MAY 1999

COMMISSION ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MAY 1999

There were no cases filed in which review was granted during the month of May:

Review was Denied in the following case during the month of May:

Secretary of Labor, MSHA v. Knock's Building Supplies, Docket No. CENT 98-1-M.
(Judge Hodgdon, May 29, 1999)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 99-72-M
	:	A.C. No. 29-00785-05528
AGRONICS INCORPORATED	:	

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

ORDER

BY: Riley, Verheggen, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 7, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Agronics Inc. ("Agronics") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on December 31, 1998, or the judge's Order to Respondent to Show Cause issued on February 4, 1999. The judge assessed the civil penalty of $891.00 proposed by the Secretary.

On April 26, 1999, the Commission received a letter from Agronics asserting that the judge's Order of Default was erroneously served on "Leland B. Taylor, Chairman, Agronics Inc." rather than on "Leland Thomas Taylor, President, Agronics Inc." Mot. at 1. Agronics requests that the Order of Default be set aside, denies the violations alleged, challenges the penalty amount, and requests various documents and a hearing. *Id.* at 1-2.

On May 5, 1999, the Commission received the Secretary's opposition to Agronics' request to set aside the Order of Default. The Secretary submits that, at the time MSHA issued the proposed assessment, "Leland B. Taylor" was the agent designated by Agronics. S. Opp'n at 2-3. She asserts that Leland B. Taylor was, therefore, an "agent" of Agronics pursuant to section 3(e) of the Mine Act, 30 U.S.C. § 802(e), and that service upon Leland B. Taylor was sufficient to accomplish service on Agronics. *Id.* at 3. The Secretary also maintains that, "as the judge noted in the order of default, . . . Agronics received a copy of the show cause order," and alleges that Agronics has provided no valid explanation which would excuse the default. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on April 7, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Agronics' letter to be a timely filed petition for discretionary review, which we grant. *See, e.g.*, *Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Agronics' position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (Feb. 1989).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

We vote to treat Agronics' motion to vacate the judge's default order as a timely filed petition for discretionary review, which we would deny. We also vote to deny the motion.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : : :	
v.	: :	Docket No. PENN 99-16-M A.C. No. 36-08739-05502 9BK
CECIL KILMER FLAGSTONE	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 25, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cecil Kilmer Flagstone ("Kilmer") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on November 19, 1998, or the judge's Order to Respondent to Show Cause issued on January 14, 1999. The judge assessed the civil penalty of $1,200 proposed by the Secretary.

On April 29, 1999, the Commission received a letter from Kilmer asserting that, on December 15, 1998, it had sent a letter answering the Secretary's petition for assessment of penalty. Mot. at 1. The December 15 letter, which Kilmer enclosed along with its motion, was addressed and sent to the Department of Labor's Regional Solicitor's Office in Geneva, New York. The December 15 letter also admits the two alleged violations of mandatory safety standards, but contests the amount of the penalty proposed.

The judge's jurisdiction in this matter terminated when his decision was issued on February 25, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Commission received Kilmer's letter on April 29, 1999, after the judge's default order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). On the basis of the present record, we are unable to evaluate the merits of Kilmer's position. In the interest of justice, we reopen the proceeding, treat Kilmer's letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See F. W. Contractors*, 17 FMSHRC at 248. We remand this matter to the judge, who shall determine whether final relief from default is warranted. *See id.*

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. CENT 98-1-M
	:	A.C. No. 13-01916-05505
KNOCK'S BUILDING SUPPLIES	:	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 1, 1999, the Commission received from Knock's Building Supplies ("KBS") a request to reopen a decision issued by Administrative Law Judge T. Todd Hodgdon on May 29, 1998. In its request for relief, KBS demands a jury trial and alleges that "a prejudicial error of procedure was committed." K. Mot. The operator also claims to have more knowledge of safety than MSHA's inspectors, and submits that it has never had a serious injury. *Id.* In opposition to KBS's request, the Secretary argues that the operator's request does not establish grounds upon which the Commission could grant relief under Fed. R. Civ. P. 60(b)(1) or 60(b)(6). S. Opp'n at 4-5.

The judge's jurisdiction over these cases terminated when his decision was issued on May 29. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1).

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g., De Atley Co.*, 18 FMSHRC 491, 492 (Apr. 1996) (excusing late filing of petition for discretionary review where operator's predecessor failed to inform operator of unconsummated settlement agreement). Typically, in such cases, a default order has been entered against a party, depriving the party of any opportunity to defend against the enforcement action taken by the Secretary. Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable

neglect. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *see Green Coal Co.*, 18 FMSHRC 1594, 1595 (Sept. 1996).

Here, KBS has availed itself of the opportunity to defend the case before a judge. The operator offers no explanation for its failure to timely submit a petition for discretionary review. Thus, KBS has failed to set forth grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief); *Brown Bros. Sand Co.*, 15 FMSHRC 203, 204 (Feb. 1993) (rejecting late-filed petition for discretionary review of judge's decision where stated rationale did not meet the criteria of Fed. R. Civ. P. 60(b)). Accordingly, KBS's request for relief from the final Commission decision is denied.

For the foregoing reasons, the operator's motion is denied.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
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FALLS CHURCH, VIRGINIA 22041

May 6, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-184-D
on behalf of BENNARD SMITH,	:	BIRM CD 98-02
Complainant	:	
v.	:	
	:	No. 3 Mine
JIM WALTER RESOURCES INCORPORATED,	:	Mine ID No. 01-00758
Respondent	:	

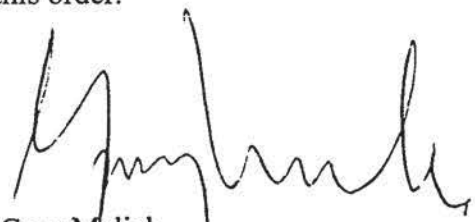
DECISION

Appearances: William Lawson, Esq., Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, on behalf of Complainant;
David M. Smith, Esq., and James P. Naftel, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and Guy W. Hensley, Esq., Jim Walter Resources, Inc., on behalf of Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination and petition for assessment of civil penalty under Sections 105(c) and 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Following hearings a decision on the merits was issued on March 23, 1999, granting the Secretary's Complaint in part. The parties have now filed a motion to approve a settlement agreement providing a reduction in civil penalty to $1,500.00 and damages to the individual Complainant, Bennard Smith. Mr. Smith has agreed to the proposed amount of damages. I have considered the representations and documentation submitted in this case including the entire trial record and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay damages of $2,789.00 to Bennard Smith and a civil penalty of $1,500.00 to the Secretary within 40 days of this order.



Gary Melick
Administrative Law Judge

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 6, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-59-M
Petitioner	:	A.C. No. 30-02566-05517
v.	:	
	:	Granby Pit
SAM PUGLIA EXCAVATING,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Bulluck

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss this case. A reduction in penalty from $4,144.00 to $580.00 is proposed. The citations initial assessments, and the proposed settlement amounts are as follows:

Citation No.	Initial Assessment	Proposed Settlement
7707680	$2,072.00	$290.00
7707682	$2,072.00	$290.00
Total	$4,144.00	$580.00

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, it is **ORDERED** that Order Nos. 7707714 and 7707715 are **VACATED**, and that Respondent pay a penalty of $580 in three installments, in accordance with the payment schedule set forth in the settlement agreement.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

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Mr. Sam Puglia, Sam Puglia Excavating, 1900 State Rt. 3, Fulton, NY 13069

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

May 10, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-240-M
Petitioner	:	A. C. No. 03-01783-05502
v.	:	
	:	Docket No. CENT 98-276-M
SPA CITY GRAVEL,	:	A. C. No. 03-01783-05503
Respondent	:	
	:	Spa City Gravel Mine

DECISION

Appearances: Stephen E. Irving, Esq., Office of the Solicitor, U.S. Dept. of Labor, Dallas, Texas, on behalf of the Petitioner;
Pamela D. Walker, Esq., Little Rock, Arkansas, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon Petitions for Civil Penalty filed by the Secretary of Labor against Spa City Gravel (Spa City) pursuant to Section 105(d) of the Federal Mine Safety and Heath Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging fourteen violations of mandatory standards and seeking civil penalties of $2,479.00 for those violations. The general issue before me is whether Spa City committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

At hearing the Secretary, exercising her unilateral authority, vacated Citation Nos. 7865443, 7865449 and 7865457. The parties also agreed to a settlement of Citation Nos. 7865444, 7865448, 7865450, 7865451, 7865453, 7865454, 7865455, 7865456 and 7865458, proposing a reduction in total penalties for these violations to $1,176.00. The proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act and an order directing payment of that amount will be incorporated in this decision.

Two citations remain at issue. Citation No. 7865445 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14105 and charges in relevant part as follows:

> The Cat 950 front-end loader (serial #73J10976) was observed parked at the plant (truck loading area) with the engine running, no operator inside, loader

bucket approximately 18 inches off the ground, park brake not set, wheels not blocked, and the mechanic had his right arm inserted into the oscillating section of the loader up to his shoulder trying to repair the provided back-up alarm while customer trucks were being loaded with the Cat 977 crawler loader. The customer trucks and Cat 977 crawler were both in the same area as the stopped Cat 950 front-end loader. Not having the park brake set, wheels blocked or the power off allows for movement of the Cat 950 loader (from being bumped by other mobile equipment or just rolling) which could result in serious injury to the mechanic's arm or him being run-over . . . .

The cited standard, 30 C.F.R. 56.14105, provides as follows:

> Repairs or maintenance of machinery or equipment shall be performed only after the power is off and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

Donald Ratliff, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) testified without contradiction that the subject Cat 950 front-end loader was parked at the truck loading area with its engine running, with no operator inside, with the loader bucket raised and with its wheels not blocked. In addition, the mechanic had his arm inserted up to his shoulder into the oscillating section of the loader trying to repair its backup alarm. Inspector Ratliff's testimony that customer trucks were passing behind the loader only 10 to 12 feet away is also undisputed.

The subject mechanic did not testify. However, Spa City owner George Clark testified that he believed the parking brake on the loader must have been engaged because after the citation was issued he saw the front-end loader being moved and concluded that you have to release the parking brake to move the loader. Clark also testified, in essence, that it would be too time consuming to block all eight wheels on the loader before working on it.

Inspector Ratliff credibly testified however that Clark was not present when he cited the loader and that he, Ratliff, observed the mechanic engage the parking brake only after the loader was cited Ratliff testified that after the loader was cited he proceeded to the mine office where Clark was located and told Clark of the violation. It therefore appears that Clark's belief that the brake had been engaged before it was cited was based only upon observations made at a later time, i.e., subsequent to the issuance of the citation after the mechanic was told to engage the brake and had thereupon actually engaged the brake. I therefore find that, indeed, the parking brake on the cited loader had not been engaged as alleged in the citation.

Under the circumstances the violation is proven as charged. In reaching this conclusion I have not disregarded Mr. Clark's testimony that it would have been too time consuming to block

all the wheels of the loader. While this concern is no defense to the violation I note in any event that Inspector Ratliff testified that only one wheel need be blocked to meet the requirements of the cited standard.

The violation is also "significant and substantial." A violation is "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 safety 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 an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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, 916-17 (June 1991). In this regard I accept Inspector Ratliff's undisputed testimony that the actions of the mechanic, in placing his arm into the oscillating section of the cited loader under the noted conditions were so serious as to constitute an imminent danger. Since mine owner George Clark himself effectively acknowledged that at least the parking brake should have been engaged on the subject loader while the mechanic was performing work in the area of the oscillating section, I find that the violation was also the result of operator negligence. However, considering the minimal history of only one prior violation at this mine and the small size of the operator (only two workers) I find that a civil penalty of $300.00, is appropriate.

Citation No. 7865452 alleges a violation of the standard at 30 C.F.R. § 56.15001 and charges as follows:

> No stretcher or adequate first aid supplies were being provided at the mine site. Some Band-Aids, cold pack, and other small idem [*sic*] were in a first aid box but nothing was provided to stop or restrict blood flow in the event of a serious cut to an employee. A stretcher is necessary in the event an injured person

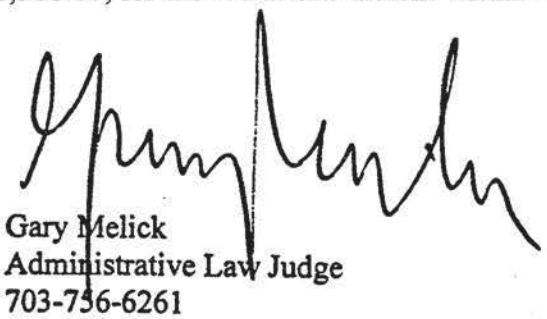
is required to be moved to prevent the employee from receiving more injuries. Failure to properly treat injured employees could result in a minor injury becoming worse.

The cited standard, 30 C.F.R. § 56.15001 provides in relevant part that "[a]dequate first-aid materials, including stretchers . . . shall be provided at places convenient to all working areas."

It is undisputed that no stretcher was provided at the mine site as alleged. It is also undisputed, however, that during an earlier inspection at the mine, another MSHA inspector had informed Mr. Clark that, in light of the fact that his mine was near an ambulance facility and that it was essentially only a two-man operation, there was no need for Clark to provide a stretcher. I do not therefore find the operator chargeable with negligence. I note that the Secretary also acknowledges that the violation was of low gravity in that she represents that an injury was unlikely. I further note that although a "Section 104(b)" order was issued for the alleged failure of the operator to timely abate the violation, it is undisputed that when that order was issued, nearly a month after the related citation, Clark had already placed an order for a stretcher and was awaiting delivery. Thus, although the order itself is not at issue, for purposes of assessing a civil penalty I credit the operator with a good faith effort to abate the violation. I again note the minimal history of violations and small size of the operator in concluding that a penalty of $25.00 is appropriate.

