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Review was granted in the following cases during the month of May:

RAG Shoshone Coal Corporation v. Secretary of Labor, MSHA, Docket No. WEST 99-342-R, 99-384-R. (Judge Cetti, April 9, 2001)

The American Coal Company v. Secretary of Labor, MSHA, Docket No. LAKE 2000-111-R, 2000-112-R. (Judge Zielinski, May 9, 2001)

Secretary of Labor, MSHA and United Mine Workers of America v. Arch of West Virginia, Docket No. WEVA 2000-55. (Judge Hodgdon, April 16, 2001)

Secretary of Labor, MSHA v. RAG Shoshone Coal Corporation, Docket No. WEST 2000-349. (Judge Cetti, May 16, 2001)

No case was filed in which Review was denied the month of May

COMMISSION DECISIONS AND ORDERS

the judge's decision and remand to the judge for assessment of penalty. For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

I.

Factual and Procedural Background

Rocky Hollow is an underground coal mine, categorized under MSHA's guidelines as "active-nonproducing," and is owned and operated by Rawl. 21 FMSHRC at 221. A belt conveyor runs through Rocky Hollow carrying coal for approximately 5.5 miles from an adjacent underground mine, Sycamore Fuels ("Sycamore"), to the Sprouse Creek Preparation Plant ("Preparation Plant"), which is also owned and operated by Rawl. *Id.* The coal from Sycamore is brought to the surface by belt line once again, and is then transported approximately 3/4 of a mile on the surface. It then goes underground and travels through the Rocky Hollow mine. *Id.* Upon surfacing from Rocky Hollow, the belt line runs approximately 100 feet to the Preparation Plant. *Id.* at 220. Sycamore is located about 8 miles by road from the Preparation Plant. *Id.* at 221. Coal is extracted from Sycamore on two shifts — 7 a.m. to 4 p.m. and 4 p.m. to 12 a.m. *Id.* at 222. The belt conveyor carries coal from Sycamore from 7:30 a.m. to 11:30 p.m., and a maintenance shift is conducted at Sycamore from 12 a.m. to 7 a.m. *Id.* at 221-22.

Miners are underground in Rocky Hollow from 7:30 a.m. to 3:30 p.m., performing various tasks, including the examination, cleaning, and maintenance of the belt line and related areas of the mine. Rawl Mot. for Summ. Dec. at 4-5, Stip. 11 (hereinafter cited as "Stip.>"). Also during that shift, an on-shift examination is conducted. Stip. 12. The belt conveyor in Rocky Hollow continues transporting coal from 3:30 p.m. to 11:30 p.m., when there are no miners underground. 21 FMSHRC at 220. From 3:30 a.m. to 7:30 a.m., three miners conduct a preshift examination in the Rocky Hollow mine. *Id.* at 220, 222; Stip. 12. Rocky Hollow is equipped with an automatic fire warning system which is active 24 hours-a-day, and the belt conveyors are flame-resistant. 21 FMSHRC at 222. There are four portals through which intake air enters the mine, and a mine fan which operates 24 hours per day and is examined daily. *Id.*

On October 1, 1998, MSHA Inspector Gary Collins issued Citation No. 7175284 to Rawl alleging a violation of section 75.362(b). *Id.* The citation stated: "Coal is being transported through the [Rocky Hollow] mine, from Sycamore Fuels to the Sprouse Creek Preparation Plant, on the 1530 to 2330 shift, an on-shift examination is not being conducted on this shift." *Id.* at 220. The inspector found moderate negligence and the Secretary proposed a \$55 penalty.

Rawl filed a notice of contest, and the parties filed cross-motions for summary decision. In his decision, the judge found that although the language of section 75.362(b) was plain, the meaning advanced by the Secretary was contrary to legislative intent under the Mine Act when applied to Rocky Hollow, and therefore, an on-shift inspection of the belt conveyor haulageway was not required, because no miners were underground between 3:30 p.m. and 11:30 p.m. *Id.* at

219, 223. As an alternative ground for his decision, the judge found that the Secretary's interpretation was not entitled to deference because she failed "to advance any consistent, convincing policy concerns that justify interpreting the pertinent statutory and regulatory provisions in a way that prohibits unattended operation of the Rocky Hollow beltline," or to identify any miners who were particularly at risk. *Id.* at 227. Finding that it would be more desirable to have miners above ground, the judge concluded that there was no justification for the exposure of on-shift examiners to the danger of an operational belt line. *Id.* at 226-27. The judge granted Rawl's motion for summary decision and vacated the citation. *Id.* at 228.

II.

Disposition

The Secretary argues that the plain language of section 75.362(b), its regulatory history, and the purpose of the standard support the Secretary's position that an on-shift examination of the Rocky Hollow belt line is required between 3:30 p.m. and 11:30 p.m. S. Br. at 12-20. The Secretary contends that section 75.362(b) is applicable, although no miners are underground, because the transportation of coal is within the regulatory definition of coal production. *Id.* at 16-19. Alternatively, the Secretary argues that coal production at Sycamore may be considered for purposes of satisfying the standard. S. Reply Br. at 3-4. The Secretary also contends that the judge's conclusion is erroneous because he failed to address the Secretary's arguments and evidence in support of her position, while applying irrelevant Mine Act provisions in his plain meaning analysis. S. Br. at 20-22. In addition, the Secretary argues that, if the regulation is ambiguous, then the judge erred by concluding that the Secretary was not entitled to deference, by applying the wrong standard for deference, substituting his judgment in place of the Secretary's, and failing to consider and analyze the entire record. *Id.* at 23-30. Finally, the Secretary replies that no notice problem exists because section 75.362(b) is not impermissibly vague. S. Reply Br. at 9-11.

Rawl responds that section 75.362(b) is inapplicable to the Rocky Hollow mine because there is no "shift," "active workings," or "working sections," because there are no miners working and no coal produced from 3:30 p.m. to 11:30 p.m., while the belt is in operation. R. Br. at 7-10. Rawl contends that the plain language of the standard, in addition to the regulatory and statutory histories, supports its reading of the regulation. *Id.* at 10-17. Finally, Rawl argues that the Secretary is not entitled to deference because her interpretation reduces rather than promotes the safety of miners and is not reasonable. *Id.* at 17-23. Alternatively, Rawl asserts that, even if the Secretary's interpretation were reasonable, the result would be the same because it did not have notice of the Secretary's interpretation. *Id.* at 23-25.

III.

Separate Opinions of the Commissioners

Commissioner Riley, in favor of affirming the decision of the judge:

The Chairman and Commissioner Beatty conclude that the language of section 75.362(b) is plain and applicable to Rocky Hollow, even when no miners are present. Slip op. at 11, 13. Because an essential element of the inspection requirement under section 75.362(b) is the presence of miners who must be protected from hazardous conditions during their work shift, I conclude that Rocky Hollow is not required to perform an “on-shift” examination when no miners are working or present. I therefore affirm the judge’s decision finding no violation.

