180.) Kalmi told Jaxun that the company had the right to assign employees to any job at the plant. (Tr. 181–82, 438.)

After this exchange, Kalmi met with Allum and Lupita Gonzales, Human Resources Manager at the time of the events in question, and made the determination to terminate Jaxun's

employment. (Tr. 191, 458.)

The Law

Section 105(c)(1) provides in pertinent part:

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

30 U.S.C. § 815(c)(1).

The Complainant bears the burden of proving that discrimination occurred. In order to establish a *prima facie* case of discrimination, he must establish that (1) he engaged in a protected activity; and (2) he suffered an adverse action that was motivated in part by the activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Robinette vs. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980).

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 2799–2800. If an operator cannot rebut the *prima facie* case, it may still affirmatively defend the action by proving it was also motivated by the Complainant's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817–18.

The Commission has also recognized that the Complainant might not be able to offer direct evidence that adverse action taken against him was motivated in any part by protected activity, stating “[d]irect evidence of motivation is rarely encountered; more typically the only available evidence is indirect.” *Chacon vs. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981).

Further Findings of Fact and Conclusions of Law

Protected Activity

The first determination to be made is whether Jaxun engaged in protected activity as defined by the Mine Act. A complaint made to an operator or its agent of “an alleged danger or safety or health violation” is described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c).

Jaxun asserts that he made several safety complaints, although at hearing, he could not

clearly state to whom some of the comments were made. Jaxun testified that he spoke to a supervisor, who was determined to be Garcia, about safety issues. (Tr. 60–61.) Garcia and Jaxun agree that Jaxun complained to Garcia about performing cleanup in his orthopedic boots. (Tr. 61, 413.) Jaxun, however, states that he also told Garcia “in so many words” that the trainees were working in the material “foot deep without galoshes, [or] [] monkey suits.” (Tr. 60.) At trial, Garcia explicitly denied that Jaxun made any safety complaints, and he denied making any representations to Jaxun about the type of equipment trainees should wear while working in the mill. (Tr. 411.) In addition to Garcia, Jaxun made complaints to David about having to wear his \$285 orthopedic boots while working on the cleanup. (Tr. 354.)

Jaxun also testified that he made safety complaints to a supervisor who escorted him to the “Mine Operation Manager’s” office. (Tr. 71.) It was established at hearing that it was Ron Allum who escorted Jaxun to Mark Kalmi’s office. (Tr. 171.) Jaxun claimed that he discussed issues related to safety complaints “to some degree” with Allum. *Id.* As Allum was unavailable for hearing, Asarco presented a written statement, which was the recording of an interview of Allum conducted by now deceased MSHA special investigator Andrew Lowe. (Tr. 172; Asarco Trial Ex. C.) Jaxun testified that at the time, the “primary problem bothering [him] was that [the trainees] were left . . . without having been introduced to any mine mill personnel and, basically, [left] unsupervised.” (Tr. 174.) In his statement, Allum denies that Jaxun mentioned any safety issue to him. (Tr. 176.) However, in that same statement, Allum says he did not know whether there was a supervisor while the trainees performed cleanup work. (Tr. 177; Asarco Trial Ex. C p. 4.)

Jaxun offered conflicting testimony about his conversation with Kalmi. Initially, he stated that he spoke to the “Operations Manager” about “safety issues relevant to galoshes, safety issues relevant to being left unsupervised, [and] safety issues relevant to being improperly equipped.” (Tr. 78.) Later, in his own cross-examination of Kalmi, Jaxun stated, “I don’t remember the exact conversation but I did not get involved in safety issues specifically with you.” (Tr. 456.) Kalmi testified that he did not receive any safety complaints from Jaxun. (Tr. 440–41.) Based upon Jaxun’s own conflicting testimony and Kalmi’s assertion, I conclude that Jaxun did not make safety complaints to Kalmi.

Asarco argues that Jaxun failed to establish a *prima facie* case of discrimination because Jaxun did not establish any credible evidence that he made a safety complaint and did not engage in protected activity. (Resp. Brief at 7.) Asarco argues that Jaxun’s testimony that he made safety complaints to the various mine personnel is unreliable because it was unclear and contradictory. I find, however, that Jaxun did make a safety complaint to mine management – Garcia, David, and Allum, specifically – and, thus, engaged in protected activity. To make a safety complaint, the Mine Act does not require one to commence the conversation with “I am making a safety complaint” or any similar statement. Jaxun’s complaints, whether valid or not, amounted to safety complaints because it is clear that he had a concern about his safety. Both Jordan and Garcia testified that Jaxun asked several questions during both the MSHA training session and the mine tour. (Tr. 408, 236.) In fact, Jordan stated that during training, Jaxun was “very active, asked a lot of questions.” (Tr. 236.) Based upon these statements, it seems

apparent that Jaxun showed an interest in safety issues. Later, Jaxun made statements about having to wear his boots during the cleanup to both Garcia and David. Ms. Gonzales admitted that while she did not view it as a “safety-related issue,” she was aware Mark Kalmi agreed to loan Jaxun his rubber boots which “could be considered as personal protective equipment.” (Tr. 500–01.) Finally, and most persuasively, Jaxun claimed he spoke to Allum about safety issues, including the lack of supervision. Allum’s statement that he did not know whether the trainees were supervised gives credence to Jaxun’s assertion that at least the issue of lack of supervision was raised. In addition, David said he left the crew and came back before lunch, which also supports Jaxun’s contention that there may have been insufficient supervision. At the very least, Jaxun must have discussed supervision with Allum for Allum to have made that assertion. Moreover, even if Jaxun did not make safety complaints to Kalmi, Kalmi testified that he met with Gonzales and Allum before Jaxun’s termination. Allum should have, if he did not do so, put Kalmi on notice that Jaxun had made complaints about safety.²

Motivation of the Adverse Action

Jaxun suffered an adverse action when he was terminated on February 23, 2006. However, the question remains whether the adverse action was caused by Jaxun’s protected activity. Asarco argues that even if Jaxun did engage in protected activity, he has not shown discriminatory intent. (Resp. Brief at 18.)

David and Kalmi testified about inappropriate statements that Jaxun allegedly made and also testified about Jaxun’s insubordinate behavior. David recounted that as he attempted to give Jaxun instructions about his cleanup duties, Jaxun “looked at [him] and said, ‘I’m not going to ruin these [expletive] \$285 orthopedic boots.’” (Tr. 335–36.) In his cross-examination of David, Jaxun admitted to complaining about the boots, but notably did not question David on the manner in which he allegedly made the complaint. (Tr. 354.) Kalmi testified:

... right away Jr. Jaxun said to me he has got an issue with doing mill cleanup at the mill. He was hired to be a truck driver and he should be training on a truck at this time and he said, “At \$2.17 a pound copper, I should look in the Yellow Pages and hire Clean A Mill Company.”

I told him that we had management rights to assign people to wherever we thought they could be best utilized; and he had an exception, took exception to that.

...

And then I told him his assignment was to go over to the mill and do mill clean up; and I believe at that time he stood up, he is standing up and he said, “Well we will see about that.” I said, “What do you mean by that?” He said, “I don’t care what we have

² Although Jaxun displayed a concern about the type of work he was being required to perform as opposed to the job he thought he was hired to perform – truck driving – contrary to Asarco’s argument, I am not convinced that this issue was at the root of his complaints.

done in the past.”

At that time I said, “Are you special” and he said, “Yes, yes, I am.”

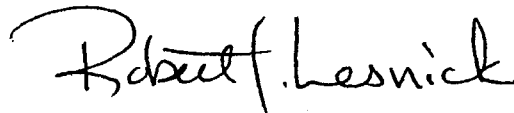
(Tr. 438–39.)

Jaxun denied having said “we’ll see about that” and stated that he did not recall one way or another whether he said he thought he was special. (Tr. 182–83.) However, in Jaxun’s cross-examination of Kalmi, Jaxun admits to being “a little grumpy” and “upset,” which leads me to believe Kalmi’s testimony. (Tr. 456.) Kalmi also testified that after his conversation with Jaxun, he was concerned about Jaxun’s unwillingness to perform tasks other than what Jaxun thought he was hired for, especially since Jaxun was still a probationary employee. He did not know what Jaxun would be like after the seventy-five days. He considered Jaxun’s actions to be insubordinate. (Tr. 440.)

Based upon Jaxun’s failure to rebut David’s testimony about Jaxun’s use of vulgar language, Kalmi’s testimony that Jaxun did not make safety complaints to him and was insubordinate, Jaxun’s admission that he did not make safety complaints to Kalmi, and his admission to being “grumpy” and “upset,” I credit the testimony of David and Kalmi. Moreover, because Jaxun did not make safety complaints to Kalmi, I find that Kalmi decided to terminate Jaxun’s employment based solely upon Jaxun’s insubordinate behavior.

While I do find that Jaxun made safety complaints, and, therefore, engaged in protected activity, he was clearly insubordinate and used vulgar language. Jaxun understood that he was a probationary employee and could be fired at will by the company. The Mine Act does not grant miners protection from discipline or termination if, even when making safety complaints, they behave in a threatening or insubordinate manner. Considering the record as a whole, I do not find that the adverse action was motivated in any part by Jaxun’s safety complaints.

As Jaxun has not met both criteria to establish a *prima facie* case, his complaint is **DISMISSED**.

A handwritten signature in black ink that reads "Robert J. Lesnick". The signature is written in a cursive, flowing style.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

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/eb

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 10, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-853
Petitioner	:	A.C. No. 46-08791-090341 01
	:	
	:	Docket No. WEVA 2006-854
	:	A.C. No. 46-08791-090341 02
v.	:	
	:	Docket No. WEVA 2007-666
	:	A.C. No. 46-08791-121866
	:	
WOLF RUN MINING COMPANY,	:	Sago Mine
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

These civil penalty proceedings concern Petitions for the Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, as amended ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, Wolf Run Mining Company ("Wolf Run"). The petitions seek to impose a total civil penalty of \$32,278.00 for 36 violations of mandatory safety standards contained in 30 C.F.R. Parts 75 and 77 of the Secretary's regulations governing underground coal mines that allegedly occurred at Wolf Run's Sago Mine.

These matters were heard on October 21 through October 23, 2008, in Fairmont, West Virginia. The parties have presented Motions for Approval of Partial Settlement with respect to 31 of the 36 cited violations that are the subject of these proceedings. Wolf Run has agreed to pay \$25,257.00 rather than the \$28,339.00 civil penalty initially proposed by the Secretary for the 31 settled citations. The parties' joint motion for approval of their settlement terms shall be granted.

The Secretary seeks to impose a total civil penalty of \$3,939.00 for the remaining five citations in issue. All of these citations allege a violation of section 75.521, 30 C.F.R. § 75.521, of the Secretary's mandatory safety standards that pertain to the installation of lightning arresters on "ungrounded and exposed power conductors and telephone wires." The citations concern power lines, power cables and telephone lines that run from the surface to underground areas of the mine. The citations were issued as a result of the Mine Safety and Health Administration's (MSHA's) investigation of the Sago Mine explosion on January 2, 2006. It has neither been contended nor shown that the conditions cited in the subject citations contributed to the explosion.

To determine if the Secretary's interpretation and enforcement of section 75.521 prior to the Sago Mine accident was consistent with her position in these proceedings, the record was left open for the Secretary to submit MSHA's history of enforcement of section 75.521 prior to January 2, 2006. The Secretary filed the requested documentation on January 28, 2009. The information was marked for identification and is admitted as Government Exhibits 25, 26 and 27. On March 23, 2009, the Secretary filed additional documentation and joint stipulations, marked for identification as Government Exhibit 28, concerning Sago Mine's Carbon Monoxide (CO) monitoring system. Government Exhibit 28 is admitted as Wolf Run does not object to its admission. The parties exchanged simultaneous post-hearing briefs on April 10, 2009, and filed simultaneous replies on May 15, 2009, that have been considered in the disposition of these matters.

I. Statement of the Case

On January 2, 2006, an explosion occurred at approximately 6:26 a.m. in Wolf Run's Sago Mine. At the time of the explosion, 29 miners were underground. Twelve miners were killed, and one miner was seriously injured. The explosion occurred in by the 2 North Mains seals, and destroyed all ten of the seals used to separate that area from the active portion of the mine.

At the time of the explosion, the area in the vicinity of the mine was experiencing a storm, accompanied by heavy rain and lightning. Before entering the mine, some Sago miners observed lightning strikes near mine property. After an extensive accident investigation, MSHA concluded that methane in an inactive sealed area apparently was ignited by lightning. The ignition and resulting explosion destroyed the seals, causing portions of the active mine to fill with toxic levels of carbon monoxide.¹

The Sago mine tragedy heightened MSHA's awareness with regard to the hazards associated with lightning strikes. Consequently, MSHA's accident investigation included a

¹ This information is taken from MSHA's Sago accident investigation report issued on May 9, 2007. This information is for background purposes. It is not dispositive of the citations in issue.

complete inspection of all electrical equipment at the mine. As a result of its investigation, MSHA issued the subject five citations that raise issues concerning the applicability of section 75.521. This mandatory standard governs lightning arresters on segments of ungrounded and exposed power conductors and telephone wires that are located on the surface before they enter an underground mine.

Section 75.521 states:

Each *ungrounded, exposed* power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning arresters of approved type *within 100 feet of the point where the circuit enters the mine*. Lightning arresters shall be connected to a low resistance grounding medium on the surface which shall be *separated from neutral grounds by a distance of no less than 25 feet*.

(Emphasis added).

To support the fact of the five alleged violations of section 75.521 that the subject insulated conductors were “exposed,” the Secretary relies on the interpretation of section 75.521 contained in the MSHA Program Policy Manual that specifies when conductors are not exposed. The policy manual states:

75.521 Lightning Arrester; Ungrounded and Exposed Power Conductors and Telephone Wires

Conductors that are (1) provided with metallic shields; (2) jacketed by a ground metal covering or enclosure; (3) installed under grounded metal framework; (4) buried in the earth; or (5) made of triplex or quadraplex that is supported by a grounded messenger wire, *are not considered exposed for the length so protected*. If the trolley wire of a d.c. system is paralleled by an exposed feeder cable, one lightning arrester would provide protection for both if they are connected together near the lightning arrester.

Lightning arrester ground fields shall be maintained with as low a resistance to earth as possible, preferably less than 5 ohms and no more than 25 ohms. *Lightning arrester ground fields shall be separated from neutral ground fields by at least 25 feet. This distance prevents lightning surges from being transmitted to the neutral field where they could momentarily energize the frames of equipment grounded to the neutral ground field.*

Mines using single-phase power originating at the power company’s secondary and extending underground cannot normally comply with this Section due to the power company’s practice of connecting the lightning arrester ground

to the grounded neutral which also connects to the center tap of the transformer, unless an isolation transformer is installed or the power company isolates the lighting arrester ground from the center tap ground and a separated neutral ground field is established.

(Emphasis added). (Gov. Ex. 8).

The heightened safety related lightning concerns that have arisen in the aftermath of this disaster do not alter the Secretary's burden of demonstrating that the cited conditions constitute violations of section 75.521. *Garden Creek Pocahontas Co.*, 6 FMSHRC 2148, 2152 (Nov. 1989). The purpose of the lightning arrester requirement in section 75.521 is to prevent or minimize the risk of energy from a lightning strike on the surface of a mine from entering into the underground portions of the mine. That is why the language in section 75.521 requires the installation of lightning arresters on "ungrounded" power conductors that are separated from the neutral ground field.

The Secretary asserts that it is the ground wire in a cable that is "grounded" rather than the power conductors that are not separately grounded because they carry electrical energy. However, as discussed below, the Secretary may not rely the policy manual to support her interpretation of the term "ungrounded power conductor" in section 75.521. Rather, the issue is whether the Secretary's interpretation, that all power conductors entering an underground mine are subject to the provisions of section 75.521, even if they are insulated and contained in grounded cables, is reasonable and, therefore, entitled to deference.

It is undisputed, as acknowledged in MSHA's policy manual, that lightning arrester protection may not be provided to power conductors that are in cables connected to the neutral grounds. (Gov. 8). Thus, the Secretary argues, in essence, that it should be inferred from the language of section 75.521 that a mine operator is prohibited from connecting power cables entering an underground mine to a neutral ground. However, a regulation may not be interpreted to mean what an agency intended but did not express. In addition, disconnecting cables that extend underground from the neutral ground medium would remove ground fault protection. Consequently, for the reasons discussed, the lightning arrester provisions of section 75.521 do not apply to cables that are connected to neutral grounds because, in the event of a lightning strike, electrical energy would be transmitted from the surface through the underground mine from lightning arrester ground field to the neutral grounds.

II. Findings of Fact

a. The Power System

Wolf Run's Sago Mine is located in Upshur County, West Virginia. Power to the mine was delivered from the French Creek substation, located approximately two miles from the mine.

(Joint Ex. 1; Gov. Ex. 9). Power from French Creek was transmitted through over-head transmission lines to a branch transmission line that extended to the mine substation. *Id.*

As discussed below, a lightning arrester is a device that limits the overvoltage caused by lightning or other electrical surges by providing an electrical path between an ungrounded conductor and earth which is used as the grounding medium. (Joint Ex. 1). The transmission lines from the French Creek substation to the mine substation were protected by various electrical devices including lightning arresters. *Id.*

Transformers located at the mine substation reduced the voltage of the branch transmission line for underground distribution. *Id.* Electrical devices, including lightning arresters located in the mine substation, provided protection for the underground distribution system. *Id.* The segments of the high voltage shielded power cables on the surface were equipped with lightning arresters before the cables entered the underground area of the mine. *Id.* Power centers were located throughout the mine to reduce the voltage for use on underground equipment. *Id.* With the exception of one underground power center, all underground power centers contained surge protectors which serve a similar purpose as lightning arresters. (Tr. 785-87).

The branch transmission line from the mine substation also supplied power to the surface facilities and equipment. (Joint Ex. 1; Gov. Exs. 9, 12). The voltage was reduced for the surface fan by pole-mounted transformers. *Id.* The power circuit utilizing these transformers was protected by lightning arresters. (Joint Ex. 1; Gov. Exs. 9, 23; Tr. 84-85). The same pole had a cable that supplied power for the surface conveyor belts. (Joint Ex. 1; Gov. Exs. 9, 23).

The transmission lines bringing power from the French Creek substation were grounded. The grounding consisted of two grounded neutral conductors that were installed above the power conductors from French Creek to the branch circuit leading to the mine substation. (Joint Ex. 1). One neutral conductor was continued from the branch circuit to the mine substation. *Id.* This conductor was installed below the power conductors and connected to the ground bed for the mine substation and surface electric equipment. *Id.* The lightning arresters on the surface were linked to the ground bed at the mine substation and grounded at the power poles. (Gov. Ex. 23; Tr. 85-87, 327, 382, 691). The substation and lightning arrester ground beds were inspected thoroughly by MSHA inspectors and determined to be in compliance with the requisite minimum 25 feet separation dictated by section 75.521. (Tr. 724).

A second ground bed or medium, located on the surface, also known as the neutral ground, was used for the grounding of the underground cables and equipment. (Gov. Ex. 9; Tr. 691). This ground bed was created by grounding the underground cables and equipment to the underground frame of the belt conveyor. The belt conveyor frame was grounded to the neutral ground field on the surface. (Tr. 833-35). As previously noted, this neutral ground bed for underground equipment was separated by more than 25 feet from the ground bed located

under the substation that was used to protect the surface equipment and that served as the lightning arrester ground bed. (Gov. Ex. 9; Tr. 334).

Government Exhibit 9 is an annotated diagram of the Sago Mine power system and ground fields that has been appended to this decision and will be referred to hereinafter as Appendix I. It delineates the surface area from the underground portion of the mine. It illustrates the electricity path from the French Creek substation to the Sago Mine substation. It depicts the neutral ground field for underground equipment, located on the surface, designated as “earth” and the ground field for surface equipment, including lightning arresters, that is located under the mine substation. Appendix I reflects that the neutral ground and substation ground fields are separated by at least 25 feet. Appendix I also depicts the frame of the belt conveyor that extends from the surface underground. It demonstrates how the conveyor frame was used as a ground medium between the underground equipment and the neutral grounds.

b. Lightning Arresters

As noted, a lightning arrester, connected to power conductors, limits the overvoltage caused by lightning or other electrical surges by providing an electrical path between an ungrounded conductor and earth which is used as the grounding medium.² (Joint Ex. 1). It is similar to the overvoltage protection provided by surge protectors. (Tr. 642, 786). Lightning arresters vary in size and have different voltage ratings. (Tr. 784). They are sized for the amount of current in the cable they are protecting. (Tr. 432).

MSHA Inspector Arthur Wooten testified that lightning arresters are designed to protect against both direct and indirect lightning strikes. (Tr. 204, 239). Lightning strikes from as much as a mile away can cause a surge of energy on power conductors. (Tr. 206, 240). The purpose of lightning arresters is to direct the excess energy into the ground so that it does not enter the mine. (Joint Ex. 1; Tr. 194, 223). A lightning arrester has air gaps over which the normal current level cannot arc. However, if there is an overvoltage on the line, the current will jump that air gap and the lightning arrester will direct the excess energy through a path to ground. (Tr. 194 – 96). As noted, the lightning arrester ground field was located at the ground bed for surface equipment located under the substation.

Wooten explained that in the absence of lightning arresters, the energy from a lightning strike would not be dissipated into the ground. Rather, the excess energy from a lightning strike would enter the mine by way of the power conductors and energize the frames of equipment resulting in a shock or electrocution hazard. (Tr. 316). The excess energy could also cause arcing that would pose a fire hazard, and an ignition source for methane. (Tr. 220, 240-42).

² This decision contains redundancies because it concerns technical electrical circuitry issues. The essential concepts that provide the basis for this decision have been repeated for the sake of clarity.

c. Underground Equipment and Surface Equipment
Ground Fields

The Secretary's regulations governing electrical safety in the construction industry define a "ground" as "[a] conducting connection . . . between an electrical circuit or equipment and the earth" 29 C.F.R. § 1926.449. The "neutral grounds" in this case consist of a low resistance ground bed that is established on the surface area of the mine. (App. I). It also consists of all of the underground equipment and the ground wires that are attached to the ground bed. (Tr. 383-84). The underground equipment and ground wires are attached to the surface ground bed through the frame of the belt conveyor. (App. I). As noted, the neutral ground field for underground equipment at the Sago Mine is depicted on Appendix I and labeled "earth." (Tr. 380).

Ground fault protection for surface equipment is located on the surface under the substation. The lightning arrester ground field is also located under the substation. (App. I; Tr. 325-26). At the Sago Mine there were several lightning arresters that were attached to overhead high voltage power lines. (Tr. 326). They were connected to ground by solid copper conductors and a "butt ground" at a power pole. (App. I; Gov. Ex. 23; Tr. 327). A butt ground is a copper wire that runs down a power pole to the earth. (Tr. 338). The butt ground at the base of the power poles is linked to the ground bed located under the mine substation.

d. The Hazard Posed by Connecting
Ground Fields

Inspector Wooten analogized an electrical circuit to a waterline with several branches. When a water valve is opened, water flows through all segments of the waterline. (Tr. 315). So too, lightning induced energy travels through electrical cables in all directions. (Tr. 315-16). A ground medium provides electrical energy with a path of least resistance to ground. (Tr. 315). A problem arises when a lightning arrester is connected to a ground field that is less than 25 feet from a neutral ground field. (App. I; Tr. 334). Under such circumstances, when ground fields are in close proximity, any overvoltage can be transferred from one ground field to the other. The hazard of overvoltage is heightened when the neutral grounds and the lightning arrester ground field create a path of least resistance because the ground wire in the power cable is connected to the metal frame of the belt structure. In such cases, the conduit of the metal conveyor frame, that results in connecting the lightning arrester ground field to the neutral ground field, provides a direct circuit for lightning energy to travel through the mine, a hazard that the separation provisions of section 75.521 are intended to prevent. As Inspector Wooten explained, "[i]t's easy to get those two [ground fields] shorted together." (Tr. 323).

James Honaker, an MSHA electrical engineer who participated in the Sago Mine accident investigation, also explained that lightning arresters could not be installed on power conductors that are grounded from underground power centers through the conveyor belt frame to the neutral ground because "... you would have the two ground fields tied together." (Tr. 868-69, 833-34).

Honaker noted that such a grounding system would violate section 75.521 that requires the lightning arrester ground field to “be separated from neutral grounds by a distance of not less than 25 feet.” (Tr. 869, 874-75, 877). Thus, the determinative fact in these matters is that overhead high voltage power lines or power cables located on the surface, that are connected to the lightning arrester ground field at the substation, may not be connected to the neutral grounds.

e. Citations

Citation Nos. 7583316 and 7583317 – Battery Charger Cables

As noted, all five citations in issue allege a violation of section 75.521 of the Secretary’s mandatory safety standards. This regulatory standard applies to ungrounded and exposed power conductors that are located on the surface before they enter an underground mine. If lightning arresters are installed, this mandatory standard requires the lightning arrester ground field to be separated from the neutral grounds by a distance of at least 25 feet.

Citation Nos. 7583316 and 7583317 essentially cite the same condition on two separate cables. (Gov. Exs. 2, 3). The rated capacity of each cable was 2,000 volts. (Tr. 274). Each cable supplied 575 volts power to different battery chargers on the surface. The chargers were used to charge battery powered man trips. (Tr. 264-65). As shown in Appendix I, the cables were attached to, and received power from, a power center that was located in an underground section of the mine. (Tr. 270-71). The power center was grounded through the metal frame of the belt conveyor to the neutral ground field on the surface. The citations relate to the portion of each cable, that the Secretary asserts required lightning arrester protection, that was visible on the ground from the point where it exited the mine until its connection to each battery charger.

These two cited cables contained six conductors, three of which were phase wires that conducted power, two ground wires and a ground check monitor wire. (Tr. 273, 289). The three phase conductors in each cable were each separately insulated and were contained, along with the ground wires and monitor wires, in a protective outer jacket. (Joint Stip. 23, 27; Gov. 21; Tr. 427). The cables were undamaged and intact in that there were no bare power conductors along the length of the cables. (Joint Stip. 27; Gov. Ex. 21).

Wooten testified that the two ground wires and the check monitor wire were not required to be connected to lightning arresters because they were grounded. The purpose of the ground wires is to cause the circuit breaker to trip in the event of a fault or short circuit. (Tr. 277). The ground wires serve no protection against an overvoltage on the power conductors caused by a lightning strike. (Tr. 278).