ORDER

Citation Nos. 7865443, 7865449 and 7865457 have been vacated by unilateral decision of the Secretary. Charging document Nos. 7865444, 7865448, 7865450, 7865451, 7865452, 7865453, 7865454, 7865455, 7865456, 7865458 and 7865445 are hereby affirmed and Spa City Gravel is hereby directed to pay civil penalties of $1,501.00, for the violations therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 12, 1999

JIM WALTER RESOURCES, INCORPORATED,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. SE 99-6-R
v.	:	Citation No. 7665505; 9/23/98
	:	
SECRETARY OF LABOR,	:	Docket No. SE 99-7-R
MINE SAFETY AND HEALTH	:	Citation No. 7665506; 9/23/98
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 99-8-R
	:	Citation No. 7665507; 9/23/98
	:	
	:	Docket No. SE 99-9-R
	:	Citation No. 7665512; 9/24/98
	:	
	:	Docket No. SE 99-10-R
	:	Citation No. 7665512; 9/24/98
	:	
	:	Central Supply Shop
	:	Mine ID 01-02515
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 99-66
Petitioner	:	A.C. No. 01-02515-03521
v.	:	
	:	Central Shop
JIM WALTER RESOURCES	:	
INCORPORATED,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Feldman

These contest proceedings are before me for summary disposition based on the parties' joint stipulations of material facts that serve as the basis for their motions for summary decision. These matters concern whether Jim Walter Resources Inc.'s (JWR's) Central Machine Shop (Central Shop) and/or Central Supply Shop (Central Supply) are "mines" subject to the

jurisdiction of the Federal Mine Safety and Health Act of 1977 (the Mine Act). Section 3(h) of the Act defines "coal or other mine" as follows:

> (1) "[C]oal or other mine" means . . . (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, ***structures, facilities, equipment, machines, tools, or other property*** including impoundments, retention dams, and tailings ponds, on the surface or underground, ***used in, or to be used in,*** or resulting from, ***the work of extracting*** such minerals from their natural deposits in nonliquid form, or in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, ***or, the work of preparing coal or other minerals*** and includes custom coal preparation facilities. (Emphasis added).

Simply stated, JWR's Central Shop and Central Supply are not located within any specific mine boundary. Rather, they are located in the vicinity of, and support, JWR's mining operations at its Nos. 3, 4, 5 and 7 Mines. Central Shop provides maintenance and repair services to the machinery used at the JWR mines and its preparation plants. Central Supply furnishes mining tools, equipment, and major necessities to the JWR mines such as rock dust, line curtains and hammers and nails. Additionally, Central Supply serves as the primary source of parts, tools and other equipment used at Central Shop. Central Shop has been inspected by the Mine Safety and Health Administration (MSHA) since 1982. Prior to the September 1998 issuance of the subject contested citations, MSHA has not claimed or otherwise exercised jurisdiction over Central Supply.

JWR stipulates that it will not contest the fact of occurrence of the subject citations in the event it is determined that Central Shop and/or Central Supply is subject to Mine Act jurisdiction. For the reasons discussed below, consistent with the Commission's basic jurisdictional framework set forth in *Secretary of Labor v. Elam*, 4 FMSHRC 5, 7 (January 1982),[1] it is concluded that Central Shop, but not Central Supply, is subject to Mine Act jurisdiction. Accordingly, the eight non-significant and substantial (non-S&S) citations in civil penalty Docket No. SE 99-66 shall be affirmed. Also consistent with this decision, JWR's contests in Docket Nos. SE 99-6-R through SE 99-10-R shall be granted resulting in the dismissal of these contest proceedings.

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[1] As discussed *infra*, *Elam* requires an inquiry into whether the predicate operations alleged by the Secretary to be "used in, or resulting from, the work of extracting" coal, are operations usually performed by the operator of a coal mine. Section 3(h) of the Act; 4 FMSHRC at 7.

I. JOINT STIPULATION OF FACTS

1. Jim Walter Resources, Inc. (JWR) is an Alabama corporation that is engaged in the business of coal production. JWR owns and operates four underground coal mines within the state of Alabama. Those mines are the No. 3 mine in Jefferson County and the Nos. 4, 5, and 7 mines located in Tuscaloosa County. JWR owns and operates a preparation plant at each of their four mines.

2. JWR owns and operates a Central Shop and a Central Supply, located adjacent to one another on JWR property, in Tuscaloosa County. The Central Shop/Supply are located within approximately one mile of the No. 5 mine, within twenty-five miles of the No. 3 mine and within six miles of the Nos. 4 and 7 mines.

3. JWR also owns and operates a Training Center and a Central Mining Office in the same vicinity. Neither of these facilities has ever been inspected by MSHA.

a. Central Shop

4. MSHA's inspection reports indicate that the Central Shop has been inspected since November 16, 1982. Since that time, the following actions have been performed by JWR regarding the Central Shop:

(a) Pursuant to 30 C.F.R. § 41.11, JWR notified the Mine Safety and Health Administration (MSHA) of the legal identity of the operator of the C entral Shop. Accordingly, the Central Shop was issued Federal Mine Identification Number 01-02515.

(b) JWR has complied with the requirement to notify MSHA of any changes to the legal identity report for the Central Shop as required by 30 C.F.R. § 41.20.

(c) MSHA has conducted inspections of the Central Shop at least once each year as identified in Exhibit "A" attached hereto.

(d) MSHA has also conducted the following at the Central Shop: noise technical investigation, respirable dust technical inspection, electrical investigation, code-a-phone spot inspection, and Section 103(g) spot inspections.

(e) The Central Shop has complied with 30 C.F.R. § 50.20 by preparing and submitting MSHA Report Form 7000-1 with respect to the reporting of accidents, injuries, and illnesses.

(f) The Central Shop has complied with 30 C.F.R. § 50.30 by preparing and submitting MSHA Report Form 7000-2 with respect to the quarterly reporting of employment and coal production.

(g) During the period of November 1, 1982 through November 10, 1998, JWR has paid 43 violations that were issued by MSHA as a result of inspections made at the Central Shop.

5. The Central Shop's function is to provide repair services and to maintain electrical and mechanical equipment used throughout JWR operations. The majority of the work activities involve the repair, rebuild, modification, or overhaul of various types of mining equipment. Typical jobs include the rebuilding of longwall stageloaders, continuous mining machines, ram cars, scoops, versa tracs, roof bolting machines, man buses, locomotives, electrical starter boxes, overhauling longwall shields and fabricating chutes and hoppers for the preparation plant.

6. The workers at the Central Shop are hourly workers employed by JWR and are members of the United Mine Workers of America (UMWA). They are supervised by management employees. The Shop operates two shifts (formally three shifts until 9/98) per day, five days per week and occasionally performs work on Saturdays and Sundays, if the need arises. Presently, the Central Shop employs 9 salary workers and 54 hourly workers. The salaried employees of the Central Shop are not members of the UMWA. The salaried personnel of the Central Shop consist of a shop manager, coordinator, master mechanic, four shop foremen, a maintenance clerk/secretary and an accountant who also serves as the accountantyy for Central Supply.

7. The equipment that is repaired at the shop is transported to and from the shop by JWR employees using JWR vehicles. The equipment that is brought to the shop is identified with a particular JWR mine or other facility and all charges for materials and labor are attributed to that particular mine or other facility by the Central Shop.

8. The Central Shop provides its services to only JWR mines and facilities.

b. Central Supply

9. (a) Prior to the instant action, the Central Supply has never been inspected by MSHA.

(b) The Central Supply does not have a Federal Mine Identification Number as required by 30 C.F.R. § 41.11.

10. The primary function of the Central Supply is to serve as a warehouse of goods, materials and supplies that are used in or to be used in JWR's mines, preparation plants and the Central Shop.

11. The nature of supplies maintained at the Central Supply range from conveyor belts and belt structures to hard hats and safety glasses to automobile oil filters and nails. The majority of the inventoried goods at the Central Supply are used or intended to be used in support of JWR's mining operations. A complete list of inventoried items is attached hereto as Exhibit "B".

12. The Central Supply does not sell to the public.

13. The value of the inventoried goods at the Central Supply is approximately $12 million.

14. Approximately $7 million of the goods is considered on "consignment" while the remaining $5 million constitutes materials/supplies purchased outright by JWR.

15. Over 90% of the value of inventoried goods at the Central Supply are ultimately used in JWR's mining operations. This figure represents approximately 80% of the entire stock of inventoried goods.

16. JWR has agreements with approximately 70 vendors who place goods on "consignment" at the Central Supply. These consigned goods are intended to be used by JWR's mining operations, at which time JWR compensates the vendor for the goods. In the event the vendor has a need for the consigned goods while still in inventory, the vendor retains the right to retrieve the goods from JWR's Central Supply. Such a retrieval of consigned goods by a vendor is not a normal, everyday occurrence.

17. The delivery of materials and supplies from the Central Supply to the mines is accomplished by Central Supply employees transporting the goods in a JWR owned vehicle. The Supply has a one ton flat bed truck that is used for most deliveries. The drivers are required to have a commercial driver's license.

18. Employment at the Central Supply consists of 16 salaried and 7 hourly personnel. The 7 hourly employees are members of the UMWA. The salaried employees of the Central Supply are not members of the UMWA. The sixteen salaried personnel of the Supply consist of the general manager of purchasing and materials control, assistant manager of materials control, assistant manager of purchasing, materials disposition coordinator, warranty claims manager, buyer, assistant buyer, purchasing assistant, assistant storekeeper/purchasing, assistant store supervisor motor program, assistant supervisor of evening shift, four materials control analysts and an accountant who also serves as the accountant for the Central Shop. The Central Supply is open 24 hours per day, 7 days per week. The regular work week is Monday through Saturday with the Sunday shifts being staffed through "on call" personnel.

19. JWR agrees that, should there be a decision conferring MSHA's jurisdiction over the Central Shop and/or the Central Supply, JWR will pay the proposed assessments set forth in the Civil Penalty Proceeding, SE 99-66, and will withdraw its related Contest Proceedings, Docket Numbers SE 99-6-R, SE 99-7-R, SE 99-8-R, SE 99-9-R, and SE 99-10-R.

II. FINDINGS OF FACT AND CONCLUSIONS

a. Definition of "coal or other mine"

Section 4 of the Mine Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. Under section 3(h)(1) of the Mine Act, "coal or other mine" includes "lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, . . . the work of preparing coal . . . ." 30 U.S.C. § 802(h)(1). Included in the definition of "coal mine" in section 3(h)(2) of the Act, 30 U.S.C. § 802(h)(2), are "machinery, tools [and] equipment . . . placed upon, under, or above the surface of such [mine]." Section 3(i) of the Act defines "work of preparing coal" to include such other mining related work that "is **usually done** by the operator of a coal mine. 30 U.S.C. § 802(i). (Emphasis added).

These matters concern the question of statutory interpretation of the jurisdictional predicates in section 3 of the Mine Act. The definitions of "coal mine" and "work of preparing coal" in sections 3(h) and 3(i) are "broad [,]" "sweeping" and "expansive[,]" *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589, 591-92 93(3d Cir. 1979), *cert. denied,* 444 U.S. C 1015 (1980). The first inquiry in statutory construction is whether the statutory provision is clear and unambiguous and "whether Congress has directly spoken to the precise question in issue." *Chevron U.S. A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (referred to as the "*Chevron I*" analysis). Congress intended that "doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 602 (1978). Thus, Mine Act coverage is to be given the "broadest possible" scope, *Pennsylvania Elec. Co. v. Federal Mine Safety & Health Review Comm'n,* 969 F.2 1501, 1503 (3d. Cir. 1992),

in that the statute "was intended to provide a 'sweeping definition' of the word 'mine,' encompassing much more than the usual meaning attributed to it." *Bush & Burchett, Inc. v. Reich,* 117 F.3d 932 936 (6th Cir. 1997) (*quoting Donovan v. Carolina Stalite Co.,* 236 U.S. App. D.C. 264, 734 F.2d 1547, 1551 (D.C. Cir. 1984)).

Although Congress has articulated that the statutory definitions of "coal mine" and "work of preparing coal" should be broadly applied, the issue of whether a broad range of activities beyond traditional mining is covered by section 3(h) of the Act has been the subject of frequent

litigation with conflicting results. For example, Courts have disagreed over whether a power plant that crushes and screens coal is subject to the Act. *See, e.g., Pennsylvania Elec. Co. v. Federal Mine Safety & Health Review Comm'n*, 969 F.2d 1501, 1503 (3rd Cir. 1992) (sizing and cleaning coal by power plant constitutes coal preparation under section 3(h) of the Act); *cf. Secretary of Labor v. Associated Electric Cooperative, Inc.*, CA 8 No. 98-1876, _ F.3d._ (April 20, 1999, 8th Cir.) (coal handling and crushing by power plant more properly characterized as "manufacturing" than "mining").

Given the ambiguous nature of the applicability of section 3(h) of the Act, the analysis shifts to whether the Secretary's interpretation of section 3(h) of the Act is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project v. Dole*, 899 F.2d 1127, 1131 (D.C. Cir 1989) (referred to as the "*Chevron II*" analysis). The Mine Act is a statute designed to ensure safe working conditions for miners. Therefore, an analysis of the proper jurisdictional reach of section 3(h) requires consideration of whether the subject activities involve substantial coal processing operations that expose workers to the unique hazards associated with mining. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997).

b. The Central Machine Shop

While there are numerous cases that apply the Mine Act's broad jurisdictional mandate to a variety of activities associated with the preparation of coal, the specific question of whether a central off-mine site maintenance facility is subject to Mine Act jurisdiction is not a matter of first impression. In *U.S. Steel Mining, Inc.*, 10 FMSHRC 146 (February 1988), in virtually identical circumstances to the facts of this case, the Commission considered the jurisdictional question concerning a central repair shop that: (1) was used for the repair and maintenance of electrical and mechanical coal mining equipment; (2) had an MSHA ID number and was previously subject to MSHA enforcement; and (3) was located between ½ mile and 5 miles from two of U.S. Steel's mines and its processing plant. The Commission concluded U.S. Steel's maintenance facility was, in and of "itself," ". . . a separate surface 'coal mine' within the meaning of [section 3(h)(1)] of the Act . . . ." *Id.* at 148. In determining the repair activities were subject to Mine Act regulation, the Commission noted that U.S. Steel employees were exposed to hazards inherent in moving heavy equipment, performing electrical work, and engaging in various grinding, cutting, sharpening and welding tasks. *Id.* at 147; *see also W. J. Bokus Industries, Inc.*, 16 FMSHRC 704,708 (April 1994) (equipment in a maintenance and storage garage could injure miners working in the garage).

In its Motion for Summary Decision, JWR's seeks to distance itself from *U.S. Steel.* For reasons that are not entirely clear, JWR argues the *U.S. Steel* holding only imposed Mine Act jurisdiction on equipment rather than the repair shop itself. *(See JWR Motion*, subsection (B)(3)(r)). However, *U.S. Steel* makes no such distinction. Moreover, it is a mine facility, not the equipment therein, that is the predicate for Mine Act jurisdiction. In this regard, as a general proposition, a haulage truck ceases to be subject to Mine Act jurisdiction once it exits mine property. Thus, *U.S. Steel* is the controlling case law that supports MSHA's exercise of jurisdiction over JWR's Central Shop.