In a free market system, government regulation is not an end in itself, but rather interference, albeit necessary, in what is otherwise a self-regulating economic system. Such intervention, especially where it imposes additional burdens on a regulated entity, is to be undertaken reluctantly, carefully, and only to achieve a higher public purpose, such as protecting miners from a cognizable threat to their life or health. Since I cannot discern what mining danger threatens miners at home in their beds, I will not support the Secretary’s gratuitous demand that Rawl order miners underground for several hours, who would otherwise be at home, to conduct an “on-shift” examination to protect nobody from anything.

Generally, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). Section 75.362(b) requires an inspection for hazardous conditions along each belt conveyor haulageway while the belt is operating during each coal-producing shift. However, to apply the regulation to a non-producing mine when no miners are present leads to an absurd result and in no way furthers the purposes of the Mine Act.¹

¹ It is well established that even if the language of a statutory or regulatory provision appears to be plain, one must not read that language in a way that produces absurd results. *Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1137 (9th Cir. 2000) (“We adhere to plain meaning ‘unless that meaning would lead to absurd results.’”) (citing *Reno v. NTSB*, 45 F.3d 1375, 1379 (9th Cir. 1995)); *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132 (3d Cir. 2000) (refusing to read the plain language of the Perishable Agriculture Commodities Act in such a way that would produce an absurd result and defeat Congress’ intent); *In re Lehman*, 205 F.3d 1255, 1256 (11th Cir. 2000) (“Although statutory interpretation begins with the language of the statute itself, . . . a court may look beyond the plain language of a statute if applying the plain

The belt conveyor at issue operates from 7:30 a.m. to 11:30 p.m. 21 FMSHRC at 220. Miners work a single (day) shift, from 7:30 a.m. to 3:30 p.m. *Id.* Thus, for the remainder of the time during which the belt is operating in Rocky Hollow, from 3:30 p.m. to 11:30 p.m., the belt passes through an empty mine. *Id.* The purpose of the inspection requirement in section 75.362(b) is to protect miners from hazards as they work or travel along the haulageway. Applying the standard when no miners are underground at Rocky Hollow clearly does not further the statutory purpose of the Mine Act, protecting miners from occupational hazards. *See Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). In short, I agree with the judge that, in the absence of any miners at Rocky Hollow, the record in this case demonstrates absolutely no enhancement to miner safety in applying the regulation's inspection requirement to Rocky Hollow. 21 FMSHRC at 225-26.

I am well aware of the hazards associated with belt conveyors noted by my colleagues. Slip op. at 12 n.2. However, I have found no Commission case involving a belt conveyor in which a violation was found in a mine empty of miners. Thus, the Secretary has presented the Commission with a unique situation involving a regulation in search of a hazard from which miners must be protected *in futuro*. I agree with the judge's well-reasoned analysis on this point:

In essence, the Secretary asserts that it is safer to expose beltline examiners to the hazards of underground mining in an attempt to prevent a belt malfunction and possible fire. However, the Secretary has failed to identify any miners who would be exposed to any hazard if a fire occurred because the beltline was not routinely examined after 3:30 p.m. A fire or other smoke hazard could occur at any time, anywhere along this 5½ mile belt, with or without the presence of belt examiners. In such event, it is more desirable to have personnel on the surface rather than underground.

...

Finally, the Secretary contends the failure to on-shift the beltline may contribute to a fire which would pose a hazard to firefighters. The potential hazard to victims trapped underground in the event of a fire, far outweighs the potential hazard to firefighters who would enter the mine from the surface fully prepared to extinguish a fire.

21 FMSHRC at 226-27.

language would produce an absurd result.”) (citations omitted).

The language and purpose of the underlying provisions of the Mine Act, which section 75.362(b) implements, further support this common-sense application. As the judge explained in his decision, the Secretary's regulations regarding pre-shift and on-shift examinations, found in 30 C.F.R. §§ 75.360² and 75.362, implement statutory requirements for inspections set forth in sections 303(d)(1) and (e) of the Mine Act, 30 U.S.C. §§ 863(d)(1) and (e).³ 21 FMSHRC at 224. These statutory provisions require inspections only in active workings and working sections of a mine.⁴ *Id.* Limiting the requirement for inspections (either "pre-shift" or "on-shift") to active workings and working sections imposes the burden of inspection only when it enhances the safety of miners who will soon be or are already working or traveling in such areas of the mine. If there are no miners present, there is obviously no one to protect from hazards. Similarly, during periods when no miners are assigned to work anywhere in the mine, there is no "shift," a prerequisite to any obligation to inspect.⁵

² Section 75.360 requires a pre-shift inspection "within three hours preceding the beginning of any shift during which any person is scheduled to work or travel underground."

³ Section 303(d)(1), in pertinent part, provides:

Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the *active workings* of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. . . . Belt conveyors on which coal is carried shall be examined after each coal producing shift has begun.

30 U.S.C. § 863(d)(1) (emphasis added). Section 303(e) provides in pertinent part, "At least once during each coal producing shift, or more often if necessary for safety, each *working section* shall be examined for hazardous conditions by certified persons designated by the operator to do so." 30 U.S.C. § 863(e) (emphasis added).

⁴ Both the Mine Act and the Secretary's regulations define active workings as "any place in a coal mine where miners are normally required to work or travel" (30 U.S.C. § 878(g)(4); 30 C.F.R. § 75.2), and working section as "all areas of the coal mine from the loading point of the section to and including the working faces" (30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2).

⁵ Of particular importance in this case, "words should never be given a meaning that produces a stunningly counterintuitive result – at least if those words, read without undue straining, will bear another, less jarring meaning." *United States v. O'Neil*, 11 F.3d 292, 297 (1st Cir. 1993). Laws "must be interpreted in light of the spirit in which they were written and the reason for their enactment." *Gen. Serv. Employees Union Local No. 73 v. NLRB*, 578 F.2d 361, 366 (D.C. Cir. 1978).

Indeed, the legislative history of the Mine Act is clear regarding the link between “hazards involved with . . . mining” and “the need to provide for the health and safety of the nation’s miners.” S. Rep. No. 95-181, at 1 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 589 (1978). Therefore, the Secretary’s interpretation and application of section 75.360(b) to require an on-shift inspection during a time when no miners are present would not serve any safety-promoting purpose of the Act. If the Secretary is permitted to impose her present interpretation, the result will be counter to the Mine Act’s entire regulatory scheme. The Mine Act was enacted to protect miners, not mines. Here the Secretary seeks to interfere in the normal operations of a mine, requiring miners to be on-site, underground and exposed to hazards in order to monitor the operation of an automated overland conveyor system in an otherwise closed mine.