Wooten stated that the three phase power conductors are not grounded because they are current carrying conductors that are not connected to ground. (Tr. 277). The power conductors must remain ungrounded in order to energize equipment without tripping a circuit breaker.

(Tr. 861). In the event of an overvoltage of current on the conductors from a lightning strike, the conductors would carry the excess current into the mine because there was no path to ground. (Tr. 278). Lightning arresters would dissipate the electrical energy from a lightning strike by providing a path for the electrical current to go to ground on the surface rather than to the underground mine.

Wooten also testified about the significance of the requirement in section 75.521 that “[l]ightning arresters shall be connected to a low resistance grounding medium on the surface which shall be separated from neutral grounds by a distance of not less than 25 feet.” The neutral ground “is a low resistance ground bed that has to be established for the underground power source.” (Tr. 383). The neutral grounding medium consists of the ground field on the surface, all of the equipment in the underground portion of the mine, and the ground wires connected to that equipment. (Tr. 384). The purpose of the neutral ground is to dissipate the electricity from the frames of equipment located inside the mine in the event of an electrical fault in the system. (Tr. 384).

At the Sago Mine, underground power centers and equipment were connected and grounded to the neutral ground field on the surface through the medium of the metal frame of the belt structure. As a result of the connection from the cited cables to the power center and to all underground electrical equipment, in the absence of lightning arresters, a lightning strike on the cited cables would result in a direct path of elevated electrical current through the power conductors and on to all electrical face equipment. (Tr. 284). The installation of lightning arresters would have provided a path to ground for any excess current before it had a chance to enter the mine. (Tr. 284-285).

However, both Inspectors Honaker and Wooten testified that creating a lightning arrester ground field for a cable entering an underground mine when the cable is connected to the neutral ground creates a significant hazard because, in effect, it ties the two ground fields together. (Tr. 398-400, 868). As previously noted, the purpose of a lightning arrester is to direct to ground an overvoltage from a lightning strike on a power conductor. When the voltage goes to ground, it creates an electrical field, the extent of which will depend upon many factors, including the amount of current and the conductivity of the soil. (Tr. 314). As noted above, if the neutral ground for the underground electrical equipment is too close to the lightning arrester grounding medium, or, in this case, where the neutral ground and lightning arrester ground are connected, lightning current that is transmitted by a lightning arrester to ground can feed back to the neutral ground through the grounding system for the underground mine equipment. (Tr. 393-400). This would result in the frames of the equipment becoming energized by lightning, thus exposing miners to an electrical hazard. (Tr. 399).

Inspector Wooten considered the power conductors to be “ungrounded” as specified in section 75.521 because they were carrying current and not directly connected to ground. (Tr. 277). Wooten considered the power conductors to be “exposed” as specified in the cited mandatory standard, even though the conductors were insulated and contained in a protective

outer jacket, because they were exposed to the atmospheric effects of lightning before entering the underground mine.

The inner insulation serves two functions. Namely, it prevents a short circuit by separating the conductors, and, it protects persons who handle cables from electrical shock hazards by preventing contact with energized copper leads inside the wires. (Tr. 205, 218). Insulation does not provide protection against overvoltage caused by lightning which can be as high as one million volts. (Tr. 220). Wooten gave no evidentiary significance to the outer jacket of the cable because it primarily is designed to protect the inner insulated lead wires from damage.

Wooten determined the power conductors were “exposed” because they did not satisfy any of the criteria in MSHA’s Policy Manual that constitutes an unexposed conductor. (Tr. 291). Namely, the conductors were not provided with metallic shields; jacketed by a ground metal covering or enclosure; installed under grounded metal framework; buried in the earth; or made of triplex or quadraplex that is supported by a ground messenger wire. (Gov. Ex. 8).

Thus, Wooten issued Citation Nos. 7583316 and 7583317 alleging violations of section 75.521 because he considered the insulated power conductors contained in the cables powering the battery chargers to be ungrounded, exposed power conductors that lacked lightning arrester protection. Wooten designated the citations as significant and substantial (S&S) because he believed the electrical hazard created was reasonably likely to result in serious or fatal injuries in the event of a lightning strike. (Tr. 291). Wooten attributed the cited violations to a moderate degree of negligence because the cables were visible on the surface and they were examined on a weekly basis. (Tr. 317).

Significantly, because the installation of lightning arresters would contravene the 25 feet minimum separation of ground fields on cables that were already connected to the neutral grounds, Wolf Run did not install lightning arresters to abate the citations. Rather, Wolf Run abated the citations by removing the cables from the underground power source and, instead, connecting the cables to the battery chargers from a power source on the surface. (Tr. 324). The Secretary proposes a civil penalty of \$1,238.00 for each of these citations concerning the battery charger cables.

Citation No. 7583340 – High Voltage Overhead Lines

As previously noted, the belt structure which extended from the surface area of the mine into the underground portion of the mine was connected through the grounding medium to the underground power centers, as well as all underground electrical equipment. (Tr. 375). As depicted in Appendix I, Wooten observed that lightning arresters were attached to high voltage lines suspended outside of the underground mine. The lightning arresters were grounded to a “butt ground” at a power pole. (Tr. 327, 337, 348). As noted, a butt ground is a copper wire that runs down a power pole to the earth. (Tr. 338). Several lightning arresters were connected to the

butt ground. The butt ground was connected to the ground bed under the substation. (App. I). A static line was also attached to the butt ground. (Tr. 330, 358). A static line is a line that runs above high voltage power lines and provides an umbrella like protection from lightning. (Tr. 348-49, 374).

The ground wire for a power cable, that was supplying power to surface belts, was attached to that butt ground. (App. I; Tr. 379). That ground wire also was connected to a segment of the metal frame of the belt structure on the surface. The metal frame of the conveyor extended from the surface into the underground portion of the mine where it served as the medium to the neutral ground. (Tr. 330, 351). These connections caused the neutral ground to be common with the lightning arrester ground, thus defeating the purpose of section 75.521. (Tr. 340). Through these connections, the energy from a lightning strike had a path from the surface through the underground mine as a result of the belt metal frame that served as the means of grounding underground equipment to the neutral ground field. (Tr. 352).

Wooten explained that the manner in which the ground fields were initially established was not the problem. The location of the lightning arrester ground field, at the butt ground, was more than 25 feet from what was originally established as the neutral ground field. (See App. I). As noted, the problem was the connection of the lightning arresters to the belt frame through the ground wire for a power cable that was supplying the surface belts. (Tr. 241, 370). That connection eliminated the separation of the butt ground and substation ground fields from and the neutral grounds. (Tr. 398-400). Electrical current from a lightning strike would have a path to the butt ground, from the butt ground to the ground wire for the power cable, along that ground wire to the belt frame, and then into the underground portion of the mine.

As a result of his observations, Wooten issued Citation No. 753340. The citation states:

The lightning arresters grounding medium was not separated from the neutral grounds by a distance of 25 feet. The arresters were wired in a manner that would not prevent the frames of the equipment being used underground which are connected to the neutral grounding field from becoming energized in the event of a strike on the surface. The arrester ground was connected to the frames of the surface belt structure which are entering the mine and are connected to the mine track and all underground electrical equipment.

(Gov. Ex. 4).

Citation No. 753340 was abated by disconnecting the ground wire from the belt frame. Wooten designated the violation as S&S because of the three distinct hazards it contributed to: an electrocution hazard; a fire hazard; and an ignition source hazard. (Tr. 400). Inspector Wooten testified that an injury was reasonably likely to occur because there was a direct path for electrical current to travel from the lightning arresters to the metal frame of the belt structure,

which extended into the underground portion of the mine, and to every piece of electrical equipment in the mine. (Tr. 401).

The power pole where the butt ground was attached, and the belt frame where the ground wire was connected, were located on the surface area of the mine where people traveled on a daily basis. In fact, the power pole was just outside the building where the mine manager and the chief electrician's offices were located. Furthermore, the surface electrical equipment was subject to monthly examinations. Consequently, Inspector Wooten designated the respondent's negligence as moderate because the condition was obvious and in plain view. (Tr. 404). The Secretary proposes a civil penalty of \$963.00 for Citation. No. 7583340.

Citation No. 7582485 – Water Pump Cable

Wooten noted that a 120 volt power cable supplying power from the fan house on the surface to an underground water pump at the No. 10 crosscut in the track entry was not provided with a lightning arrester. (Joint Stip. 16; Gov. Ex. 1). The power cable contained a ground wire and copper wires that conducted electricity. Like the cables supplying power to the battery chargers, the ground wire and the power conductor wires were separately insulated and contained within an outer protective jacket. However, the ground wire was improperly connected because it was conducting electrical current. (Tr. 212-13; Gov. Ex. 10). There were no bare power conductors along the length of the cable. As with the battery power cables, Wooten considered the power conductors in the water pump power supply cable to be "exposed" because there was no metal shielding or other accepted methods of protection or enclosure as enumerated in the Secretary's policy manual. (Gov. Ex. 8).

Consistent with battery cable Citation Nos. 7583316 and 7583317, Wooten issued Citation No. 7582485 citing the water pump power supply cable for an alleged violation of section 75.521 because of Wolf Run's failure to install lightning arrester protection on "exposed" power conductors. Unlike the cited violations for the battery charger cables, the water pump supply cable was not grounded to the conveyor frame or otherwise attached to the neutral ground medium.

For an injury to occur, Wooten explained that a person would have had to be in contact with the pump at the moment that a lightning strike caused a surge on the cited conductors. (Tr. 260). He also testified that the cited condition did not pose a reasonable likelihood of fire because the area around the pump was wet. (Tr. 262). Thus, Wooten characterized the cited violation as non-S&S because the pump was isolated from other equipment in the mine. (Tr. 260). The cited cable had rock dust on it and appeared to have been in place for some time. (Tr. 192). Wooten concluded that the level of negligence was moderate because the pump is required to be examined on a weekly basis. (Tr. 262). Like the battery cable citations, the cited condition was abated by removing the cable from the fan house and powering the water pump from a cable connected to an underground power source. (Tr. 262). The Secretary proposes a civil penalty of \$60.00 for Citation No. 7582485.

Citation No. 7335233 – Telephone and Trolley Wires

Citation No. 7335233 cites an alleged violation of section 75.521 because lightning arresters were not provided on either a telephone wire, or a trolley phone wire, that leads from the surface into the underground portion of the mine. (Gov. Ex. 5). Kevin Hedrick, an engineer with MSHA's Technical Support Group, testified that he observed the cited conditions. However, Hedrick is not authorized to issue citations because he is not an authorized representative of the Secretary. Consequently Inspector Russell Dresch, who played a supervisory role in the accident investigation, issued the Citation No. 7335233. Dresch did not observe the conditions cited in Citation No. 7335233. Rather, he based the citation on Hedrick's observations.

Hedrick has been employed by MSHA as an electrical engineer for 25 years. (Tr. 597) His participation in the accident investigation included assisting the electrical team in its inspection of the environmental monitoring and communication systems at the Sago Mine. (Tr. 600). Hedrick stated there were two different communication systems - - a hard wired paging telephone system and a trolley phone system. The paging system allowed communication between the dispatcher's office on the surface to approximately 20 pagers hard wired at various locations throughout the mine. (Tr. 602). The trolley phone system allowed communication from the surface to occupants of man trips in the track entry .

Both the telephone and trolley systems had wires that were connected to the dispatcher's office and entered the mine at the portal of the track entry. Hedrick testified that he examined the telephone and trolley wires from the dispatcher's office to the mine portal with the exception of a portion of the lines that were buried. (Tr. 605, 610, 626). There was approximately 400 feet of line that ran from the dispatcher's office to the mine portal. (Tr. 613). There were no lightning arresters connected to either of the wires. (Tr. 626).

The trolley phone wire consisted of two wires that were contained in a single jacket up to the portal. At that point, the two wires were separated. One wire was suspended along the roof as an antenna for the length of the track. The other trolley wire was attached to the track and grounded at the mouth of the portal. Since this trolley wire was grounded before entering the mine, it did not require a lightning arrester. (Tr. 615 -18, 621). The wire that was hung along the roof above the track was grounded to the end of the track at the furthest point in the mine. (Tr. 677-79). Therefore, any lightning energy on the roof trolley wire conductor could be transmitted into the mine until it reached ground at the end of the track. (Tr. 680). As a consequence, Hedrick believed the trolley wire attached to the mine roof required a lightning arrester. (Tr. 622). The telephone wire also consisted of two conductors, neither of which were grounded. Consequently, Hedrick determined both conductors were required to be equipped with lightning arresters. (Tr. 623-24).

Hedrick and Dresch opined that their understanding of the term "exposed," as it is used in section 75.521, is that it refers to being exposed to the atmospheric effects of lightning. (Tr. 632, 671.). Hendrick repeated Wooten's testimony that lightning arresters are designed to provide a path to ground for an overvoltage that occurs as a result of lightning. (Tr. 627, 630). Hedrick stated that lightning arresters would significantly reduce the amount of overvoltage that would enter the mine in the event of a lightning strike. (Tr. 631) Hedrick stated that the transmission of energy from a lightning strike would pose a hazard in the form of a shock hazard, a fire hazard and an ignition source hazard. (Tr. 635-36).

Government Exhibit 24 is an annotated photograph that has been appended to this decision and will be referred to hereinafter as Appendix II. It presents a view of the surface area of the Sago Mine including the overhead power lines and the conveyor belt assembly. It illustrates the paths of the telephone and trolley phone cables until the point where they enter underground at the portal of the track entry.

Dresch designated the cited violation as S&S in nature because he believed it was reasonably likely that a shock or electrocution injury caused by the ungrounded communication wires would result in lost workdays or restricted duty. (Tr. 681). The cited condition also created a fire and an ignition hazard as a result of heat that would be generated by an overvoltage on the lines in the event of a lightning strike. Because the telephone system was a hard wired system, Dresch concluded that the dispatcher and the miners were regularly exposed to serious injury should a lightning strike occur. (Tr. 682). Dresch believed injury was less likely with respect to the trolley system because persons would not be in direct contact with the trolley wire. (Tr. 683-84).

Dresch considered the lack of lightning arresters to be an obvious condition in that the wires were visible on the surface of the mine, and mine electrical equipment was examined monthly by qualified examiner personnel. Dresch acknowledged that MSHA inspectors apparently did not recognize the need for lightning arresters during previous inspections. (Tr. 685). Consequently, the negligence attributable to Wolf Run for the cited violation was deemed to be moderate.

The cited violation was abated by installing a lightning arrester on each of the telephone paging wire conductors located outside the mine, and installing one lightning arrester on the outside portion of the trolley wire conductor that was suspended from the mine roof. (Tr. 685). As noted, the trolley wire that was grounded to the track at the mouth of the track entry did not require a lightning arrester. (App. II). The Secretary proposes a civil penalty of \$440.00 for Citation No. 7582485.

f. Post-Hearing Submissions

At the conclusion of the hearing, the record was left open for the Secretary to submit MSHA's history of enforcement of section 75.521 prior to the January 2, 2006, Sago explosion. This information was requested to determine if the Secretary's interpretation of section 75.521 has been affected by the Sago Mine accident.

On January 28, 2009, the Secretary submitted citations reflecting her relevant enforcement history with respect to lightning arresters prior to the January 2, 2006. The citations were divided into three categories. Four citations concerned insulated power cables (Gov. Ex. 25); 35 citations concerned communication or carbon monoxide (CO) monitoring systems (Gov. Ex. 26); and 18 citations concerned conditions where the lightning arrester ground field and the neutral ground field was not separated by at least 25 feet (Gov. Ex. 27). The citations do not reflect whether the cited power cables, communication lines or CO monitoring systems were grounded to a common neutral ground or otherwise grounded.

III. Disposition

a. Regulatory Framework of Section 75.521

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F. 2d 1062, 1066 (citing *Consumer Prod. Safety Comm'n v. GET Salvinia, Inc.* 447 U.S. 102, 108 (1980)). So we must examine the language used by the Secretary in promulgating section 75.521 as a mandatory safety standard. Section 75.521 provides:

Each *ungrounded, exposed* power conductor and each ungrounded, exposed telephone wire that leads underground shall be equipped with suitable lightning arresters of approved type within 100 feet of the point where the circuit enters the mine. Lightning arresters shall be connected to a low resistance grounding medium on the surface which shall be *separated from neutral grounds by a distance of no less than 25 feet*.

(Emphasis added).

The cited mandatory standard has three components. The meaning and applicability of these components are disputed by the parties. The three elements of the section 75.521 are: (1) the power conductor required to be protected from a lightning initiated power surge must be "exposed;" (2) the power conductor must be "ungrounded;" and (3) the lightning arrester ground field must be separated from the neutral grounds by a distance of at least 25 feet. In this case, the cited standard requires interpretation because the operative terms "exposed" and "ungrounded" are subject to different meanings.

When the meaning of the provisions of a regulatory standard are disputed, the courts and this Commission have deferred to the Secretary's reasonable interpretation of the regulation. *Energy West Mining Co. v. FMSHRC*, 40 F. 3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels - Utah, Inc.*, 900 F. 2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowls v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). Thus, we address whether the Secretary's proffered meaning and application of section 75.521 is entitled to deference.

b. The Term "Exposed"

As a threshold matter, the meaning of the term "exposed" power conductors as contemplated by the cited regulation must be resolved. The Secretary seeks to explain the meaning of an "exposed" power conductor by relying on the provisions of MSHA's policy manual that enumerate when a power conductor is "not exposed." Specifically, the relevant provisions of MSHA's policy manual state:

Conductors that are (1) provided with metallic shields; (2) jacketed by a ground metal covering or enclosure; (3) installed under grounded metal framework; (4) buried in the earth; or (5) made of triplex or quadraplex that is supported by a grounded messenger wire, are not considered exposed for the length so protected.

(Gov. Ex. 8).

Since the cited conductors satisfy none of the enumerated five requirements in the policy manual, the Secretary asserts the power conductors are exposed despite their insulation and containment in an outer cable jacket. The Secretary may not rehabilitate ambiguous mandatory standards by simply explaining in MSHA's policy manual what she intended to, but did not say. Rather, regulatory interpretations contained in policy manuals or opinion letters, not arrived at through notice-and-comment rulemaking, lack the force of law and are not entitled to *Chevron* style deference. *Edward Christensen, et al. v. Harris County, et al.*, 529 U.S. 576, 586-87 (2000) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (a court must give effect to agency's reasonable interpretation of an ambiguous statute); *Bulk Transportation Services, Inc.* 13 FMSHRC 1354, 1360 (Sept. 1991) (policy manuals are expressions of general policy and are not binding regulations); *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) (the express language of a statute or regulation "unquestionably controls" over material in MSHA'S policy manual) (citations omitted).

Although I am not persuaded by the Secretary's reliance on MSHA's policy manual, Subpart K of Part 1926 of Title 29 of the Secretary's regulation concerning electrical safety in

the construction industry is instructive. 29 C.F.R. Subpart K of Part 1926. Section 1926.449 contains the definitions that are relevant to electrical safety. 29 C.F.R. § 1926.449. Section 1926.449 reflects that the term “exposed” electrical cables has several meanings depending on the term’s context:

When referring to live parts, the definition of “exposed” is “[c]apable of being inadvertently touched or approached nearer than a safe distance by a person. It is applied to parts not suitably guarded, isolated or insulated.”

When referring to wiring methods, Section 1926.449 defines exposed as “[o]n or attached to the surface or behind panels designed to allow access.”

Wolf Run, relying on the functional purpose of insulated wires, as in the first definition in section 1926.449, argues that the term “exposed” in section 75.521 applies to live electrical conductors capable of contact. Wolf Run contends that the conductors in the charger cables, the water pump cable, and the telephone and trolley wires were not exposed because they were covered by insulation and/or housed in an outer jacket. Therefore, Wolf Run argues that the subject conductors are not governed by the lightning arrester provisions of section 75.521.

The Secretary, on the other hand, relies on a definition of “exposed” that is similar to the wiring method definition in section 1926.449. The Secretary argues that insulated power conductors prevent electrical shorts rather than protect against overvoltage. (Tr. 205). Similarly, she asserts the outer jacket of the cable is designed to protect the inner leads from damage rather than provide protection against lightning. (Tr. 218). Thus, despite the insulation and outer jacket, the Secretary maintains that the subject power conductors are “exposed” because the above ground portions of the cables containing them are exposed to the weather related atmospheric effects of lightning.

The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation and . . . serves a permissible regulatory function” *General Elec. Co. v. U.S. E.P.A.*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). Here, section 75.521 seeks to mitigate, by means of lightning arresters, the hazard posed by the high powered transmission of electrical energy from a lightning strike from the surface to the underground mine. Thus, the focus of the cited standard is on power cables that are situated on the earth’s surface and “exposed” to lightning. It naturally follows that the term “exposed conductors” refers to the location outside the underground mine, rather than their method of insulation and protection from human contact.

Moreover, the Secretary’s interpretation that the term “exposed” refers to location rather than wiring method is consistent with the language of section 75.521 that requires “suitable lightning arresters of approved type within 100 feet of the point where the circuit enters the mine.” Thus, the Secretary’s interpretation of “exposed” is consistent with both the language and the purpose of the cited standard. Consequently, the Secretary’s interpretation that the term “exposed” reflects that the cable is on the surface rather than buried is manifestly reasonable.

c. The Term “Ungrounded”

Having concluded that power conductors contained in above ground portions of cables that run underground are “exposed,” the focus shifts to whether the cited power conductors are “ungrounded.” Wolf Run contends the subject power conductors are grounded if the power cable is grounded, regardless of the method of grounding. The Secretary takes the view that it is the ground wire in the cable that is grounded rather than the power conductors. In this regard, she emphasizes that the power conductors are not separately grounded because they carry electrical energy. Consequently, the Secretary asserts that power conductors in exposed cables located above ground are governed by section 75.521 even if the power conductors are contained in an insulated cable that is connected to a neutral ground.

Before discussing the meaning of the term “ungrounded” when read in the context of the provisions of section 75.521, it is helpful to envision an illustration of the effect of connecting a lightning arrester ground bed to the neutral grounds at the Sago Mine. Think of an electrical path entering the mine from the surface in the shape of a capital “U.” A lightning arrester ground field is created on the surface at the top of one end of the “U,” in this case under the substation. The curved bottom of the “U” represents the power to the equipment located underground. The remaining top of the “U” is the site of the neutral grounds, also located on the surface. (See App. I). At Sago Mine, the lightning arrester ground field located at one end of the “U,” would be connected, through the metal conveyor frame ground medium, to the neutral ground field at the other end of the “U.” In such an event, since lightning induced energy travels through conductors in all directions, an electrical surge would be directed through the underground mine. That is why it is impossible to install a lightning arrester on a cable that is connected underground to the neutral ground fault medium and yet comply with the section 75.521 requirement that ground fields remain separate.

The Secretary’s concept of an “ungrounded power conductor” is fundamentally flawed because: it is inconsistent with the technical definition; it is inherently inconsistent with the separation requirements of section 75.521; it is contrary to the language in MSHA’s policy manual;³ and it undermines the purpose of the mandatory standard.

³ The policy manual states:

Lightning arrester ground fields shall be separated from neutral ground fields by at least 25 feet. This distance prevents lightning surges from being transmitted to the neutral field where they could momentarily energize the frames of equipment grounded to the neutral ground field.

(Gov. Ex. 8).

As a threshold matter, the Secretary's proffered meaning of "ungrounded" is contrary to the mining industry definition of the term. The industry definition of a "grounded power conductor" is:

An insulated or bare cable that constitutes one side of a power circuit and normally is connected to ground. It differs from a ground wire in that a grounded power conductor normally carries the load current while the equipment it serves is in service.

Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms*, 247 (2d. Ed. 1997) (emphasis added).

Moreover, the Secretary's proposed meaning of the term "ungrounded power conductor" places the Secretary in the unenviable position of arguing that a mine operator must comply with the first requirement of section 75.521, *i.e.*, installation of a lightning arrester, even though such compliance would violate the second requirement of this standard, *i.e.*, separation of the ground fields. Rather, the logical meaning of section 75.521 is that it requires that conductors in cables that extend from the surface to the underground mine must be grounded to either a lightning arrester ground field, or a neutral ground field, but not both.

In addition, the Secretary's view that conductors in an insulated grounded cable are "ungrounded" undermines the purpose of section 75.521. As previously noted, if the ground fields are connected, the purpose of section 75.521 – to minimize the lightning energy that enters underground – would be frustrated because excess lightning energy could be conveyed through the underground mine from ground field to ground field. That is why the requirements in section 75.521 of installing lightning arresters, and, separating the lightning arrester ground field from the neutral grounds by a distance of at least 25 feet, are mutually exclusive. In other words, it is impossible to separate a lightning arrester ground field from a neutral ground field on a cable that has ground fault protection.

In the final analysis, the installation of lightning arresters on power conductors in a cable that is grounded to the neutral ground is prohibited by section 75.521 because it would violate the 25 feet minimum separation. Thus, the Secretary's interpretation that power conductors contained in insulated cables that are connected to a neutral ground system are governed by section 75.521 is unreasonable. Rather, the term "ungrounded" in section 75.521, referring to cables entering a mine that are not grounded, is a condition precedent for the applicability of section 75.521. As Inspector Honaker testified, installing lightning arresters on conductors in grounded cables is "doomed to failure." (Tr. 877).

In reaching the conclusion that conductors must be connected to lightning arresters, or connected through the neutral grounds, but not both, I am cognizant of the Secretary's legitimate goal, particularly in light of the Sago explosion, of mitigating the danger posed by lightning. The Secretary argues, in essence, that section 75.521 implies that exposed cables entering underground are prohibited from connecting to the neutral grounds. However, "a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (citations omitted).

Moreover, as explained by Inspector Wooten, lightning arresters and neutral grounds mitigate different hazards. Lightning arresters mitigate the hazard posed by lightning strikes by dissipating electrical energy before it enters the mine. (Tr. 384). Neutral ground mediums provide ground fault protection from electrocution by causing circuit breakers to trip in the event of a short circuit in electrical mining equipment. (Tr. 277). If the Secretary wishes to subordinate the hazard posed by short circuits to the hazard posed by lightning she should do so by rulemaking. In other words, if the Secretary wishes to prohibit cables that enter an underground mine from being connected to a neutral ground, or prohibit powering underground equipment from an above ground power center, she should do so explicitly through a notice-and-comment rulemaking rather than by inference and/or policy manual.⁴

However, cables that run from the surface underground that are truly "ungrounded" present an important distinction because they do not thwart the purpose of section 75.521. In this regard, the installation of lightning arresters on power connectors contained in such cables would be consistent with the purpose of section 75.521 -- to direct an electrical surge to the lightning arrester ground field and away from the underground mine. Thus, the Secretary's contention that conductors in *ungrounded cables* (that are not connected to neutral grounds) are governed by section 75.521 is reasonable as it is consistent with the plain meaning of the regulation.