Notwithstanding *U.S. Steel*, the jurisdictional framework for conferring Mine Act jurisdiction involves an analysis of whether the particular coal-processing operation sought to be regulated as "mining" is in the nature of activities "usually" performed by mine operators engaged in the extraction of minerals. *Secretary of Labor v. Elam*, 4 FMSHRC at 7; 30 U.S.C. § 820(i). As discussed above, the hazards associated with activities closely related to mining are the activities Congress intended to regulate under the Mine Act's statutory scheme.

The maintenance of mining equipment is an integral part of the mining process, and proper maintenance is the means to achieve a fundamental Mine Act purpose -- continued operation of safe equipment. The maintenance function, if performed improperly, could pose a hazard to miners working on mine property as well as Central Shop employees. Accordingly, the Secretary's Motion for Summary Decision of the Central Shop jurisdictional question in Docket No. SE 99-66 shall be granted. Consequently, consistent with JWR's stipulation, JWR has agreed to pay the $440.00 civil penalty proposed by the Secretary for the eight non-S&S citations that are the subject of Docket No. SE 99-66.

c. The Central Supply Shop

The significant facts that provide the basis for jurisdiction of the Central Shop are absent with respect to the Central Supply. Although the Central Shop was registered as a mine facility and actively inspected by MSHA since 1982, MSHA previously has not sought to exercise jurisdiction over Central Supply despite its location adjacent to the Central Shop. While MSHA is not estopped from asserting its jurisdiction at the present time, less deference must be accorded to MSHA's statutory interpretation of section 3(h) of the Act in view of its inconsistent enforcement history with regard to the Central Shop as compared with Central Supply. *Cf. General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45 (1976) (less judicial deference required when agency has taken inconsistent positions in promulgating interpretative regulations).

Moreover, as noted above, while Congress intended the Mine Act's coverage to be broad in scope, the remedial nature of the Mine Act is not without its limitations. *Carolina Stalite*, 734 F.2d at 1551. Although the term "miner" has been broadly applied to include a construction worker, elevator mechanic, laboratory technician or clerk-typist working at a mine, it is only the performance of such wide ranging activities on mine property that confers "miner" status under the Act.[2] *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285 (D.C. Cir. 1990); *Martha Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491 (April 1988). For example, in *National Industrial Sand Ass'n v. Marshall*, 601 F.2d 689, 704 (3rd Cir. 1979), in determining whether one is a miner, the Court stated that "the statute looks to whether one works in a mine, not whether one is an employee or nonemployee or whether one is involved in extraction or nonextraction activities." (Emphasis in original). *See also, Cyprus Empire Corporation*, 15 FMSHRC 10, 14 (January 1993). Thus, the Court has concluded that a manufacturer of mining equipment, that sends sales representatives onto mine property in connection with the sale of its products, is an independent contractor-operator subject to jurisdiction of the Mine Act. *Joy Technologies Inc. v.*

[2] Section 3(g) of the Act defines "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g).

Secretary of Labor, 99 F.3d 991 (10th Cir. 1996).

However, because a variety of activities performed on mine property may give rise to Mine Act jurisdiction, such activities may not provide jurisdiction if performed off mine site property. *Dilip K. Paul v. P.B. - K.B.B., Inc.*, 7 FMSHRC 1784, 1787 (November 1985) (a mine engineering office located off mine property is not "a coal or other mine"). Although Central Supply is a facility engaging in vendor activities similar to those in *Joy Technologies,* Central Supply's activities occur outside mine property. To hold that Central Supply is a "coal or other mine" subject to the Mine Act conceivably could subject all vendors of mining equipment and supplies to mine regulation, a result never contemplated by Congress.

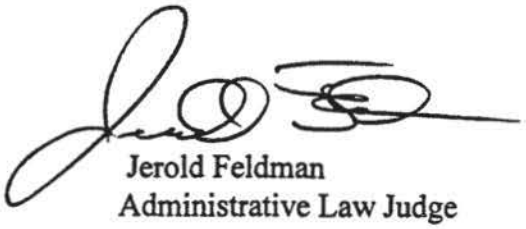
In the final analysis, individuals employed by a mine operator performing sales and supply activities outside mine property are not "miners" in need of Mine Act protection. Put another way, mining equipment sales and supply functions, are, by their nature, usually performed by vendors and warehouse personnel who are not exposed to hazards normally associated with mining. Such activities performed off mine property, whether performed by employees of a mine operator, or by independent vendors and suppliers, cannot be classified as "mining" under the Commission's *Elam* test.

In this regard, three of the five contested citations issued at Central Supply involve technical violations concerning failure to allow MSHA inspections and a reporting violation. The remaining two citations concern non-significant and substantial violations with respect to a forklift. Citation No. 7665508 contested in these matters states, "[t]his forklift is used to move supplies and material within the confines of the main supply building." The transfer of supplies and materials within the confines of a central supply warehouse are not activities normally performed by the operator of a mine. Accordingly, the Secretary has failed to demonstrate the Central Supply Shop is "a coal or other mine" as contemplated by Congress under section 3(h) of the Mine Act. Consequently, JWR's Motion for Summary Decision with respect to its Central Supply shall be granted and the captioned contest proceedings shall be dismissed.

ORDER

In view of the above, **IT IS ORDERED** that Jim Walter Resources Inc., pay, within 40 days of the date of this Decision, a civil penalty of $440.00 in satisfaction of the eight citations that are subject of Docket No. SE 99-66. Upon timely receipt of payment, Docket No. SE 99-66 **IS DISMISSED**.

IT IS FURTHER ORDERED that Jim Walter Resources Inc.'s contests in Docket Nos. SE 99-6-R, SE 99-7-R, SE 99-8-R, SE 99-9-R, and SE 99-10-R **ARE GRANTED**. Accordingly, the subject citations in these contest proceedings **ARE VACATED**, and Docket Nos. SE 99-6-R, SE 99-7-R, SE 99-8-R, SE 99-9-R, and SE 99-10-R **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 19, 1999

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. SE 99-39 A. C. No. 01-02901-03658
v.	:	
DRUMMOND COMPANY, INCORPORATED, Respondent	: : :	Shoal Creek Mine

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of the civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements. A reduction in the penalties from $6,000 to $2,950 is proposed.

Order No. 4477477 was issued under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.400 because loose coal and coal dust accumulated at various locations in the bleeder roadway. The originally assessed penalty was $1,000 and the proposed settlement is $100. The parties advise that MSHA modified the violation from a 104(d)(1) order to a 104(a) citation, deleted the unwarrantable failure finding and reduced negligence from high to low prior to the assessment of a penalty. However, these modifications were not considered when the penalty was calculated by MSHA. Therefore, the reduction reflects the penalty that would have been assessed had MSHA considered the changes to the violation.

Order No. 4477476 was issued under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.1903(a)(2) because the underground diesel fuel storage facilities were not provided with self-closing doors. The violation was designation non-significant and substantial and resulted from the operator's unwarrantable failure. The originally assessed penalty was $1,000 and the proposed settlement is $100. In their joint motion the parties request that the violation be modified from a 104(d)(1) order to a 104(a) citation, that the unwarrantable failure finding be deleted and that negligence be reduce from high to moderate. The parties advise that there is no evidence that the operator was aware or should have been aware of this condition nor is there evidence indicating how long this condition existed. Finally, the parties state that the area was inspected daily by the operator and there is no record that the doors were inoperative or in need of repair.

Citation No. 4480767 was issued under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 75.400 because coal and coal dust accumulated along both sides of the slope belt for approximately 4,500 feet. The citation further notes that the fire boss book contained notes that the slope belt needed cleaning on each shift for the two weeks prior to the issuance of the citation. The violation was designated significant and substantial and that it resulted from the operator's unwarrantable failure. The originally assessed penalty was $4,000 and the proposed settlement is $2,750. The parties request in their motion that the violation be modified from a 104(d)(1) citation to a 104(a) citation, that the unwarrantable failure finding be deleted and that negligence be reduced from high to moderate. The parties advise that the accumulations were caused when the longwall sections encountered water problems resulting in water being transported along with the coal on the conveyor system. While traveling up the incline of the slope belt, coal and water would frequently wash off the conveyor onto the mine floor.

The parties advise in their joint motion that at the time of the violation the operator was in the process of addressing the problems with the slope belt. According to the motion, the operator had committed to spending $217,000 for the repair of the surge bin which is used to maintain an even distribution of coal throughout the length of the slope belt. The operator also purchased and installed a mini-conveyor system at the bottom of the slope to return coal fines and spillage back onto the slope belt. (It subsequently ordered a second mini-conveyor). Finally, the operator had attended to the accumulations along the slope belt by assigning additional personnel to keep the area clean. The motion states that these facts were unknown to MSHA when the citation was issued.

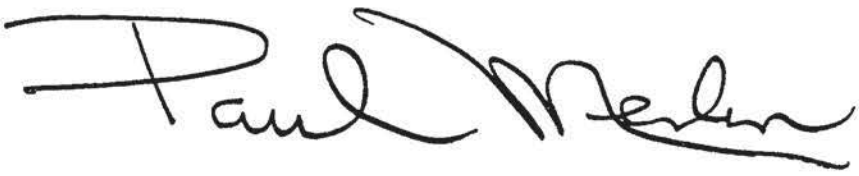
I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlements are appropriate under the criteria set forth in section 110(i) of the Act.

In light of the foregoing, the motion for approval of settlements is **GRANTED**.

It is **ORDERED** that Order No. 4477476 be **MODIFIED** from a 104(d)(1) order, to delete the unwarrantable failure finding and to reduce negligence from high to moderate.

It is further **ORDERED** that Citation No. 4480767 be **MODIFIED** from a 104(d)(1) citation, to delete the unwarrantable failure finding and to reduce negligence from high to moderate.

It is further **ORDERED** that the operator pay a penalty of $2,950 within 30 days of this decision.



Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 24, 1999

GETCHELL GOLD CORPORATION, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 99-162-RM
	:	Order No. 7966725; 3/05/99
v.	:	
	:	Turquoise Ridge Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Id. No. 26-02286

DECISION

Appearances: Laura E. Beverage, Esq., and L. Anthony George, Esq., Jackson & Kelly, Denver, Colorado, for Contestant;
Susan Gillett Kumli, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Respondent.

Before: Judge Manning

This case is before me on a notice of contest filed by Getchell Gold Corporation ("Getchell") against the Secretary of Labor pursuant to sections 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d)(the "Mine Act"). Getchell contested an order of withdrawal issued on March 5, 1999, at its Turquoise Ridge Mine alleging a violation of the Secretary's safety standard at 30 C.F.R. § 57.14204. An expedited hearing was held on May 5 and 6, 1999. The parties presented testimony and documentary evidence, presented oral argument, and waived post-hearing briefs. At the close of the hearing, I entered a bench decision in which I vacated the subject order of withdrawal. (Tr. 482-96). This written decision supersedes my bench decision. I have amplified certain findings and conclusions in this written decision based on my review of the record and further legal research.

I. BACKGROUND

The Turquoise Ridge Mine is an underground gold mine in Humboldt County, Nevada. It is less that a mile away from the Getchell Mine, which is also operated by Getchell. The two mines are jointly managed by Getchell. On February 16, 1999, one miner was killed and another seriously injured while attempting to adjust a compressed air line at the Turquoise Ridge Mine.

The area of the Turquoise Ridge Mine where the accident occurred was under development and the compressed air lines were being installed on February 16. The compressed air system was working in parts of the mine. Two types of piping are used in the compressed air system. Steel utility pipes carry air throughout the mine. Wire-braided rubber air hose is used in working sections. This hose is referred to as a "bull hose." In this instance, the bull hose was installed to carry compressed air through the intersection of the TR1550 ramp and the TR3955 access roadway. At the north end of the intersection, the bull hose was already connected to a steel pipe. A steel pipe had recently been installed up to the south end of the intersection.

On February 16, Thomas Gross and Thomas Crowley were to connect the bull hose to the steel pipe at the south end of the intersection. After completing installation of the airline, Mr. Gross noticed that the handle of the valve located at this coupling was facing the rib rather than the haulageway. While repositioning the valve at the south end, Mr. Gross noticed that a part of the coupling had not been properly installed by the previous crew. The two employees began disconnecting the coupling to reposition the valve and to correctly install the misadjusted portion of the coupling. Unknown to these employees, the compressed air system was energized at this location. When they loosened the coupling, the bull hose began thrashing about violently. The hose struck the employees, killing Mr. Gross and seriously injuring Mr. Crowley.

MSHA conducted an investigation of the accident and issued a number of citations and orders. Only Order No.7966725 is at issue in this proceeding. It alleges a violation of 30 C.F.R. § 57.14205 as follows:

> At the three-way intersection of the 1550 Turquoise Ridge ramp and the TR3955 access, a combination nipple [was] being utilized as the interconnecting device between a Victaulic coupling and 4-inch diameter rubber hose on a high pressure air line. Accordingly to readily available information from the manufacturer, this nipple was designed for low pressure discharge and suction purposes and was not engineered for use on high pressure air lines. The mine operator's failure to require and insure that this device was used in applications within its design capacity as intended by the manufacturer is a lack of reasonable care constituting more than reasonable negligence and is an unwarrantable failure to comply with the standard.

Inspector David Kerber determined that a fatal injury was reasonably likely; that the alleged violation was of a significant and substantial nature; and that Getchell's negligence was high. He issued the order under section 104(d)(2) of the Mine Act. The cited safety standard provides:

> Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons.

Getchell contested the order in this proceeding and the parties attempted to resolve the issues through settlement negotiations. On April 19, 1999, I granted Getchell Gold's motion to schedule an expedited hearing in this case because the cited combination nipple is used throughout the Turquoise Ridge and Getchell Mines. Replacing them with another type of coupling would require shutting down the compressed air system for a significant period of time. At the hearing, Leland Page, who is the mine manager for the Turquoise Ridge and Getchell Mines, testified that there are about 98 such couplings in the Getchell Mine and about 43 in the Turquoise Ridge Mine. (Tr. 302).