I also find unpersuasive the Secretary’s resort to the use of miners in the adjacent Sycamore Fuels mine and Sprouse Creek Processing Preparation Plant to argue that section 75.362(b) imposes an obligation for an “on-shift” inspection of Rocky Hollow when no miners are working any shift that would otherwise impose such an obligation. PDR at 18-19; S. Br. at 19-20, 26-27, 29. The judge rejected the Secretary’s contention that the presence of miners in nearby facilities triggered the standard’s inspection requirement. 21 FMSHRC at 225. The Secretary has presented no evidence to suggest that Rocky Hollow or Sycamore Fuels are under common ownership or management, share a workforce or in any other way constitute a unitary operator, responsible jointly for the safety of all miners employed by any of its constituent parts. *Compare, e.g., Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1317 (Dec. 1999). Nor is there any record support for the Secretary’s contention that hazards which may develop at Rocky Hollow could somehow travel to the surface and migrate to Sycamore or the Preparation Plant, thus putting at risk miners who do not work in Rocky Hollow. Consequently, the Secretary’s importation of risk from Rocky Hollow to Sycamore or the Preparation Plant is without factual foundation.

Under the facts of this case, I conclude that section 75.362(b) does not require an inspection of the belt conveyor in the Rocky Hollow mine while the belt is operating from 3:30 p.m. to 11:30 p.m., because no hazardous conditions can conceivably threaten miners who are not present in the mine. 21 FMSHRC at 224-25. Moreover, miners are not scheduled to enter Rocky Hollow until 3:30 a.m. the following morning, when a pre-shift inspection is conducted before the next scheduled work shift begins at 7:30 a.m. *Id.* at 220. The only purpose that an examination between 3:30 p.m. to 11:30 p.m. could possibly serve is to enhance protection for pre-shift examiners on the next shift, i.e., preshifting the preshift, an obligation heretofore never imposed on any operator.⁶

⁶ Moreover, in attempting to examine the belt for the benefit of the pre-shift examiners, the on-shift examiners themselves would be traveling the belt without the benefit of a pre-shift examination, since the Secretary conceded that a pre-shift examination of the mine prior to the 3:30 p.m. “shift” was not required under section 75.360. 21 FMSHRC at 226 n.3. As the judge

Based on the foregoing, I thus would affirm the judge's decision dismissing the violation in this proceeding. To do otherwise merely encourages unnecessary bureaucratic muscle flexing with no salutary purpose. The Secretary's illogical insistence that an "on-shift" examination is required to protect "off-shift" miners when "no shift" is present is not only an unfortunate case of regulatory excess, but a perfect example of regulation for regulation's sake.



James C. Riley, Commissioner

noted, if a pre-shift examination is not required for the 3:30 p.m. to 11:30 p.m. period because no one is underground, it makes little sense to require an on-shift examination for the same period. *Id.* at 226.

Commissioner Verheggen, in favor of affirming the decision of the judge:

I concur with the opinion of my colleague Commissioner Riley in its entirety, and join him in affirming the judge's decision finding no violation. I write separately to address points on which I respectfully disagree with the Chairman and Commissioner Beatty's opinion in which they would reverse the judge.

The Chairman and Commissioner Beatty assert that affirming the judge and finding no violation here "is contrary to the protective intent of the regulation," arguing that if a belt conveyor in an underground coal mine that is "idle and unattended" and experiences "an unanticipated and unchecked disruption in its normal functioning routine," the hazards of such a situation are self evident because of the "hazardous nature" of such conveyors. Slip op. at 14. I find it contrary to the overall safety objectives of the Mine Act, however, to require that the belt be attended simply to identify hazards for those who *might* have to enter the belt line in the event of a belt stoppage. In my view, any such requirement would needlessly expose miners to hazards.

I also note that the Chairman and Commissioner Beatty point to what they characterize as an "operator's practice" under which they allege that "any interruption in the belt conveyor system would completely halt production at the Sycamore mine on the 4 p.m. to 12 a.m. shift." Slip op. at 13. They further allege that "only a certified mine examiner would be permitted to enter the Rocky Hollow belt line to ascertain the nature of [a] conveyor belt disruption." *Id.* My colleagues, however, have gleaned this purported "operator's practice" from a statement made at oral argument by counsel for Rawl, who stated: "If the belt goes down . . . from 3:30 [p.m.] to 11:30 [p.m.], there has not been any experience where they've called people back out to get that taken care of. They've waited until the next morning." Oral Arg. Tr. 11. Referring to "general maintenance problems," counsel further explained that "the problem is more of a logistical issue. It requires a number of people, before going back in . . . to first pre-shift and then a number more . . . to do the work." Oral Arg. Tr. 12.

These unsworn statements by counsel regarding the practices of his client are part of an argument before the judge, not evidence, material or otherwise, of what Rawl does in a particular situation. In fact, these statements have no evidentiary basis whatsoever. But even if these statements could somehow be transformed into relevant evidence of an operator's practice, on their face, the statements do not foreclose Rawl from responding immediately to any situation or emergency that might arise along the Rocky Hollow belt line. As the Chairman and Commissioner Beatty point out, in the event of a belt disruption, "a certified mine examiner would be permitted to enter the Rocky Hollow belt line to ascertain the nature of the conveyor belt disruption?" (slip op. at 13), and I certainly see no harm in that.

Finally, as for my colleagues' concern that "any interruption in the belt conveyor system would completely halt production at the Sycamore mine on the 4 p.m. to 12 a.m. shift" (*id.*), if the interruption is an emergency, even an "incipient" one (*see id.*), I reiterate the judge's point

that, in such an event, "it is more desirable to have personnel on the surface rather than underground." 21 FMSHRC at 227. Production halts due to routine maintenance problems, on the other hand, are irrelevant and of no proper concern to this Commission — it is not for us to second guess Rawl's apparent business decision to occasionally suffer such down time.

Ultimately, the choice here is whether to expose miners to the myriad hazards that exist in underground coal mines when there is no necessity for such exposure. To expose miners to risk gratuitously certainly thwarts "the first priority and concern of all in the coal . . . industry" to protect "the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a). I agree with the judge that the Secretary "has failed to advance any consistent, convincing policy concerns that justify interpreting the pertinent statutory and regulatory provisions in a way that prohibits unattended operation of the Rocky Hollow beltline." 21 FMSHRC at 227. I would thus affirm the judge's decision dismissing the violation.


Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Beatty, in favor of reversing the judge's decision:

Based on the plain language of section 75.362(b), we find that the regulation requires an inspection of the Rocky Hollow mine during the 3:30 p.m. to 11:30 p.m. shift while the belt is operating. Therefore, we would reverse the judge and remand for assessment of penalty.

It is well established that “[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning.” *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If the regulation is plain on its face, effect should be given to the regulation's clear meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990).