By way of summary, power conductors contained in cables connected to the neutral ground fault medium are not subject to the provisions of section 75.521 because they are not "ungrounded". Similarly, power cables, telephone wires and trolley wires that are not grounded are subject to section 75.521. Having determined that section 75.521 applies to ungrounded power conductors that enter underground, we turn to the disposition of each of the subject citations.

⁴ MSHA's current application of section 75.521 apparently is a matter of first impression. As Wooten explained, "[i]t's an unusual situation to find this like this because usually [mine operators] want to power everything that's on the surface from the surface and ground everything to that. And everything that's underground to the underground source."

(Tr. 321).

d. Citation No. 7583340 – High Voltage Overhead Lines

As previously noted, Citation No. 7583340 states:

The lightning arresters grounding medium was not separated from the neutral grounds by a distance of 25 feet. The arresters were wired in a manner that would not prevent the frames of the equipment being used underground which are connected to the neutral grounding field from becoming energized in the event of a strike on the surface. The arrester ground was connected to the frames of the surface belt structure which are entering the mine and are connected to the mine track and all underground equipment.

(Gov. Ex. 4).

Citation No. 7583340 was issued because the lightning arrester ground for the overhead high voltage lines was connected to a ground wire for the power cable supplying the surface belts which in turn was connected to the conveyor belt frame on the surface. The problem arose because the underground portion of the conveyor frame was the medium used to connect the underground equipment to the neutral grounds. This condition clearly constitutes a violation of the 25 feet separation required in section 75.521. Citation No. 7583340 exemplifies why section 75.521 does not apply to power conductors in cables that are connected through the neutral ground medium.

To abate the citation Wolf Run was required to remove the ground wire for the power cable supplying the surface belts from the belt frame. In effect, removal of the ground wire separated the lightning arrester ground field from the neutral grounds.

Having determined the fact of the violation, we turn to the S&S issue. As a general proposition, a violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC at 825. In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

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

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC at 1129, the Commission explained its *Mathies* criteria as follows:

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

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

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

While unpredictable and random, lightning is an ever present danger during severe weather conditions. Lightning’s unpredictability and randomness must not be confused with the severity or likelihood of the hazard. For example, it obviously is inadvisable, if not extremely dangerous, to stand under a tree during an electrical storm. So too, it is dangerous to expose underground miners to an electrical surge because high voltage overhead power lines entering the mine are not effectively equipped with lightning arrester protection.

Although I have not concluded that a violation of the provisions of section 75.521 governing lightning arresters is a *per se* S&S violation, the particular circumstances of this violation warrant an S&S designation. Significantly, the power line inadequately protected was a high voltage line capable of carrying a significant surge of electrical energy underground. Such a surge would create an electrocution hazard to miners who were in contact with, or in the vicinity of, the conveyor frame or underground equipment. An electrical surge is also an ignition source that could result in a fire or explosion. The Sago tragedy is a testament to the serious hazard presented by exposing miners to lightning related dangers. Thus, the facts surrounding the cited violation, when viewed in the context of continued underground mining operations, in an

environment that is unprotected from high voltage lightning related hazards on a daily basis, support the Secretary's assertion that the cited condition constituted an S&S violation and was serious in gravity.

The Secretary has adequately supported her assertion that the cited violation was attributable to a moderate degree of negligence in that the condition was in plain view and subject to monthly electrical inspections. Wolf Run is a large mine operator that timely abated the cited condition. The Secretary's proposed \$963.00 civil penalty is consistent with the penalty criteria in section 110(i) of the Mine Act.⁵ 30 U.S.C. § 820(i). **Accordingly, a \$963.00 penalty shall be imposed for Citation. No. 7583340.**

e. Citation Nos. 7583316 and 7583317 – Battery Charger Cables

Citation Nos. 7583316 and 7583317 essentially cite the same condition on two separate power cables connected to battery chargers on the surface from a power center that was located in an underground section of the mine. (App. I; Gov. Exs. 2, 3). The underground power center was grounded through the metal frame of the belt conveyor to the neutral ground field on the surface. The power cables cited in Citation Nos. 7583316 and 7583317 were used to supply power to the No. 4 and No. 8 battery chargers, respectively. The cited conditions were abated by removing the cables from the underground power source and supplying power to the chargers from a power source located on the surface.

Section 75.521 prohibits connecting lightning arresters to power conductors that are connected to the neutral grounds. This is illustrated by the condition cited in Citation No. 7583340 concerning the high voltage overhead lines that was abated by disconnecting the lightning arrester ground from the neutral ground conveyor frame medium. Since the cited power cables in Citation Nos. 7583316 and 7583317 were connected to the neutral ground medium through the frame of the underground conveyor, the power conductors contained in the cables are exempt from the provisions of section 75.521. **Accordingly, Citation Nos. 7583316 and 7583317 shall be vacated.**

⁵ In determining the appropriate civil penalty, section 110(i) provides, in pertinent part:

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

f. Citation No. 7582485 – Water Pump Cable

Citation No. 7582485 states:

The 120 volt underground cable supplying power from the fan house to the No. 3 pump at the [N]o. 10 cross cut in the track entry was not provided with a lightning arrester.

(Gov. Ex. 1).

Unlike the power cables supplying the battery chargers, the cited power cable, connected from the fan house located on the surface, to the pump located underground, was not connected to the conveyor frame or otherwise connected to the neutral grounds. The pump was not otherwise grounded as the ground wire was conducting electric current. The cited condition was abated by powering the pump from an underground power source.

Since the cable was not connected to the neutral ground medium or otherwise grounded, the cable was not exempt from the lightning arrester provisions in section 75.521. Thus, Wolf Run's failure to attach lightning arresters to the conductors contained in the cable supplying power to the water pump constituted a violation of section 75.521.

I concur with the Secretary's designation of the cited condition as non-S&S in nature. The water pump was located in an area of the mine that was isolated from other mine equipment. For injury to occur, a miner would have to be in contact with the water pump the moment a lightning strike caused a surge in the power cable. Fire was unlikely because of the damp conditions in the vicinity of the pump. The negligence attributable to Wolf Run is moderate because the pump was examined on a weekly basis. **Consistent with the penalty considerations in section 110(i) of the Mine Act, the \$60.00 civil penalty proposed by the Secretary is an appropriate penalty that shall be assessed for Citation No. 7582485.**

g. Citation No. 7335233 – Telephone and Trolley Wires

Citation No. 7335233 states:

The exposed telephone wire and trolley phone wire that lead underground are not equipped with suitable lightning arresters of approved type within 100 feet of the point where circuits enter the mine. No lightning arresters were found.

(Gov. Ex. 5).

Both the cited telephone wire and trolley wire were connected from the dispatcher's office on the surface through the portal of the track entry underground. (App. II). The telephone wire, consisting of two conductors, was hard wired to approximately 20 pagers underground.

Neither telephone conductor was grounded. Consequently, each conductor required a lightning arrester in accordance with section 75.521.

The trolley wire consisted of two wires that were separated at the track entry portal. One wire was grounded by connecting it to the track at the mouth of the track entry. (App. II). This wire did not require a lightning arrester because it did not extend to an underground area of the mine.

The other trolley conductor served as an antenna. It was hung along the roof from the mouth of the track entry to the farthest end of the track where it was grounded. A lightning arrester was installed on this trolley conductor to abate the citation. The citation was also abated by installing a lightning arrester on each of the ungrounded telephone conductors. The Secretary proposed a civil penalty of \$440.00 for Citation No. 7335233.

The parties have jointly stipulated that similar insulated power conductors for a CO monitoring system at the Sago Mine, that also originated at the dispatcher's office, were equipped with a transient voltage suppressor for protection against lightning. (Gov. Ex. 28). Significantly, consistent with this decision, the parties' stipulations describing the CO monitoring system that was protected from lightning do not reflect that the system's conductors were grounded.

Section 75.521 applies to the telephone wire as neither of the two telephone conductors was grounded. Accordingly, Wolf Run's failure to provide lightning arrester protection for the telephone conductors constituted a violation of the cited mandatory standard. However, Wolf Run was not required to attach a lightning arrester to the grounded trolley wire suspended on the track roof because it was grounded to the end of the track at the furthest point in the mine. (677-80). I reach this conclusion based on Wooten's testimony that current carrying conductors that are connected to ground are not governed by section 75.521. (Tr. 277).

With respect to the question of S&S, the Secretary contends that serious injury is reasonably likely because the dispatcher and miners are regularly exposed to the telephone line paging system. In evaluating the likelihood of injury, it is significant that, unlike high voltage overhead power lines that are capable of carrying an excess electrical surge, the telephone conductors are thin wires that have a relatively low voltage capacity of 12 volts. (Tr. 644). A lightning surge can create over one million volts. (Tr. 220). Consequently, it is likely that a lightning power surge would destroy the subject telephone conductors before they entered the mine, a distance of approximately 400 feet from the dispatcher's office to the mine portal. (Tr. 613). Thus, it is reasonably likely that lightning induced energy distributed through these low voltage lines would be interrupted before it could create a significant ignition source or electrocution hazard. (Tr. 644). Consequently, viewing the circumstances surrounding the cited violation in their entirety, it cannot be said that the hazard contributed to by the violation, *i.e.*, a transfer of a high degree of electrical energy into the mine, causing serious or fatal injuries, is reasonably likely to occur.

In view of the above, Citation No. 7335233 shall be modified by deleting the portion of the citation concerning the trolley wires, and by reflecting that the cited condition was non-S&S in nature. The record reflects the violation was attributable to a moderate degree of negligence based on the failure of detection during weekly mine inspections. **Consistent with the statutory penalty criteria in section 110(i), a civil penalty of \$60.00 shall be imposed for Citation No. 7335233.**

I note, parenthetically, that my conclusion that power conductors may be connected to either a lightning arrester field or the neutral grounds, but not both, is consistent with MSHA's enforcement history prior to the Sago mine accident. Specifically, the determination that section 75.521 applies to the ungrounded water pump power cable, but does not apply to grounded battery charger power cables, is consistent with the relevant history of citations furnished by the Secretary. In this regard, none of the four citations relied on by the Secretary involving power cable violations of section 75.521 reflect that the cited cables were attached to ground. (Gov. Ex. 25). Similarly, the 35 citations submitted by the Secretary that concern communication and monitoring systems do not reflect the systems were connected to a neutral ground. (Gov. Ex. 26). Finally, the 18 citations submitted concerning past violations in instances where both the lightning arrester ground and neutral grounds were tied to a common medium, such as a conveyor frame, are similar to the overhead power line violation that has been affirmed in these proceedings. (Gov. Ex 27).

Moreover, the outcome in this case is consistent with the enforcement history of section 75.521 prior to the Sago disaster that was related by Inspector Wooten. Wooten noted that he has issued citations for: communication wires that lacked lightning arresters; power lines that violated the 25 feet minimum ground field separation; and damaged lightning arresters that needed of replacement. (Tr. 318-19). However, Wooten's testimony does not reflect any history of citations that were issued because power cables connected to neutral grounds did not have lightning arrester protection.

In the final analysis, the Secretary seeks to require, through an implicit interpretation of section 75.521, that surface equipment must be powered from a power source located on the surface, and, underground equipment must be powered from an underground power source. Alternatively, if the equipment and power sources are not co-located underground or on the surface, in lieu of installing lightning arresters, the Secretary, consistent with MSHA's policy manual, seeks to require power cables on the surface to be buried, enclosed in a ground metal covering, or provided with metallic shields. However, the explicit language of section 75.521 governs over the Secretary's proffered implicit meaning and the provisions of the policy manual.

IV. Settlement and Total Liability

These civil penalty proceedings concern a total of 36 citations, 31 of which have been settled. The total civil penalty initially proposed by the Secretary for the 36 citations was \$32,278.00. Pursuant to the parties' settlement terms, Wolf Run has agreed to pay \$25,257.00 rather than the \$28,339.00 civil penalty initially proposed by the Secretary for the 31 settled citations. The reduction in civil penalty is based on a reduction in the degree of negligence attributable to Wolf Run with respect to several of the subject citations. I have considered the representations and documentation submitted by the parties and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Consequently, the parties' motions to approve settlement shall be granted.

The Secretary proposes a total civil penalty of \$3,939.00 for the five citations that have been adjudicated in these matters. These five citations are Citation No. 7582485 in Docket No. WEVA 2006-853; Citation Nos. 7583316 and 7583317 in Docket No. WEVA 2006-854; and Citation Nos. 7335233 and 7583340 in Docket No. WEVA 2007-666.

Citation Nos. 7583316 and 7583317 in Docket No. WEVA 2006-854 have been vacated. A total civil penalty of \$1,083.00 has been assessed in these proceedings for the three remaining citations, consisting of a \$60.00 civil penalty for Citation No. 7582485 in Docket No. WEVA 2006-853, a \$60.00 civil penalty for Citation No. 7335233 in Docket No. WEVA 2007-666, and a \$963.00 civil penalty for Citation No. 7583340 in Docket No. WEVA 2007-666. Consequently, Wolf Run's total liability is \$26,340.00.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 7583340 in Docket No. WEVA 2007-666 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay a civil penalty of \$963.00 in satisfaction of Citation No. 7583340.

IT IS FURTHER ORDERED that Citation No. 7335233 in Docket No. WEVA 2007-666 **IS MODIFIED** by deleting the significant and substantial designation, and that Wolf Run Mining Company shall pay a \$60.00 civil penalty for the cited condition.

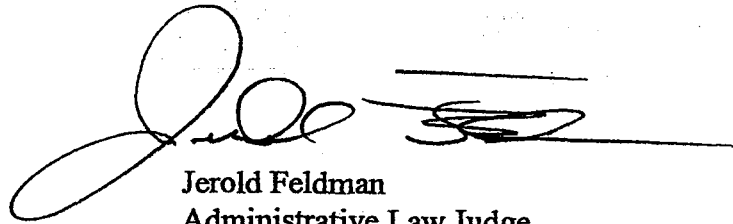
IT IS FURTHER ORDERED that Wolf Run Mining Company shall pay the \$60.00 civil penalty proposed by the Secretary for Citation No. 7582485 in Docket No. WEVA 2006-853 that **IS AFFIRMED**.

IT IS FURTHER ORDERED that Citation Nos. 7583316 and 7583317 in Docket No. WEVA 2006-854 **ARE VACATED**.

IT IS FURTHER ORDERED that the parties' motions to approve partial settlement **ARE GRANTED**. Consistent with the parties' settlement terms, **IT IS ORDERED** that Wolf Run Mining Company shall pay a total civil penalty of \$25,257.00 in satisfaction of the remaining 31 citations that are in issue in these proceedings.

Consistent with the total civil penalty assessment of \$1,083.00 for the five citations that were adjudicated in these matters, as well as the parties' settlement terms, **IT IS ORDERED** that Wolf Run Mining Company pay, within 40 days of the date of this decision, a total civil penalty of \$26,340.00 in satisfaction of the 36 citations that are in issue in these proceedings.

IT IS FURTHER ORDERED that, upon receipt of timely payment, the civil penalty proceedings in Docket Nos. WEVA 2006-853, WEVA 2006-854 and WEVA 2007-666 **ARE DISMISSED**.



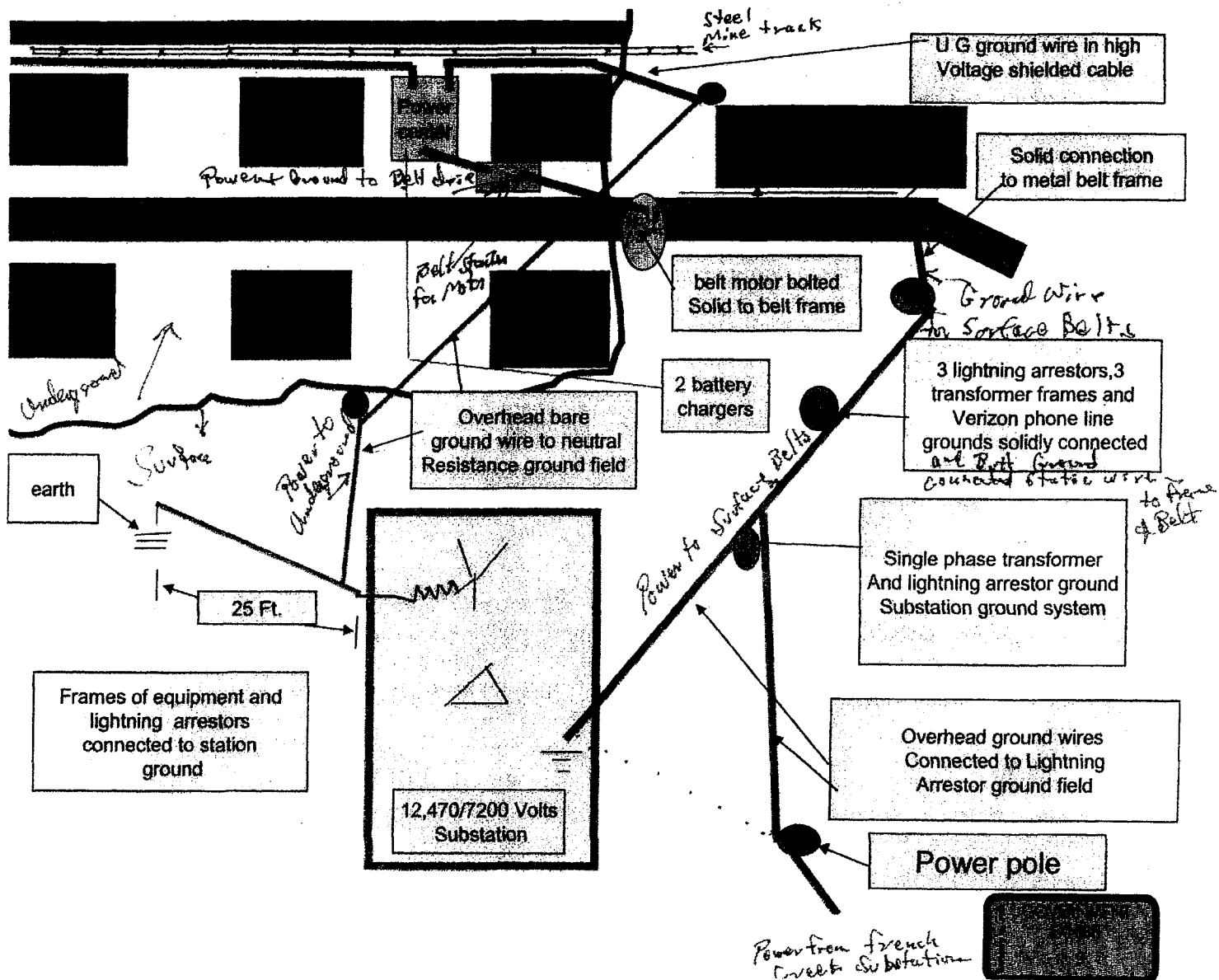
Jerold Feldman
Administrative Law Judge

Distribution:

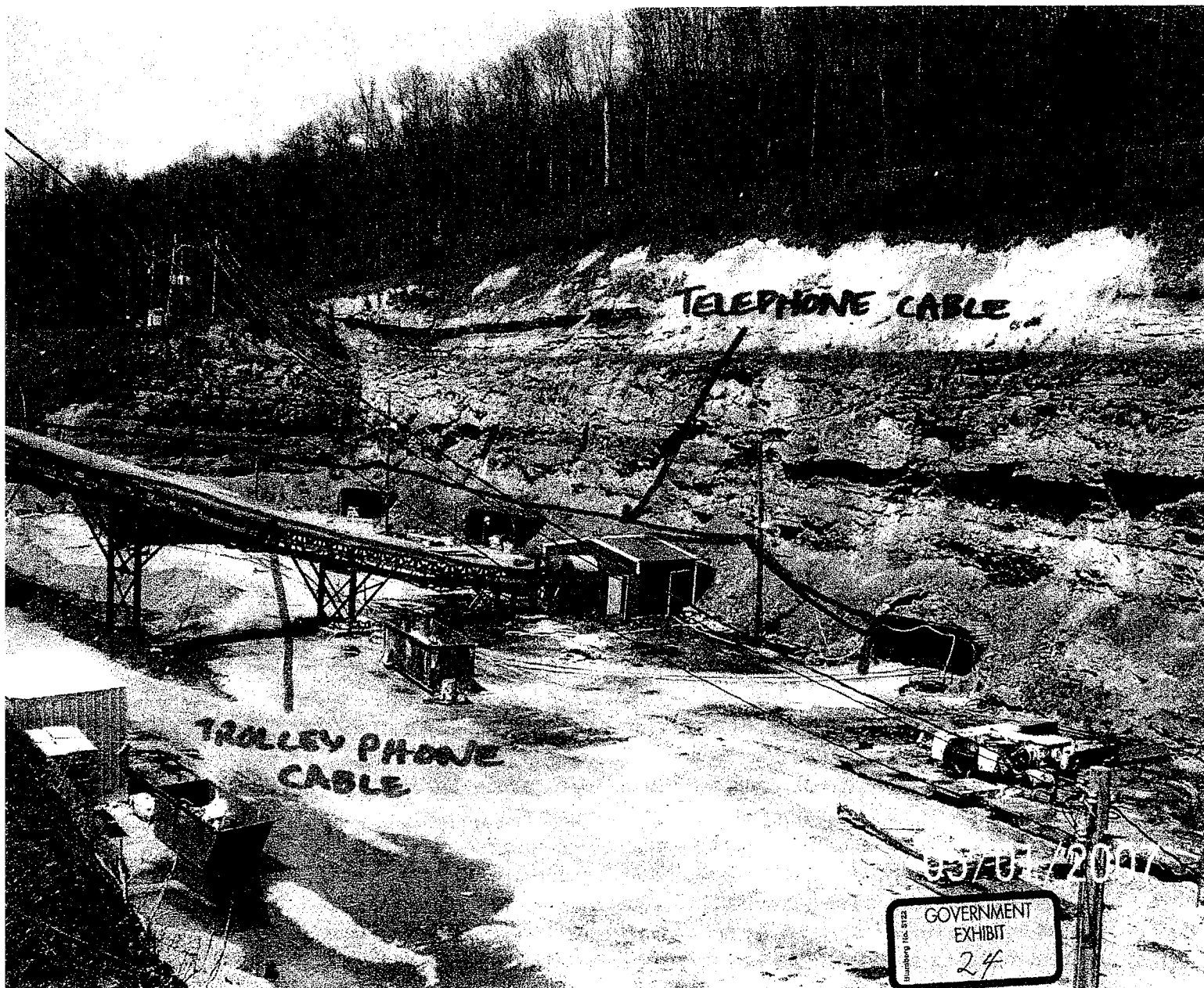
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/rps



Appendix I



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-99 / FAX: 202-434-9949

June 17, 2009

DYNAMIC ENERGY, INCORPORATED,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2007-448-R
v.	:	Order No. 7264179; 04/26/2007
	:	
SECRETARY OF LABOR	:	Mine ID 46-09062
MINE SAFETY AND HEALTH	:	Mine: Coal Mountain No. 1 Surface
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Carol Ann Marunich, Esq., Dinsmore and Shohl, Morgantown, WV, for Contestant;
Francine Serafin, Esq., U.S. Department of Labor, Arlington, Virginia, for Respondent.

Before: Judge Bulluck

In this proceeding arising under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("Mine Act" or "Act"), Dynamic Energy, Incorporated ("Dynamic") challenges the validity of an order issued pursuant to section 104(d)(2) of the Act. 30 U.S.C. § 814(d)(2). The Order alleges that Dynamic violated 30 C.F.R. § 77.1607(b), a mandatory safety standard for surface coal mines and surface work areas of underground coal mines. The standard, which applies to loading and haulage equipment, requires that "Mobile equipment operators shall have full control of the equipment while it is in motion." 30 C.F.R. § 77.1607(b).

While conducting an inspection of Dynamic's Coal Mountain No. 1 Mine, MSHA Inspector Bruce Billups observed a tractor-trailer truck being pushed up a steeply inclined haulage road by a grader. Billups believed that the truck driver was not in "full control" of the tractor-trailer during the procedure, and consequently, issued Order No. 7264179 for violation of section 77.1607(b). In addition to finding the alleged violation, Billups also found that it was a significant and substantial ("S&S") contribution to a mine safety hazard, and that it was caused by Dynamic's unwarrantable failure to comply with the standard. Dynamic contested the Order, asserting that there was no violation, or, if there was, it was not S&S or a result of unwarrantable

failure.¹ Dynamic sought temporary relief from the Order.² The Secretary answered, asserting that the Order was valid in all respects, and opposed temporary relief. I denied temporary relief, and scheduled the matter to be heard in Beckley, West Virginia.³

The issues are whether Dynamic violated section 77.1607(b) and, if so, whether the violation was the result of Dynamic's unwarrantable failure to comply with the standard.

I. Factual Background

Bruce Billups is an MSHA surface coal mine inspector, a position that he has held for

¹ The Order was later modified to delete the S&S finding. The unwarrantable failure finding remained.

² Section 105(b)(2), 30 U.S.C. §104(b)(2), of the Act provides for temporary relief from an order issued under section 104.

³ Prior to the hearing, the Secretary moved for partial summary judgement. The Secretary argued that the violation was established on the record. The parties agreed that the grader pushed the truck up the hill and, in the Secretary's view, the act of pushing the truck meant that Dynamic "concede[d] . . . [that the truck was] assisted up the mountain." Mot. for Partial Sum. Dec. at 2 (emphasis in original). Therefore, "[t]he only issue . . . [to] be addressed . . . [is] whether the driver of the . . . truck . . . had *full control* of that truck[.]" as required by the standard. She argued that the key words of the standard are "full control" and, "[i]f a coal truck driver need[ed] assistance to navigate the road and [was] being pushed from behind by a grader, then the driver of the truck clearly [had] yielded some control of the vehicle and it cannot be said that the driver of that truck [had] 'full control' of the truck." Mot. for Partial Sum. Dec. at 2.