It is important to understand the parts used to connect the 6-inch steel pipe with the 4-inch bull hose. Three interlocking parts are used: a reducer, shut-off valve, and the combination nipple. The reducer is attached at the end of the steel pipe. The reducer changes the diameter of the opening from 6 inches to 4 inches. It is attached to the end of the steel pipe by a Victaulic coupling. A Victaulic coupling consists of two C-shaped metal bands that are drawn together with two bolts around the joint to be connected. A rubber gasket is placed between the Victaulic coupling and the joint. A groove is cut into the end of the pipe and a groove is manufactured into the various devices to be attached, such as the reducer. When the Victaulic coupling is tightened, the ridge on each edge of the coupling fits into the corresponding groove on the components that are being attached. As the bolts on the Victaulic coupling are tightened, the rubber gasket is compressed, making an airtight joint, and the ridges engage in the grooves, making a mechanically strong coupling.

A Victaulic coupling is also used to attach the shut-off valve to the reducer and to attach the combination nipple to the shut-off valve. The use of Victaulic couplings to attach the components in the compressed air system at the mine is not contested by MSHA. That is, MSHA does not consider the use of Victaulic couplings to be in violation of section 57.14205.

The method of connecting the combination nipple to the bull hose is what is in dispute in this case. As stated above, the combination nipple has a groove at one end that was used to attach the nipple to the shut-off valve with a Victaulic coupling. The combination nipple fits inside the bull hose at the other end and is secured with several band clamps. The outside surface of the steel nipple is equipped with a number of ridges that face away from the outer edge of the nipple. Thus, when the nipple is forced into the bull hose these ridges cut into the hose to help prevent the hose from separating from the nipple. The band clamps are tightened with a special tool. Once the clamps are attached, they cannot be removed except by cutting them off.

As stated above, the accident occurred when Mr. Gross noticed that the Victaulic coupling attaching the nipple to the shut-off valve was not properly seated into the groove for the valve. When he attempted to fix the problem by loosening the bolts for the Victaulic coupling, the energized bull hose began whipping around and struck Messrs. Gross and Crowley. The connection between the bull hose and the nipple did not fail.

MSHA contends that the use of the combination nipple in the mine's compressed air system exceeds the design capacity intended by the manufacturer. During its accident

investigation, MSHA asked for information about the combination nipple and received from Getchell a copy of the parts catalogue from Dixon Valve and Coupling Company ("Dixon"). Under the entry for Dixon's "King Combination Nipple" the catalogue states as follows:

> Combination nipples are recommended for low pressure discharge and suction services. **The working pressure of combination nipples varies with the size of the nipple, the size and construction of the hose, and the type of clamping system used; consult the Factory for recommendations. NOT INTENDED FOR COMPRESSED AIR.**

(Ex. S-9, emphasis in original). Dennis Ferlich, who is a mechanical engineer with MSHA's Mechanical Safety Division at the Approval and Certification Center in Triadelphia, West Virginia, contacted Dixon. Mr. Ferlich testified that Paramjit Singh, Vice President of Engineering with Dixon, told him that its King combination nipple should not be used with any type of compressed air. (Tr. 96; Ex. S-4 at 9). After considering the language in Dixon's catalogue and discussions with Mr. Singh, MSHA officials determined that Getchell was in violation of section 57.14205 and the subject order was issued by Inspector Kerber.

II. DISCUSSION AND FINDINGS OF FACT

One of the key disputes in this case is the meaning of the words "used beyond the design capacity intended by the manufacturer" in the safety standard. The Secretary contends that if equipment is put to a different use than that intended by the manufacturer and that use may create a hazard to persons, a violation has been established. Getchell, on the other hand, argues that the equipment must be used beyond its "design capacity." That is, the use must be beyond the design tolerances of the equipment. Thus, according to Getchell, there is a quantitative element in the standard.

I find that the words "design capacity" cannot be equated with use. Thus, if a mine operator uses a piece of equipment for a purpose not intended by the manufacturer, there is no violation without proof that such use exceeds the design capacity. None of the witnesses at the hearing could precisely define the term "design capacity." Indeed, none of the witnesses were very comfortable with the term because it is not a traditional engineering concept. The word "capacity" means, "the power or ability to hold, receive, or accommodate ... the ability to store, process, treat, manufacture, or produce...." *Webster's Third International Dictionary* 330 (1976). Thus, based on the language of the standard, I interpret the standard to mean that a mine operator cannot use equipment for a task that is beyond the ability of the equipment to perform, as designed by the manufacturer, if such use may create a hazard to persons. There is a quantitative element in the standard and the mere fact that equipment is used for a different task than that intended or anticipated by the manufacturer does not establish a violation.

A review of the regulatory history is instructive. This standard has existed in a similar form for a considerable time. In 1988, the Secretary substantially revised its standards for

machinery and equipment in metal mines. In the preamble to the final rule, the Secretary addressed some of the comments filed by mine operators about this standard, as follows:

> Some commenters considered the requirement to use machinery, equipment, and tools according to the manufacturers' specifications and instructions ... to be unrealistic in some mining situations. They propose that this standard be deleted. *MSHA agrees that the manufacturers' specifications and instructions could go beyond the intent of this regulation.* However, MSHA notes that serious mining accidents can occur from the misuse of equipment. For example, haulage trucks can be loaded beyond their design capacity, and braking and suspension systems can fail. MSHA has, therefore, retained the requirement that machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons.
>
> ***The final standard permits mine operators to modify the machinery, equipment, or tools they purchase from manufacturers to suit their particular mining needs provided that hazards to persons aren't created.*** Overloading of equipment, such as haulage equipment and cranes, that can create a hazard to equipment operators and other persons in the area would not be permitted by the standard.
>
> Some commenters also considered this standard to be duplicative of [§ 56/57.14100(b)] (defects affecting the safe operation of machinery, equipment, or tools). The ***focus of this standard is the safe use and modification of mining equipment*** while [§ 56/57.14100(b)] addresses defective equipment....

(53 Fed. Reg. 32496, 32514-15 (August 25, 1988)(emphasis added). The regulatory history makes clear that mine operators can modify equipment for their own use so long as they do not "overload" such equipment in such a way as to create a hazard to persons. Thus, one issue in this case is whether, by using a combination nipple in its compressed air system, Getchell overloaded the nipple beyond its capacity as intended by the manufacturer.

Getchell contends that its use of the combination nipple to connect the bull hose to the shut-off valve does not violate the safety standard. It raises a number of factual and legal issues in its defense. First, it contends that there is no proof that the combination nipple in question was a King combination nipple manufactured by Dixon. Its witnesses testified that combination nipples are manufactured by a number of different companies. Because Getchell purchases combination nipples from a supplier rather than directly from a manufacturer, it does not know where they come from. All combination nipples are essentially the same and brand names are

not marked on them. Getchell introduced into evidence portions of parts catalogues from three other manufacturers that sell combination nipples. (Ex. C-4, 5 & 6). These exhibits do not contain language indicating that such nipples are not intended for use in compressed air systems.

Because the cited combination nipple may well have been manufactured by Dixon and Getchell provided MSHA with Dixon's catalogue when asked for information about the nipple, I will assume, for purposes of this case, that the cited combination nipple was a King combination nipple manufactured by Dixon.

Next, Getchell argues that it was the manufacturer in this instance because it assembled the coupling by inserting the nipple into the bull hose and secured the connection with band clamps. It states that the combination nipple by itself is just a component part of the assembly. In addition, it maintains that if a failure were to occur in this assembly, the hose or the band clamps would fail, not the nipple. The nipple is made of heavy gage steel that can withstand more pressure than that found in Getchell's compressed air system.

I agree with Getchell that it manufactured the combination nipple, bull hose, and band clamp assembly (the "nipple assembly"). Getchell assembles these components on the surface before the bull hose is taken underground. The nipple itself is just one part of the assembly and the Secretary did not show that the nipple was incapable of holding or carrying 118 psi of compressed air, which is the working pressure in Getchell's system.

Nevertheless, because Dixon put the disputed language in its catalogue, further analysis is required. I will assume that Dixon is one of the manufacturers of this assembly along with the manufacturer of the bull hose and the band clamps. I find the language in the catalogue to be confusing and somewhat contradictory. On one hand, it states that "the working pressure of combination nipples varies with the size of the nipple, the size and construction of the hose, and the type of clamping system used." (Ex. S-11 at 109). On the other hand, it states that it was not "intended for compressed air." *Id.* The amount of pressure the nipple can safely hold depends on many factors including the construction of the hose and the integrity of the clamping system. The "design capacity intended by the manufacturer" likewise depends on these factors. There does not appear to be a quantitative element to Dixon's recommendation. Even if the pressure were very low, it would not recommend use of the nipple in air systems. The reasons for this recommendation are not clear.

The Secretary issued a subpoena to Mr. Singh but he did not appear at the hearing because of a family medical emergency. (Ex. S-1). Mr. Singh testified, without objection, through his affidavit dated April 29, 1999. (Ex. S-2). In his affidavit, Mr. Singh testified that:

> The KNC [King Combination Nipple] is not intended to be used with compressed air. This means that it is not intended to be used with compressed air *at any level of pressure*. Absolutely under no circumstances is a KNC intended to be used with compressed air at a pressure level of 100 psi (pounds per square inch).

(Ex. S-2, at 2)(emphasis added). Mr. Singh goes on to state that Dixon manufactures other devices that it recommends for use in compressed air systems. He states that such couplings are "either swaged onto hoses using swaging equipment, or they are installed with bolt-on type clamps for which tightening torque can be specified and readily measured in order to ensure a sufficiently tight connection." *Id.*[1] He suggests two proprietary devices manufactured by Dixon be used to connect a hose to a compressed air system.

At the end of his affidavit, Mr. Singh raises safety issues by stating:

> Although it is difficult to quantify risk of hose separation, it is safe to say that this risk is increased if inappropriate equipment, such as the KNC used with compressed air, is used. Dixon also cautions that air hose couplings are of particular concern because when pressurized air releases suddenly, it does so explosively and can cause rapid hosewhip.

(*Id.* at 2-3).

There is no dispute that compressed air systems present safety hazards and that a failure of a coupling can cause death or serious injury. It is clear the Dixon does not intend for its customers to use its combination nipple in compressed air systems. It recommends that customers use proprietary couplings that it manufactures specifically for use in compressed air systems, such as "Boss Clamps." Mr. Singh states that the use of its combination nipple in compressed air systems raises the risk of hose separation, but he did not quantify that risk. He also did not state that the nipple assembly used at the Turquoise Ridge Mine exceeded the design capacity intended by Dixon.

The issue is whether Getchell, by using a combination nipple in its compressed air system, overloaded the nipple and the nipple assembly beyond its capacity as intended by the manufacturer. The Secretary focuses on the words "intended by the manufacturer" when interpreting the safety standard. She argues that the fact that Dixon does not intend its King combination nipple to be used in compressed air systems proves that, by doing so, Getchell was exceeding the design capacity intended by the manufacturer. She equates the manufacturer's intended use with "design capacity." I reject this interpretation of the safety standard.

First, as discussed above, the Secretary's interpretation is not consistent with the plain language of the standard or the preamble to the final rule. If I assume that the language of the regulation is ambiguous, I must defer to the Secretary's interpretation of the standard. It is well established that an agency's interpretation of its own regulations should be given "deference ... unless it is plainly wrong" and so long as it is "logically consistent with the language of the

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[1] In a swaged system, a coupling is crimped onto the hose with special equipment. This work would normally be done by the distributor and not the customer. (Tr. 362).

regulation and ... serves a permissible regulatory function." *General Electric Co. V EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995)(citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978).

Although the Secretary's interpretation is consistent with the remedial purposes of the Mine Act, it is contrary to the plain language of the standard and is therefore not reasonable. In addition, I believe that the safety standard does not provide mine operators with sufficient notice of the requirements of the standard, as interpreted by the Secretary. The language of section 57.14205 is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory [health] standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. V. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not realize that the standard is violated because a mine operator uses equipment for work that is not intended by the manufacturer. The language speaks of design capacity not intended use.

It is worth noting that the Secretary's interpretation could lead to unintended results. A manufacturer of mining equipment could state in its sales documents that its equipment can only

be safely used in conjunction with its own line of equipment and that any other use could create a hazard to miners. A mine operator would be forced to purchase all of the parts and ancillary equipment from the same manufacturer to avoid potential violations of the safety standard.

I hold that, in order to prove a violation, the Secretary must establish that the manufacturer has tested its equipment and determined that it is capable of performing a certain amount of work. The Secretary can also rely on testing performed by such organizations as the American Society for Testing and Materials ("ASTM"). The Secretary need not always produce evidence of formal laboratory studies; the designed capacity can often be based on empirical information or knowledge of the manufacturer. For example, if a braking system on a haulage truck is designed by the manufacturer to carry no more than the weight of the truck plus 50 tons and the mine operator modifies the dump on the truck to carry 80 tons, the Secretary may be able to establish a violation with this information. My holding in this regard is consistent with the decisions of other Commission administrative law judges. *See Stillwater Mining Co.*, 18 FMSHRC 1291 (July 1996), *aff'd* 142 F.3d 1179 (9th Cir. 1998); *Eastern Ridge Lime Co.*, 19 FMSHRC 398 (February 1997).

As further support for her position, the Secretary argues that the nipple assembly was unsafe because the bands used to secure the hose to the nipple cannot be tested for torque. She believes that a clamping system that uses bolts that can be tightened with a torque wrench and tested periodically provides a greater measure of safety. She relies on the testimony of Messrs. Singh and Ferlich. The Secretary contends that the individual who installs the bands around the hose to secure the nipple can only guess if the bands are tight enough through visual examination and by the "feel" as they are installed. She maintains that one never knows whether the bands are correctly installed and mistakes can be made. With a bolting system, on the other hand, the torque can be tested to make sure that the coupling is secure.

Getchell argues that, in fact, the banding system is easier to install and is less prone to human error. Bolts can become loose over time and visual examination will not detect the problem. Bands, on the other hand, cannot loosen and can be checked with a visual inspection without the use of special tools. Getchell produced evidence to support its position, including the testimony of Michael Pfister, Vice President and General Manager of Punch-Lok. His company manufactures several types of coupling devices including band clamps. He testified that it is easy to determine whether band clamps have been properly attached and tightened to a nipple assembly. (Tr. 358). He recommends using band clamps in this type of application rather than swaged or bolted systems. (Tr. 356-62).[2]

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[2] Mr. Pfister sits on the standards committee of the National Association of Hose and Accessory Distributors. (Tr. 321). In developing standards for industrial hoses, the committee has determined that nipple assemblies will be allowed in compressed air systems. (Tr. 355-56).