In this case, the regulation expressly provides that during each shift in which coal is produced a certified person must examine each belt conveyor haulageway for hazardous conditions. Thus, the only prerequisite for a belt line inspection during a shift is that coal production occur. The undisputed evidence here shows that from 7:30 a.m. to 11:30 p.m. coal is cut from the face of the Sycamore Fuels mine, placed on a belt conveyor, transported over 6 miles (the majority of which is in the Rocky Hollow mine), and then unloaded at the Preparation Plant for further processing. Consequently, the operations at Sycamore and Rocky Hollow constitute coal production.

Moreover, the relationship between Rocky Hollow and Sycamore support the application of the standard to Rocky Hollow in this case. Sycamore and Rocky Hollow are involved in one continuous production process and are functionally integrated. A clear nexus exists between the extraction of coal in Sycamore and its immediate transportation through Rocky Hollow. Hence, there can be little doubt that the transportation of coal through Rocky Hollow on the belt conveyor is an integral part of coal production. *See e.g., Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1459 (Sept. 1991) (finding that a trucking company that hauled coal between mine and generating plant was an independent contractor operator under the Mine Act because coal hauling services were essential and closely related to the extraction process). Under these facts, section 75.362(b) clearly requires an inspection of the Rocky Hollow belt haulageway.

The standard's regulatory history supports a plain meaning approach. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1547-48 (Sept. 1996) (analyzing regulatory history of a plain regulation to determine whether the regulation's exemption applied to the facts). The regulatory history clearly states that the words “during each shift that coal is produced” includes the transportation of coal. In the preamble to the final rule implementing section 75.362(b), the Secretary explained that she intended the phrase “during each shift that coal is produced” to have the same meaning as “coal-producing shift,” as used in 30 C.F.R. §§ 75.303 and 75.304 (1991), predecessors to sections 75.360 and 75.362, regarding preshift and on-shift examinations. 57 Fed. Reg. 20,868, 20,896 (May 15, 1992). The term “coal-producing shift” was defined in section 75.304-1 (pertaining to on-shift examinations), as “any shift during which one or more of

the following operations are performed: cutting, blasting, or loading of coal, *or the hauling of coal* from the face areas, regardless of whether the coal is dumped at a tipple.” 30 C.F.R. § 75.304-1 (1991) (emphasis added). The Secretary has explained that this definition includes “activities performed in a working place that are related to the extraction and *transportation of coal* from the face.” 57 Fed. Reg. at 20,896 (emphasis added).

Here, coal is cut and extracted from the face in Sycamore where it is loaded directly onto a belt and immediately transported through Rocky Hollow. Carrying coal on the Rocky Hollow belt line is certainly “haulage” and “transportation” of coal from the face, as contemplated in the Secretary’s definition of coal production. *See* 30 C.F.R. § 75.304-1 (1991); 57 Fed. Reg. at 20,896. Thus, it is apparent that the Secretary intended the words “during a shift that coal is produced” to apply to Rocky Hollow from 3:30 p.m. to 11:30 p.m. while the belt is operating.¹

Furthermore, the plain meaning application of section 75.362(b) is also consistent with the underlying purpose of the Mine Act — to provide safe working conditions for miners. *See W. Fuels-Utah, Inc.*, 19 FMSHRC 994, 998-99 (June 1997) (considering the legislative history and purpose of the Mine Act to determine the meaning of a plain regulation). In the preamble to the final rule, the Secretary recognized the need to inspect operating belts, stating that “[e]xamination of belt conveyors reduces the potential hazards associated with operating belts.” 57 Fed. Reg. at 20,896. The Secretary clearly intended that belt haulageways through which belt conveyors continuously operate to transport coal be inspected during a coal-producing shift to prevent these hazards from arising.² Interpreting the regulation to require an inspection during any coal-producing shift while the belt is operating, regardless of whether miners are present, is consistent with the prophylactic purpose of this inspection requirement under the Secretary’s regulatory scheme and the protective purpose of the Mine Act. *See, e.g., Manalapan Mining Co.*, 18 FMSHRC 1375, 1396 (Aug. 1996) (Jordan and Marks, separate opinion) (recognizing the prophylactic purpose of preshift examinations).

¹ Rawl argues that there is no coal production in Rocky Hollow because it is classified as “nonproducing,” and indicates that an underground mine is “non-producing,” as defined in MSHA’s regulations, when “no material is being produced.” R. Br. at 10 (citing 30 C.F.R. § 70.220(b)(1)(ii)). Rawl’s argument is unpersuasive because this definition of “non-producing” is applicable only for purposes of respirable dust sampling procedures under Part 70 of the Secretary’s regulations and is not applicable here for purposes of mine inspections under Part 75, regarding mandatory safety standards in underground mines.

² The Secretary has promulgated several standards regulating belt conveyors, including 30 C.F.R. §§ 75.400 (accumulation of combustible materials around belt conveyors); 75.342 (methane monitors in belt haulageways); 75.1102 (slippage and sequence switches on belts); and 75.1100 (fire protection in belt haulageways). The heavily regulated nature of belt conveyor haulageways illustrates the Secretary’s recognition of the dangers associated with this area of the mine and the importance of inspections.

We disagree with Commissioner Riley that application of the standard during a time when no miners are present defeats the safety-promoting purpose of the Mine Act. *See slip op.* at 5. At the hearing, the Secretary presented examples of specific hazards that could arise from the unattended belt line – including coal accumulation, coal spillage, float dust, malfunctioning equipment, belt friction and slippage, which could contribute to explosions and fires – and poor roof and mine conditions. Tr. 9, 19-30; *see also* PDR at 19-20; S. Br. at 19-20, 26-29; Stips. 24-31 (citations issued to Rawl for coal accumulations, bad roof, and inoperative fire warning system in Rocky Hollow). The inspection of any conveyor belt transporting coal enhances the safety of miners who may enter the mine during that shift for emergency purposes or to conduct a preshift examination, as well as those who enter the mine at a later time.

In essence, under the operator's practice, as explained by its counsel (Tr. 11-12),³ any interruption in the belt conveyor system would completely halt production at the Sycamore mine on the 4 p.m. to 12 a.m. shift. Under this scenario, only a certified mine examiner would be permitted to enter the Rocky Hollow belt line to ascertain the nature of the conveyor belt disruption. Simply stated, from a safety perspective, the situation causing the disruption in the conveyor system could linger for up to 12 to 16 hours before being detected.⁴ By contrast, applying the standard, consistent with its plain meaning, to require an inspection of the belt line during the afternoon shift would increase the likelihood that any incipient problem could be identified and addressed before it developed into a dangerous situation.⁵

In the legislative history of the Coal Act, Congress expressed its concern with coal-carrying belts and the potential hazards associated with belt lines, noting that “[m]any fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, an examination of belt conveyors is necessary.” S. Rep. No. 91-411, at 57 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975). Given these potential hazards, Congress deemed it necessary for operators to conduct an inspection of coal-

³ At the hearing, the operator's counsel asserted that “[i]f the belt line goes down during the . . . period of time . . . from 3:30 to 11:30, there has not been any experience where they've called people back out to get that taken care of. They've waited until the next morning.” Tr. 11.