Dynamic countered, arguing that the motion should be denied, because the issue of whether the truck driver had "full control" over the truck was a genuine issue of material fact. In Dynamic's view, the regulation must be interpreted to harmonize, not conflict, with its objective, which is the safe operation of loading and haulage equipment. Use of the grader to assist a haulage truck does just that, by "ensuring the truck's smooth operation." Op. to Mot. for Partial Sum. Dec. at 3. The facts at hearing would show that, "[w]hile the . . . grader may give assistance, the operator of the truck [was] always in full control . . . [in] that the truck's steering and braking control [was] not compromised and . . . there [was] no danger." Op. to Mot. for Partial Sum. Dec. at 3.

I deferred ruling on the motion at that time. I now **DENY** the Secretary's Motion for Partial Summary Decision. As the hearing made clear, the material facts necessary to decide the issue of liability are very much in dispute.

over seven years. Before working for MSHA, he had 25 years of experience in the coal mining industry. Much of his experience related to the operation of heavy mobile equipment such as "loader[s], . . . dozers, graders, [and] all different types of trucks." Tr. 13. Billups also served as a surface coal mine foreman. Tr. 14.

The contested Order had its antecedent in an event that occurred on April 25, 2007. On that date, Billups was conducting an inspection of the Coal Mountain No. 1 Mine, a surface coal mine located in Wyoming County, West Virginia. Tr. 8; see Stip. 2. Shortly after arriving at the mine, Billups observed a grader sitting close to a coal haulage truck near the bottom of the mine's main haulage road.⁴ Billups approached the grader operator and asked him what he was doing. The operator told Billups that when haulage trucks lost traction and were unable to ascend to the top of the road, he moved the grader behind the trucks and pushed until the trucks regained enough traction to move on their own. Tr. 16. Billups advised the grader operator that pushing the trucks was a "bad practice." Tr. 16. He also told the operator that he would discuss the practice with the mine foreman, Kirby Bragg. Tr. 16.

Later that day, Billups met Bragg. He told Bragg that he, Billups, did not think it was a good practice to push the loaded coal trucks up the steep grade. Tr. 17. In fact, Billups indicated that he believed that the practice violated section 77.1607 (b). Billups stated, "I told him what the law was or the standard and I read it to him." Tr. 76; see also 54, 87. Billups testified that he warned Bragg that if he saw the practice repeated, he would cite the company for a violation of the regulation. Tr. 75. According to Billups, Bragg stated that he did not think that the practice was a violation, and that MSHA and the company would have to "agree to disagree." Tr. 17, 76; see also 369; Ex. 12.

Billups returned the following day to complete the inspection. Upon reaching the mine, he contacted Bragg, asked him if he would like to accompany him, and Bragg declined. Tr. 19. As Billups traveled in his car toward the area where he intended to resume the inspection, he overheard a haulage truck driver on the mine's Citizen's Band ("CB") radio system state that his truck was stuck and needed a push. Tr. 20. Billups turned his car around and headed toward the haulage road where he saw the 18-wheel truck. Tr. 20. It had lost traction and could only spin its wheels. Tr. 20. As Billups watched, he saw the grader "come down the hill, turn around, and then start to push the truck up the steep grade." Tr. 21; see Ex. R-1 through R-3. The road was very dusty and, according to Billups, much dust was thrown up by the truck's movements. Tr. 27; see Ex. R-1 through R-4. Billups did not know how fast the truck and grader were traveling during the assist, nor did he ask. He did not interrupt the assist, but instead, called Bragg on the CB radio and informed Bragg that he would issue a withdrawal order. Tr. 26, 62-63. He also contacted the truck driver and told the driver that he wanted to speak with him before he left the mine. Tr. 26.

⁴ The gravel-surfaced road was steeply inclined. Near its midpoint was a sharp switchback. Fully loaded haulage trucks were required to ascend the road.

After observing the grader operator assist the truck driver, Billups issued Order No. 7264179. The Order states, in relevant part:

The driver of the loaded Kenworth tractor trailer truck Serial No. 98526 being used at the mine to haul coal over a loose dirt and gravel roadway did not have full control of the truck while it was in motion, in that he had to be pushed upgrade by a 14H Caterpillar motor grader. It is reasonable to think that if this continues the truck driver could be injured when exposed to the hazards of bed pins breaking, or fifth wheel king pin breaking causing the cargo trailer to be shoved into the truck operator's cab area. The mine foreman of the operator was warned of this violation in a pre-inspection conference on 04-25-2007. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. R-5.

II. Findings of Fact and Conclusions of Law

A. Testimony of the Secretary's Witnesses

1. Bruce Billups

As previously noted, section 77.1607(b) requires a haulage truck driver to have "full control" of his truck while it is in motion. Billups issued the Order because, during an assist, the driver "does not have full control of the steering. He does not have full control of the braking, and he does not have full control of his acceleration." Tr. 29.

Billups explained that when the truck is being pushed and the truck driver turns the truck's wheels, "the tractor [part of the truck] is still going forward . . . and the grader is actually forcing the tractor part of the truck through the turn." This, he stated, "is known as jackknifing."⁵ Tr. 35. Billups maintained that jackknifing can very easily happen when the road is composed of loose gravel and dirt, and that on April 26, such was the composition of the roadway. Tr. 35; see Ex. R-5, R-6. He also stated that the "[truck] driver . . . cannot stop as he wants to," because the force applied by the grader from behind can continue even though the truck driver applies the brakes. Tr. 34. Billups agreed, however, that the truck driver retained

⁵ Jackknifing was best explained by Dynamic's expert witness, Jose Calgone. He testified that it occurs when "the trailer starts overcoming the tractor . . . [and] the direction of the tractor and the trailer, instead of being one behind the other, starts changing angles." Tr. 363. According to Calgone, jackknifing can happen "on icy roads, abrupt maneuvers, sudden changes of direction by the driver . . . usually at highway speed." Tr. 363.

the ability to use the truck's brakes, as needed.⁶ Tr. 67.

Billups also testified that when the truck driver sees an obstruction in the road, such as a large rock, he "will tend to let up on the fuel," but the grader operator will continue to push the truck. Tr. 30. Thus, the truck operator has "cede[d] . . . power from the engine when he let up to get over a rough area or obstacle." Tr. 30. "[I]f he wants to slow the truck down to go over . . . [a] hump, when he decelerates, the grader still has that driving force pushing him forward. So he [does not] have full control of the truck." Tr. 31. Such a situation is dangerous because the force from behind can put "undue pressure" on the bed-pins holding the cargo trailer to the trailer bed, and on the king-pin connecting the tractor to the trailer. Tr. 37-38. Should either the bed-pins or king-pin break, the cargo trailer can be forced into the truck's cab.⁷ Tr. 37-40. Billups admitted, however, that he had no idea of the amount of mechanical force necessary for the grader operator to push the truck bed into the truck cab. Tr. 82-83. He also admitted that, after the grader finished pushing the truck, he examined the tractor-trailer and found no defects; the bed-pins and the king-pin showed no visible damage. Tr. 65-66.

With regard to other possible hazards, Billups expressed concern that the truck driver might be unable to timely stop, in the event that other equipment using the road were on a collision course with the truck. He understood that during the assist, the truck driver could not see any oncoming traffic in the "very steep" area of the road's switchback turn. Tr. 44. Therefore, the grader operator would continue to push the truck, even though the truck driver would be trying to bring the truck to a halt. Additional hazards to the truck driver included a 60-foot drop-off along one side of the road, as well as a drainage ditch or "sump hole" at the bottom of the drop-off.⁸ Tr. 45-47, 49; see also 125; Ex. R-10.

Finally, Billups explained that when a grader is assisting a tractor-trailer, the grader operator and the truck driver communicate by CB radio on a channel that is different from that regularly used by equipment operators at the mine. Tr. 63. Billups expressed concern, however, that other equipment operators could interfere with the effectiveness of the communication by unintentionally overriding their designated channel. Tr. 53-54. Billups testified that there had

⁶ The tractor-trailer's brakes were described by MSHA's expert witness, Ronald Medina, as consisting of foot operated hydraulic service brakes and spring operated parking brakes. The parking brakes are not on each wheel and, in general, the service brakes are 50% stronger than the parking brakes. Tr. 160.

⁷ Although Billups admitted that he had never seen a bed-pin break as a result of a grader pushing a tractor-trailer, he maintained that he had heard about it happening "through casual conversation." Tr. 80. In fact, he stated, a front-end-loader had shoved a tractor-trailer into, and through, the cab of a truck at a mine operated by Princess Susan Coal Company near Montgomery, West Virginia. Tr. 81.

⁸ Medina confirmed, however, that the roadway was "bermed." Tr. 158.

been “a multitude of injuries associated with pushing,” including injuries to drivers’ necks, backs, and heads, as well as sprains. In his opinion, such injuries were reasonably likely to be fatal.⁹ Tr. 87, 97.

Due to the warning given to Bragg on April 25 about the assist practice, Billups found that the alleged violation, committed the next day, was the result of Dynamic’s unwarrantable failure.

2. Ronald Medina

Ronald Medina, a mechanical engineer working at MSHA’s Approval and Certification Center, appeared as an expert witness for the Secretary. See Tr. 102. Medina described the areas in which he specialized as “hydraulic systems and air systems such as brake systems [and] steering systems.” Tr. 104. He also stated that he participated in approximately 10 to 12 MSHA accident investigations per year, in order to “evaluate the equipment . . . involved in the accident and determine if there were any equipment-related defects that contributed to the accident.” Tr. 105.

In preparing for his testimony, Medina went to the mine with Inspector Billups and took measurements of the steepness and length of the road where the truck had been pushed. Tr. 106. He also reviewed photographs of the truck in question. Tr. 106. Referring to the notes and diagrams that he had made during his investigation, Medina described the subject haulage road as being composed of dirt covered with loose gravel, and connecting with a state public road used by regular car traffic. Tr. 107-09, 115. According to him, part of the road was “fairly steep,” in that a 17 % grade lead to the first switchback. Tr. 109, 111. Just before the switchback, the grade increased to 18% and, as the road entered the switchback, the grade increased again to 19%. Tr. 110; Ex. R-10.

In Medina’s opinion, there are several reasons why a truck driver would not have full control of a fully loaded tractor-trailer haulage truck when it is being pushed by a grader. First, if the truck driver takes his foot off of the throttle pedal, “there’s still the force and the momentum of the motor grader behind him that pushes him . . . forward even though he let his foot off the

⁹ Billups confirmed that, during his deposition, he had stated that he knew of no fatal injuries or any other injuries resulting from the practice of pushing tractor-trailor trucks with equipment. He maintained, however, that since his deposition, he had become aware of MSHA data showing that “multiple injuries” had been caused by the assist practice. Tr. 57. Medina’s opinion on the likelihood of fatal injuries as a result of the maneuver was more speculative. He knew of no incidents which had lead to a fatal accident, but believed that there were circumstances in which the practice “*could* cause the driver to lose some control of the truck, and it *could* develop into a fatal accident.” Tr. 162-63 (emphasis added).

throttle pedal.” Tr. 112. Moreover, when the truck driver puts his foot on the brake pedal, the truck’s brakes also have to contend with the force of the grader as it continues to push on the truck which, in turn, increases the stopping distance of the tractor-trailer. Tr. 112-13.

Pushing from behind also increases the possibility that the tractor-trailer will jackknife. Medina stated that “when the . . . grader is pushing on the back of the trailer . . . the trailer in turn pushes on the back of the tractor, so there’s a possibility that . . . the vehicle will want to fold or jackknife.” Tr. 113-14. The danger of jackknifing is increased if the truck spins out. Tr. 114. Because of lost traction, the tractor would not be helping in any way to propel the trailer. All of the force would be coming from the grader, which would increase the possibility that the tractor-trailer would “fold.” Tr. 117. Further, as the truck is being pushed into the switchback curve, the danger of jackknifing increases. Tr. 116. Once the tractor turns into the curve, the “difference in the angle” between the tractor and the grader means that the force from the grader increases the pressure on the truck to jackknife. Tr. 117-18.

Additionally, Medina believes that the rough patches in the road are another cause for concern, in that they could cause the tractor-trailer and the grader to separate as the grader pushes the truck. When the grader reestablishes contact, both vehicles could be jarred and jostled, which could interfere with the truck driver’s ability to steer, shift, and apply the brakes. Tr. 118-19.

Medina also testified that the grader, which is one third of the weight of the loaded truck, does not have the “traction to be able to control the haul truck if something went wrong and the haul truck started going backward down the slope.” Tr. 119; see also 121-22, 166. This could happen if the truck’s brakes fail or their holding capacity were, for some reason, diminished. Tr. 119-20, 130. Also, if the truck’s U-joint breaks, the truck loses power to its rear wheels and, in Medina’s opinion, “anytime a truck . . . on a very steep road . . . loses its engine power . . . that’s a dangerous situation.” Tr. 168. The driver might delay applying the brakes, thinking that the truck has just jumped out of gear, and the truck could begin to roll backwards, pushing the grader down the hill with it. Tr. 120-21, 128-29.

According to Medina, another potential loss of control could occur when the grader pushes the truck around the switchback curve. The grader operator may not be able to see what is in front of the truck. If another truck is approaching from the opposite direction, the truck driver may want to stop or slow down, but the grader operator would be unaware of what the truck driver faces. Consequently, the grader operator would continue pushing the truck where the truck driver does not want to go.¹⁰ Tr. 132.

Finally, like Billups, Medina believes that an undetected defect could cause the tractor’s

¹⁰ Medina was concerned that the truck driver and grader operator would be unable to communicate fast enough via CB radio, to prevent an accident. He was also concerned about another miner “talking on” the CB channel that the pair was using. Tr. 131-32.

bed-pins or king-pin to fail as the grader pushes the truck from behind. If this were to happen, he is concerned that the trailer would be pushed into the truck's cab. Tr. 133, 153. In sum, Medina opined that the practice results in the truck driver "ced[ing] some of the control of the truck to the grader operator." Tr. 107.

B. Testimony of Dynamic's Witnesses

1. Bobby Justice

B&J Trucking Company owned the truck in question, and Bobby Justice is the owner of B&J and has driven the truck. Tr. 171-72. Justice has spent 28 years as a truck driver and he and his company have been associated with Dynamic for six or seven years. Justice testified that the practice of a grader assisting a tractor-trailer truck up a steeply graded road is common in the surface mining industry. Tr. 172. He estimated that he had driven trucks assisted by graders approximately 20 times at Dynamic's mine. He had never been advised that the practice was unsafe, nor had the drivers ever complained about safety. Tr. 172-73. He indicated that he was unaware of any accidents resulting from the practice. Tr. 186.

According to Justice, there is a difference between losing traction, which prevents further travel, and losing control, which prevents steering or stopping. Tr. 174. In his opinion, when a truck is being pushed, the truck driver "is definitely in full control" of the truck, because of full use of the throttle, brakes and steering. Tr. 175.

Justice explained his understanding of how the practice of assisting trucks works. When a truck first loses traction, a supervisor is called and informed of the problem. Tr. 180. The grader operator is then directed to go to the area where the truck has stalled and assist the truck. Tr. 180. Justice believes that everyone at the mine knows that the truck is going to be assisted, because they overhear discussions via the mine's CB system. Therefore, "everybody stops and waits on the truck to be assisted." Tr. 179. Once the grader reaches the truck, the driver and the grader operator get on the same CB channel, which means that any problems that develop during the assist will be "instantly" communicated. Tr. 180-82. The driver puts the truck in the lowest gear possible, and the grader pushes the truck until it can move on its own.¹¹ Tr. 175-76. Because the truck is in low gear, the truck and the grader always travel at speeds ranging from three to five miles per hour. Tr. 175, 186-87, 196-97. The low speeds mean that dust is not a problem for the truck driver or the grader operator. Tr. 186-87, 198. Normally, the assist starts at the steepest part of the road, and it lasts for no more than 30 feet before the tractor-trailer

¹¹ Justice maintained that he never experienced a truck coming out of gear during an assist. However, were such a thing to happen, he believes that the truck driver would simply activate the emergency brake and stop the truck. Tr. 179.

regains traction.¹² Tr. 179, 195.

The truck driver retains the ability to use his brakes. The brakes are subject to inspection on a daily basis before the truck is taken onto the road.¹³ Tr. 176-78. According to Justice, if the truck's hydraulic brakes lose air and become defective, they will "lock up" and the truck will stop. Tr. 177. Justice believes that once the brakes lock, they hold the fully loaded truck, even on a 17% to 19% grade. Tr. 200-10. Therefore, the truck will not roll backward down a grade. Tr. 200-10. However, Justice acknowledged that brakes can go out of adjustment, which could affect a truck driver's ability to stop as quickly as he would like. Tr. 191. In Justice's opinion, even if, for some reason, a truck loses its brakes and starts rolling backwards, it can be stopped because the grader has good brakes and, in addition, the grader operator can lower the grader's blade. Tr. 182. In addition, if, for some reason, the truck's transmission slips out of gear into neutral on its way uphill, the truck driver would "probably just lock his truck up," by engaging the emergency brake, which would probably necessitate dumping the load. Tr. 194.

Justice testified that he has never had a truck jackknife during an assist, and that he does not understand how such a thing is possible. Tr. 185-86. Furthermore, he does not believe that a truck can go off the road while it is being assisted, because the truck driver has full control. Tr. 186.

2. Derick Steele

Dynamic also called as a witness Derick Steele, the driver of the truck involved in the assist in question. Steele testified that he has been driving at the mine for approximately two years. He explained the assist process from the standpoint of a haulage truck driver. He stated that he is able to determine whether he will need an assist by the way the load feels. If he thinks an assist is necessary, he will pull to the side of the road and make sure the grader operator is alerted via CB radio. After the grader reaches the truck, Steele and the grader operator, "get on the CB radio and . . . have a discussion." Tr. 206. Steele tells the grader operator what gear the truck will be in, or the grader operator tells Steele what gear the truck should be in--usually first gear or, as Steele called it, "low, low gear." Tr. 207. All other traffic on the road is stopped. Tr. 206. Once the grader begins to push the truck, Steele does not change gears. Tr. 208. The grader operator pushes until the truck gets traction. Tr. 207. While the grader operator is pushing, Steele has his foot on the throttle. Tr. 209. If he needs to communicate with the grader operator, he does so over the CB radio. Steele maintained that he never experiences any

¹² However, truck driver Derick Steele believes that a truck is usually pushed for "30 to 40 foot, 50 at the most," during an assist. Tr. 214.

¹³ Grader operator Kenneth Kenneda noted that, although equipment is pre-shift examined, there are times after the examination when mechanical failure will occur during the course of the shift. Tr. 264.

bumping or jostling, because the truck and grader move as a unit. "Me and Darren help one another," he testified. "If the truck's going and the grader's going, we go. If I stop, we don't go. If he stops, we don't go. You got to help one another. It's teamwork." Tr. 210. Moreover, he has never had dust-related visibility problems during an assist, because the vehicles do not travel at speeds that would raise appreciable dust. Tr. 219. Steele also testified that when the grader is pushing the truck, he can always steer it. Further, although he has the ability to use the truck's brakes, there is no need to do so. Before the truck gets to the switchback turn, the road levels somewhat and the truck usually regains traction. Steele advises the grader operator over the CB radio that he has traction. The grader will stop pushing, Steele switches gears, and the truck pulls away. Tr. 215, 219, 223-24.

Steele stated that he does not worry about the truck going over the embankment during the assist, because the roadway is bermed and "kind of wide," and it gets wider after the curve. Tr. 216. Further, the truck has traction and is usually moving on its own by the time it reaches the spot in the road where it could roll off and end up in the sump area. Tr. 216. Additionally, Steele maintained that he is not worried about jackknifing, because he believes that if the truck stops, the grader is unable to push it. Tr. 218.

Finally, Steele testified that, although he has experienced problems with a coal haulage truck coming out of gear and with a broken U-joint, in such case, he is not concerned about the truck rolling backwards into the grader, because the truck's brakes are reliable. Tr. 226. In this regard, Steele noted that he conducts a pre-shift examination of the truck, during which he checks "the tires, the brakes, the drive lines, . . . [the] wheels and everything."¹⁴ Tr. 227.

3. Darren Kenneda

Darren Kenneda, the grader operator involved in the assist maneuver at issue, was also called by Dynamic to testify. Kenneda's description of what usually happens during an assist mirrored Steele's. Tr. 236-38. Kenneda emphasized that, because the truck moves slowly, the grader and truck are always in contact and there is no bumping and jostling. Tr. 242. In addition, he has never experienced a time when he could not communicate with the truck's driver. Tr. 240. Kenneda always instructs the driver to keep his foot on the throttle, because if the driver takes his foot off, the grader will not be able to push the truck. The loaded truck is just too heavy, he testified, and without the extra help from the truck, both the truck and grader will come to a stop. Tr. 241.

Kenneda insisted that he has never experienced problems during an assist. He has never feared going off the road and over the embankment, or into the sump, because the road is

¹⁴ He subsequently testified, however, that "anything is possible," even brake failures. Tr. 230.

“decently wide.” Tr. 245-250. He stated that he has never experienced visibility problems.¹⁵ Once the truck enters the switchback, Kenneda can see what is in front of the tractor-trailer, and if his view is obstructed and another vehicle is coming down the hill, the haulage truck driver will alert him on the CB. Tr. 264, 268. As for the possibility of jackknifing, Kenneda does not believe that it can happen, because if the truck stops, the grader does not have enough power to move the truck. Tr. 250. For these reasons, Kenneda believes that the truck and the grader are always under control.¹⁶

4. Kirby Bragg

Mine Superintendent Kirby Bragg was the last non-expert witness for Dynamic. Bragg recalled the inspection of April 25 and 26, and testified about his view of the practice of assisting tractor-trailer trucks with graders. Bragg has worked in the mining industry since 1975. He maintained that the practice is common, and that wherever he has worked that tractor-trailers have been used to haul coal, graders have been used for assistance. Tr. 286.

Bragg described what he recalled happening on April 25:

[Billups] noticed that the grader operator was sitting at the bottom of the hill. He asked me what the grader operator was doing. I said he was waiting there to assist some tractor-trailers in that curve area. He explained to me that he didn't think that was a good practice. And he explained to me that he didn't like that idea because he thought there was a possibility that they would not be in full control of their vehicles. And I explained to him that . . . it's a common practice that occurs elsewhere on other operations, this operation as well, and that both the truck driver and the grader operator had full control of their equipment they were running, and it was only for a short . . . distance and it was at very slow speeds.

Tr. 286; see also 292. As Bragg remembered, during the discussion, Billups made clear that he believed that the practice violated section 77.1607(b), but Bragg did not recall Billups saying that if he saw the grader assisting a tractor-trailer in the future, he would cite the company. Tr. 291-

¹⁵ Kenneda maintained that the truck and grader go so slowly that they do not raise “that much” dust. Moreover, the fans that cool the engine on the front of the truck blow downward on the roadway, rather than to the side of the truck. Tr. 249.

¹⁶ On cross examination, however, Kenneda agreed that if the truck lost its brakes and rolled back toward the grader, the grader would not be able to stop the truck. Tr. 253. Although he has never experienced a loss of brakes, he has heard about it happening to other drivers. He has also heard about problems with a U-joint breaking, problems with steering, and problems with the transmissions. Tr. 263. Further, he admitted that if the grader's engine stalled while assisting a truck, the truck would try to move forward. Tr. 254-55.

92. Bragg did not instruct those who worked under his supervision to discontinue the practice, because "it was an accepted practice," one that had been conducted "time and again." Tr. 292. In fact, depending on weather and road conditions, the practice was an "everyday occurrence." Tr. 293.

On April 26, when Billups told Bragg that he had seen a grader assisting a tractor-trailer and, consequently, that he would issue an order, Bragg responded that he did not think that the practice violated any regulations. Nonetheless, Bragg instructed the grader operator to discontinue the practice until further notice.¹⁷ Tr. 297.

5. Jose Calonge

Jose Calonge testified as a tractor-trailer and transportation expert witness for Dynamic. Calonge holds a Bachelor of Science degree in mechanical engineering from the Missouri School of Mines and Metallurgy, and is a transportation consultant. Prior to becoming a consultant, he worked as the chief engineer for Fruehauf Trailers, and he has worked for approximately 40 years in the trucking industry.¹⁸ Tr. 302-06.

In preparation for his testimony, Calonge prepared a report based on his review of documentary background materials and a trip to the mine. Tr. 304-05; Ex. C-7. Calonge testified that the practice of pushing a loaded truck is "pretty common, not only . . . in the coal industry, but a lot of industries . . . either because of the grade or because of the terrain, mud, obstacles." Tr. 305; see also 310.

For several reasons, Calonge is also of the opinion that the practice is safe. He explained that when a tractor-trailer needs an assist, it is because there is insufficient traction between the wheels of the tractor pulling the trailer up the hill. Therefore, pushing from behind overcomes the inertia holding back the truck. Tr. 310-11. Calonge described the procedure as benign. "There's no way . . . that he [the driver] cannot have control of this equipment at this very low speed . . . everything is very controlled." Tr. 311. The slow speed allows the truck driver and the grader operator "ample time to react to any circumstance that might arise . . ." Tr. 329. Although he agreed that the truck could jackknife because of the way the tractor and the trailer are linked together, Calonge concluded that the slow speed of the vehicles during an assist makes it "very unlikely" to happen. Tr. 322, 351-52. He also opined that the slow speed of the vehicles makes bumping and jostling a non-issue, as well. Tr. 322.

¹⁷ Since issuance of the Order, 18-wheel tractor-trailer trucks are no longer used to haul coal at the mine, and have been replaced by 10-wheel tandem trucks. Although the tandem trucks haul less coal than the tractor-trailers, they can ascend the hill without assistance. Tr. 262-63, 266-67.

¹⁸ However, Calonge is not a professional engineer, and he has no prior experience in the mining industry. Tr. 333.

Calonge expressed no concern that the practice would result in the trailer being pushed into the cab of the truck as a result of the king-pin failing. He described the king-pin as a "very strong structure" that can withstand forces far in excess of those exerted during an assist. Tr. 309. In fact, he testified that it takes 210,000 pounds of force to shear a king-pin and, at most, a grader can apply between 25,000 to 30,000 pounds of force. Tr. 321. Further, Calonge did not believe that failure of the bed-pins could cause a loss of control, because the tractor is connected to the trailer by "a massive six, seven-inch diameter cylinder in front of that trailer, [and] this humongous hydraulic cylinder . . . is not going to shear." Tr. 319-20.