I find that this dispute is largely irrelevant. The issue is not whether a system using bolted connectors are safer or less prone to human error than a banded system; the issue is whether Getchell's system exceeded the design capacity intended by the manufacturer.

As part of its defense in this case, Getchell sent a sample of its nipple assemblies to Michael Fourney, a registered professional mechanical engineer, for testing. Each nipple assembly consisted of a combination nipple that had been inserted into a section of bull hose and secured with three band clamps. This is the type of installation that is typically used by Getchell. Mr. Fourney subjected the assemblies to a number of tests. He pressurized the assemblies with gas in his laboratory to determine at what pressure they would fail. (Ex. C-9). He also performed these tests with water. He ran tests with only one or two band clamps securing the hose as well.

The lowest level of pressure at which a nipple assembly with three band clamps failed was 1000 psi. (Ex. C-10). With two bands, failure occurred as low as 700 psi; and with one band failure occurred as low as 450 psi. Getchell contends that these results demonstrate that its use of the combination nipple at 118 psi did not exceed the design capacity intended by the manufacturer.

If the Secretary establishes the design capacity intended by the manufacturer, independent testing performed by a mine operator would be largely irrelevant. In this case, however, Mr. Fourney's tests provide some support for my holding that the Secretary did not establish a violation.

The Secretary produced evidence that, at the connection in question, only one band clamp or perhaps two band clamps were securing the hose to the nipple. Only one clamp was found at the accident site; Mr. Crowley testified that he believes that there was only one clamp, and there were only two clamps present on the nipple assembly at the north end of the bull hose. Getchell maintains that the Secretary's evidence is insufficient to establish that less than three were present.

On reviewing the record as a whole, I find that it has not been established that there was only one band clamp present. The combination nipple was damaged as it whipped about the haulageway following the accident. Parts were strewn all over the area. The area was very muddy and clamps could have been lost. Because the nipple assembly was not a suspected cause of the accident, an exhaustive search for band clamps was not undertaken. Mr. Crawley was not asked about the number of bands on the cited nipple assembly until two days before the hearing. There was no real effort to look for the clamps on the scissors lift in the area. The fact that only one was found does not establish that there were not more clamps securing the nipple.

Mr. Crowley testified that he thought he saw only one band clamp on the day of the accident. (Tr. 167-69). I find that he was a credible witness and I do not question his integrity or honesty. Nevertheless, the events that occurred on that day were very traumatic and his memory on this issue may not be accurate. Consequently, whether there were less than three band clamps

at the cited nipple assembly has not been established. There well could have been two clamps since two were installed on the other end of the bull hose and these assemblies are put together on the surface. It is important to recognize that the Secretary did not base her allegations in the order of withdrawal on the number of band clamps on the nipple assembly.

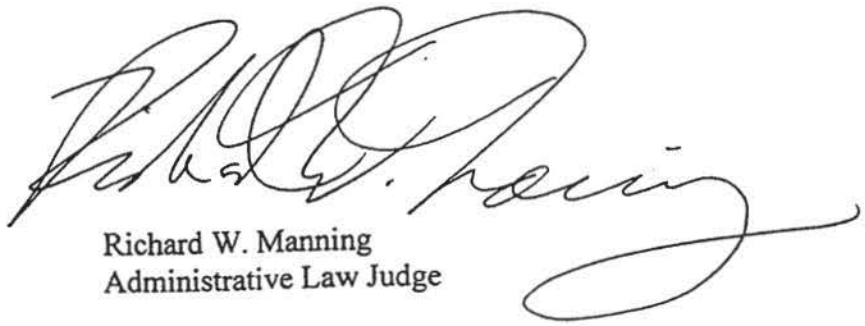
My holding would be the same if two clamps were present, although I note that there is a smaller margin of safety as the number of band clamps decreases. Mr. Fourney testified that with compressed air systems, one should divide the test results by four to provide a working pressure that is safe to use. (Tr. 404-06). With three band clamps, the working pressure would be 340 psi; with two band clamps, the working pressure would be 230 psi; and with one band clamp, the working pressure would be 120 psi. *Id.* The compressed air system normally operates at 118 psi, but excursions above that pressure are possible. Since Mr. Fourney sampled only a small number of nipple assemblies, his results are not exact.

The safety standard provides that there is a violation only if the mine operator uses the equipment beyond the design capacity intended by the manufacturer *and* such use may create a hazard to persons. If I had deferred to the Secretary's interpretation of the standard and determined that Getchell's use of the nipple assembly was beyond the design capacity of Dixon's combination nipple, I would still find that a violation was not established. The record does not show that Getchell's nipple assembly creates a hazard to persons.

There is no question that compressed air systems have seriously injured miners at the nation's mines. (Ex. S- 15). Given the testimony in this case, however, it has not been established that a properly assembled and installed nipple assembly creates a hazard to miners at the Turquoise Ridge Mine. If a given nipple assembly is improperly "manufactured" by Getchell, it would likely violate section 57.14100(b).

III. ORDER

For the reasons set forth above, the notice of contest in this case is **GRANTED** and Order of Withdrawal No. 7966725 issued on March 5, 1999, is **VACATED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 27, 1999

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-262-D
ON BEHALF OF	:	MSHA Case No. DENV CD 99-07
RODNEY E. STEPHENS,	:	
Complainant	:	Willow Creek
v.	:	Mine ID 42-02113
	:	
CYPRUS PLATEAU MINING CORP.,	:	
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of Rodney E. Stephens, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Stephens as an employee of the Respondent, Cyprus Plateau Mining Corporation, pending a decision on the Discrimination Complaint he has filed against the company.[1] A hearing was held on the application on May 20, 1999, in Salt Lake City, Utah. For the reasons set forth below, I grant the application and order Mr. Stephens' temporary reinstatement.

[1] The Secretary has not yet filed a Complaint of Discrimination with the Commission.

Summary of the Evidence

On December 8, 1998, Stephens filed a discrimination complaint with MSHA alleging that he had been discharged on November 11, 1998. In the Summary of Discriminatory Action he stated:

> On August 19th 1998 Cyprus Amax took me off of mine examiner (fire boss) because I was putting violations in the Week Book. I had been battling with the company over rock dust in returns, hydrocarbons not being taken care of in the mine, was being pumped outside with the discharge water [*sic*]. Standing water where I would have to go physically put in pumps to take care of the problem in the main escape ways out of the mine [*sic*].

Stephens testified that he had worked for Cyprus Plateau since 1990 and began working at the Willow Creek mine in 1996. In August 1998 he was working as a Mine Examiner, also known as Fire Boss. In this position, he was required to examine the intakes, returns, entries and other areas where people worked and to take gas and air readings. He recorded his findings in the mine's preshift and weekly examination books.

On August 19, 1998, he was reassigned from Mine Examiner to the crib crew. It was Stephens' belief that this occurred for the reasons he set out in his complaint. He elaborated at the hearing that he was "very vocal" that the company had to "have an adequate bleeder system" to get rid of the gas in the mine and that he complained about not keeping up with the rock dusting necessary to dilute the float coal dust in the mine. (Tr. 82.) He testified: "I believe that the company was waiting to try to find something to get me out of the way so I wouldn't bother them about the conditions of the mine." (Tr. 115.)

Stephens was discharged by the company on November 11, 1998. In his opinion, this was a culmination of all the complaints he had made about unsafe things in the mine. He claimed that he was discharged because "I was a trouble maker . . . I complained too much about safety violations." (Tr. 118.)

The company presented the testimony of Kimberly Coleman, Human Resources Assistant, and Jerry H. Fortson, Human Resources Manager. They testified that Stephens was reassigned from his Fire Boss position as the result of a sexual harassment complaint made against him. They determined after investigating the complaint that it was valid, and by reassigning him, among other things, he was removed from coming in contact with the woman making the complaint.[2] As a result of this complaint, Stephens was informed that any future violations of company rules would result in his termination. (Resp. Ex. A.)

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[2] He continued to receive the same pay he had been making as Fire Boss.

Victor H. Ewell, Shift Foreman, and Fortson testified that Stephens was terminated because he subsequently violated safety rules. Specifically, when directed to do so in his capacity as fill-in crib crew foreman, they alleged that he did not adequately determine whether a member of his crew had been task trained on operating a scoop, that two days later he committed a safety violation himself by leaving a scoop running and unattended, and while being questioned about that, he allowed the crew member, who it turned out had not been task trained, to drive a can setter out of the mine.

Stephens averred that the sexual harassment and the safety violations were pretexts for getting rid of him.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has provided for this procedure with Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. § 2700.45(d), states that:

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

Thus, the issue at hand is not to determine whether or not Stephens was discriminated against, but rather to determine whether his complaint "appears to have merit." *Jim Walter Resources v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990). I conclude that it does.

Taken in their best light, Stephens' claims of protected activity are vague and sketchy. However, if they are found to be credible and if it is determined that there is a connection between them and his discharge, then he would be entitled to relief under the Act. Stephens' testimony was not inherently incredible, nor was any evidence presented that he was unworthy of belief.

The company's evidence indicates that it may well have a valid defense to Stephens' claims, but that was not the issue in this proceeding. The conflicts between Stephens' assertions as to what occurred and the company's raise credibility issues which arise in any case. By itself, this evidence does not demonstrate that his claim is frivolous or clearly without merit. Furthermore, it is apparent that a determination on the merits is not contemplated in a temporary reinstatement hearing by the express limitation of the scope of the hearing and by the fact that the Secretary can limit her case to the testimony of the Complainant. As Chairman Jordan and Commissioner Marks have stated: "The Secretary should not, at this juncture, be expected to present that which is necessary to prove that a violation occurred, or to prove that retaliatory animus existed." *Secretary on behalf of Markovich v. Minnesota Ore Operations, USX Corp.*, 18 FMSHRC 1349, 1352-53 (August 1996).

In a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should be with the employee rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since he retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources* at 748 n.11. Accordingly, I conclude that Stephens' discrimination complaint has not been frivolously brought.

Order

Rodney E. Stephens' Application for Temporary Reinstatement is **GRANTED**. The Respondent is **ORDERED TO REINSTATE** Mr. Stephens to the position he held on November 11, 1998, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION.**

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-68
Petitioner	:	A. C. No. 44-06227-03583
v.	:	
	:	
BEAR RIDGE MINING, INC.,	:	
Respondent	:	No. 1 Mine

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Stephen M. Hodges, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition 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 Bear Ridge Mining Inc. (Bear Ridge) with one violation of the mandatory standard at 30 C.F.R. § 75.202(a) and seeking a civil penalty of $40,000.00 for that violation. The general issue before me is whether Bear Ridge committed the violation as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The citation at issue, No. 7293918, alleges as follows:

> The mine roof in the area of the left coal rib, located approximately 70 feet inby survey station No. 2156, in the No. 6 entry on the 001-0- MMU, was not supported or otherwise controlled to protect persons from hazards related to falls of the mine roof. The Section Foreman removed three wood cribs using a rubber tired battery powered scoop. After the cribs were removed no action was taken to support or otherwise control the mine roof in the area of the left coal rib prior to the foreman and one other person working in the area. The foreman received fatal injuries when struck by a section of the mine roof 44" by "58 by 8" that fell in the area where the cribs had been removed.

The cited standard, 30 C.F.R. § 75.202(a), provides that "[t]he roof, face and ribs of areas where persons shall work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts."

On March 23, 1998, at approximately 4:30 p.m., Bear Ridge section foreman Bruce Bandy was killed by a rock fall from the mine roof along the left rib of the No. 6 entry. Several days earlier, on March 17, David Elswick, a roof control specialist for the Virginia Department of Mines, Minerals and Energy (DMME), was investigating an earlier roof fall at the subject mine at the right crosscut of the same No. 6 entry. During the course of his investigation Elswick noted that there were five cribs on the right side of the No. 6 entry with some additional cribs on the left side. After evaluating the roof in the right crosscut off the No. 6 entry with state mine inspector Altizer, roof control specialist Kenneth Shortridge from the Federal Mine Safety and Health Administration (MSHA), mine superintendent Tim Lowe and two miners' representatives, it was initially decided to clean the crosscut through the No. 6 entry. Because of concerns of another state inspector it was then decided to cut through the No. 5 crosscut after rehabilitating the roof in both the No. 5 and 6 entries. It was also agreed that eight-foot point anchor roof bolts would be installed before the No. 5 crosscut would be cut through. In addition, it was decided by the group that additional cribs would be added in the intersection before cutting through the No. 5 crosscut. In this regard Elswick suggested that the left side cribs in the No. 6 entry could be used and reset in the intersection prior to cutting through the No. 5 crosscut. Elswick specifically recalls examining the area near the cribs for draw rock and found nothing abnormal. No one from the group dissented from this plan, including the removal of the left side cribs in the No. 6 entry, and Elswick therefore assumed that everyone had agreed to it.

Elswick returned to the same area following the fatal rock fall on March 23rd to secure the area. He was satisfied that the roof was adequately supported because the eight-foot roof bolts had been installed. Elswick opined that the roof was adequately supported even without cribs. The DMME did not issue any warnings or citations as a result of the fatal rock fall. In particular, Elswick concluded that there was nothing wrong with removing the cribs on the left side of the No. 6 entry as the deceased had done. Indeed, Elswick did not believe that a reasonably prudent person would have done anything different from the procedures followed by Bandy. Moreover, he saw nothing on his earlier visit on March 17th that would have warranted not removing the cribs.

Michael McGlothlin, a continuous mining machine helper, while employed by Bear Ridge only since 1997, has been a miner for 18 years. He is a certified mine foreman but at the time of the accident was working as a miner helper on the second shift under the deceased, foreman Michael Bandy. According to McGlothlin, Bandy was the "safest boss" he had ever worked for. Bandy had arrived earlier on the scoop. Three sets of cribs along the left side of the No. 6 entry were to be removed. According to McGlothlin he and Bandy both examined the roof before removing the first crib. Bandy then pushed it away and sat for 20 to 30 seconds in the scoop looking at the top again before repeating this procedure. Bandy examined the roof while seated on the scoop and then, off the scoop, from the side of the scoop. McGlothlin also moved

inby the scoop and from that position again looked at the roof. He found no indication that any rock would fall. After the first blocks were removed he and Bandy talked for a while and continued watching the top. McGlothlin threw some of the blocks aside. They both continued to look at the roof and saw nothing to indicate an imminent rock fall. McGlothlin agreed that the roof was "bad" but it had been double bolted and he determined that it was supported. McGlothlin also testified that none of the slips that were in the roof extended into the area where the rock fell. According to McGlothlin Bandy did nothing that was substandard either in his observations of the roof or removal of the cribs. In addition he concluded that sounding the roof would not have disclosed the rock fall because the entire top sounded drummy. McGlothlin did not hear the roof "working" prior to the rock fall and there was no flaking or popping. It was after Bandy had again examined the top, moved to the side of the scoop and looked again before he picked up some blocks and the rock fell.