⁴ The on-shift examination could conceivably start at 7:30 a.m., and takes three to four hours. 21 FMSHRC at 221. It could thus be completed by 11:30 a.m., and the belt would not be inspected again until 3:30 a.m. the next day, as part of the preshift examination for the day shift.

⁵ Commissioner Verheggen asserts that the Commission need not be concerned with “[p]roduction halts due to routine maintenance problems.” *Slip op.* at 9-10. In fact, there is no way to identify the problem, routine maintenance or otherwise, if miners are not permitted to enter the belt line. We are concerned with non-routine problems that could give rise to serious and dangerous hazards that threaten the health and safety of miners.

carrying belts during each production shift these belts are in operation.⁶ The Secretary's concern with the hazards associated with belt conveyors led her to require operators to inspect belt haulageways during coal production to guard against those hazards.

In spite of this, Commissioner Riley contends that a plain meaning interpretation of 30 C.F.R. § 75.362 leads to "absurd results." Slip op. at 4. Given the hazardous nature of belt conveyors in underground coal mines, any interpretation of this regulation that creates a situation where a belt conveyor remains idle and unattended, in the face of an unanticipated and unchecked disruption in its normal functioning routine, is contrary to the protective intent of the regulation.

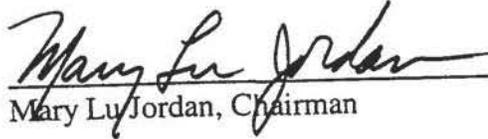
Finally, we reject Rawl's argument that the presence of miners is required to constitute a "shift." Unlike our colleague, we do not believe that the physical presence of miners is a prerequisite to the application of the inspection requirement under the plain language of the standard. Slip op. at 6-7. If the Secretary intended, by the use of the term "shift," to require the presence of miners in the belt haulageway, she would have explicitly said so as she has done in other provisions of Part 75. See 30 C.F.R. §§ 75.360(a)(1) ("any shift during which any person is scheduled to work or travel underground") and 75.362(a)(1) ("at least once during each shift, a certified person . . . shall conduct an on-shift examination of each section where anyone is assigned to work during the shift"). Section 75.362(b), unlike sections 75.360(a) and 75.362(a), does not specify or refer to the presence of miners in the belt haulageway area of the mine. Generally, the omission of particular language in one section of a provision found in another section of the same provision indicates that the drafter intentionally and purposefully acted in the disparate exclusion. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (applying principle to statutory interpretation); see also *Morton Int'l Inc.*, 18 FMSHRC 533, 539 n.9 (Apr. 1996) (recognizing that the same rules of statutory construction apply to the construction of regulations). This is particularly true when, as is the case here, the differing sections were adopted at the same time. See 61 Fed. Reg. 9764, 9838-39 (Mar. 11, 1996). Because section 75.362(b) does not specify the presence of miners, there is no basis for reading such a requirement into the regulation.

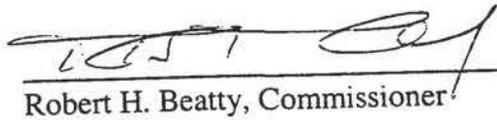
Based on the above, we have no difficulty concluding that section 75.362(b) applies to Rocky Hollow, requiring an inspection of the belt conveyor haulageway during the second shift while the belt is in operation, but no miners are underground. Contrary to the judge's analysis, the statutory requirements for preshift and on-shift inspections in sections 303(d)(1) and (e) of the Mine Act, 30 U.S.C. § 863(d)(1) and (e), are not applicable to the regulation's requirement

⁶ There are numerous Commission cases illustrating the hazards associated with belt conveyors. See, e.g., *Cannelton Indus. Inc.*, 20 FMSHRC 726, 726-27 (July 1998) (finding a violation for failure to clean up coal accumulation under a conveyor belt) and *W. Fuels-Utah Inc.*, 19 FMSHRC at 994-96 (concerning slippage and sequence switches and dry chemical powder fire suppression system on belt conveyor and the failure of both to stop the belt at the time of an incident resulting in a fire).

for on-shift inspections of belt haulageways. The requirements that a preshift or on-shift examination take place in active workings or in working sections apply only to general preshift and on-shift inspections under section 303(d)(1) and clearly do not apply to on-shift belt haulageway inspections required under section 75.362(b).⁷

For the foregoing reasons, we would reverse the judge's decision and remand for assessment of penalty consistent with the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).


Mary Lu Jordan, Chairman


Robert H. Beatty, Commissioner

⁷ The judge's reliance on *Jones & Laughlin Steel Corp.*, 5 FMSHRC 1209 (July 1983), remanded 8 FMSHRC 1058 (July 1986) is also misplaced. 21 FMSHRC at 225. First, *Jones & Laughlin* involved *preshift* inspections of *coal-carrying belts* under the first sentence of section 303(d)(1) and an identical implementing regulation, and not *on-shift* inspections of *belt haulageways* under section 75.362(b). 5 FMSHRC at 1209-10. Moreover, as noted above, the regulation at issue does not contain an explicit requirement for an active working, as did the regulation in *Jones & Laughlin*. Finally, in *Jones & Laughlin*, the Commission noted that despite the exemption of coal-carrying belts from preshift inspections under section 303(d)(1), coal-carrying belts were subject to on-shift inspections after the beginning of each coal-producing shift. 5 FMSHRC at 1212-14; 8 FMSHRC at 1063 n.7.

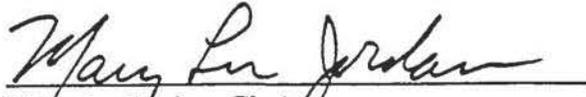
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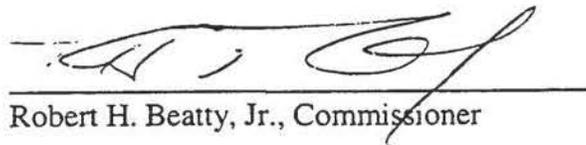
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Finally, Gabel Stone presents no evidence that its counsel misunderstood the Commission's filing requirements.¹ Accordingly, the Motion for Reconsideration is denied.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ The Commission has previously reopened final Commission orders and excused the late-filing of petitions for discretionary review when parties' counsel misunderstood the Commission's filing requirements. See *Turner v. New World Mining, Inc.*, 14 FMSHRC 76, 77 (Jan. 1992) (finding sufficient allegation that counsel misinterpreted deadline for filing petition); *Boone v. Rebel Coal Co.*, 4 FMSHRC 1232, 1233 (July 1982).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 2001

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

v.