In Calonge's view, it only takes from 10 to 12 feet of pushing for the truck to gain traction, "otherwise, it's not going anywhere if the wheels are spinning." Tr. 345. Calonge believes that the grader does not have enough power, by itself, to push the trailer and tractor uphill when the truck has lost all traction. Tr. 345. Furthermore, from the moment the tractor-trailer begins to move, the driver has directional control, and if the driver applies the truck's brakes, the grader does not have enough power to hinder the ability of the tractor-trailer to stop. Tr. 312, 345-47. Even were the tractor-trailer to lose its service brakes, the brakes would lock instantaneously on all five axles, and the locked brakes have more than enough capacity to hold a fully loaded truck, even on a steep hill. Tr. 314-15; see also 334. Moreover, the automatic slack adjusters on the service brakes mean that the brakes are always properly adjusted.¹⁹ Tr. 317. In addition, were the truck driver to apply the brakes and the grader were to continue pushing, the difference in weight of the tractor-trailer and the grader means that the truck would still stop. The grader simply does not have the power to overcome the weight of the truck. Tr. 318-19. Further, any time the truck moves in a direction that the driver does not want--for example, if the truck's transmission fails and the truck begins to roll backward--all the driver has to do is apply the emergency brake by pulling a lever on the dash board. Tr. 323.

Calonge admitted that his opinions regarding the truck's braking ability and the force with which the grader pushed, were not based on any mathematical calculations. Tr. 317. He justified his position by stating that "when you do this for 40 years it's second nature, you understand these things, not to have to write them and do calculations." Tr. 338.

C. Fact of Violation

The Secretary emphasizes that the standard requires a mobile equipment operator to have "*full control* of the equipment while it is in motion." 30 C.F.R. §77.1607(b) (emphasis added). She states that "the main issue in this case is what is 'full control' and whether or not the operator of the coal truck is maintaining 'full control' when he is being pushed from behind to get assistance up the steep grade of the haul road." Sec'y Br. at 6. The Secretary points to Billups' testimony that during the course of a push, the driver necessarily cedes some control of the tractor-trailer to the grader operator. She particularly notes Billups' testimony that during the

¹⁹ Calonge noted that the equipment is inspected every day and is well maintained. Tr. 341-42.

assist, there are times when the driver needs to decelerate due to road conditions, but the grader continues to push the truck forward, interfering with the driver's control of the truck.²⁰ Sec'y Br. at 8. The Secretary states that when the driver takes his foot off of the accelerator, "the propulsion of the truck is being altered by the pushing force of the grader." Sec'y Br. at 9.

Also, according to the Secretary, the braking ability of the truck driver is compromised because when the driver applies the brakes, the grader continues to push the truck forward. Sec'y Br. at 8. Citing to Medina's testimony, the Secretary argues that if the truck driver attempts to apply the brakes while being pushed by the grader, the normal stopping distance is increased because the truck must also stop the force of the grader, which is continuing its forward thrust. Sec'y Br. at 10. Therefore, the grader causes the truck driver to "[lose] some control over [his] braking capabilities." Sec'y Br. at 10. Moreover, there is a possibility that the truck is subject to an involuntary loss of control, as the grader pushes the truck forward and the truck begins to turn through the curve of the switchback. The Secretary asserts that, "there is a possibility that the grader will push the tractor-trailer portion of the truck into a jackknife." Sec'y Br. at 8. She especially notes Medina's testimony that pushing the truck through the switchback increases the potential for jackknifing. Sec'y Br. at 10-11.

The Secretary maintains that "the plain language of the standard . . . requires that the coal truck be able to navigate the haul road under its own power and under the full control of the truck driver," and that the truck driver lacks "full control over the propulsion, braking and steering of the equipment," thus establishing the violation. Sec'y Br. at 11.

The company counters that the evidence proves that the grader operator and the coal truck operator are always in full control when the grader is assisting the tractor-trailer. Dynamic emphasizes that neither the cited grader nor truck was defective and, when Billups watched the assist, both vehicles were where their operators intended. Dynamic Br. at 3-4. The company cites *Garrett Const. Co.*, 4 FMSHRC 2202 (Dec. 1982), in which Commission Administrative Law Judge Charles Moore found that the operators of equipment that collided, nonetheless, had "full control" when their vehicles were not defective and the vehicles went where the operators intended. Dynamic Br. 3-4. Dynamic also notes that the testimony establishes that the practice of assisting haulage trucks up a grade is common in the industry. Dynamic Br. at 5.

Dynamic argues that the Secretary should be required to establish either that the inspector observed some loss of control, or that the inspector observed a hazard. Dynamic Br. at 6. All that Billups observed was a loss of traction, which is not the same as a loss of control. Dynamic Br. at 7. Moreover, according to Dynamic, the testimony establishes that the practice was safe, because of the many precautions that were in place. In particular, the slow speed of the assist rendered the truck driver and grader operator able to react to any situation that might arise.

²⁰ The Secretary also notes that the same problem was identified by her expert witness, Medina. Sec'y Br. at 9.

Dynamic Br. at 7; 11. The evidence further establishes that the truck retained its braking and steering ability during the assist and, finally, that the truck driver and the grader operator were in constant communication via CB radio. Dynamic Br. at 7-8,11.

Careful review of the evidence supports the Secretary's position. The standard requires a mobile equipment operator to have "full control of the equipment while it is in motion." 30 C.F.R. §77.1607(b). "Full" is defined as "being at or of the greatest or highest degree" and "control" is defined as having the "power . . . to guide or manage." *Webster's Third New International Dictionary* (2002) at 919; 496. Thus, "full control" means having "complete" power to guide or manage. Here, the evidence shows that when an assist is in progress, as on April 26, the tractor-trailer driver does not have complete power to manage the truck. For the driver to have full control, the truck's control mechanisms--its throttle or accelerator, its brakes and its steering apparatus--must at all times be capable of management by him, and the ability to activate any one or any combination must not be ceded in any degree to a non-operator of the equipment. Rather than having full control, the facts reveal that during an assist, the tractor-trailer driver and the grader operator share control of the truck, in that both supply power that causes it to accelerate to the point where its driver can resume full management of the vehicle's acceleration.²¹ The facts also establish that the tractor-trailer driver and the grader operator share control of the truck's deceleration.²² Until the tractor-trailer reaches a speed wherein it is able to pull away from the assisting grader, its driver shares control over the acceleration and deceleration with the grader operator. Therefore, I find that the cited assist procedure violated section 77.1607(b), as alleged.²³

D. GRAVITY

In the Secretary's view, the violation was serious, because she proved that there are many situations during an assist which can lead to a serious, even fatal, accident. She argues that visibility problems created by the dust raised during an assist can cause collisions with oncoming

²¹ I fully credit the testimony of Steele that during the assist, regaining full control of the truck's ability to accelerate requires the truck driver to keep his foot on the throttle and the grader operator to keep pushing from behind. Tr. 207-11.

²² I fully credit the common sense opinion of the Secretary's expert, Medina, that when the truck driver takes his foot off of the throttle, the force from the grader continues to push the truck forward and, consequently, it will "take a longer time for [the tractor-trailer driver] to slow down or stop." Tr. 112.

²³ Because I have concluded that the tractor-trailer operator's loss of control over the acceleration and deceleration of the truck establishes the violation, findings with regard to the alleged loss of control of the truck's braking and steering capacity are unnecessary to resolve the issue.

vehicles. Sec'y Br. at 12. Further, if the tractor-trailer's transmission "pop[s] out of gear," the truck will effectively go into neutral and start rolling backward down the hill, pushing the grader with it, possibly over the embankment and into the sump. Sec'y Br. at 13-14. Finally, the problems with steering, especially at the switchback where the driver is "intending to go in one direction but is being pushed in another," can cause the truck to jackknife. Sec'y Br. at 14. Additional risks are created by the potential failure of the tractor-trailer's U-joint, which can cause the truck to roll backwards, and failure of the truck's king and bed-pins, which can cause the truck bed to go into the cab. Sec'y Br. at 15-16.

Dynamic essentially argues that the practice was not serious, because it did not create a hazard to any Dynamic employees, including the truck driver or the grader operator.

I find that this was a moderately serious violation. The evidence establishes that the violation could lead to an accident in which the driver of the truck would be seriously, even fatally, injured. However, the evidence also establishes that the chance of such an accident was unlikely, even remote. The Commission has stated that the focus of the seriousness of a violation "is not necessarily on the reasonable likelihood of serious injury . . . but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). However, there are times, as here, when an assessment of likelihood plays a supplemental role in determining the gravity of a violation. There is no question that an accident during the assist was possible, especially an accident caused by the truck experiencing mechanical failure, resulting in the truck traveling in a direction other than that intended. In fact, as Kenneda pointed out, even though equipment is subject to a pre-shift examination every morning, there are times, nonetheless, when mechanical failure will occur. Tr. 264. I also note the testimony of Steele, who, when describing the possibility that the truck's brakes could be defective, stated that "anything is possible," despite the required examinations. Tr. 230. I agree.

The evidence fully supports a finding that, had the brakes failed, the grader could not have held the truck in place, and I find Kenneda's testimony persuasive in this regard. Tr. 241. I also find persuasive in its logic, the testimony of Medina, who explained that, in the event of the truck rolling backward and the grader operator trying to hold it by lowering his blade, the procedure would have little effect "because the blade . . . is designed to push material forward," and the additional weight on the blade would cause less weight on the grader's tires, resulting in a loss of traction. Tr. 165-66. Therefore, I credit Medina's testimony over the unsupported assertion of Justice, that lowering the blade could help stop the truck. See Tr. 182. I further note the credible testimony of Calonge, that if the truck driver had applied the brakes and the grader operator kept pushing, the tractor-trailer would have stopped shortly because the loaded truck was heavier than the grader. The grader simply did not have the power to overcome the truck's weight. Tr. 318-19. From this, I conclude that the converse is true. If the tractor-trailer had started to roll backward, the grader would not have been able to exert enough force and braking power to stop the heavier truck, even if the grader's brakes operated effectively. A tractor-trailer with inadequate or no brakes, rolling backward down the steep incline in question, would pose a hazard to not only the truck driver, but to the grader operator as well. If the truck had hit and

pushed the grader or if the truck had rolled off of the road, the grader operator and/or the truck driver could have suffered serious, or even fatal, injury.

However, as I have indicated, in analyzing the gravity of the violation, I must also take into account the record evidence that such an accident was unlikely. Although Billups believed that there was a "multitude of injuries" associated with assists, neither he nor any of the Secretary's other witnesses were able to identify any specific accidents involving a tractor-trailer with grader assist, or any injuries that occurred as a result thereof. Tr. 54. Rather, the testimony offered by the Secretary regarding such alleged injuries was general and speculative.²⁴ Further, although it was possible that the truck's brakes could fail, it was unlikely. The truck's owner, Bobby Justice, testified that the brakes were subject to daily inspection, and therefore, I infer that any developing brake problem was likely to be detected. Tr. 176-77. Moreover, for the brakes to give out, the automatic slack adjusters would have to totally fail--something that was possible, but not likely, given daily inspections of the brakes. See Tr. 200-01.

In addition, given the low speed of the assist, there was little chance that the tractor-trailer would jackknife. I fully credit Calonge's testimony that, although it was conceivable that the truck could jackknife, it was very unlikely. Tr. 322, 351-52, 363. I also find that a collision with another vehicle during the assist, although possible, was unlikely. As Steele testified, prior to beginning an assist, traffic is stopped on the road and equipment operators are alerted by CB that the maneuver is in progress. Tr. 206; see also 263. Furthermore, the low speed at which the assist takes place means that, in most circumstances, the truck driver and the grader operator will have ample time to react to any unexpected traffic.

Finally, I find Billups' concern, that the trailer bed can be forced into the operator's cab if the king or bed-pins break, to be unsubstantiated. Tr. 37-40. As previously noted, the Secretary did not offer any specific examples that such accidents had ever occurred under circumstances similar to those at issue. In fact, Billups admitted that he had never seen such an accident, but had only heard of the possibility "through casual conversation." Tr. 80. I reject Billups' speculation in favor of the more persuasive explanation of Calonge, that the forces during an assist are simply insufficient to cause the truck's king-pin or bed-pins to fail. Tr. 331-32. Moreover, neither Billups nor any other witnesses for the Secretary had apparent knowledge of the six to seven-inch cylinder that secured the tractor to the trailer, and I accept Calonge's opinion that the cylinder would have to shear or otherwise break in order for the trailer to go into the tractor's cab-- a contingency that, under the circumstances, was extremely unlikely. Tr. 332. For these reasons, I find that the violation was only moderately serious.

²⁴ For example, Medina offered the opinion that jostling "could cause the driver to lose some control of the truck" and be injured, but he did not support his opinion with specific examples. Tr. 163.

E. Unwarrantable Failure

In the Secretary's view, the violation occurred because of Dynamic's disregard of Billups' April 25 warning. Sec'y Br. at 17. She contends that Dynamic "completely disregarded . . . Billups' instruction and continued to operate in the same fashion" on April 26, and that the company's continuation of the procedure in the face of the warning was "highly neglectful conduct . . . meet[ing] the definitions of unwarrantable failure and reckless disregard." Sec'y Br. at 18.

Dynamic argues that if it did not commit high negligence, then "it certainly is not guilty of aggravated conduct such as that necessary to justify the inspector's unwarrantable failure finding." Dynamic Br. at 13. The company notes that both Bragg and Kenneda testified that they did not believe the practice to be a violation. Dynamic Br. at 13. It also emphasizes that no miners complained to Bragg about the practice, that Bragg knew of no injuries as a result thereof, that Dynamic never received a prior citation, and that no trucks had jackknifed or gone over a berm and into the sump. Dynamic Br. at 14.

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence . . . in relation to a violation of the Act." *Emery Mining Corp.* 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or "a serious lack of reasonable care." *Id.* 2003-2004; *Rochester & Pittsburg Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure, and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent). Negligence, of course, is the failure to meet the standard of care required by the circumstances.


I conclude that the violation was not caused by Dynamic's unwarrantable failure to comply with the standard. I disagree with the Secretary's position that the company exhibited "reckless disregard" for compliance, because Bragg "completely disregarded" Billups' warning of a future citation. Tr. 17; *see* 54, 87; *see also* Sec'y Br. at 18. Although the record confirms that Billups advised Bragg that assisting tractor-trailers with graders is not a good practice, read section 77.1607(b) to Bragg, and warned Bragg that he would cite the company if he saw the practice repeated, and that the company engaged in the same conduct the following day, I am not persuaded that Dynamic's conduct amounted to "reckless disregard." *See* Sec'y Br. at 18. The record reveals that assisting coal haulage trucks in negotiating steep inclines was a common practice at the mine and in the industry. Tr. 172, 292-93. The company was never cited previously, nor did MSHA have any policy memoranda or public information bulletins notifying the industry of the prohibited practice. Tr. 82. As a result, when Billups and Bragg met on April

25, they honestly and openly disagreed on the interpretation of the regulation. As evidenced at hearing, strong arguments were presented by both sides as to whether the truck driver had full control of the truck during the assist. While I am persuaded that the standard was violated, the Secretary has failed to establish that repeating the haul truck assist on the second day of the inspection, despite the inspector's warning, constituted "aggravated conduct," "reckless disregard" and/or "intentional misconduct" that rises to the level of unwarrantable failure.

The Secretary is effectively asking Dynamic to have accepted, without question, either the inspector's interpretation of the standard, or being charged with elevated negligence and the onerous consequences arising therefrom.²⁵ Rather than unwarrantable, I find that Bragg's failure to ensure discontinuation of the truck assist practice, or to have Dynamic's management seek modification of the standard's application to its operation, represented ordinary failure to meet the standard of care required.²⁶ Therefore, I assess Dynamic's negligence as moderate.

ORDER

WHEREFORE, it is **ORDERED** that the Secretary **MODIFY** section 104(d)(2) Order No. 7264179 to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. §814(a), and reduce the degree of negligence from "reckless disregard" to "moderate," within 30 days of this Decision. Upon modification of the Order, this case is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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²⁵ Unwarrantable failure findings lead to closure orders and heightened penalties under section 104(d), sections 110(a)(3)(A), and 110(a)(3)(B). 30 U.S.C. §§814(d); 820(a)(3)(A); 820(a)(3)(B).

²⁶ Under section 101(c), an operator may obtain modification of a mandatory safety standard at its mine upon showing that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners" 30 U.S.C. §811(c).

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 23, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-712
Petitioner	:	A.C. No. 15-19076-141789
	:	
v.	:	
NALLY & HAMILTON	:	
ENTERPRISES, INC.	:	Chestnut Flats
Respondent	:	

DECISION

Appearances: Jennifer Booth, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Roy Timothy Cornelius, Billy Parrott, Peggy Langley, Conference and Litigation Representatives, MSHA, U.S. Department of Labor, Barbourville, Kentucky, for the Petitioner;
C. Bishop Johnson, Esq., Stephen C. Cawood, Esq., Cawood & Johnson, PLLC, Pineville, Kentucky, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Nally & Hamilton Enterprises, Inc. (N&H). The petition seeks to impose a civil penalty of \$3,095.00 for three alleged violations, designated as significant and substantial (S&S), contained in 30 C.F.R. Part 77 of the Secretary's mandatory safety standards governing mining operations at surface coal mines.¹

This matter was heard in Richmond, Kentucky on March 24, 2009. The parties stipulated that N&H is a mine operator subject to the provisions of the Mine Act, and that N&H abated the alleged violations in a timely manner. The parties' post-hearing briefs have been considered in the disposition of this case.

¹ Generally speaking, a violation is S&S if it is reasonably likely that a hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981).

I. Findings and Conclusions

Mine Safety and Health Administration (“MSHA”) Inspector David A. Faulkner inspected N&H’s Chestnut Flats surface mine from January 3 to January 5, 2008. Faulkner has been an MSHA coal mine inspector for approximately three years. Prior to his MSHA employment, he worked in the coal mining industry for seventeen years. Faulkner’s family owned a trucking company and he drove and maintained coal trucks for the family business.

a. Citation No. 7557475

During the course of his January 2008 inspection, Faulkner observed the production pit where trucks and loaders are operated to remove overburden in order to expose the coal seam. Faulkner observed a white RD-600SX Mack lube truck that carries liquids such as fuel, oil, and antifreeze, which is used to service mobile equipment at the pit. Specifically, Faulkner viewed the lube truck as it serviced a Caterpillar loader, three Caterpillar haul trucks, and three dozers. At that time, while the lube truck was servicing mobile equipment, Faulkner observed three people, on foot, adjacent to the mobile equipment, who were on the opposite side of the lube truck. The individuals apparently were operators of the equipment being serviced.

At approximately 2:15 p.m., Faulkner inspected the lube truck after it had completed servicing the mobile equipment. Faulkner noted that the back-up alarm on the lube truck was not operational. Faulkner explained that a back-up alarm is important because it warns individuals in high noise environments to avoid walking in the truck’s path as it is operated in reverse. The back-up alarm is particularly important because of the obstructed view resulting from the position of the tanks on the back of the truck. Consequently, the lube truck operator must rely on his rear and side view mirrors when backing up.

As a result of his inspection, Faulkner issued Citation No. 7557475 citing an alleged violation of the mandatory safety standard in 30 C.F.R. § 77.410(c) that provides that “[w]arning devices [on mobile equipment] *shall be maintained* in functional condition.” (Emphasis added). Specifically, Citation No. 7557475 states:

The operator *failed to maintain* the automatic reverse warning device in a functional condition on the White RD-600SX lube truck, S/N 2189, that is in operation at this mine. Warning devices *shall be maintained* in functional condition. The truck is being used around employees on foot and [in] congested equipment areas while performing routine maintenance.

(Gov Ex. 2). (Emphasis added).

Faulkner designated the violation as significant and substantial because he believed it was reasonably likely that mine personnel in the pit area will be struck by the lube truck if they are not warned to stand clear by the back-up alarm. The cited condition was attributed to a moderate degree of negligence. The citation was abated on January 5, 2008, after the back-up alarm was repaired. The Secretary proposes a civil penalty of \$946.00 for Citation No. 7557475.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). The obligation imposed on a mine operator by section 77.410(c) of the Secretary's regulations is to maintain equipment in "functional condition." "Maintenance" has been defined as "the labor of keeping something (as building or equipment) in a state of repair or efficiency: care, upkeep ..." and "[p]roper care, repair, and keeping in good order." *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), quoting *Webster's Third New Int'l Dictionary, Unabridged* 1362 (1986), *aff'd*, 156 F.3d 1076 (10th Cir. 1998).

Thus, the question is whether N&H failed to keep the back-up alarm in "good [working] order." Answering this question requires determining the length of time of the back-up alarm malfunction. The back-up alarm was the subject of a pre-shift examination that was performed at 6:00 am on January 3, 2008. Faulkner examined the pre-shift report and determined that the pre-shift examiner noted that the back-up alarm was functioning properly. As previously noted, Faulkner determined that the back-up alarm was not functioning at 2:15 pm.

Faulkner initially testified that, as a general proposition, it is not uncommon for pre-shift examiners to perform perfunctory examinations by checking boxes on the examination report that all systems are functioning properly. (Tr. 45-46). I too recognize that perfunctory pre-shift examinations are not uncommon. However, in this case, Faulkner does not question the accuracy of the pre-shift notation that the back-up alarm was operating normally. Specifically, Faulkner testified:

THE COURT: [The attorney for N&H] asked you do you have any reason – he said that the back-up alarm was checked off as operational on the pre-shift and he asked you if you have any reason to believe otherwise. And you said no, were you referring to you have no reason to believe otherwise that it was checked off, or you have no reason to believe otherwise that it was not working at the time of the pre-shift?

THE WITNESS: I have no reason to believe that the operator did an inadequate examination. The record is what I look at is the record, that's his record. When he checks that - -

THE COURT: Right. So I'm asking you do you believe that the warning device was working at the time of the pre-shift?

THE WITNESS: According to the record it was.

THE COURT: I didn't ask you what the record said. I asked you do you believe it was working?

THE WITNESS: I don't have no reason not to believe it.

THE COURT: So in other words, what time would the pre-shift have occurred?

THE WITNESS: Probably 6 o'clock

THE COURT: 6 a.m.?

THE WITNESS: 6 a.m.

THE COURT: What time were you there?

THE WITNESS: 14:15 when the citation was issued.

THE COURT: That would be 2:15 p.m.?

THE WITNESS: That's correct.

THE COURT: So is it your belief that between 6 a.m. and 2:15 p.m. on January 3rd, 2008, the back-up alarm became dysfunctional?

THE WITNESS: That's correct.

(Tr. 47-49).

The Secretary does not contend that the severity of the hazard posed by the inoperable back-up alarm required the lube truck to immediately be removed from service.² Thus, Citation No. 7557475 concerns a proper maintenance issue rather than a removal from service question. I am constrained by Faulkner's testimony. While ignoring a pre-shift report that noted a defective back-up alarm clearly would constitute a violation of section 77.410(c), Faulkner does not contend that pre-shift examiner determined that the back-up alarm was inoperable.

² The mandatory safety standard in section 77.404(a), 30 C.F.R. § 77.404(a), requires that mobile equipment that is in an unsafe condition must be immediately removed from service.

The pre-shift examination is a means to identify defects requiring repair that occurred during the previous shift. Fundamental fairness dictates that a mine operator must be given a reasonable period of time to address defects after they are noted by the pre-shift examiner, an opportunity that the evidence reflects was unavailable to N&H in this case. As the record does not reflect that the needed repair was not performed in a timely manner, the Secretary has not demonstrated that N&H failed to maintain the back-up alarm in functional condition. **Accordingly, Citation No. 7557475 shall be vacated.**

b. Citation No. 7557476

The RD-600SX Mack lube truck is a tandem three axle vehicle with six brake assemblies. The three axles are the front steering axle and the two rear drive axles. The six brake assemblies consist of two brakes on the front wheels of the steering axle, and four brakes on the rear wheels of the two rear drive axles. Each brake assembly consists of a clamp type brake chamber. When the brakes are applied by the truck operator, air pressure, held in place by a rubber diaphragm, accumulates. The air pressure pushes a slack adjuster out which, in turn, is attached to a push rod that turns a cam shaft that engages the brake shoe. (Tr. 87-88).

During his inspection, Faulkner conducted a brake function test on the Mack lube truck. Faulkner asked the operator of the truck to operate the engine until a maximum of 120 psi was achieved which pressurized the braking system. The truck operator was then requested to turn off the truck engine, place the transmission in low gear, and release the parking brake. Faulkner then walked around the truck and measured the stroke distance on the brake push rods to determine the effectiveness of each brake. Excess travel of the push rod causes metal to contact metal that results in a loss of compression. This condition is corrected by adjusting the slack adjuster to limit the push rod travel to under two inches. (Tr. 97).

Faulkner testified that he relied on the North America out-of-service criteria guideline for commercial vehicles. This guideline limits the maximum allowable travel of the push rod for normal rear brake function is two inches. (Tr. 104, 123-24). Faulkner believed the front drive axle brake assembly needed adjustment because it had two and one half inches of travel in the push rod. However, Faulkner conceded that the North America out-of-service guideline is not in MSHA's policy manual, and it has not otherwise been adopted as an MSHA safety standard. (Tr. 123).

Faulkner opined that, if there is one maladjusted slack adjuster on a truck with five otherwise functioning brakes, it would have a negative impact on the overall braking system because it puts additional stress on the five functioning brakes. (Tr. 91-92). Faulkner was particularly concerned with the loads that the truck carried. He estimated that the truck contained approximately 4,000 gallons of diesel fuel, 200 gallons of 15-40-oil, 200 gallons of anti-freeze, 200 gallons of transmission fluid, 200 gallons of hydraulic oil, and 200 gallons of used motor oil. However, Faulkner apparently did not consider the service brakes to be "unsafe" as contemplated by section 77.404(a) because he testified the condition of the brakes "did not meet out-of-service criteria." (See fn. 2; Tr. 110).

As a result of his inspection, Faulkner issued Citation No. 7557476 citing an alleged violation of the mandatory standard in section 77.1605(b), 30 C.F.R. § 77.1605(b). This mandatory standard states, in pertinent part, “[m]obile equipment shall be equipped with adequate brakes. . . .” The citation states:

The operator failed to maintain the White RD-600SX Mack lube truck, S/N 2189, in a safe operating condition. The following condition exist[s] on the truck[:] (1) When checked the drivers’ side front drive [rear] axle brake assembly has more than the allowed 2 inches of travel in the brake chamber push rod. The truck is used in adverse conditions up and down steep inclines on elevated roadways at this mine. Mobile equipment shall be equipped with adequate brakes.