This Commission in *Secretary v. Canon Coal Company*, 9 FMSHRC 667, 668 (April 1987) stated in reference to the proper method of interpreting the nearly identical language of predecessor 30 C.F.R. § 75.200, that questions of liability must be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized the hazardous condition that the standard seeks to prevent. More specifically the Commission stated that the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purposes of the standard, would have provided in order to meet the protection intended by the standard. The Commission further emphasized that the "reasonably prudent person test" contemplates an objective, not subjective, analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry at issue. See also, *Secretary v. Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (December 1998).

Within this framework I note that the two persons most qualified to meet the reasonably prudent person test were the deceased Michael Bandy and miner operator helper Michael McGlothlin. These were the only persons in a position to make a timely and objective analysis of the surrounding circumstances relevant to an appropriate inquiry of the roof conditions at the time of the rock fall. In this regard I accord McGlothlin's testimony significant weight. He is a certified mine foreman with 18 years mining experience. Both he and the deceased, also a mine foreman, were well-qualified by experience and observations to have properly assessed the roof conditions immediately before the roof fall. They both examined the subject roof from several different perspectives and concluded that it was adequately supported before Bandy proceeded beneath the area that fell.

Other roof control experts also testified concerning conditions at various times before and after the rock fall and corroborate McGlothlin's observations. MSHA roof control specialist Harold Musik was at the scene shortly after the fatal rock fall and found that the roof was "supported." Indeed, he found that the original four-foot roof bolts inserted according to the roof control plan plus the rebolting bolt-for-bolt with eight-foot roof bolts constituted "intense" control. Musik opined that even when a roof is intensely supported as it was here you nevertheless can have a rock fall. He found no indications that the rock would have been

observably loose before it fell. Moreover, Musik found nothing that would indicate that Bandy did anything substandard.

MSHA mining engineer Linda Hrovatic also corroborated that the area around the fatal roof fall had been heavily bolted and opined that the bolting had been in accordance with sound mining practices. Indeed, she concluded that the area was "supported roof." She saw nothing suggesting that the rock would have been visible as a hazard before it had fallen. MSHA supervisor of inspectors, Larry Worrell, also confirmed that there had been substantial roof bolting in the area of the roof fall and that the bolting had been done in a workmanlike manner. He knew of no actions by Bandy that he considered negligent or not prudent.

Finally, Virginia State mine inspector Daniel Altizer, who was at the accident scene that same night, observed that there were as many roof bolts in the affected area as he had ever seen anywhere. He also agreed that a "sound and vibration" method of roof testing was not necessary in that area since the roof conditions were known and the entire roof would sound drummy in any event. In sum, following the roof fall accident eight inspectors, supervisors and roof control experts from two regulatory agencies investigated the scene, six from MSHA and two from DMME, and three of those from MSHA and the two from DMME concluded that the No. 6 entry was fully supported even after the removal of the cribs.

In reviewing the evidence I have noted the testimony of several of the Secretary's witnesses who now maintain that the procedures followed by foreman Bandy (in removing the cribs on the left side of the No. 6 entry before cutting the 5 right crosscut), were unsafe. However, it is apparent that this was not the Secretary's position before the fatal rock fall. It is clear from the credible evidence that the Secretary, through its agent, roof control specialist Shortridge not only acquiesced in, but affirmatively approved the precise procedures followed by Bandy now criticized by the Secretary. The testimony of DMME roof control specialist David Elswick is particularly probative in this regard. Elswick's credibility is unchallenged and his recollection is particularly convincing. As previously noted, Elswick testified that, following the March 16 roof fall in the 6 right crosscut, a group of state and federal roof control specialists met on March 17th and agreed, without dissent, to the precise procedures followed by Bandy on March 23rd. Elswick's testimony is not only credible in itself but is fully corroborated by the testimony of mine superintendent Tim Lowe, who was also present when this agreement was reached.

While the Secretary also appeared to question the recollection of these witnesses regarding the existence of three sets of cribs along the left side of the No. 6 entry on March 17th, Elswick, Lowe and Daniel Houchins, an employee of Bear Ridge and union committeeman, all testified as to the existence of cribs on both the right and left side of the No. 6 entry on the 17th of March. In addition, Brian Salyers, another Bear Ridge employee, testified that he had helped build the three sets of cribs along the left side of the No. 6 entry. He felt that the area had been properly supported once the supplemental eight-foot roof bolts had been inserted. Salyers, who is also a certified mine foreman, further testified that it was common practice to remove cribs prior to cutting through. He also opined that Bandy, who he knew very well, was probably the safest person he had ever worked with. He agreed that it would do no good to sound the roof in

this area since the entire roof would have sounded drummy. He agreed that once the eight-foot bolts had been inserted, the roof was indeed "supported." He further testified that there were no cracks in the roof on the left side of the No. 6 entry at the time they installed the cribs on March 16th or 17th. He specifically recalled that the arrangement with the state and Federal inspectors, including MSHA Inspector Shortridge, was that once they rebolted the No. 6 entry they would then remove the three cribs on the left side before cutting through the crosscut.

On the day of the accident, Salyers was in the area before the fall at 10 or 11 a.m. He checked the three cribs on the left side of the No. 6 entry and checked the top. He tapped the wedges on the cribs with a hammer and indeed found that there was no weight on them. He saw no unusual hazard. He concluded that even had the cribs been removed, the roof was adequately supported because of the insertion of the eight-foot roof bolts. It was his opinion that the cribs on the left side were no longer necessary once the eight-foot bolts had been inserted. Under all the circumstances I give but little weight to Inspector Shortridge's absence of a recollection of the cribs on the left side of the No. 6 entry.

The Secretary also claims that Bandy was negligent and did not act prudently when he failed to "sound" the roof in the vicinity of the rock fall. However, as noted, the overwhelming credible evidence is that such efforts would have been futile and likely to have been a reckless and dangerous act in itself. Indeed, the credible evidence is that not even the MSHA inspectors and investigators themselves sounded the roof while in this area. The roof was admittedly in bad condition and it has been established by credible evidence that the entire roof would have sounded drummy in any event.

Within the above framework of evidence it is clear that the Secretary has failed to sustain her burden of proving a violation as charged. The overwhelming weight of credible evidence, based on the testimony of reasonably prudent persons, is that the existing roof control met the protective requirements of the cited standard.

ORDER

Citation No. 7293918 is hereby vacated.

Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

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

May 3, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-148-M
Petitioner	:	A. C. No. 16-01192-05508
	:	
v.	:	Docket No. CENT 99-149-M
PHOENIX ASSOCIATES LAND	:	A. C. No. 16-01192-05509
SYNDICATE,	:	
Respondent	:	Murphy Sand & Gravel

ORDER TO RESUBMIT PENALTY PETITIONS

These cases are before me upon petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. On February 26, 1999, penalty petitions were filed on behalf the Secretary which were answered by the operator on April 22, 1999.

I will not accept these penalty petitions. They have been filed on behalf of an individual who styles himself as a law clerk, but this "law clerk" did not sign the petition. In this case the law clerk did not even sign the petition. It is signed by an individual whose status and position are not given. In addition, the petitions contain the names of three Solicitors in ascending degrees of responsibility, but none of them has signed the motion. I have recently held that a law clerk from this regional office may not file settlement motions with the Commission. Bowen Industries, Inc., Docket No. CENT 98-268-M, 21 FMSHRC _____, (April 26, 1999). These cases present a situation where the individual who signed the petitions is even further removed from an attorney who is entitled to appear.

Commission Rule 2700.3, 29 C.F.R. § 2700.3, sets forth the individuals and categories of individuals who are permitted to practice before the Commission. Under subparagraph (a) attorneys are permitted to practice and under subparagraph (b) a non attorney may practice if he is a party, a representative of miners or certain designated individuals associated with specified entities. The law clerk on whose behalf the petitions were filed is not an attorney and is not one of the described non attorneys allowed to appear before the Commission. And the person who signed the petitions is a fortiori unacceptable and unqualified. Subparagraph (c) permits any other person to practice with the approval of the presiding judge or the Commission. My approval has not been sought for the appearance of the law clerk. Nor has my approval been sought for the appearance of the individual who signed the petition but whose position and responsibilities are completely unknown to me.

The filings from the Dallas Office of the Solicitor are in contrast to procedures previously followed by the national Office of the Solicitor in seeking permission for non attorneys to appear before the Commission. In 1994, when the Office of the Solicitor wished to have Conference and Litigation Representatives (CLR) appear on behalf of the Secretary in mine safety cases, information was furnished regarding the training and credentials of these individuals. Cyprus Emerald Resources Corp., 16 FMSHRC 2359 (November 1994). The very substantial experience and training of CLRs entitled them to appear before the Commission. Moreover, in every case where a CLR wishes to represent the Secretary, he has filed a motion for permission to appear.

The petitions filed in these cases must be refiled and signed by an attorney in the Office of the Solicitor. Otherwise a show cause order will be issued why these cases should not be dismissed for want of prosecution.

These unauthorized filings connote a serious lack of respect for the Commission which I find very disturbing. Any office that submits such pleading obviously attaches little importance to penalty cases under the Mine Act.

In light of the foregoing, it is **ORDERED** that within 21 days of the date of this order the penalty petitions be resubmitted and signed by an attorney in the Office of the Solicitor.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 5, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-39
Petitioner	:	A. C. No. 44-06795-03524
v.	:	
	:	Sargent Hollow Mine
ANR COAL COMPANY LLC,	:	
Respondent	:	

ORDER DENYING MOTIONS FOR SUMMARY DECISION AND NOTICE OF HEARING

In this civil penalty proceeding brought under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d) (the Act)), the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) seeks the assessment of civil penalties against ANR Coal Company (ANR or the company) for three alleged violations of mandatory safety standards for underground coal mines. The Secretary charges the violations occurred at the company's Sargent Hollow Mine, an underground bituminous coal mine located in Wise County, Virginia. The Secretary proposes total civil penalties of $824.

In answering the petition, ANR denies the violations or in the alternative argues that if they did occur, the inspector's findings regarding negligence and gravity are wrong.

The case was scheduled to be heard and the parties engaged in prehearing discovery, including the deposition of potential witnesses. Shortly before the hearing counsels advised me they intended to submit the case for summary decision. Counsels then filed stipulations, cross motions for summary decision, and replies.

THE CONTROVERSY'S BACKGROUND

Although three violations are charged in the case, the parties are at odds over only one --

an alleged violation of 30 C.F.R. §75.334(b)(1) set forth in Citation No. 4566305.[1] As explained more fully below, section 75.334(b)(1) requires in areas where pillars are being recovered that the operator ventilate the areas with a bleeder system that will "continuously dilute and move methane-air mixtures away from active workings and into a return air course". The Secretary maintains ANR failed to comply with this requirement in that "methane being liberated on the . . . 001 . . . section [was] not being diluted, rendered harmless, and carried away during normal production operations" (Stip. 46; see also Gov. Exh. 1).

THE FACTS

The parties' agreements with regard to the relevant facts are set forth in 49 stipulations. They establish that between March 8, 1999, and the late night-early morning hours of March 13-14, methane exceeded 1% of the mine atmosphere in the No. 10 entry on the 001 section on four occasions — March 8, March 10, March 12, and March 13-14 (Stips. 13 - 16). They also establish that on each of these occasions management authorities made adjustments to the ventilation and that the methane levels soon fell to under 1% (Id.).

Around 9:30 p.m. on March 14, the roof fell in an area of the section where five or six pillars had been previously mined and a crack developed in the roof outby the pillar line in the No. 10 entry. The section foreman detected methane of up to 5%. Most of the methane seemed to be coming from the crack and the surrounding area (Stip. 18). The section foreman shut off the power, de-energized the equipment and withdrew the men. He also adjusted the ventilation in order to dilute the methane (Stips 19-20).

About an hour and ten minutes after the roof fell, MSHA Inspector Charles Reece arrived at the mine to conduct an inspection. Reece went to the No. 10 entry and he too detected methane coming from the crack and adjacent area. He measured the methane and found it had reached levels of 10% or more. Therefore, at about 11:30 p.m., Reece issued an imminent danger order of withdrawal under section 107(a) of the Act (30 U.S.C. §817(a)). The order required the withdrawal of miners from the entire mine (Stips 22, 24-25; Gov. Exh. 7). Reece then left the mine.

Approximately an hour after the order was issued, ANR's Manager of Mine Operations, Paul Campbell, arrived and went underground. Campbell knew the mine had been encountering methane due to the mining method the company was utilizing (Stip. 30). Campbell went to the No. 10 entry where he hung a curtain to redirect the air and to facilitate sweeping the methane from the entry. The methane was diluted to acceptable levels within 10 minutes. Campbell also

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[1]The parties agree that ANR will pay in full the proposed penalties for the violations alleged in the other two citations (Stips. 48, 49). The agreement effectively settles the parties' differences regarding the two citations, and I will approve the settlement when I issue a final decision and order in this case.

adjusted the ventilation outby the No. 10 entry. All of this work was completed within approximately six hours of the fall, and once it was completed, no methane was detected in the entry (Stips. 26, 30).

Campbell expected that the imminent danger order would be terminated. After it was, he intended to resume mining in the No. 10 entry. However, he did not plan to begin where mining had left off. Rather, he decided he would leave the curtain in place and pull back several pillars so that mining would resume several breaks outby the area last mined (Stip. 29). Campbell then left the mine. When he returned after daybreak on March 15, he found that methane levels in the No. 10 entry measured at most a few tenths of one percent. The levels were acceptable (Stips. 29, 31).

On the afternoon of March 15, Inspector Reece came back to the mine. He was accompanied by two other inspectors, Douglas Carico and James Hicks. The inspectors talked to Campbell about what ANR had done to adjust the ventilation. Campbell believed he also told them about his plan to resume mining several blocks outby the area last mined. However, neither Reece nor Hicks remembers Campbell discussing the subject (Stip. 32-33).