VIRGINIA SLATE COMPANY

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Docket No. VA 99-8-M

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge Avram Weisberger determined that Virginia Slate Company (“Virginia Slate”) violated a number of safety standards, and that the violations were not due to unwarrantable failure. 22 FMSHRC 378 (Mar. 2000) (ALJ). The Commission granted the Secretary of Labor’s petition for discretionary review challenging the judge’s determinations of no unwarrantable failure. For the following reasons, we affirm in part, vacate in part, and remand, and we vacate the penalty assessments and remand them for reassessment.

I.

Factual and Procedural Background

Virginia Slate mines slate from an open pit, crushes it in a crusher, and uses it to make different materials. 22 FMSHRC at 378; Tr. I at 22.¹ The company is owned by Adco Land Corporation, which in turn is owned by V. Cassel Adamson Jr., Esq. Tr. II at 90. Adamson Jr. is also counsel for Virginia Slate in this case. V. Br. at 8. On June 2, 1998, Ricky Joe Horn, an

¹ The transcript contains a separate volume for each day of the three-day hearing. Transcript references note the appropriate hearing day by Roman numeral I through III followed by the page number.

inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Virginia Slate's operation. 22 FMSHRC at 378. As a result of the inspection, Horn issued Order No. 7711661 under 30 C.F.R. § 56.1407(a) because there was no protective guard for the V-belt drive and pulleys on the feeder attached to the crusher. 22 FMSHRC at 382. The unguarded V-belt and pulleys were approximately 3 feet above ground level. *Id.* Horn designated the violation significant and substantial ("S&S")² and a result of the operator's unwarrantable failure. *Id.*; Gov't Ex. 2.

The inspector issued Citation No. 7711663 under section 56.1407(a) because there was no protective guard on the tail pulley for the No. 2 belt on the crusher. *Id.* at 382-83. The unguarded tail pulley was located approximately 2½ feet above ground level. *Id.* Horn did not designate the violation S&S but did designate it unwarrantable. Gov't Ex. 3.

The inspector issued Citation No. 7711665 under 30 C.F.R. § 56.11001 because there were no guard rails or catwalks to provide safe access to clutch and throttle hand levers used to operate the crusher. 22 FMSHRC at 383. Access to the levers could only be obtained by walking on a 6-inch wide I-beam located approximately 6 feet above the ground. *Id.* Horn cited the violation as S&S and unwarrantable. Gov't Ex. 5.

The inspector issued Order No. 7711667 under 30 C.F.R. § 56.9301 because there were no bumper blocks or any other impeding devices to prevent a front-end loader, loading the hopper on the crusher, from running into the hopper, hitting a rock, or overturning. 22 FMSHRC at 385. The inspector designated the violation S&S and a result of the operator's unwarrantable failure. Gov't Ex. 6.

The inspector issued Order No. 7711681 under 30 C.F.R. § 56.14100, which requires inspection of mobile equipment prior to its being placed in operation on a shift. 22 FMSHRC at 390. He concluded that such preshift examinations had not been adequately performed because he found a number of alleged mobile equipment violations that would otherwise have been detected and corrected. *Id.*; Gov't Ex. 11. The inspector cited the violation as S&S and unwarrantable. Gov't Ex. 11. Horn also issued several other orders and citations to Virginia Slate.

Virginia Slate challenged the orders and citations that are the subject of this review (Order Nos. 7711661, 7711667, and 7711681, and Citation Nos. 7711663 and 7711665) as well as a number of other orders and citations. These matters proceeded to hearing before Judge Weisberger.

² The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

II.

Disposition

A. Unwarrantable Failure Issues

1. Order No. 7711661 and Citation No. 7711663³

As to Order No. 7711661, the judge determined that Virginia Slate violated section 56.1407(a)⁴ because there was no protective guard on the V-belt drive and pulleys for the feeder attached to the crusher. 22 FMSHRC at 382. He determined that the violation was S&S but did not result from the operator's unwarrantable failure based on the credited testimony of Adamson Jr. that the crusher had not operated during the period in question. *Id.* As to Citation No. 7711663, he concluded that the operator violated section 56.1407(a) because there was no guard on the tail pulley for the No. 2 belt on the crusher. *Id.* at 383. He determined that the violation was not S&S, and did not result from the operator's unwarrantable failure for the same reasons as in his analysis of Order No. 7711661 and because the guard at issue had been removed in order to clean the area. *Id.* The judge's unwarrantable failure analyses for both Order No. 7711661 and Citation No. 7711663 consisted of a reference to his unwarrantable failure analysis for Citation No. 7711660, dealing with a similar violation involving a missing guard on the crusher.⁵ *Id.* at 378-79, 381-83.

On review, the Secretary argues that the judge failed to give weight in his unwarrantable analyses to the involvement of supervisor Cassel Adamson III in the violations. PDR⁶ at 12-14, 16. She asserts that the judge also failed to give adequate weight to out-of-court statements made by supervisor Adamson III concerning the violations. *Id.* at 14, 16. She contends that, because these out-of-court statements are admissions by a party-opponent under Rule 801(d)(2)(D) of the

³ All Commissioners vote to vacate and remand the judge's negative unwarrantable failure determinations for Order No. 7711661 and Citation No. 7711663.

⁴ Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

⁵ The judge analyzed and affirmed Citation No. 7711660 (22 FMSHRC at 378-82) even though the Secretary informed the judge that she had vacated that citation. S. Post-Hr'g Br. at 2. The judge also erroneously referred to Citation No. 7711660 as Order No. 7711660. Gov't Ex. 1.

⁶ The Secretary **designated** her petition for discretionary review as her opening brief.

Federal Rules of Evidence,⁷ the judge erred in treating them as hearsay. *Id.* The Secretary argues that the judge erred when he drew an adverse inference against the Secretary because she did not call supervisor Adamson III to testify, and when he failed to draw such an inference against the operator because it did not call Adamson III to testify. *Id.* She asserts that the judge erred in both the order and the citation in crediting Adamson Jr.'s testimony that the crusher was not in operation during the period in question, and by ignoring miner Leroy Williams' testimony that the crusher was operated without guards. *Id.* at 15-16. Virginia Slate responds that the judge ignored evidence that the crusher was out of service at the time of the inspection and claims that the judge improperly admitted hearsay testimony. V. Br. at 2-3.