(Gov. Ex. 5).

Faulkner designated the violation as significant and substantial because he believed it was reasonably likely that a lube truck operator will sustain serious or fatal injuries if he lost control because the brakes ultimately failed due to the compromised brake assembly. The cited condition was attributed to a moderate degree of negligence. The citation was abated on January 5, 2008, after the movement in the push rod was corrected by adjusting the slack adjuster. The Secretary proposes a civil penalty of \$946.00 for Citation No. 7557476.

Despite the alleged maladjustment in the cited brake chamber, Faulkner testified that the truck operator believed the brakes were functioning normally. (Tr. 114-15). In fact, Faulkner conceded that, unless the push rod movement was individually measured for each brake, there was no reason to believe the brakes were not functioning adequately as that term is commonly known in the industry. (Tr. 115-16). Significantly, Faulkner testified that although testing the slack adjusters during a pre-shift examination is discretionary, slack adjusters are not routinely checked when brakes are performing normally. (Tr. 113-16; 120-22). Finally, Faulkner testified that the pre-shift examination reflected that the brakes were functioning properly and that there was no reason to believe that the pre-shift examination was inadequate. (Tr. 114; 120-22).

The language of a regulation is the starting point for determining whether its provisions have been violated. *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *See e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984).

Section 77.1605(b), the cited mandatory standard, requires the subject lube truck to be equipped with “adequate brakes.” The applicable meaning of the term adequate is “. . . fully sufficient for a specified or implied requirement.” *Webster’s Third New Int’l Dictionary, Unabridged* 25 (2002). An entity is “sufficient” when it is “marked by quantity, scope, power, or quality to meet with the demands, wants, or needs of a situation or of a proposed use or end.” *Id.* at 2284.

The plain use of the terms “adequate” and “sufficient” reflects that section 77.1605(b) is a functional standard. In other words, service brakes can be deemed adequate as contemplated by section 77.1605(b) even if a component part is in need of adjustment. Thus, the dispositive question is whether the braking system on the lube truck was functioning adequately.

The Secretary has not adopted the North America out-of-service criteria guideline for commercial vehicles relied on by Faulkner to determine if service brakes are adequate. Rather, in addressing the issue of when brakes are deemed to be inadequate, it is instructive to consider the Secretary’s mandatory safety standard in section 56.14101, 30 C.F.R. § 56.14101, governing the minimum requirements and testing for service brakes on trucks that are operated in surface metal and non-metal mines. The pertinent provisions are:

§ 56.14101 Brakes

(a) *Minimum requirements.* (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. . . .

* * * *

(3) All braking systems installed on equipment shall be maintained in functional condition.

(b) *Testing.* (1) Service brake tests shall be conducted when an MSHA inspector has reasonable cause to believe that the service brake system does not function as required, unless the mine operator removes the equipment from service for the appropriate repair.

Thus, the Secretary’s criteria for determining whether the minimum requirements for service brakes are satisfied requires ascertaining whether a truck’s service brake system is capable of stopping and holding the vehicle with its typical load on the maximum grade it typically travels. Although Faulkner expressed his concern with respect to the large capacity of fluids and load weight carried by the lube truck, the Secretary does not contend the service brakes were incapable of stopping and holding the vehicle under normal operating circumstances. Significantly, the Secretary concedes that the lube truck operator believed the brakes were functionally normally.

In the final analysis, the issue is not whether the pre-shift examiner conducted a rigorous enough test to determine if the braking system was adequate. In fact, under the testing provisions of section 56.14101(b)(1), there is no requirement to conduct a thorough brake test unless there is reasonable cause to believe that the “brake system does not function as required.” Rather, the issue is whether the Secretary has met her burden of proof of demonstrating that the brakes were inadequate. Although Faulkner speculated about the additional stress placed on five operational brake assemblies when the sixth is out of adjustment, there is no meaningful evidence of inadequate brake performance. Significantly, even Faulkner admitted the condition of the service brakes did not warrant the lube truck to be removed from service.

Thus, the Secretary has failed to demonstrate the fact of occurrence of a section 77.1605(b) violation. **Accordingly, Citation No. 7557476 shall be vacated.** In reaching this conclusion I recognize that the Mine Act is a strict liability statute. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff’d*, 868 F.2d 1195 (10th Cir. 1989). Under strict liability, one could argue that N&H is liable, even though the service brakes were capable of stopping and holding the lube truck with its typical load on the maximum grade it travels, if the braking system needed an adjustment. However, as the Commission has acknowledged, an operator may be held liable regardless of fault only “if a violation of a mandatory standard occurs.” *Spartan Mining Company, Inc.*, 30 FMSHRC 699, 706 (Aug. 2008). Here, the Secretary has failed to prove the fact of occurrence of the cited violation as she has failed to demonstrate that the lube truck was not “equipped with adequate brakes.”

c. Citation No. 7557479

During his inspection, Faulkner observed removal of the overburden from the coal seam at the base of the pit. The equipment consisted of a 992 Caterpillar loader and three Caterpillar 777D haulage trucks. Faulkner initially stood at one end of the pit, approximately 700 feet from the other end of the pit where the loader was loading overburden material into the haul trucks for transportation to the dump. (Tr. 140). Faulkner testified the Caterpillar loader was not visible from one end of the pit to the other because of the dust created by the truck loading process. (Tr. 139-40).

After the trucks were loaded, they proceeded to the dump from the pit area over a dirt road. (Tr. 148). Faulkner estimated the trucks traveled at a maximum speed of 20 miles per hour. (Tr. 161-62). As the trucks were leaving and approaching the loading site during the overburden removal cycle, the trucks passed each other on the road. As the trucks approached each other from opposite directions, the truck operators were side by side in their respective positions on the left side of the cabs of their trucks. Faulkner observed that the trucks slowed as they passed each other. Faulkner attributed the reduction in speed by the truck operators to the dust that was created as the trucks approached. (Tr. 141-42).

Faulkner compared the dust to the cloud of dust created behind a passenger vehicle when it travels down a gravel road. (Tr. 147-48). Faulkner testified the dusty road conditions were caused by the loosening of the dirt on the road that occurred as a result of truck traffic rather than by dust accumulations that resulted from removal of the overburden at the pit. (Tr. 146-47). Faulkner used a wooden ruler to determine the dust in the roadway was approximately two to four inches deep. (Tr. 139-40).

Faulkner conceded that dust on a dirt road is a natural consequence of truck traffic. (Tr. 164-65). However, Faulkner explained:

I understand the mining process and when I see trucks traveling in a straight line and there's no traffic around them I'll allow some dust. But when I see trucks passing in close proximity and they're having to slow and it's limiting those operators to what they can see and do then I'll issue a citation. I'm very lenient as an inspector on dust. There's other people that are probably a lot harder than I am.

(Tr. 165).

As a result of his observations, Faulkner issued Citation No. 7557479 citing an alleged violation of the mandatory standard in section 77.1607(i) that provides: "[d]ust control measures shall be taken where dust *significantly* reduces visibility of equipment operators (emphasis added)." Citation No. 7557479 states:

Road dust has been allowed to accumulate about 2 to 3 inches in depth on the pit floor and haul road exiting the No. 01 coal pit of the mountain top cut through, and proceeding to the truck dump significantly reducing the visibility of the operators. There are three Cat 777D haul trucks and a Cat 992G wheel loader using this area which consists of limited passing and turning areas in the pit, elevated inclines, and curves that require proper visibility during operation. Should this condition be allowed to continue a collision will result. Dust control measures shall be taken where dust significantly reduces visibility of equipment operators.

(Gov. Ex. 6).

Faulkner designated the violation as significant and substantial because he believed a collision of haulage trucks was likely to occur as a result of the hazard caused by limited visibility. If a collision were to occur Faulkner opined that a truck operator would sustain at least broken bones as a result of the accident. Faulkner attributed the alleged violation to a moderate degree of negligence. The alleged violative condition was abated when N&H applied water to the pit floor and haul road. The Secretary proposes a civil penalty of \$1,203.00 for Citation No. 7557479.

The Commission has addressed the burden the Secretary must carry to demonstrate the fact of the occurrence of an alleged violation in its decision in *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819 (Nov. 1995). The Commission stated:

The Mine Act imposes on the Secretary the burden of proving each alleged violation by a preponderance of credible evidence. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989). The preponderance standard, in general, means proof that something is more likely so than not so. See 3 Edward J. Devitt et al., *Federal Jury Practice and Instructions* § 72.01 (1987); 2 Kenneth S. Brown et al., *McCormick On Evidence* § 339, at 439 (4th ed. 1992); *Hopkins v. Price Waterhouse*, 737 F.Supp. 1202, 1206 (D.D.C. 1990).

17 FMSHRC at 838.

As a threshold matter it is not surprising that Faulkner's view of the Caterpillar loader, from a distance of approximately 700 feet, was obscured from the dust generated by loading overburden material into haulage trucks. Rather, the issue is whether the Secretary has demonstrated a violation of section 77.1607(i) because the dust created by truck travel on the dirt road "significantly" reduced the visibility of the haulage truck operators.

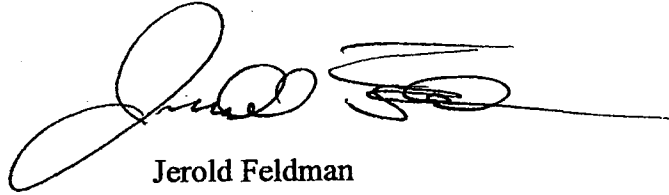
It is significant that Faulkner did not speak to any of the truck operators to determine if they felt their vision was impaired. (Tr. 162). Nor is there any evidence that Faulkner observed the truck operating conditions from the cabs of the trucks, or from an area in close proximity to where the trucks were operating. Significantly, Faulkner did not recall whether the truck operators had turned on their headlights, which would indicate reduced visibility. (Tr. 162). Dust in depths of approximately two to four inches on a dirt road churned by the tires of haulage trucks, alone, is inadequate to establish a section 77.1607(i) violation.

It would be easy to prevail if prosecutorial officials could demonstrate an alleged violation by simply opining that they believed that the violation occurred. However, due process requires more. In the final analysis, the Secretary must present adequate evidence to support the inspector's subjective opinion that a violation, namely a significant impairment of visibility, existed.

In other words, the Secretary must present supporting evidence that the alleged violation occurred. In this regard, Faulkner failed to obtain the opinion of the truck drivers to corroborate his belief that visibility was significantly affected. Moreover, it has neither been contended, nor shown, that the operators relied on their headlights because they believed their visibility was impaired. Consequently, the Secretary has failed to satisfy her burden of proof. **Accordingly, Citation No. 7557479 must be vacated.**

ORDER

In view of the above, **IT IS ORDERED** that Citation Nos. 7557475, 7557476, 7557479 **ARE VACATED**. Accordingly, Docket No. KENT 2008-712 **IS DISMISSED**.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman
Administrative Law Judge

Distribution:

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/rps

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

June 29, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2008-76-M
Petitioner	:	A.C. No. 36-07715-129546
	:	
	:	Docket No. PENN 2008-112-M
	:	A.C. No. 36-07715-131955-01
	:	
	:	Docket No. PENN 2008-113-M
v.	:	A.C. No. 36-07715-131955-02
	:	
	:	Docket No. PENN 2008-165-M
	:	A.C. No. 36-07715-134191-01
	:	
	:	Docket No. PENN 2008-166-M
	:	A.C. No. 36-07715-134191-02
	:	
	:	Docket No. PENN 2008-182-M
	:	A.C. No. 36-07715-136625
	:	
WALTER KUHL,	:	Fourmile Gravel Pit
Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Petitioner;
Robert J. Jeffery, Esq., Orton & Jeffery, PC, North East, Pennsylvania, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging Mr. Walter Kuhl with violations of mandatory standards and proposing civil penalties for those violations. The general issue before me is whether Mr. Kuhl violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearings, the parties reported that they had reached a settlement of all but three of the charging documents at issue and supplemented that proposed settlement post-hearing. I have reviewed the representations and documentation submitted with the proposed settlement and find that it is acceptable under the criteria set forth in section 110(i) of the Act. Accordingly an order for payment of the agreed penalty will be incorporated in this decision.

Citation No. 6045490, issued pursuant to section 104(d)(1) of the Act, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.3130 and charges as follows:¹

The mine operator (Walter Kuhl) has engaged in aggravated conduct constituting unwarrantable failure to comply with mandatory standard 56.3130 by continuing to disregard his own safety and his employee’s safety while mining in the active mine pit. The high wall face is approximately 30 to 40 feet high, near vertical, consisting of consolidated sand and gravel. Walter Kuhl has intentionally under-cut (approximately 3 Ft.) into the high wall near the toe. This mining practice is not conducive to maintaining the stability of the high wall and exposed his employees to entrapment/crushing injuries. A withdrawal order No. 6026012 was issued on Dec. 16, 2004, under the provisions of Section 104(d)2 of the Mine Act for violation of 56.3130 during the investigation of a fatal accident for similar mining practices at this mine site. Mr. Kuhl had his two (2) hourly employee’s working in this area of the mine until the Pennsylvania Dept. Of Environmental Protection inspectors issued a cease and desist order during their site visit the week of May 1, 2007. MSHA has issued citations on 08/03/04, 11/19/03, 07/28/03, and on 04/26/01 to the mine operator violating Part 56.3130 of the 30 CFR. This is a reckless and repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety or

¹ Section 104(d)(1) provides in relevant part as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

A "subsequent action" notice issued to Mr. Kuhl on May 10, 2009, stated as follows:

The termination due date and time are being extended to allow Walter Kuhl additional time to correct the condition. Mr. Kuhl understands that MSHA will not accept berms as corrective action to terminate this citation.

The cited standard, 30 C.F.R. § 56.3130, provides as follows:

Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning benches or for scaling of walls, banks and slopes.

Richard Burkley has been an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) for over 10 years and has an additional 26 years of industry experience as a foreman. Inspector Burkley's testimony is largely undisputed. He testified that on May 8, 2007, he arrived at the Four Mile Gravel Pit for a regular inspection at around 8:00 a.m. Burkley explained the purpose of his visit to mine owner Walter Kuhl then proceeded to inspect the pit area. When he arrived at the pit, he observed loader operator Mike Fenno loading a dump truck located about 30 to 40 feet from the highwall. The highwall at that location was estimated by Burkley to have been 30 to 40 feet high with a concave undercut extending from the toe to one-third the way up the face. Burkley documented the condition of the highwall with photographs (See Gov't Exhs. 1A and 1B). Fenno explained to Burkley that "Walt" dug out the undercut at the end of Fenno's shift the day before for Fenno to load out that morning.

Burkley instructed Fenno to set up a berm or barrier at the toe of the highwall and then returned to the mine office. He told Kuhl that he was issuing a citation for undercutting the highwall and that employees were to backfill the highwall to an angle of repose. Kuhl responded that it was his mine and that he was going to mine it his way. When Burkley told Kuhl that the law prohibits undercutting the highwall to create a concave area, a void, and an overhang, Kuhl again responded that it was his property and that he would mine it his way. Upon his return to the mine the following day, May 9, 2007, Burkley found that nothing had been changed at the highwall.

On May 20, 2007, MSHA Inspector Thomas Shilling arrived at the Kuhl mine to conduct a compliance follow-up visit to see if the cited conditions had been abated. Shilling observed that the highwall was in the same condition as depicted in the photos taken by Inspector Burkley on May 8, 2007. Shilling thereupon issued Order No. 6047638 under Section 104(b) of the Act for failure to

abate the citation issued by Inspector Burkley on May 8, 2007.²

Loader operator Fenno testified at hearings that he had observed the highwall conditions to be similar to those as depicted in the Government's photographs (taken on May 8, 2007). Fenno further testified that when he came to work that morning, Walter said that he had taken the material down the night before and the material at the base of the highwall was to be loaded out that morning. In loading the material Fenno was within five to eight feet of the high wall. The same procedures had been followed on prior occasions as well. According to Fenno, Walter used an excavator to scrape the wall. Fenno told Inspector Burkley that Kuhl had a practice of digging out the material from the high wall at the end of the shift and leaving it to Fenno to dig it out the next shift in the morning.

Within this framework of credible and undisputed evidence it is clear that a reasonable person familiar with the mining industry and the purposes of the standard would have recognized that the conditions present at the subject mine on May 8, 2007, constituted a violation of 30 C.F.R. § 56.3130. See *Secretary v. Cyprus Tonopah Mining Corp.* 15 FMSHRC 367 (March 1993). A vertical highwall in excess of thirty feet in height was undercut by Mr. Kuhl at the toe creating a concave area near the base. He further directed his employee to work in the hazardous area at the toe. The mining method used did not maintain wall, bank, and slope stability in work areas, but in fact was intentionally designed to create instability. This was the same mining method that had previously caused the death of Mr. Kuhl's son three years before.

In reaching these conclusions I have not disregarded Respondent's claim that the Secretary's witness, Arnold Belz, testified that the method followed by Kuhl was a "common mining method". However, this claim is based on an obvious misreading of Belz's testimony. Belz was clearly referring only to Kuhl's use of an excavator to "scratch" at the highwall and not to Kuhl's undermining the highwall at the toe (Tr. 146-147).

² Section 104(b) of the Act provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

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

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

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

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

As noted above, I have found that Mr. Kuhl violated a mandatory safety standard. Mr. Kuhl himself, in creating the hazardous undercut, worked in the zone of danger and directed one of his employees, Mr. Fenno, to do so also. The hazard contributed to by Kuhl’s violation of Section 56.3130 is that persons working or traveling in proximity to the highwall could be crushed by collapse of the highwall. There can be no question that an employee crushed by a collapsing highwall would sustain serious or fatal injuries. Accordingly, the violation herein was “significant and substantial” and of high gravity.

The violation was also clearly the result of “unwarrantable failure” and gross negligence. “Unwarrantable failure” has been defined by the Commission in *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), as aggravated conduct constituting more than ordinary negligence. . . . [and] is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* At 2001, 2003-2004. *See, e.g., Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (August 2001); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001); *Dynatec Mining Corp.*, 23 FMSHRC 4, 15 (January 2001); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (September 1999).

In assessing whether a violation is unwarrantable, this Commission has identified a number of factors that should be considered, including: (1) the extent of the violative condition, (2) the length of time the violative condition existed, (3) whether the violation was obvious, (4) whether the

condition posed a high degree of danger, (5) whether the operator was on notice that greater efforts were necessary for compliance. *Windsor Coal Company*, 21 FMSHRC at 1000; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984).

In this case there is no dispute that the mine owner himself, Mr. Kuhl, created a vertical highwall, undercut it at the toe and exposed both himself and one of his employees to the hazard of a highwall collapse. A supervisor's involvement in violative conduct is particularly persuasive evidence in establishing a heightened awareness of the violative condition and a conscious disregard of, or indifference toward, miner safety. A supervisor is held to a high standard of care, and evidence of a supervisor's involvement in the violation is an important factor supporting an unwarrantable failure finding. See e.g. *Consolidation Coal Co.*, 22 FMSHRC 328, 332 (March 2000); and *Lafarge Construction Materials* 20 FMSHRC 1140 at 1146 (October 1998).

The violative condition also exposed miners to a high degree of danger. Indeed, as previously noted, a fatal injury occurred at the subject mine in December 2004 as a result of the same mining methods (undercutting the highwall) at issue herein. The evidence in this case shows that Kuhl received, either individually or as an officer of the corporation charged, six prior citations or orders for violations of the same standard at issue herein i.e. Section 56.3130.³ For five of these citations or orders, Mr. Kuhl received individual penalties under Section 110(c) of the Act.⁴ Under the circumstances, I find that Mr. Kuhl was provided ample and repeated notice that the practices he followed herein were violations as charged. See e.g. *Eagle Energy* at 838.

Order No. 6054306, also issued pursuant to Section 104 (d) of the Act, alleges a violation of 30 C.F.R. § 56.12025 and charges as follows:

³ While Respondent argues that prior violations of the cited standard, issued at a time when Kuhl was operating as a corporation are not relevant hereto it may reasonably be inferred that Walter Kuhl, who owned the mine and was vice president of the corporation and actively involved in the mining operations, was aware of the prior violations (Tr. 250, 251 and 253). Indeed Kuhl admitted that he was aware that employees of the corporation had been operating in the same manner as cited herein (Tr. 257).

⁴ Section 110(c) of the Act provides as follows:

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

The 110 volt #2 off road diesel fuel pump is not properly grounded to motor frame to prevent a person from being electrocuted when making contact with the metal pump housing. The white and black insulated conductors are hanging down from the motor electrical box and plugged into a grounded extension cord. A toggle switch inside the office turns on circuit to pump. Equipment operators are exposed to this outside wet condition frequently each week as they fuel their equipment. The mine owner stated it had been like this for approximately three years. The owner has to walk past the condition numerous times daily to access his pickup truck that is parked next to the tank and pump and also to access the garage where his FEL [front end loader] that he operates is parked. No records have been documented that a grounding test has been conducted on this circuit. Walter Kuhl, Owner has engaged in aggravated conduct constituting more than ordinary negligence in that he has allowed this electrical circuit to the fuel pump not be ground and tested and that he has allowed the equipment operators to fuel the mobile equipment with such a hazard. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 56.12025, provides, in pertinent part, that “[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection....”

Citation No. 6054305 also issued pursuant to Section 104(d)(1) of the Act alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 56.12008 and charges as follows:

The power cable to the #2 off road diesel fuel 110 volt pump is not properly bushed at the electrical compartment on the side of the pump motor. Insulated black and white conductors are hanging out from the underside of the compartment. Pump is in use frequently during the week to fuel the mine[’s] mobile equipment. Owner states that it has been in this condition for approximately three years. Owner has to walk past hazard many times daily to get into his truck that is parked next to the tank and to access the garage where his FEL that he operates is parked. Mr. Walter Kuhl, Owner has engaged in aggravated conduct constituting more than ordinary negligence in that he has not taken the appropriate action to have the fuel pump electrical circuit properly bushed at the electrical compartment and to allow the equipment operators to fuel the mobile equipment with this condition. This violation is an unwarrantable failure to comply with a mandatory standard. Photo taken.

The cited standard, 30 C.F.R. § 56.12008, provides that “[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.”

On October 2, 2007, MSHA Inspector Russell West conducted an inspection at the subject mine. Upon arrival, he met with Walter Kuhl, who identified himself as the owner and person in

charge of the mine. During his inspection, Mr. West observed a 110 volt off-road diesel fuel pump which was allegedly being operated with two electrical violations: (1) a lack of bushing at the electrical compartment on the side of the pump motor as charged in Citation No. 6054305; and (2) a lack of grounding for the motor frame as charged in Order No. 6054306. His testimony is essentially undisputed and fully corroborated by his photographs (Gov't Exhs. 20A and 20B). The violations are accordingly proven as charged.

The violations were also "significant and substantial". Based on the undisputed evidence I find that the violation charged in Order No. 6054306 contributed to the hazard of employees being electrocuted by exposure to energized metal components of the diesel fuel pump. The injury in question would also likely be serious. In this regard Inspector West explained, without contradiction, that if the cited condition were left uncorrected during continued mining operations, the electrical conductor for the fuel pump could become damaged, thus triggering the danger of electrocution. This is especially true when the fuel pump also lacked a grounding wire. The violation charged in Order No. 6054306 was therefore clearly "significant and substantial" and of high gravity.

Based on the undisputed evidence I also find that the violation charged in Citation No. 6054305 contributed to the hazard of employees being electrocuted by exposure to energized metal components of the diesel fuel pump. The injury in question would clearly be serious. Inspector West explained that if the cited condition were left uncorrected during continued mining operations, there would be a substantial risk of employee exposure to an electrocution hazard. This is especially true when the fuel pump also lacked a bushing for the conductor wires. The violation charged in Citation No. 6054305 was therefore clearly "significant and substantial" and of high gravity.

I find that both of the violations here at issue (relating to defects on the same diesel fuel pump) were the result of the operator's "unwarrantable failure". It is undisputed that both violations had existed for about three years and that the defective wiring had been installed by Mr. Kuhl's grandson at his request. It is further undisputed that the subject diesel pump was adjacent to where Mr. Kuhl parked his truck. Mr. Kuhl would also walk past the violative condition when he went to the garage to get his front end loader. The pump was also located between the scale house trailer and the maintenance shop in an area in which all employees would frequently work and travel. I find, based on this evidence, that the violative conditions were therefore obvious. I further find that the cited conditions created a danger of electrocution. The danger was contributed to by both the bushing violation and by the lack of grounding. These violations combined to make use of the subject diesel pump an extremely hazardous activity.

Under the circumstances I find the Respondent's conduct to have been "aggravated" and demonstrated "reckless disregard", "indifference," and a "serious lack of reasonable care." The violations were therefore the result of his "unwarrantable failure" and high negligence.

In reaching these conclusions I have not disregarded Respondent's argument that the cited conditions were not obvious since they had not been previously cited despite MSHA inspections over

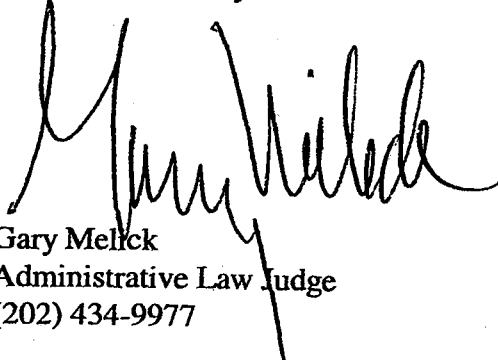
the previous three years. While this argument is certainly entitled to significant consideration I find that it is outweighed by the operator's own duty to conduct inspections, that Mr. Kuhl himself had chosen the person (obviously not competent) to install the electrical components on the cited fuel pump and was, himself, frequently in a position to have observed the violative conditions.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the subject mine had about 1,382 hours worked during the calendar year prior to the issuance of the subject charging documents and is therefore considered to be a small mine. The mine, since operated by Mr. Kuhl as a sole proprietor, does not have a significant history of violations but there had been repeated "knowing" violations by Mr. Kuhl of the standard at 30 C.F.R. § 56.3130. The violation charged in Citation No. 6045490 was not abated in a timely manner. Indeed the violation was not abated for nearly two months and only after a "Section 104(b)" order was issued. The two electrical violations were abated in a timely manner. The gravity and negligence findings have previously been discussed. The parties have stipulated that the penalties proposed by the Secretary would not affect the operator's ability to remain in business.