After talking to Campbell, the inspectors went to the 001 section. Reece and Hicks saw the curtain that Campbell had erected to help dilute the methane. It was on the left side, along the rib. To conduct pillar mining, the curtain had to be on the right side. Therefore, Reece and Hicks had the curtain taken down and re-erected as it would have been if mining had continued in the area. As soon as it was taken down and re-erected, methane levels increased to over 1% . However, as long as the curtain remained where Campbell had positioned it, the methane levels were acceptable (Stip. 35).

While the inspectors were underground they met Darrell Holbrook, the mine superintendent.[2] The inspectors and Holbrook had occasion to visit the No. 6 entry of the 001 section. Holbrook detected air moving from the gob into the entry. The air flow was opposite the direction it was supposed to move. The purpose of the bleeder system was to sweep methane and other gases into and over the gob and out the return. Air flowing from the gob into the entry meant that methane might be coming into the entry. However, Holbrook detected only .2% methane in the No. 6 entry. This was an acceptable level. Holbrook suggested to Hicks that he erect a curtain in the No. 6 entry to insure air would flow from the entry into the gob, and Hicks said that was not a big concern and the condition was not a violation (Stip. 37).

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[2]In addition to meeting Holbrook underground, the inspectors met him again after they returned to the surface. Holbrook believes that during both meetings he told the inspectors that ANR was going to pull back several blocks before it resumed pillaring operations and that it was going to leave Campbell's curtain in place when it pulled back. Reece and Hicks do not recall discussing these matters with Holbrook (Stip. 36).

Reece too noted the direction of the air in the No. 6 entry. In his deposition Reece testified that the roof in the crosscut between the No. 6 and No. 7 entries had fallen "tight," meaning that it almost blocked the crosscut. Reece believed this was why the air was flowing from the gob into the entry. Reece testified this lead him to believe the bleeder system for the 001 section was inadequate and that the volume of air on the section needed to be increased to "force" the air flow to change direction (ANR Exh. 1 at 44, 45, 65-67, 69-70). However, Reece made no specific references to the No. 6 entry when he issued Citation No. 4566305.

While Reece and Hicks were in the No. 6 and No. 10 entries of the 001 section, Inspector Carico traveled to the bleeder entries on the back side of the gob and evaluated the bleeder system at its specified measurement locations. He found nothing to indicate the system was functioning improperly (Stip. 38).

All of the inspectors and Holbrook returned to the surface and Hicks called the MSHA office. Hicks advised Holbrook that MSHA was not going to terminate the section 107(a) order as it related to the 001 section, although MSHA did agree to modify it so that mining could resume on the 002 section (Stip. 39).

In an attempt to have the order terminated, ANR presented MSHA with a modified ventilation plan that indicated ANR would resume mining outby where the methane was detected in the No. 10 entry and that it would leave two rows of pillar blocks intact where the cracks emanating methane had formed. However, MSHA refused to terminate the order (Stips. 40-41). The agency feared the curtain positioned by Campbell would be knocked down by subsequent roof falls and the methane levels immediately would rise (see ANR Exh. 1 at 53). Rather than delay production while it contested the order, the company chose to remove the equipment and seal the 001 section (Stip. 41).

In the meantime, on March 16, Reece issued Citation No. 4566305 alleging a violation of section 75.334(b)(1). The citation states:

> The bleeder system for the second mined area (gob) of the . . . 001 . . . section is inadequate in that the methane being liberated on the . . . 001 . . . section is not being diluted and rendered harmless, and carried away during normal production operations. Methane is presently being liberated through cracks and fissures in the mine roof in the No. 10 entry, 20 feet inby Survey Station No. 1850. This methane cannot be diluted, rendered harmless and carried away by the present bleeder system through normal ventilation methods and procedures. This citation was a factor that contributed to the Issuance of . . . Order No. 4566579 dated 4/14/98, therefore no abatement time was set (Gov. Exh. 1).

The citation and the order were terminated when the area was finally sealed (Stip 43; Gov. Exh. 7).

SUMMARY DECISION

Under the Commission's rules, a motion for summary decision shall be granted if the entire record shows: (1) No genuine issue as to any material fact, and; (2) The moving party is entitled to summary decision as a matter of law (29 C.F.R.§2700.67). Summary decision is only authorized "upon proper showings of a lack of a genuine, triable issue of material fact" (Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)). If material facts are disputed, incomplete, or missing, a hearing is necessary, but the hearing may be limited to the issues contingent upon the disputed, incomplete, or missing facts (29 C.F.R. §2700.67(d)).

THE ISSUES

The issues are whether the agreed upon facts establish a violation of section 75.334(b)(1) as set forth in Citation No. 4566305; or, if not, whether they preclude finding a violation. In order to resolve the issues it is necessary to understand the meaning of section 75.334(b)(1), which in turn requires a review of the standard's derivation. Also, it is necessary to understand the place of section 75.334(b)(1) in the regulatory scheme and the elements necessary to prove a violation of the regulation.

SECTION 75.334(b)(1)

Section 75.334(b)(1) is a subsection of section 75.334, a regulation that mandates how areas where pillars have been and are being mined are to be ventilated. Section 75.334(b)(1) states in part:

> During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface of the mine.[3]

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[3]Neither the regulations nor the Dictionary of Mining, Mineral, and Related Terms (DMMRT) define "bleeder system". However, the DMMRT defines "bleeder entries" as "panel entries driven on a perimeter of a block of coal being mined and maintained as exhaust airways to remove methane promptly from the working faces to prevent buildup of high concentrations either at the face or in the main intake airways." It states that bleeder entries are "[w]idely used for draining methane in coal mines . . . where the room-and-pillar method [of mining] is employed" (American Geological Institute DMMRT 451 (2nd ed. 1977)).

Section 75.334 was promulgated in 1992 (57 FR 20869 (May 15, 1992)), and has remained in effect without substantive change (see 61 FR 9828 (March 11, 1996)). The section is derived from previous sections 75.328 and 75.329, and from ventilation plan approval criteria then found in section 75.316-2. In promulgating the standard, the Secretary stated that these predecessor standards "specif[ied] use of bleeder entries, bleeder systems or an equivalent means in pillared areas to control the accumulation of methane" (57 FR at 20866). The Secretary explained:

> During and after pillar recovery, methane . . . is liberated from the coal and strata. When this occurs, bleeder systems route gases away from worked-out areas and areas where pillars are being mined. [Section 75.334] . . . revises the requirements for bleeder systems and establishes ventilation standards for control of methane . . . in worked-out areas and for areas where pillars are being mined.
>
> * * * * * *
>
> Where pillars are being fully or partially recovered, paragraph (b)(1) requires the bleeder system to be used to control the air passing through the area and to continuously dilute and move methane-air mixtures . . . from the worked-out area away from active workings and into a return air course or to the surface . . . . MSHA generally consider[s] bleeders to be a system of entries that form special air courses designed, developed, and maintained to continuously move gases from retreat mining areas.
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> * * * * * *
>
> [A]ny bleeder system used must continuously move gases from the mined-out area and away from active working into a return air course or to the surface (57 FR at 20886-87).

The specifics of a bleeder system are determined on a mine-by-mine basis and are specified in the mine's approved ventilation plan (57 F.R at 20886). This is because the system is tailored to the conditions in the particular mine. The system "[d]epend[s] on particular mining conditions" because "[d]ifferent mines have different conditions and methane liberation rates" (Id.). The utility of the system is gauged by evaluating the system pursuant to section 75.364 (57 FR at 20886), a regulation that states the frequency, type, and location of measurements that are made to establish the system's effectiveness.

As the Secretary's regulatory comments make clear, because the release of methane may be an unavoidable consequence of mining, especially during pillaring operations, the goal of the system is to reduce the level of methane on active workings by moving it out of the workings, into and over the gob, and out the return. Continuous movement of the gas is intended to keep it

from building to a hazardous level. However, the Act and the regulations also recognize that there may be instances when methane inevitably will build to hazardous levels and that these instances do not necessarily represent violations of the Act or its standards.

In order to establish a violation of section 75.334(b)(1), the burden is on the Secretary to show that a cited bleeder system did not continuously dilute and move methane-air mixtures away from the worked-out areas into a return air course or to the surface of the mine. One way the Secretary could meet this burden would be to show that the bleeder system ceased to function. For example, if the Secretary found methane in areas where pillars were being extracted and she also found no ventilation when she took measurements at the system's evaluation points, she could establish that methane was not being diluted and moved without interruption — that is, it was not being moved "continuously". However, violations such as this would be unusual because bleeder systems rarely stop working altogether. Rather than allege the system suffered a total breakdown, the Secretary's theory usually is that the bleeder system did not function effectively enough to meet the intent of the regulation.

As stated previously, the Act and the regulations recognize the presence of methane may be inevitable when coal is mined, and that accumulations of methane do not represent per se violations of the regulations.[4] Nevertheless, the Act and the regulations also recognize that there is a point at which methane becomes a potential hazard. Therefore, in addition to maintaining a bleeder system that continuously dilutes and moves methane, an operator is required to test for methane and to take action of reduce the level of methane when the tests show the methane at a level of 1% or more (see 30 C.F.R. §75.323).

Section 75.334 (b)(1) does not specifically state methane is to be diluted so as to rendered it harmless, but such clearly is the standard's purpose. Considering a level of methane of 1% or more to be an objective indicator that the system may not be "continuously dilut[ing] and mov[ing]" the gas is a reasonable interpretation of the standard. Therefore, a finding of 1% or more of methane may be a signal to a reasonable operator that adjustments are needed in the bleeder system to keep it effectively diluting and moving methane. If an operator fails to make such adjustments to the system (as opposed to palliative "fixes" to the individual incident or incidents of excessive accumulations), the operator may have violated the standard.

In such a case, the existence of a violation ultimately turns upon whether the Secretary can establish that under all of the circumstances present a reasonable operator, familiar with the conditions in its mine, including but not necessarily limited to the miner's history of methane liberation and the capacity of its ventilation system, would have made adjustments to the miner's

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[4]The Secretary has acknowledged this by noting that "Neither the Act nor the regulations provide that a mere presence of methane gas in excess of 1[%]. . .is per se a violation" (U.S. Department of Labor, Mine Safety and Health Administration, V. *Program Policy Manual* 34 (1996)).

bleeder system so as to ensure that methane continuously, and effectively, was diluted and moved away from active workings and into the return.

THE SECRETARY'S MOTION AND THE STIPULATIONS

Although the citation was issued on March 16, 1998, it was apparently based on conditions that existed from at least March 8, up to and following the roof fall of March 14 (Reece Dep.17, 45, 59, 65-67).

The Secretary states that "[t]he bleeder system . . . that was in place on the 001 section allowed excessive levels of methane to be present on the active section on at least five occasions in the week prior to when . . . [the citation] was issued[,]" and argues therefore "[i]t was reasonable . . . to expect that . . . continued mining on the 001 section, without fundamental adjustments being made to the bleeder system, would have resulted in further instances of excessive levels of methane in the active areas of the section" (Sec's Mot. 5; see also Sec's Resp. 1-2). Simply put, the Secretary maintains the instances of excessive methane "demonstrate the bleeder system was not adequate to dilute and carry away the methane during . . . normal operations" (Sec. Resp. 4).

To agree that the instances of methane (Stips. 13-16, 19, 24; Gov. Exh. 6) in and of themselves establish the bleeder system was not adequate, would be to make repeated instances of excessive methane tantamount to a violation, something which neither section 75.334 nor any other standard provides. While the instances of methane may be evidence that the system was not functioning as intended, they also may represent a series of singular occurrences that would not have alerted a reasonable mine operator of the need for adjustments in its overall bleeder system.

The Secretary must present testimony from the inspector who issued the citation, and perhaps from others, as to why the methane accumulations found by the company and the inspector (see Reece dep. at 38-39, 45) indicate the bleeder system was not being maintained in compliance with section 75.334(b)(1). The Secretary also needs to establish clearly just when the violation came into existence and what caused the violation to exist at that particular time.

Further, the inspector stated in his deposition that following the March 14 roof fall, the way the air moved in the No. 6 entry lead him to believe the bleeder system was inadequate (Reece Dep. 45). On the face of the citation there is no obvious link between the citation and the conditions in the No. 6 entry that the inspector referenced. If there is a link, the Secretary needs to present testimony establishing what it is. In other words, the Secretary needs to demonstrate that the conditions in the No. 6 entry were connected with the accumulations in the No. 10 entry, if in fact they were, and why the conditions should have signaled to ANR that the bleeder system was inadequate. In so doing, it would behoove the Secretary to explain why Inspector Hicks told Holbrook the air on the No. 6 entry was "not a big concern" and the "condition was not a violation" (Stip. 37).

Because I cannot conclude the stipulations and supporting materials establish the alleged violation, the Secretary's motion for summary judgement must be denied.

ANR'S MOTION AND THE STIPULATIONS

Essentially, ANR argues that because in each instance it was able to reduce the concentration of methane to below 1%, the bleeder system was adequate and did not fail. ("Each time an unacceptable level of methane was detected, the bleeder system carried away the methane in a matter of minutes. The bleeder system was adequate" (ANR Rep. 4, see also ANR Mot. 2-5).) In a variation on this theme, the company also asserts that because mine personnel were able to eliminate hazardous levels of methane in relatively short periods of time by adjusting existing curtains or by erecting new curtains, the system was doing what it was designed to do — move methane away from working places, into the gob, and out a return (ANR Mot. 4). Finally, it maintains the fact that the inspector detected air moving from the gob into the No. 6 entry is irrelevant. The company points out the inspector did not mention the condition in the body of the citation, nor did he mention it to anyone at the mine (Id. 8).

Taken together, the company's arguments, the stipulations, and the supporting documents, do not preclude finding a violation. The allegation of a violation pertains to the bleeder control system. "The bleeder system for the second mined area (gob) of the . . . 001 . . . section is inadequate in that the methane being liberated on the . . . 001. . . section is not being diluted, rendered harmless, and carried away during normal production operations" (Gov. Exh. 1). The corrective measures instituted by ANR to eliminate individual instances of excessive methane did not necessarily affect the overall system. Conceivable there was a continuing defect in the entire system, despite the individual corrections. I cannot conclusively determine from the stipulations whether or not this was so. Further, the fact the methane levels were reduced by the adjustments does not answer the fundamental question of why they occurred in the first place, and the stipulations and supporting materials do not offer a definitive answer.

Moreover, that the citation does not specifically reference the direction of air flow on the No. 6 entry does not mean that the information is irrelevant. After all, the citation charges the system was inadequate, and air flow on the No. 6 entry was part of the system.