As a threshold matter, we reject the Secretary's assertion that the judge erred by failing to draw an adverse inference against Virginia Slate for not calling Adamson III as a witness. It is well-established that an adverse inference may be drawn against a party if the party fails to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party. *United States v. Ariza-Ibarra*, 651 F.2d 2, 15-16 (1st Cir.), *cert denied*, 454 U.S. 895 (1981); 2 *McCormick on Evidence* § 264, at 174-76 (5th ed. 1999). As an employee of Virginia Slate and as Adamson Jr.'s son, it can be reasonably assumed that Adamson III was favorably disposed toward Virginia Slate and was peculiarly available as a witness to that party. *Ariza-Ibarra*, 651 F.2d at 15-16; *see Jones v. Otis Elevator Co.*, 861 F.2d 655, 659-60 (11th Cir. 1988) ("Because of an employee's economic interests, the employer-employee relationship is recognized as" making the employee peculiarly available as a witness to the employer); Alan Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine Family Member Other than Spouse — Modern Cases*, 80 A.L.R.4th 337, 373-77 (1990) (discussing cases where courts have drawn an adverse inference against a party for failing to call a material witness who is the party's son or daughter). However, the decision to draw an adverse inference against a party for not calling a material witness to testify lies within the sound discretion of the trier of fact. *See Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 267 n.1 (D.C. Cir. 1998) ("The decision to draw an adverse inference has generally been held to be within the discretion of the fact finder."); *Underwriters Labs. Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) (the adverse inference rule "does not create a conclusive presumption against the party failing to call the witness") (quoting *Rockingham Machine-Lunex Co. v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981)). There is nothing in the record to indicate that the judge abused his discretion when he refused to draw an adverse inference against Virginia Slate for not calling Adamson III as a witness.⁸

⁷ Federal Rule of Evidence 801(d)(2)(D) provides in pertinent part that "[a] statement is not hearsay if . . . [t]he statement is offered against a party . . . by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

⁸ We disagree with the Secretary that the judge erred when he drew an adverse inference against her because she did not call Adamson III to testify. The judge never stated anywhere in his decision that he drew such an inference against the Secretary.

Regarding unwarrantable failure, that terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) (“*Consol*”); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

The judge ruled that the violations in Order No. 7711661 and Citation No. 7711663 were not unwarrantable for the same reasons he relied on in determining the violation in Citation No. 7711660 was not unwarrantable. 22 FMSHRC at 382-83. In fact, as previously indicated, the judge merely referenced back to his ruling on Citation No. 7711660, without even restating that analysis with respect to the higher numbered order and citation.⁹ Unlike his testimony about the belt violation in Citation No. 7711660, however, Williams testified that the belts involved in Order No. 7711661 and Citation No. 7711663 had both been run in an unguarded state during production. Tr. I at 164-65, 169. Based on this distinction in Williams’ testimony, the judge erred when he applied his credibility determination concerning Williams’ testimony about the belt violation in Citation No. 7711660 to his unwarrantability analyses of the belt violations in

⁹ In his unwarrantable analysis for Citation No. 7711660, the judge noted that Inspector Horn testified that Roy Terry, a foreman, and the two crusher operators had told the inspector that the crusher had been operated in an unguarded condition for the two weeks prior to Horn’s inspection. 22 FMSHRC at 381. However, the judge did not credit this testimony in part because Williams, one of the crusher operators, did not testify that the belt involved in Citation No. 7711660 had been run without a guard even though he testified that the belt had no guard “at the time leading up to the inspection.” *Id.*

Order No. 7711661 and Citation No. 7711663, and failed to consider Williams' testimony that the belts involved in Order No. 7711661 and Citation No. 7711663 were run without guards during production.¹⁰

We are mindful that the record is anything but clear on a number of these important issues.¹¹ Nonetheless, testimony was offered that, at least for some period of time, equipment was operated, apparently in production mode, without guards. Because the judge imported his unwarrantable failure analysis from a vacated citation into these other matters, we are unable to determine if he appropriately considered such evidence and how he disposed of it to reach a contrary result. We therefore vacate the judge's determinations as to unwarrantable failure with respect to Order No. 7711661 and Citation No. 7711663 and remand for the judge to properly consider testimony that fairly detracts from his decision on that issue.

2. Citation No. 7711665¹²

The judge determined that Virginia Slate violated section 56.11001¹³ because there were no guard rails or catwalks to provide safe access to the clutch and throttle levers used to operate the crusher. 22 FMSHRC at 383. He concluded that the violation was S&S but did not result

¹⁰ Contrary to the Secretary's assertions, the judge did not err by not considering Inspector Horn's testimony that Adamson III told him that the guards involved in Order No. 7711661 and Citation No. 7711663 had at one time been in place but that he did not "know how long the guard[s] had been off." Tr. I at 57, 65. It is not clear from Adamson III's out-of-court statements how long he knew the guards were missing. Indeed, he may only have discovered the guards were missing after they were cited. Thus, his out-of-court statements are not probative of whether the violations in Order No. 7711661 and Citation No. 7711663 were unwarrantable. Accordingly, there is no need for the Commission to determine whether Adamson III was a supervisor or whether the judge erred in treating his out-of-court statements as hearsay.

¹¹ At the hearing, the judge sought clarification of confusing and conflicting testimony, often obtained from the same witness. Unfortunately, the judge's attempt to clarify the record appears to have been thwarted by attorneys seemingly intent on impeaching their own witnesses or misapprehending the nature of "hearsay" testimony and its role in administrative proceedings.

¹² Commissioners Riley and Verheggen vote to affirm the judge's negative unwarrantable failure determination for Citation No. 7711665. Commissioner Beatty does not join this part of the opinion and instead votes with Chairman Jordan to reverse the judge's negative unwarrantability finding. See slip op. at 16-17. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's unwarrantability determination to stand as if affirmed.

¹³ Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places."

from the operator's unwarrantable failure because, based on Adamson Jr.'s credited testimony, the crusher had only been run for a short time without the guards in order to test the crusher. *Id.* at 383-84.

On review, the Secretary argues that the judge failed to give weight to foreman Terry's involvement in the violations and to his out-of-court statements about the condition of the guard railings and catwalk on the crusher. PDR at 16-18. She contends that, because these out-of-court statements are admissions by a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence, the judge erred in treating them as hearsay. *Id.* at 18. The Secretary asserts that the judge erred in drawing an adverse inference against the Secretary because she did not call Terry to testify and in failing to draw an adverse inference against the operator because it did not call Terry to testify. *Id.* at 18-19. She asserts that the judge erred in crediting Adamson Jr.'s testimony that the crusher was not operated during the period in question and in ignoring miner Williams' testimony that the crusher was operated without a safe means of access to its controls. *Id.* at 19. Virginia Slate asserts that the judge failed to consider evidence that the crusher was out of service at the time of the inspection and that the judge improperly admitted hearsay testimony. V. Br. at 2-3.