ORDER

Citation Numbers 6045490 and 6054305 and Order Number 6054306 are affirmed as written. It is hereby ordered that Respondent pay penalties totaling \$42,374.00 (\$37,800.00, \$2,000.00 and \$2,000.00 respectively for the violations charged in the above charging documents as well as penalties of \$574.00 pursuant to the settlement agreement) within 40 days of the date of this order.



Gary Mellick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

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/lh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

May 15, 2009

MACH MINING, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 2009-395-R
	:	Order No. 8414238; 03/13/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	Mach No. 1 Mine
MINE SAFETY AND HEALTH	:	Id. No. 11-03141
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER DENYING MACH MINING'S MOTION FOR SUMMARY DECISION
ORDER GRANTING IN PART THE SECRETARY'S MOTION
FOR SUMMARY DECISION

This case is before me on a notice of contest brought by Mach Mining, LLC, ("Mach") against the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* (the "Mine Act"). Mach filed a motion for summary decision under Commission Procedural Rule 67 and asked for expedited consideration. 29 C.F.R. § 2700.67. In response, the Secretary filed a cross motion for summary decision. Both parties briefed the issues.

Section 2700.67 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.

On March 13, 2009, an MSHA inspector issued Order No. 8414238 under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(d). The order alleges the following violation:

A proposed ventilation plan dated February 25, 2009 was implemented before it was approved by the district manager. The mine operator has mined over 1000 feet in by the location of the

proposed set up rooms in headgate No. 3. The drawing titled "Ventilation Plan Map for future Longwall Operations" dated March 19, 2006, which is part of the current approved plan for this mine, approved on March 18, 2008, shows a six panel design with all six panels approximately 18,000 feet deep without any stair steps.

The proposed ventilation plan addendum, panel 3 extension, was received by the MSHA District Manager on February 26, 2009. An acknowledgment letter dated February 26 was sent to the mine operator stating that approval by the district manager was required. The mine operator had been put on specific notice in several meetings and by other letters of this requirement.¹

The MSHA inspector determined that it was unlikely that the cited condition would injure a miner and that the violation was not significant and substantial. He also determined that the operator's negligence was high.

The cited safety standard provides:

No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in §75.371 shall be submitted to and approved by the district manager before implementation.

I. BACKGROUND

Mach argues that there are no genuine issues as to any material fact and that it is entitled summary decision as a matter of law. Its motion for summary decision is supported by a declaration from Richard "Pete" Hendrick, who is the president of Mach, as well as provisions from its ventilation plan. The Secretary's cross-motion for summary decision is supported by a declaration from Mark O. Eslinger, who is a supervisory mining engineer for MSHA Coal District 8, and other supporting material.

The Mach No. 1 Mine is an underground coal mine in Williamson County, Illinois. Mach develops headgate entries using a continuous mining machine. The mine uses a longwall to mine the coal. At the time the order of withdrawal was issued, the longwall had just begun mining the

¹ The order was subsequently modified to allow Mach to remove the section loading equipment from Headgate No. 3.

second panel and Headgate No. 3 was being developed with a continuous mining machine in preparation for future mining of the third and fourth longwall panels. Two mine maps prepared by Mach are included in the Secretary's exhibits and are discussed by both parties. The first map, dated March 19, 2006, is entitled "Ventilation Plan Map for Future Longwall Operation" ("2006 Ventilation Plan Map"). (Sec'y Ex. A). The second map, dated October 28, 2008, is entitled "Ventilation Map 75.1200/75.372 Requirements" ("2008 Annual Map"). (Sec'y Ex. B).

MSHA approved Mach's most recent ventilation plan on March 18, 2008. The plan included provisions describing how Mach will ventilate its gate entries. Mach had previously submitted the 2006 Ventilation Plan Map that contained projections of Mach's anticipated mining development as of March 19, 2006. Those projections depicted six panels that were all about 18,000 feet long. MSHA reviewed 2008 Annual Map as well as earlier maps submitted by Mach and, by letter dated January 26, 2009, advised Mach that the maps were acceptable. (Sec'y Ex. C).

All of the ventilation maps that had been submitted by Mach showed all proposed longwall panels to be of equal length with the result that the setup rooms that would become the bleeder entries were straight from panel to panel. The district manager sent a letter to Mach dated February 4, 2009, noting that the 2006 Ventilation Plan Map "showed a six-panel design will all six panels approximately 18,000-foot depth" and that "[no] stair steps are shown on the drawing." (Sec'y Ex. D). The letter then warns Mach that the "[f]ailure to obtain approval before making changes to the bleeder design could be cause for enforcement action." *Id.*

On February 25, 2009, Mach submitted a ventilation plan amendment to MSHA that indicated that panel three would be developed about 1,000 feet in by the farthest in by point depicted on the 2006 Ventilation Plan Map. (Mach Ex. 2). This submission was made at the request of the MSHA district manager.

The order at issue in this case required miners to be withdrawn from the area of Headgate No. 3 that was in by the area projected on the 2006 Ventilation Plan Map.

II. SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary issued the order of withdrawal because she contends that, when Mach mined the Headgate No. 3 entries in by the setup rooms projected on the 2006 Ventilation Plan Map, it violated the terms of its approved ventilation plan. She states that any change in the information required by section 75.371 must be approved by the district manager before implementation and that the changes being made by Mach had not been approved.

Mach maintains that the order is invalid for two reasons. First, Mach did not violate section 75.370(d) because it was developing the headgate in accordance with the approved ventilation plan. The March 2008 ventilation plan detailed the methods that Mach must use during headgate entry development. Mach was following these approved ventilation methods in

Headgate No. 3. Second, the fact that Mach mined beyond the boundary of the projections of anticipated mining depicted on the 2006 Ventilation Plan Map is irrelevant. A mine operator's projections of anticipated mine development shown on a ventilation map are not subject to MSHA approval. 30 C.F.R. 75.370.(a)(1). These projections are nothing more than an indication of anticipated mine development that a mine operator must update at least annually in its ventilation map. Because anticipated development is not subject to MSHA approval, an operator is not required to obtain approval from MSHA before it mines beyond the previously submitted projections. The operator is only required to maintain a current mine map showing all active workings in a fireproof location on the mine surface.

The Secretary contends that the facts establish a violation of section 75.370(d). Mach was operating without an approved ventilation plan when it mined 1,000 feet inby the set-up rooms depicted in the 2006 Ventilation Plan Map. She states that Mach has incorrectly characterized the 2006 Ventilation Plan Map as a map that simply shows projections of anticipated mine development that is not part of the mine's ventilation plan. The Secretary argues that Mach submitted the 2008 Annual Map for that purpose in October 2008. This map sets out its yearly projections for mining. This map was accepted by MSHA on January 26, 2009 and shows the annual mining projections through October 2009. This map was submitted by the company to comply with sections 75.370(a)(1), 75.372(b)(14), and 75.1200.

The 2006 Ventilation Plan Map, on the other hand, sets forth a number of things that are part of a mine's ventilation plan including the design of the bleeder system. This map is part of the ventilation plan and it requires approval by the district manager because it shows the design of the bleeder system as required by section 75.371(x).² The length of longwall panels, the gateways developed for the panels, and the configuration of the bleeder entries is a critical part of MSHA evaluation of the ventilation plan. Under Mach's logic, it could mine Headgate No. 3 as far inby as it wants without the approval of MSHA if it follows the gate entry ventilation protocol contained on page B5 of its current ventilation plan. (Mach Ex. 1). By mining 1,000 feet inby the set-up rooms shown on the 2006 Ventilation Plan Map, Mach went beyond its approved bleeder design. Mach was issued the order of withdrawal because it had been previously told by the district manager that its approved plan did not allow it to mine beyond the panel length set out in the Ventilation Plan Map.

Mach filed a response to the Secretary's cross-motion for summary decision. It argues that the law is clear that the Secretary has no authority to approve projections of anticipated development and an operator need not obtain any additional approval to develop beyond a prior projection where it is developing pursuant to an approved ventilation plan. Projections of future mining, even when part of the section 75.372 map, are never subject to MSHA approval. Section 75.370(a)(1). Because such projections are not subject to MSHA approval, the projections

² Section 75.371 states that the "mine ventilation plan shall contain the information described below and any additional provisions required by the district manager: . . . (x) A description of the bleeder system to be used, including its design (see 75.334)."

shown on the 2006 Ventilation Plan Map could not have been subject to MSHA approval and they did not limit Mach's right to develop Headgate No. 3.

Mach alleges that the Secretary is attempting to shift the focus to whether by mining beyond its previous projections, Mach affected the design and function of its bleeder system. This argument does not have merit because, at the time the order of withdrawal was issued, Headgate No. 3 was not physically connected to the bleeder system. The return air in the headgate traveled outby down the return air course in the headgate to the mains. As a consequence, even assuming that Mach might need to amend its ventilation plan at some future point, a new plan was not required at this time. The order must be vacated because it is premature and speculative since Mach has not cut into the bleeder entries from Headgate No. 3.

In addition, the 2006 Ventilation Plan Map was not submitted by Mach to satisfy the requirements of 75.371(x). Mach satisfied this provision on page B2 and the last page of its approved ventilation plan. (Mach Ex. 1). Mach never intended that the 2006 Mine Ventilation Map be part of the ventilation *plan* setting forth requirements for the bleeder entries. Mach characterizes the Secretary's arguments as "*ipse dixit* at best" but "ultimately immaterial." (Mach Response at 6).

Mach further argues that the court should reject the Secretary's argument that MSHA advised the company that it could not mine Headgate No. 3 any deeper than the first two panels. She bases her argument on the February 4, 2009, letter from the district manager and the "proposed ventilation plan addendum" submitted by the company on February 25, 2009, in response to this letter. Mach maintains that this correspondence does not alter Mach's legal right to develop Headgate No. 3. The issues raised in the district manager's February 4 letter "only bears on ventilation during longwall mining, once the development work in Headgate No. 3 is complete and panel 3 has been set up and connected to the bleeder entries." (Mach Response at 9). If MSHA's letter is interpreted to limit Mach's right to develop Headgate No. 3 until it obtains MSHA approval, then it was acting beyond its authority because "MSHA cannot create new rules by district manager fiat." *Id.* at 10.

III. ANALYSIS OF THE ISSUES

I find that I have the authority to determine whether Mach violated section 75.370(a)(1) as alleged in the order of withdrawal under Commission Procedural Rule 67 because there is no genuine issue as to any material fact. My analysis of the legal arguments presented by the motion and cross motion is set forth below.

A. Did Mach Violate Section 75.370(d)?

A mine's ventilation plan consists of two parts: the plan content as prescribed in section 75.371 and the ventilation map with the information prescribed in section 75.372. (Section 75.370(a)(1)). Both of the maps discussed above show that Mach planned to develop the

longwall panels to a depth of 18,000 feet. That is, the distance between the mains and the set-up rooms would be about 18,000 feet. At some point after October 18, 2008, the date of the 2008 Annual Map, Mach decided that it wanted to develop the third longwall panel to a greater depth. Because Mach takes the position that the depth of mine development is not subject to MSHA approval, it mined past the 18,000 foot point when it developed the entries in Headgate No. 3. At the time the order of withdrawal was issued, Headgate No. 3 had been driven about 1,000 feet deeper than the other gate entries.

There is no allegation in the order of withdrawal that Mach was not properly ventilating the headgate entry. For example, the ventilation plan calls for 20,000 cfm of air at the last open crosscut and MSHA does not contend that this requirement was not being met. (Mach Ex. 1, B5). The issue is whether Mach was required to obtain MSHA's approval before it developed the headgate entry deeper than the 18,000 feet shown on the approved ventilation maps. As set forth above, Mach argues that the Secretary's ventilation standards do not require a mine operator to obtain approval from MSHA if it decides to mine beyond the boundary of anticipated mining as shown on its ventilation map. Although section 75.372(b)(14) requires that a ventilation map contain "[p]rojections for at least 12 months of anticipated mine development," MSHA does not have the authority to approve or deny these projects. Section 75.371 does not require a mine operator to include projections of anticipated mine development in its ventilation plan and section 75.370(a)(1) states that "[o]nly that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager." As a consequence, Mach argues that MSHA did not have the authority to issue the subject order of withdrawal when Mach mined beyond the projected area of mining development.

Although Mach's arguments have some superficial appeal, I hold that it is looking at the plan approval process too narrowly. Mach is not only mining beyond its projections of anticipated mine development shown on the ventilation maps, it is changing the design of the ventilation system in the longwall panels. By developing the headgate entry for the third panel deeper into the mine, Mach is, *a fortiori*, changing the design of the panel. I find that the 2006 Ventilation Plan Map is part of the existing approved ventilation plan. By developing the headgate 1,000 feet deeper, the bleeder entries will have a different configuration from that shown on this map. Section 371(x) clearly provides that the design of a bleeder system is part of the ventilation plan that is subject to approval by the district manager.

Mach argues that the Secretary's arguments concerning section 371(x) are premature and speculative. I disagree. Once Mach completes its development of Headgate No. 3, the modified design of the bleeder entries proposed by Mach will be *a fait accompli*. MSHA will either have to approve the new bleeder system design for the mine or force Mach to abandon any development mining in by the location of the set-up rooms shown on the 2006 Ventilation Plan Map. The only map showing the modified gateway and bleeder design was submitted by Mach on February 25, 2009, and that map has not yet become a part of the mine's approved ventilation plan. (Mach Ex 2). This map represents a significant change in the ventilation plan and Mach

cannot make these changes without the approval of the district manager.³ I find that the Secretary established a violation. Consequently, Mach's motion for summary decision is denied and the Secretary's cross-motion for summary decision is granted on this issue.

B. Was the Violation a Result of Mach's Unwarrantable Failure to Comply?

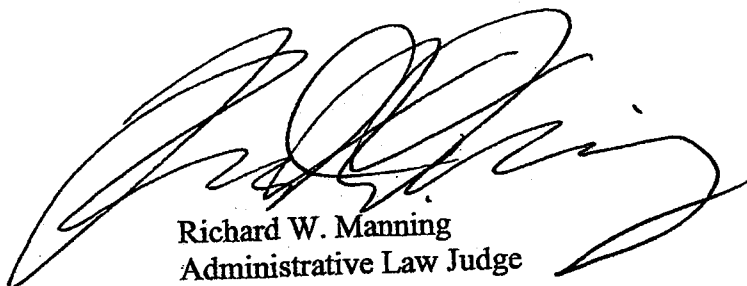
The parties have presented conflicting facts with respect to this element. In its response to the Secretary's cross-motion for summary decision, Mach set forth evidence in the supplemental declaration of Mr. Hendrick to show that the alleged violation was not the result of its unwarrantable failure to comply with the cited standard. These paragraphs state, *inter alia*, that Mach decided to start mining the panels about 1,000 feet deeper on the suggestion of an outside roof control engineering consultant. Mach states that poor roof conditions were experienced in the set-up entries in the first two panels and it was trying to avoid these conditions in future panels. It also states that MSHA was aware of this fact and that at least one local MSHA inspector was present when Mach started mining the Headgate No. 3 beyond the 18,000 feet distance shown in the 2006 Ventilation Plan Map and that no objections were raised. During a conference call, counsel for the Secretary stated that MSHA cannot stipulate to all of the evidence set forth in this declaration at paragraphs 3 through 10.

Because there are genuine issues as to material facts, I cannot enter any findings on the unwarrantable failure issue. I note, however, that if Mach were able to establish at a hearing the facts alleged in the supplemental declaration, it is unlikely that I would uphold the Secretary's unwarrantable failure determination. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. The parties are ordered to confer to try to settle the negligence and unwarrantable failure issues. In the alternative, I am willing to stay this contest proceeding until the Secretary proposes a penalty for the order of withdrawal.

³ It is not clear from the record whether the district manager has now acted on the proposed panel extension submitted by Mach. As stated above, the map showing the Panel 3 extension was sent by Mach to the district manager on February 25, 2009. This proposed plan amendment has been pending for almost three months. Many mines have bleeder systems that form a stair step pattern.

IV. ORDER

Mach Mining's motion for summary decision is **DENIED**. The Secretary's cross-motion for summary decision is **GRANTED** on the fact of violation and **DENIED** on the unwarrantable failure issue. The parties are ordered to confer to discuss the negligence and unwarrantable failure issues and report back to me by no later than **June 11, 2009**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

(202) 434-9980

May 29, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-302-D
v.	:	BARB CD 2008-07
	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198

ORDER GRANTING IN PART MOTION TO COMPEL
AND
ORDER TO SUPPLEMENT THE RECORD

BACKGROUND

In this case, arising under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 815(c)(3), the complainant, Billy Brannon, alleges Brannon was discriminated against by Panther Mining, LLC (“Panther or “the company”) when:

- (1) Company officials “spoke disparagingly about [him] to other miners . . . and encouraged [his] co-workers to shun him.
- (2) Company officials “imposed . . . onerous and unsafe working conditions on [him] by refusing to allow him to drive a buggy and by making him walk while performing his assigned job duties.

Complaint of Discrimination (Complaint) 5.

According to the complaint, the alleged discriminatory acts were motivated by the company’s knowledge that Brannon had filed suit against Cloverlick Coal Co., LLC (“Cloverlick”) and its parent company, Black Mountain Resources, LLC (Black Mountain), because he was physically assaulted by Cloverlick’s foreman, Robert Salyer. The alleged assault took place on January 23, 2008. Complaint 1-2. At the time Brannon worked for Cloverlick at its No. 1 Mine. After the assault, Black Mountain transferred Brannon to Panther’s No. 1 Mine. Panther, like Cloverlick, is a subsidiary of Black Mountain.

On April 25, 2008, one of Brannon’s attorneys wrote to Rick Raleigh, Human Resources Manager for Cloverlick/Black Mountain, that Brannon would file suit against Cloverlick because

of the incident. The attorney also asked the Kentucky Office of Mine Safety and Licensing (OMSL) to bring charges against Salyer before the Kentucky Mine Safety Review Commission, and to seek the revocation of Salyer's foreman's certificate. Complaint 2-3. In response, OSMML conducted an investigation of the incident and interviewed witnesses to the event, including Raleigh, who had investigated the incident for Black Mountain, and Salyer. Complaint 3.

On June 9, 2008, Brannon made good his stated intent, and filed suit in state court against Cloverlick and Salyer. On June 26, 2008, Brannon was transferred from the second shift to the day shift at Panther's No. 1 Mine and assigned to the position of head drive operator. As a head drive operator Brannon was responsible for making sure five head drives at the mine remained operating. The complaint alleges that after the transfer, "several day shift employees told Brannon that [Panther] management personnel . . . had told them negative things about [Brannon], and had told them not to talk to him or to avoid him." Complaint 3.

One of Brannon's duties as head drive operator was to complete checklist forms reporting the condition of "battery rides," head drives and belt take-up areas. Complaint 3. The complaint asserted Brannon several times documented unsafe conditions when completing the checklists. *Id.* The complaint also asserted, when Brannon was assigned to work on the head drives at the end of June, he was given a buggy to drive from one head drive unit to another. However, on September 2, 2008, Brannon was told by mine management he could not use a buggy. He had to walk. The complaint describes walking as "more onerous" and a safety hazard because Brannon at times was more than 25 feet away from two, self-contained self-rescuers ("SCSRs"), a violation of Panther's required SCSR plan. Complaint 4. The complaint also alleged Brannon complained about the SCSR hazard to Panther's mine superintendent, Mark Shelton, and to the mine foreman. Brannon further alleged that on September 4, a member of mine management, Richard Bowman, told him that Shelton made him walk because Brannon "had been documenting problems on the pre-operational checklists and . . . having to walk would teach [Brannon] a lesson." *Id.*

In answering the complaint, Panther admitted there was an altercation involving Brannon and Salyer and that Brannon was transferred to Panther's No. 1 Mine. However, the company stated that on June 9, 2008, Brannon moved from the second shift to the day shift at his own request. Answer and Defenses to Complaint of Discrimination (Answer) 1-2.¹ With regard to the allegation that day shift employees told Brannon that management personnel said negative things about him, the company maintained it was without sufficient knowledge to admit or deny the allegation. With regard to the allegation day shift employees told Brannon management personnel said to avoid him, Panther stated employees who complained to mine managers about having to work around Brannon, "were advised to avoid him so that safe operations could be maintained without personal conflicts." Answer 2. According to Panther, its managers were

¹Panther also stated it had not received a copy of the original complaint Brannon filed with MSHA, and, in fact, a review of the documents attached to Brannon's complaint fails to reveal a copy of the original complaint.

trying to make sure safe operations in the mine would continue without personal conflicts. Answer 4. The company also denied management officials told miners Brannon was calling mine inspectors and making safety complaints about the mine. Answer 2.

Although Panther agreed Brannon completed checklists as part of his job as head drive operator and that some of the items he checked involved potential safety issues, it asserted other items involved matters Brannon was supposed to correct but did not. Answer 2.

Panther also agreed Brannon was denied use of a buggy to make his rounds on or about September 2, 2008, but asserted it was because Brannon's assigned buggy was being repaired and was unavailable. Answer 2. Responding to Brannon's allegation of disparate treatment ("[Brannon] was the only head drive operator at the mine who was not provided with a buggy to drive" (Complaint 5)), Panther stated there was only one other head drive operator and that he had "a much greater distance to travel in lower heights than did [Brannon]." Answer 3. Panther insisted Brannon had to walk when the buggy assigned to him was being repaired, and on at least one occasion Brannon used the buggy even though it was not ready for use and was "red tagged." *Id.* Further, Brannon's buggy once was intentionally disabled while in Brannon's care. *Id.* Being without a buggy did not require Brannon to violate the mine's SCRS plan because Brannon was instructed to carry a one-hour SCRS when he walked to his work sites, and if he did as instructed, he was never out of compliance with the plan. *Id.* 3. Further, the company denied Bowman told Brannon that the mine superintendent, Shelton, was making him walk because Brannon documented problems on the checklists. *Id.*

EVENTS FOLLOWING THE RECEIPT OF PANTHER'S ANSWER

After the answer was received, the matter was assigned. That same day, Panther filed a motion to require Brannon to respond to Panther's first interrogatories and first request for production of documents. I granted the motion and stated that after July 10, 2009, no discovery would be permitted except for good cause shown. I further stated I expected counsels to cooperate to ensure all discovery was completed by that date. Finally, I scheduled the case to be heard in Barbourville, Kentucky, on August 11, 2009.

THE MOTION TO COMPEL

On April 17, 2009, Brannon responded to the company's first interrogatories and requests for production. In the responses Brannon lodged objections to some of the questions and requests. On May 12, 2009, the company moved to overrule Brannon's objections to written discovery requests and to compel Brannon to more fully respond.² Respondent's First Motion to Overrule Complainant's Objections to Written Discovery Requests and to Compel Discovery (Motion). Specifically, in its first interrogatories the company asked Brannon to state whether he

²As of the date of this order the Commission has not received a response to the company's motion from Brannon.

ever made audio or video recordings of any happenings or conversations in or around Panther's mine, and, if so, to state the types of recordings, the dates they were made and the events of conversation which were recorded. Motion, Exh. A 8. Brannon objected because the interrogatory did not specify the time period for which the information was sought. It maintained that recordings made outside the time period covering the events of the proceeding or regarding events that did not pertain to Brannon's discrimination complaint were irrelevant. Brannon acknowledged, however, that he made an audio recording of his September 12, 2008, conversation with Mark Shelton. The conversation concerned Brannon's walking to the head drives and how he was supposed to carry all of his gear and two SCSRs. Motion, Exh. B 4.

To meet Brannon's objections to the time period covered by the request for information about the recordings, Panther offered to limit its request to those recordings "created on or after the first alleged discriminatory act, June 26, 2008 [(Brannon's transfer from the second shift to the day shift)] and before the last claimed discriminatory act on September 11, 2008."³ Brannon did not respond to the offer. Motion 2: The company asserted Brannon should be required to produce all recordings made within the June 26 - September 11 time period that were reasonably calculated to lead to the discovery of admissible evidence. Panther stated it knew Brannon surreptitiously taped certain conversations, that the complaint alluded to several things other miners and management told Brannon and that Brannon should not be allowed to grant Panther access to one audio tape (the tape of the Brannon/Shelton conversation), but not to the others. Motion 3.

In the interrogatories, the company also asked Brannon to state whether he kept personal notes or logs of any events or conversations at Panther's mine. If so, it asked Brannon to describe the logs and state the dates on which entries were made, and to describe the events or conversations in the notes. The company also requested copies of all the identified documents. Motion, Exh. A 9, Exh. B 4. Brannon objected, again because the interrogatory did not identify the time period for which the materials were sought. He further maintained any logs and notes kept during a relevant time period were made at the instruction of his counsel and, therefore, were privileged under the work product doctrine. Motion, Exh. C 5.

In its motion to compel, the company repeated it had offered to limit the requested documents to those made between June 26, 2008, and September 11, 2008. As for the work product privilege, the company stated Brannon had not shown the materials were prepared in anticipation of litigation and, even if they were, the logs and notes were contemporaneous and contained information Panther could not obtain elsewhere. Motion 5.

Finally, in its request for production, the company asked for a copy of any document

³As I read the complaint, it does not allege a discriminatory act by Panther on September 11. It may be the company is referring to its receipt of copy of a letter from MSHA notifying Panther that Brannon had filed a complaint with the agency which the agency was investigating. The letter was mailed to Panther on or about September 10, 2008.

given to MSHA that related to the events in the complaint. Brannon responded by sending the company a truncated copy of Brannon's statement to MSHA. Brannon explained that the names of miner witnesses and information pertaining to miner witnesses had been redacted. In the motion to compel, the company argued the redactions exceeded the scope of any that might be justified by the Commission's rules. Motion 2.

RULING ON THE MOTION

Discovery is a device to ascertain the facts or information regarding the existence of facts relative to the issues in a case. The goal of discovery is to provide the parties with an opportunity to obtain, consistent with recognized privileges, the fullest possible knowledge of the issues and facts before trial. 29 C.F.R. § 2700.56(b). The basic philosophy behind discovery is that, prior to trial, a party is entitled to the disclosure of all relevant information in the possession of any person unless the information is privileged. *See*, Fed. R. Civ. P. 26(b)(1). The information need not be admissible at trial. Rather, if the information appears reasonably calculated to lead to the discovery of admissible evidence, it is subject to disclosure. The courts liberally construe discovery rules in order to provide parties with the information needed for trial. Thus, a party is entitled to see many, if not all, of his or her opponent's cards before proceeding through the courthouse door. The goal is to level the playing field and help to ensure a fair trial. This is especially true in administrative law cases where, in order to simplify and expedite proceedings, judges are loath to strictly construe discovery rules and bar pre-trial disclosure.