Nor can I find that conditions on the No. 6 entry should be excluded from consideration because they are not mentioned specifically in the citation. While it is true section 104(a) of the Act requires a citation to "describe with particularity the nature of the violation" (30 U.S.C. §814(a)), the purpose of this specificity requirement has been met in that the citation as worded allowed ANR to discern the conditions requiring abatement (Stip. 43), and is allowing ANR adequately to prepare for a hearing (see Cyprus Tonopah Mining Corp., 15 FMSHRC 365, 379 (March 1993)).

Finally, because in deciding this case it will in all likelihood be important to determine whether given the conditions that existed at the mine a reasonable operator would have made

adjustments to the bleeder system, ANR may want to offer testimony explaining why, if its Mine Operations Manager knew before the events of March 13-14 that the mining method being utilized was likely to produce the methane levels that resulted (Stip. 30), it did not make changes in its bleeder system to prevent the hazard.

RULING ON THE MOTIONS

Because I cannot find the undisputed material facts establish that the bleeder system for the 001 section was not continuously diluting and moving methane-air mixtures away from active workings and into a return or to the surface, or that the undisputed material facts make such a finding impossible, the parties' motions for summary decision are **DENIED**.

NOTICE OF HEARING

The stay order entered in this case is **DISSOLVED,** and the parties are advised the matter will be **CALLED FOR HEARING** in Abingdon, Virginia at 8:30 a.m., on June 9-10, 1999.[5] (A specific hearing location will be designated later.) Because many of the relevant facts have been stipulated, extensive testimony is unnecessary. Therefore, each side will be afforded four hours to present direct testimony regarding its case in chief. Cross examination will be limited to 40 minutes per witness. Rebuttal will be limited to one hour.

David Barbour
Administrative Law Judge

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[5]In *Consolidation Coal Company*, 20 FMSHRC 227 (March 1998), the Commission divided equally over whether Commission Administrative Law Judge George Koutras properly held the Secretary did not prove a violation of section 75.334(b)(1), despite the fact methane accumulated on a pillar section to the point where a fatal explosion occurred (17 FMSHRC 1982 (November 1995)). The result of the Commission's decision was to let the judge's decision stand as if affirmed. The decision was appealed to the United States Court of Appeals for the Fourth Circuit, and ANR requests that if I believe the Commission's decision is not entitled to precedential benefit, I stay this matter until the Court rules (ANR Rep. 1).

ANR's request is respectfully denied. Judge Koutras' decision was highly fact specific. It seems probable to me that the forthcoming decision of the Court of Appeals also will be fact specific, making it unlikely to provide any precedent directly applicable to this case.

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

May 7, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-162-M
Petitioner	:	A. C. No. 41-02965-05517 FTE
	:	
v.	:	Cleburne Base
FORT WORTH CRUSHED STONE,	:	
INCORPORATED,	:	
Respondent	:	

ORDER TO RESUBMIT PENALTY PETITION

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. On March 15, 1999, a penalty petition was filed on behalf of the Secretary which was answered by the operator on April 26, 1999.

The penalty petition was filed by an individual who styles herself as a law clerk. I have recently refused to accept penalty petitions and a settlement motion filed by law clerks from this regional office. Phoenix Associates Land Service Inc., 21 FMSHRC _____, (May 3, 1999); Bowen Industries, Inc., Docket No. CENT 98-268-M, 21 FMSHRC _____, (April 26, 1999). The petition filed in this case must be refiled and signed by an attorney in the Office of the Solicitor. Otherwise a show cause order will be issued why this case should not be dismissed for want of prosecution.

In light of the foregoing, it is **ORDERED** that within 21 days of the date of this order the penalty petition be resubmitted and signed by an attorney in the Office of the Solicitor.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 12, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-147
Petitioner	:	A. C. No. 36-00930-03604
	:	
v.	:	Rayne No. 1
RAYNE ENERGY INCORPORATED,	:	
Respondent	:	

ORDER TO RESUBMIT PENALTY PETITION

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. On April 26, 1999, a penalty petition was filed on behalf of the Secretary which was answered by the operator on May 3, 1999.

The penalty petition was filed by the Philadelphia Regional Counsel but was not signed by the Regional Counsel. Rather, an individual who styles herself as a "paralegal specialist" signed for the Regional Counsel. I have no idea who this "paralegal specialist" is or what her qualifications are. I have recently refused to accept a settlement motion filed by a paralegal from this regional office as well as penalty petitions and a settlement motion filed by law clerks from another regional office. Rayne Energy Inc., 21 FMSHRC ____, (April 29, 1999); Phoenix Associates Land Service Inc., 21 FMSHRC_____, (May 3, 1999); Bowen Industries, Inc., Docket No. CENT 98-268-M, 21 FMSHRC _____, (April 26, 1999). The petition filed in this case must be refiled and signed by an attorney in the Office of the Solicitor. Otherwise a show cause order will be issued why this case should not be dismissed for want of prosecution.

In light of the foregoing, it is **ORDERED** that within 21 days of the date of this order the penalty petition be resubmitted and signed by an attorney in the Office of the Solicitor.

Paul Merlin
Chief Administrative Law Judge

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May 14, 1999

SECRETARY OF LABOR, MSHA on behalf of ALLEN HAMILTON, Petitioner	:	DISCRIMINATION PROCEEDING Docket No. WEST 99-107-DM
v.	:	Lime Mountain Quarry
RONDY'S INC. d/b/a IDAHO LIME, a corporation, Respondent	:	

ORDER DENYING MOTION TO DISMISS AND FOR SUMMARY DECISION

Respondent filed a motion to dismiss this case on the grounds that: (1) the Secretary of Labor failed to notify Mr. Hamilton of her determination that Respondent violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) ("Mine Act"), within 90 days of receipt of Mr. Hamilton's complaint of discrimination, as required by section 105(c)(3); and (2) the Secretary of Labor failed to file a discrimination complaint with the Commission within 30 days after her written determination that a violation occurred, as required by 29 C.F.R. § 2700.41(a). In the alternative, Respondent argues that it is entitled to summary decision on the same grounds. The Secretary of Labor opposes the motion.

The essential facts are not in dispute. Mr. Hamilton filed his complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") on or about August 13, 1997. He filed this complaint within 60 days of the alleged act of discrimination, as required by section 105(c)(2). By letter dated October 29, 1998, counsel for the Secretary notified Respondent and Mr. Hamilton of MSHA's belief that Respondent had terminated Mr. Hamilton from his employment in violation of section 105(c). In the letter, counsel suggested that the parties attempt to settle the matter. The case did not settle and, after a change in the Secretary's counsel, a formal complaint of discrimination was filed with the Commission on or about January 22, 1999.

It is clear that the Secretary violated section 105(c)(3) of the Mine Act by failing to notify Mr. Hamilton of her "determination whether a violation ... occurred" within 90 days of receipt of his complaint. It is also clear that this time-frame is not jurisdictional. The legislative history of the Mine Act states that the deadlines imposed on the Secretary in section 105(c) are not jurisdictional and that the failure of the Secretary to meet them "should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the

failure of the Government to meet its time obligations." S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624 (1978).

In interpreting the deadlines imposed on the Secretary in section 105(c), the Commission concluded that the "fair hearing process envisioned by the Mine Act does not allow us to ignore serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend itself against the claim." *Secretary of Labor for Donald R. Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986). Accordingly, the Commission held that a discrimination complaint is subject to dismissal when the Secretary failed to meet the statutorily imposed deadlines "if the [mine] operator demonstrates material legal prejudice attributable to the delay." *Id.* This test requires more than a mere allegation of prejudice.

The Secretary states that MSHA's investigation of Mr. Hamilton's complaint was not completed on time because: (1) Mr. Hamilton claims that he was exposed to toxic substances and MSHA needed to consult with an expert toxicologist; and (2) Mr. Hamilton was difficult to reach because he did not have a telephone. The Secretary states that the delay in this case was reasonable and that Mr. Hamilton's discrimination claim should not be dismissed.

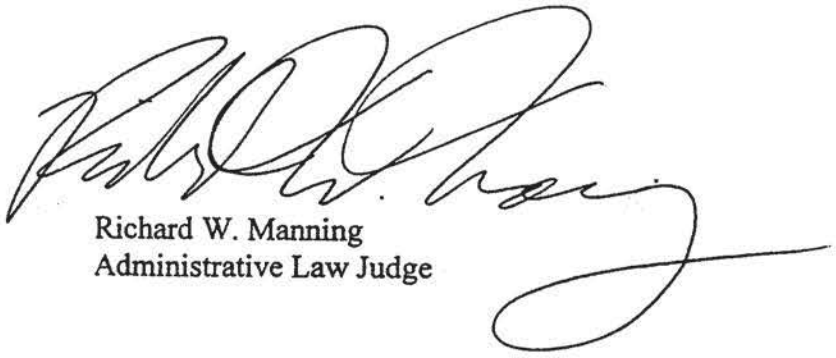
Respondent does not allege that it was materially prejudiced by this delay. There has been no showing that the Secretary's failure to report its findings to Mr. Hamilton with 90 days has hindered the ability of Respondent to defend itself in this case. I agree with the Secretary that Respondent has not set forth adequate grounds to dismiss this case because of this delay.

Rule 41(a) of the Commission's procedural rules provides that the Secretary shall file her discrimination complaint "within 30 days after his written determination that a violation has occurred." 29 C.F.R. § 2700.41(a). Respondent contends that the letter it received from William Kates of the Office of the Solicitor on or about October 29, 1998, constitutes the Secretary's written determination that a violation occurred. It contends that since the Secretary failed to initiate this proceeding within 30 days thereafter, the case should be dismissed.

The Secretary contends that Mr. Kates' letter was written as a courtesy to open settlement negotiations. The Secretary maintains that this proceeding should not be dismissed because she attempted to initiate settle negotiations in good faith. She contends that the letter was not her "written determination" that a violation occurred. In addition, the Secretary argues that even if the letter is deemed to be her written determination of a violation, the case should not be dismissed because Respondent was not prejudiced by the delay.

For the reasons set forth above, Respondent has not set forth sufficient grounds to dismiss this case. Even if I assume that the October 29 letter was the Secretary's written determination of a violation, there has been no showing that the delay has materially prejudiced Respondent. The parties were engaged in settlement negotiations during that period.

For the reasons set forth above, Respondent's motion to dismiss this proceeding or in the alternative for summary decision is **DENIED**. Dismissal is a harsh remedy and Mr. Hamilton should not have his case dismissed because the Secretary of Labor was not able to meet the deadlines set forth in the Mine Act or the Commission's rules in the absence of material legal prejudice.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

May 20, 1999

JAMES MILAM,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 99-34-D
v.	:	HOPE CD 98-11
	:	
WHITBY ELECTRIC, INCORPORATED,	:	No. 1 Mine
Respondent	:	Mine ID 46-02166

ORDER PERMITTING COUNSEL TO WITHDRAW, CONVERTING CASE TO ONE UNDER SECTION 105(C)(3), AND CHANGING CAPTION

I. The Motion and the Response

Counsel for the Secretary has moved to withdraw from this case as counsel for the Complainant. Counsel states the Complainant has retained private counsel.[1] Counsel also states the parties have engaged in settlement negotiations but, "The Secretary has been unsuccessful in attaining guidance or settlement authority from the Complainant, and the Complainant and his counsel have not provided the assistance the Secretary's counsel needs to adequately represent the Complainant's case" (Mot. to Withdraw 2). Because the Secretary's "ability to pursue [the] litigation ... has been severely compromised by ... Complainant's failure to provide [counsel with] meaningful assistance", the Secretary's counsel seeks to leave and to "convert" the case from a section 105(c)(2) action to a section 105(c)(3) action (*Id.*).

Counsel for the Respondent does not object to the Secretary's motion, provided the complaint is not "converted" and the present complaint is dismissed with prejudice. The Complainant has not filed a response.

II. The Ruling

The Act prohibits discrimination and provides two avenues for redress. Either the Secretary may represent the miner who believes he or she has been discriminated against (section

[1] Although counsel for the Secretary refers to Complainant's "private counsel", no lawyers other than those representing the Secretary and Whitby Electric, Inc. have entered appearances in this case. If the Complainant has retained private counsel, it would behoove counsel to enter an appearance on Complaint's behalf.

105(c)(2)); or, if the Secretary determines no discrimination has occurred, the miner may file his or her own complaint (section 105(c)(3)). When the Secretary initiates the complaint, the complainant on whose behalf the Secretary has filed is a party to the proceeding (29 C.F.R. § 2700.4(a)).

As this case now stands the Commission has before it an allegedly aggrieved party (James Milam) who asserts he has been illegally discriminated against in violation of section 105(c)(1) of the Act and a defending party (Whitby Electric, Inc.) who denies the allegations. Milam has sought to effectuate his section 105(c) rights by authorizing the Secretary to file a complaint for him pursuant to section 105(c)(2). Now, the Secretary wishes to withdraw her representation, something which the Commission's rules allow provided the parties (Milam and Whitby) are not prejudiced (29 C.F.R. § 2700(4)(d)).

While the Act does not specifically provide for "converting" a discrimination case brought under section 105(c)(2) to one brought under section 105(c)(3), it is clear to me conversion should be allowed. Without it a party's right to the protections of section 105(c)(1) could be defeated by disagreements between the party and his or her counsel, and the protections, not the means by which they are sought to be effectuated, must be paramount.

While counsel for Respondent expresses concern that "conversion" will allow Complainant to recover attorney's fees, recovery of costs and fees by a successful privately represented complainant is exactly what Congress intended. Congress provided for such recovery in order to encourage the effective representation of miners in those cases where the Secretary, for whatever reason, chose not to go forward on the miner's behalf.

Although allowing the case to proceed under section 105(c)(3) creates the potential for prejudice to Whitby should Complaint seek to be awarded fees for work done by counsel for the Secretary, the problem is not of the moment and may be sorted out later if the case ever reaches the point of awarding fees and costs.

ACCORDINGLY, the Secretary's motion is GRANTED. Yusaf Mohamed is PERMITTED TO WITHDRAW as counsel for the Secretary and Milam. The proceeding is CONVERTED to a case brought pursuant to Section 105(c)(3) of the Act, and the case caption IS CHANGED to reflect the Secretary no longer is involved in this matter.

The parties are reminded the matter will proceed to hearing as scheduled on July 1, 1999, in Beckley, West Virginia.

David F. Barbour
Administrative Law Judge
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