When parties are at odds over allegedly discoverable materials, the first question is whether the materials that are requested to be identified and produced – here, the copies of the audio tapes, logs and notes – are relevant and likely to lead to admissible evidence. If so, the next question is whether the materials sought are protected by privilege. If not, the materials must be identified and produced.

THE AUDIO TAPES

Certainly, audio tapes of mine-site conversations involving the complainant and other miners made between the time Brannon was transferred from the second shift to the day shift, June 26, 2008, to the date Panther received notice from MSHA that Brannon had filed a complaint of discrimination, presumably September 11, 2008, are likely to contain information reasonably calculated to lead to the discovery of admissible evidence, including the company's alleged responses to Brannon's alleged protected activities. Therefore, information requested in Interrogatory 8 is relevant and must be provided absent the names of miner witnesses or information otherwise identifying miners who may be called as witnesses. 29 CFR § 2700.62. Accordingly, Brannon's objections to Interrogatory 8 **ARE OVERRULED**.

In addition, copies of the tapes must be provided to Panther, and Brannon's objections to producing the audio tapes also **ARE OVERRULED**. Material on the tapes identifying miner witnesses or those who may appear must be redacted, and complete copies of the tapes, including

redacted material, must be provided to Panther two days before the hearing.

THE LOGS AND NOTES

Certainly, too, information about logs and notes made by Brannon between June 26, 2008, and September 11, 2008 – logs and notes that concern events or conversations at the mine involving Brannon's alleged protected activities and Panther's and its employees reactions thereto – are likely to obtain information reasonably calculated to lead to the discovery of admissible evidence. In addition, they are likely to contain information relevant to underlying facts and to the credibility of witnesses, including the complainant. Thus, the information requested in Interrogatory 9 is relevant.

Brannon's objection that the materials are protected by blanket application of the work product privilege is not well taken. The work product privilege is a qualified privilege that may be overcome, as Panther correctly notes, if Panther establishes it has a convincing need for the materials and is unable to obtain their equivalent without undue hardship. *See Haigh v. Matsushita Electric Corporation of America*, 676 F. Supp. 1332, 1357 (E.D. VA) (1987). I am persuaded that Panther is right when it argues contemporaneous materials, such as the requested logs and notes, cannot be replicated and are, in general, more reliable than latter day recollections. Motion 4. The work-product doctrine should not be implemented so as to upset a fair and balanced process by giving the advantage to one side over the other, and valid concerns enshrined in the doctrine – concerns regarding an attorney's thought process and strategy – can be accommodated by careful redaction. For these reasons, Brannon's objections to Interrogatory 9 **ARE OVERRULED**.

In addition, copies of materials identified in response to Interrogatory 9 must be provided to Panther, and Brannon's objections to producing them also **ARE OVERRULED**. Material on the copies relating to his attorney's thought processes and strategies must be redacted. In addition, material identifying miner witnesses or those who may appear as witnesses must be redacted, and complete copies of the documents, absent material relating to the thought process and strategies of Brannon's attorney, must be provided to Panther two days before the hearing.

BRANNON'S STATEMENT TO MSHA

Finally, after reviewing the copy of Brannon's statement to MSHA – the copy that Brannon sent to Panther – I do not agree with Panther that it is "over redacted." Brannon has stated he will provide Panther with a complete copy of the statement two days before the hearing, and this is as it should be under Rule 62. 29 C.F.R. § 2700.62.

SUPPLEMENTATION OF THE RECORD

A copy of Brannon's initial complaint to MSHA would provide a better understanding of the nature of this case. **ACCORDINGLY**, within ten days of the date of this Order, Brannon is

requested to file such a copy with the Commission.

Further, Brannon's allegations of the protected activity in which he engaged are not entirely clear from the complaint. **ACCORDINGLY**, within the same ten days Brannon is requested to file a list of his alleged protected activities. The list should include a short description of each protected activity and the date or dates on which it occurred.



David F. Barbour
Administrative Law Judge

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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 4, 2009

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2008-124-R
v.	:	Citation No. 7693357; 11/02/2007
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 01-00758
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2008-792
Petitioner	:	A.C. No. 01-00758-148659
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	Mine No. 3
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION **NOTICE OF HEARING** **AND** **ORDER TO FILE PREHEARING REPORT**

These consolidated cases arise out of a fatal accident that occurred on July 30, 2007, and the citation issued as a result of the fatality. In the civil penalty case the Secretary is petitioning to assess Jim Walter Resources, Inc. ("JWR") \$60,000 for an alleged violation of 30 C.F.R. § 77.1710(g), a mandatory safety standard requiring that an employee wear safety belts and lines where there is a danger of falling.¹ The alleged violation is set forth in Citation No. 7693357,

¹30 C.F.R. § 77.1710(g) states in part: Each employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below:

* * *

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

which was issued on November 2, 2007. In addition to alleging a violation of section 77.1107(g), the citation contains the inspector's findings that the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of JWR's moderate negligence.

Citation No. 7693357 states as follows:

A contract employee was not utilizing a safety line (lanyard) where there was a danger of falling while installing and dismantling roofing panels on the top of the Jim Walter Resources, Inc., No. 3 maintenance shop. At approximately 2:30 [p.m.], on July 30, 2007, a contract roofing employee was fatally injured when he fell for a distance of approximately 28 feet while dismantling the roof panels. The employee was wearing a safety harness but did not have the safety line (lanyard) secured. There was a Jim Walter [s]upervisor present in the vicinity of the shop at the time of the accident. The operator gave the required hazard training; however, the agent of the operator did not ensure that the contractor was in compliance with the applicable regulation.

THE RELEVANT FACTS

JWR owns the No. 3 Mine located in Brookwood, Alabama. The mine is an underground coal mine with very limited surface activity. *See* JWR's Motion for Summary Decision at 3. According to MSHA's Investigation Report, JWR contracted with Hooper and Chandler Steel Erectors, Inc. (H&C) to replace the roof on the mine's surface maintenance shop.² Work was scheduled to begin on July 30, 2007, the same day the accident occurred. However, before the H&C contract employees began working, JWR conducted required hazard training for them. During the training JWR's instructor informed the H&C employees that they had to utilize fall protection where there was a danger of falling and that they were responsible for complying with MSHA regulations at all times. After the training was completed, H&C's employees began to replace the shop roof. At approximately 2:30 p.m., Wade Drew, who was dismantling a maintenance shop roof panel, slipped and fell approximately 28 feet to his death. As the citation notes, Drew did not have a safety line attached to his safety harness.

MSHA investigated the accident and, as a result of the investigation, MSHA's inspector

²JWR's version of its contractual relationship varies slightly from MSHA's. According to JWR, it first contracted with Hooper & Chandler Steel Erection and Sales, LLC (H&C Sales) to replace the roof on two buildings at the mine, one being the surface maintenance shop. H&C Sales then contracted with H&C to do the work. Motion 3.

issued the citation, the company contested its validity and MSHA's civil penalty petition followed. On March 25, 2009, counsel for JWR filed a Motion for Summary Decision. The Secretary filed a response on April 23, 2009. JWR filed a reply to the Secretary's response on May 12, 2009. Under Commission Rule 67, 29 C.F.R. § 2700.67(b), 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.

JWR'S MOTION AND THE SECRETARY'S RESPONSE

JWR maintains it is entitled to vacation of the citation as a matter of law because the facts unquestionably establish section 77.1710(g) does not apply. The company emphasizes section 77.1710 states it applies to "[e]ach employee" and, therefore, "[t]he language of section 77.1710(g) requires that the individual in question be an 'employee' of the cited entity." Motion 4-5, *quoting Blue Diamond Coal Co.*, 30 FMSHRC 962, 964 (October 2008).³ JWR contends it is undisputed that Wade Drew was an employee of H&C, not of JWR. JWR did not have control over the manner in which the work was performed, nor did it supervise H&C's employees. Because the Secretary chose to use the word "employee" in section 77.1710 rather than "miner" or "persons" as she did in other regulations, JWR cannot be found to have violated section 77.1710(g) since Drew was not an employee of JWR. Motion 5-6.

The Secretary responds that *Blue Diamond* is "clearly incorrect and inconsistent with prior Commission cases interpreting . . . [the regulation to apply] to both production operators [(like JWR)] and contractors [(like H&C)], and with the overwhelming body of law that has held that the Secretary has discretion to cite production operators for violations committed by their contractors." Petitioner's Response to Respondent's Motion for Summary Decision (Response) 2. Therefore, the word "employee" as used in section 77.1710(g) can mean either the employee of the production operator or the contractor, and if the affected employee is employed by the contractor, the production operator may be cited. Response 3.

RULING

I conclude the Secretary is right. I find the Secretary's interpretation of "employee" as

³In *Blue Diamond*, Commission Administrative Law Judge Avram Weisberger held that use of the word "employee" in section 77.1701 "creates a specific classification pertaining to individuals who are employed [by the mine operator]." *Blue Diamond*, 30 FMSHRC at 964. Judge Weisberger reached this conclusion by applying the statutory interpretative principle of *expressio unius est exclusio alterius*, a principle on which JWR also relies. Judge Weisberger found that under the principle, "the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *Id.* at 964. Judge Weisberger held it was improper for the agency to cite the production operator for a violation of section 77.1710(g) that was committed by its contractor's employee. *Id.*

used in section 77.1710(g) to be reasonable and, *Blue Diamond* aside, to be consistent with established case law. JWR's restrictive interpretation of "employee" would allow the company to escape liability for a violation committed by its contractor's employee, contrary to the well recognized principle that the employees of both production operators and their contractors may be subject to mandatory standards promulgated under the Mine Act and that an owner-operator like JWR may be held liable for violations committed by its contractor's employees. As the United States Court of Appeals for the Fourth Circuit recently stated, "[p]recluding owner-operator liability for independent contractor violations would encourage owners to use contractors as a means of insulating themselves from safety regulations." *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 315 (4th Cir. 2008). Thus, when a situation arises in which an employee of a contractor does not wear the protective clothing or devices specified in section 77.1710, the employee has violated the regulation, and the production operator may be held liable for the employee's violation. In other words, liability does not hinge on whether the worker is employed by the production operator or by the contractor. To fulfill the purpose of the Act, under either situation, the production operator may be liable depending on how the Secretary chooses to proceed.⁴

JWR argues that the principle of *expressio unius est exclusio alterius* means because the word "employee" was used, all other types of employment relationships must be excluded. Motion 5. But, by the same reasoning, one would conclude that the use of the word "men" in the regulations excludes women (*see, e.g.*, 30 C.F.R. § 77.1603(b)), and this simply is not a correct way to interpret the regulations. Furthermore, JWR argues that it did not exercise control over H&C's employees, a fact that helps establish that the contractor's employees were not employees of JWR. JWR's Reply to Secretary's Response, 7-9. I find this irrelevant, because the regulation should not be interpreted to require an element of control of the affected person by the production operator, but, rather, that the affected person be employed by either the production operator or the contractor.

JWR's Motion for Summary Decision is **DENIED**, and the cases shall proceed to hearing.

NOTICE OF HEARING

The cases will be called for hearing on **September 22, 2009**, at **8:30 a.m.** in **Birmingham, Alabama**. The specific hearing site will be designated later.

The proceedings will be conducted pursuant to the Act and 29 C.F.R. § 2700.50, *et seq.* The primary issues are whether the violation of section 77.1710(g) occurred as alleged, whether

⁴As the court in *Speed Mining* stated, "30 U.S.C. § 814(a) grants the Secretary the discretionary authority to 'cite the independent contractor, the owner, or both for any violations of the Mine Act committed by the independent contractor.'" *Speed Mining* at 314 (*quoting Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981)).

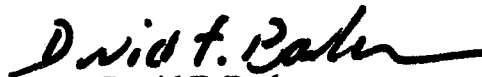
the violation was S&S and, if the violation occurred, the amount of the civil penalty that must be assessed taking into consideration the statutory penalty criteria.

Each party shall file with the undersigned and with one another on or before **August 28, 2009**, a statement regarding each of the following items:

1. Facts that are established by admissions in the pleadings or by stipulation of the parties' counsels.
2. Facts that remain to be litigated at trial.
3. Issues of law that remain to be litigated at trial.
4. Witnesses each party intends to call.⁵
5. List of exhibits each party intends to offer in evidence.⁶
7. Estimate as to probable length of the trial.

Any party requesting subpoenas for the attendance of witnesses or the production of documents shall file the request at least 20 days prior to the hearing.

Any person planning on attending the hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request such features and/or aids sufficiently in advance of the hearing to allow accommodation, subject to the limitations set forth in 29 C.F.R. §§ 2706.150(a) and 2706.160(d).



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

⁵If the Secretary intends to call miner witnesses, within the meaning of Commission Procedural Rule 62, 20 C.F.R. § 2700.62, the number of such witnesses shall be noted in the statement, and a list of the names of such witnesses and a description of their expected testimony shall be filed and served on all parties by facsimile copy by 11:00 a.m., E.S.T., on the second business day prior to the hearing.

⁶Copies of all proposed exhibits must be exchanged by the parties. The copies must be received by opposing counsel(s) no later than September 4, 2009. If proposed exhibits are too bulky or otherwise impractical to copy, they shall be made available for inspection by opposing counsel(s) prior to the hearing.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-253
Petitioner	:	A.C. No. 12-02374-139953
	:	
	:	Shamrock Mine
	:	
v.	:	Docket No. LAKE 2008-254
	:	A.C. No. 12-01732-139936
	:	
SOLAR SOURCES, INC.,	:	Craney Mine
Respondent	:	

CORRECTED ORDER DENYING RESPONDENT'S MOTION TO DISMISS¹ **AND** **PREHEARING ORDER**

These civil penalty proceedings concern two alleged violations of the new miner training provisions in Part 48 of the Secretary's regulations. The cited violations were designated as non-significant and substantial in nature to reflect that it was unlikely that the violations will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$120.00 in these matters.

Solar Sources, Inc., (Solar) has filed a Motion to Dismiss these cases based on its assertion, in essence, that the Secretary failed to file the underlying Petitions for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Solar's motion.

¹ This Order corrects the Order issued earlier today in these proceedings to more accurately reflect the Commission's past and current caseload.

Section 105(a) provides:

If, after an inspection or investigation, *the Secretary* issues a citation or order under section 104, [she] *shall, within a reasonable time* after the termination of such inspection or investigation, *notify the operator . . . of the civil penalty proposed*

(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petitions on January 9, 2009, more than eight months after the end of the 45 day filing period provided in Rule 28. Consequently, Solar contends the citations in issue must be dismissed because the Secretary failed to act reasonably when she filed her petitions for civil penalty considerably later than the 45 days specified in Rule 28.

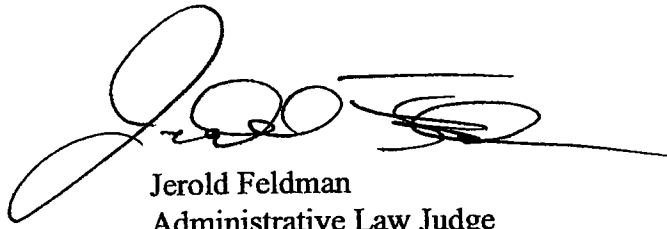
It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, the Commission currently has 12,880 contest and civil penalty cases that involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the eight month delay by the Secretary has, in any way, prejudiced Solar. On balance, in the absence of a showing of prejudice, the Secretary's eight month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Solar's Motion to Dismiss **IS DENIED**.

Having denied Solar's Motion to Dismiss, in accordance with the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the above proceedings will be called for hearing on the merits at a time and place to be selected.

1. On or before **September 4, 2009**, the parties shall confer for the purpose of discussing settlement and stipulating as to matters not in dispute. If settlement is reached, a motion for its approval shall be filed by the Secretary of Labor no later than **September 4, 2009**.

2. If settlement is not agreed upon, the parties shall send to each other and to me no later than **September 4, 2009**, synopses of their expected legal arguments, expected proof, lists of exhibits that may be introduced in evidence, and matters to which they can stipulate at the hearing. Each party shall also state its best estimate of the time necessary to present its case at the hearing, as well as hearing location preference.



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Edward B. Ritchie, Conference & Litigation Representative, U.S. Department of Labor,
MSHA, 2300 Willow St., Suite 200, Vincennes, IN 47591

G. Daniel Kelly, Jr., Esq., Ice Miller, LLP, One American Square, Suite 3100,
Indianapolis, IN 46282

/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-391
Petitioner	:	A.C. No. 12-02394-145030
	:	
	:	
v.	:	
	:	
BLACK PANTHER MINING, LLC,	:	Mine: Oaktown Fuels Mine No. 1
Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This civil penalty proceeding concerns two alleged violations Part 77 of the Secretary's regulations. The cited violation was designated as non-significant and substantial in nature to reflect that it was unlikely that the violation will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$212.00 in these matters.

Black Panther Mining, L.L.C. ("Black Panther") has filed a Motion to Dismiss this case based on its assertion, in essence, that the Secretary failed to file the underlying Petition for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Black Panther's motion.

Section 105(a) provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, *within a reasonable time* after the termination of such inspection or investigation, notify the operator . . . of the civil penalty proposed

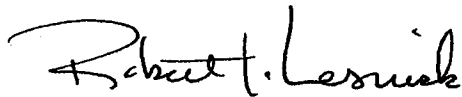
(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petition on January 9, 2009, nearly seven months after the end of the 45 day filing period provided in Rule 28. Consequently,

Black Panther contends the citations in issue must be dismissed because the Secretary failed to act reasonably when she filed her petitions for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, there are currently 12,880 contest and civil penalty cases, the vast majority of which involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the seven month delay by the Secretary has, in any way, prejudiced Black Panther. On balance, in the absence of a showing of prejudice, the Secretary's delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Black Panther's Motion to Dismiss **IS DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward B. Ritchie, U.S. Department of Labor, Mine Safety and Health Administration, 2300 Willow Street, Suite 200, Vincennes, IN 47591

G. Daniel Kelley, Jr., Esq., Ice Miller, LLP, One American Square, Suite 3100, Indianapolis, IN 46282-0200

/bla

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-487
Petitioner	:	A.C. No. 12-02249-153103
	:	
v.	:	
	:	
FIVE STAR MINING, INC.,	:	Mine: Prosperity Mine
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This civil penalty proceeding concerns eight alleged violations of Part 75 of the Secretary's regulations. Three of the eight cited violations were designated as significant and substantial in nature to reflect that it was likely that the violations will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$58,684.00 in this matter.

Five Star Mining, Inc., (Five Star) has filed a Motion to Dismiss this case based on its assertion, in essence, that the Secretary failed to file the underlying Petition for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Five Star's motion.

Section 105(a) provides:

If, after an inspection or investigation, *the Secretary* issues a citation or order under section 104, [she] *shall, within a reasonable time* after the termination of such inspection or investigation, *notify the operator . . . of the civil penalty proposed*

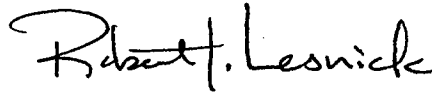
(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petition on January 12, 2009, more than five months after the end of the 45 day filing period provided in Rule 28. Consequently, Five Star contends the citations at issue must be dismissed because the Secretary failed to act

reasonably when she filed her petition for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, there are currently 12,880 contest and civil penalty cases, the vast majority of which involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the five month delay by the Secretary has, in any way, prejudiced Five Star. On balance, in the absence of a showing of prejudice, the Secretary's five month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Five Star's Motion to Dismiss **IS DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward B. Ritchie, Conference & Litigation Representative, U.S. Department of Labor, MSHA,
2300 Willow St., Suite 200, Vincennes, IN 47591

Drew Miroff, Esq., Ice Miller LLP, One American Square, Suite 2900, Indianapolis, IN 46282

/meh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-589
Petitioner	:	A.C. No. 12-02249-156265
	:	
v.	:	
	:	
FIVE STAR MINING, INC.,	:	Mine: Prosperity Mine
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This civil penalty proceeding concerns one alleged violation of Part 77 of the Secretary's regulations. This violation was designated as non-significant and substantial in nature to reflect that it was unlikely that the violation will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$207.00 in this matter.

Five Star Mining, Inc., (Five Star) has filed a Motion to Dismiss this case based on its assertion, in essence, that the Secretary failed to file the underlying Petition for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Five Star's motion.

Section 105(a) provides:

If, after an inspection or investigation, *the Secretary* issues a citation or order under section 104, [she] *shall, within a reasonable time* after the termination of such inspection or investigation, *notify the operator . . . of the civil penalty proposed*

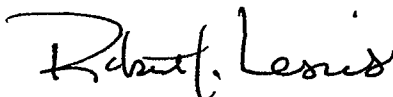
(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petition on January 23, 2009, more than four months after the end of the 45 day filing period provided in Rule 28. Consequently, Five Star contends the citation at issue must be dismissed because the Secretary failed to act

reasonably when she filed her petition for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, there are currently 12,880 contest and civil penalty cases, the vast majority of which involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the four month delay by the Secretary has, in any way, prejudiced Five Star. On balance, in the absence of a showing of prejudice, the Secretary's four month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Five Star's Motion to Dismiss **IS DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward B. Ritchie, Conference & Litigation Representative, U.S. Department of Labor, MSHA,
2300 Willow St., Suite 200, Vincennes, IN 47591

Drew Miroff, Esq., Ice Miller LLP, One American Square, Suite 2900, Indianapolis, IN 46282

/meh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-598
Petitioner	:	A.C. No. 12-02249-156265
	:	
	:	
	:	
	:	
v.	:	
	:	
FIVE STAR MINING, INC.,	:	
Respondent	:	Mine: Prosperity Mine

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

These civil penalty proceedings concern four alleged violations of Part 75 of the Secretary's regulations. The cited violations were designated as non-significant and substantial in nature to reflect that it was unlikely that the violations will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$7229.00 in these matters.

Five Star Mining, Inc., (Five Star) has filed a Motion to Dismiss these cases based on its assertion, in essence, that the Secretary failed to file the underlying Petitions for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Five Star's motion.

Section 105(a) provides:

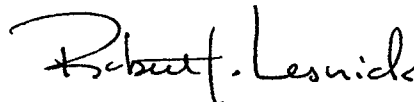
If, after an inspection or investigation, *the Secretary* issues a citation or order under section 104, [she] *shall, within a reasonable time* after the termination of such inspection or investigation, *notify the operator . . . of the civil penalty proposed*

(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petitions on January 23, 2009, more than four months after the end of the 45 day filing period provided in Rule 28. Consequently, Five Star contends the citations in issue must be dismissed because the Secretary failed to act reasonably when she filed her petitions for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, there are currently 12,880 contest and civil penalty cases, the vast majority of which involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the four month delay by the Secretary has, in any way, prejudiced Five Star. On balance, in the absence of a showing of prejudice, the Secretary's four month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Five Star's Motion to Dismiss **IS DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward B. Ritchie, U.S. Department of Labor, MSHA, 2300 Willow Street, Suite 200,
Vincennes, IN 47591

Andrew J. Miroff, Esq., Ice Miller LLP, One American Square, Suite 2900, Indianapolis, IN
46282

/ms

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-616
Petitioner	:	A.C. No. 12-02249-142777
	:	
v.	:	
	:	
FIVE STAR MINING, INC.,	:	Mine: Prosperity Mine
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This civil penalty proceeding concerns one alleged violation of Part 75 of the Secretary's regulations. This violation was designated as significant and substantial in nature to reflect that it was likely that the violation will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$1,026.00 in this matter.

Five Star Mining, Inc., (Five Star) has filed a Motion to Dismiss this case based on its assertion, in essence, that the Secretary failed to file the underlying Petition for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Five Star's motion.

Section 105(a) provides:

If, after an inspection or investigation, *the Secretary* issues a citation or order under section 104, [she] *shall, within a reasonable time* after the termination of such inspection or investigation, *notify the operator . . . of the civil penalty proposed*

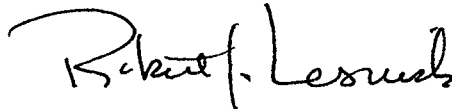
(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petition on February 2, 2009, nearly four months after the end of the 45 day filing period provided in Rule 28. Consequently, Five Star contends the citation at issue must be dismissed because the Secretary failed to act

reasonably when she filed her petition for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, there are currently 12,880 contest and civil penalty cases, the vast majority of which involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the four month delay by the Secretary has, in any way, prejudiced Five Star. On balance, in the absence of a showing of prejudice, the Secretary's four month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Five Star's Motion to Dismiss **IS DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution: (Certified Mail)

Edward B. Ritchie, Conference & Litigation Representative, U.S. Department of Labor, MSHA,
2300 Willow St., Suite 200, Vincennes, IN 47591

Drew Miroff, Esq., Ice Miller LLP, One American Square, Suite 2900, Indianapolis, IN 46282

/meh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-189
Petitioner	:	A.C. No. 05-03672-167617
	:	
	:	
v.	:	
	:	
MOUNTAIN COAL COMPANY, L.L.C.,	:	Mine: West Elk Mine
Respondent.	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This civil penalty proceeding concerns an alleged violation of the permissible miner noise exposure limits in Part 42 of the Secretary's regulations. The cited violation was designated as significant and substantial in nature to reflect that it was reasonably likely that the violation will result in an accident causing reasonably serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$963.00 in these matters.

Mountain Coal Company, L.L.C. (Mountain Coal) has filed a Motion to Dismiss this case based on its assertion, in essence, that the Secretary failed to file the underlying Petition for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Mountain Coal's motion.

Section 105(a) provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, *within a reasonable time* after the termination of such inspection or investigation, notify the operator . . . of the civil penalty proposed

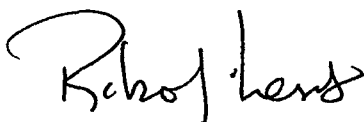
(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petition on November 11, 2008, more than

two years after the end of the 45 day filing period provided in Rule 28. Consequently, Mountain Coal contends the citation in issue must be dismissed because the Secretary failed to act reasonably when she filed her petitions for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court of Appeals for the District of Columbia Circuit has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, there are currently 12,880 contest and civil penalty cases, the vast majority of which involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the two year delay by the Secretary has, in any way, prejudiced Mountain Coal. On balance, in the absence of a showing of prejudice, the Secretary's delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Mountain Coal's Motion to Dismiss **IS DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

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