We reject the Secretary's assertion that the judge erred by failing to give any weight to Williams' testimony about foreman Terry's out-of-court statements indicating that Terry knew about the missing guard railings and catwalk for several months but did nothing about the problem. Terry was not called as a witness. The judge did not ignore Terry's out-of-court statements; rather he noted that Terry was a foreman and that Williams testified that Terry knew for several months that the crusher did not have guard railings or a catwalk and that Terry had told him that he did not know why they were missing. 22 FMSHRC at 383-84; Tr. I at 185-86. However, the judge did not place much weight on Terry's out-of-court statements because they were not corroborated. 22 FMSHRC at 383-84; *see Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1137 (May 1984) (examining contradictory or corroborating evidence in evaluating out-of-court statements). The judge determined that Williams' testimony was unclear as to how long the crusher had operated without safe access.¹⁴ 22 FMSHRC at 384. On the other hand, based on his demeanor, the judge credited Adamson Jr.'s testimony that, apart from a ten minute test period, the crusher had not operated in production without guard railings and a catwalk.¹⁵ *Id.* The

¹⁴ We disagree with the Secretary that, because Terry's out-of-court statements are admissions by a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence, the judge erred in treating them as hearsay testimony. The Commission is not required to apply the Federal Rules of Evidence. *See Mid-Continent*, 6 FMSHRC at 1135-36 & n.6 (holding that "[w]hile the Federal Rules of Evidence may have value by analogy, they are not *required* to be applied to [Commission] hearings — either by their own terms, by the Mine Act, or by [Commission] procedural rules." (emphasis in original)).

¹⁵ Contrary to Virginia Slate's argument that the judge ignored evidence that the crusher was out of service at the time of the inspection, the judge found that the crusher was out of service at the time of the inspection. 22 FMSHRC at 381-82.

Commission does not lightly overturn a judge's credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). We find no compelling reason to overturn the judge's credibility findings about Terry's out-of-court statements and Williams and Adamson Jr.'s testimony regarding guard railings and a catwalk on the crusher. Accordingly, we determine that the judge did not err when he gave little weight in his unwarrantable failure analysis to Terry's out-of-court statements.

We also reject the Secretary's assertion that the judge erred by failing to draw an adverse inference against the operator for not calling Terry to testify. It is within the discretion of the trier of fact whether to draw an adverse inference against a party for failing to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party. *Overnite Transp.*, 140 F.3d at 267 n.1; *Underwriters Labs.*, 147 F.3d at 1054. Although Terry was Virginia Slate's foreman, there is nothing in the record to indicate that the judge abused his discretion when he did not draw an adverse inference against the operator for not calling Terry as a witness. The judge also did not err by drawing an adverse inference against the Secretary for failing to call Terry to testify. Although the judge stated in his unwarrantable analysis that "the Secretary did not indicate why it had not called Terry to testify," the judge never stated in his analysis of the violation that he had drawn an adverse inference against the Secretary for not calling Terry to testify. 22 FMSHRC at 384.

Contrary to our dissenting colleagues (slip op. at 16-17), we do not think Virginia Slate's actions regarding the lack of guard rails or catwalks on the crusher constituted aggravated conduct. It is undisputed that the crusher had been run by a Murphy engine which broke down on May 10, 1998, and was replaced by a Caterpillar engine. Tr. II at 10-11. Williams testified that the original catwalk had been removed in order to remove the Murphy engine and had remained off while the Caterpillar engine was installed. Tr. I at 197. Adamson Jr. testified that it was unclear whether the Caterpillar engine would be able to run the crusher because it was a smaller engine than the Murphy. Tr. II at 11. In the late afternoon of June 1, Virginia Slate tested the Caterpillar engine for ten minutes. 22 FMSHRC at 384; Tr. II at 12. Adamson Jr. testified that, prior to testing, all unnecessary personnel were cleared of the crusher area. Tr. II at 16-17. He testified that the catwalk had not been replaced at that time because it was uncertain whether the controls for the Caterpillar would need to be moved to the other side of the crusher. Tr. II at 12, 15-16. Immediately after testing, Virginia Slate ordered that a catwalk be installed the next morning and that the crusher not be run without a catwalk. 22 FMSHRC at 384; Tr. II at 14. We do not think its actions constituted aggravated conduct because the operator needed to test the new equipment, the test period was short, the operator reduced risk during testing by removing unnecessary personnel, it intended to install the catwalk the next morning, and, after testing, it prohibited operation of the crusher until the catwalk was installed.

Based on the foregoing, we would affirm the judge's negative unwarrantable failure determination as to Citation No. 7711665.

3. Order No. 7711667¹⁶

In Order No. 7711667, the judge concluded that Virginia Slate violated section 56.9301¹⁷ because there were no bumper blocks or any other impeding devices to prevent the front-end loader, when loading the crusher with rock, from running into the crusher, hitting a rock, or overturning. 22 FMSHRC at 385. He determined the violation was not S&S and, because the Secretary's evidence failed to establish how long the violation had lasted, did not result from the operator's unwarrantable failure. *Id.* at 385-86. The judge's unwarrantable failure analysis for Order No. 7711667 consisted of a reference to his unwarrantable failure analysis for Citation No. 7711666, which dealt with a violation of section 56.9300(a)¹⁸ because of the lack of a berm along the bank of a mine roadway. *Id.* at 384-86; Gov't Ex. 5.

The Secretary argues that the judge erred by concluding, based on Adamson Jr.'s testimony, that only the excavator was used to feed the crusher during the period in question and by ignoring Williams' testimony that the front-end loader was regularly used to feed the crusher.¹⁹ PDR at 20. The Secretary asserts that the judge also erred by ignoring Adamson Jr.'s testimony that the front-end loader had been used to feed the crusher on June 1 and Inspector Horn's testimony that Adamson III had told him that the front-end loader had been used to feed the crusher for a week before the inspection. *Id.* Virginia Slate responds that the judge improperly admitted hearsay testimony and ignored relevant evidence that the crusher was out of service at the time of the inspection. V. Br. at 2-3.

We conclude that the judge erred in his unwarrantable failure analysis by failing to consider all the relevant aggravating factors, such as the obviousness of the violation, the operator's knowledge of the violation, or any abatement efforts by the operator. *Mullins*, 16 FMSHRC at 195. We also think the judge erred by adopting his unwarrantable failure analysis for Order No. 7711666 as his unwarrantable failure analysis for Order No. 7711667. 22

¹⁶ All Commissioners vote to vacate and remand the judge's negative unwarrantable failure determinations for Order No. 7711667.

¹⁷ Section 56.9301 provides that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning."

¹⁸ Section 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

¹⁹ Inspector Horn testified that section 56.9301 only required the use of bumper blocks or other impeding devices when the crusher was fed by the front-end loader, which was mobile equipment, but not when it was fed by the excavator, which was stationary equipment. Tr. II at 143-45.

FMSHRC at 384-86. The facts involved in Order No. 7711666, apart from duration, are too dissimilar to the facts involved in Order No. 7711667 to allow the same unwarrantable failure analysis to be applied to both orders.

Contrary to the Secretary's assertion, the judge did not conclude that only the excavator had been used to feed the crusher during the period in question. Although the judge in his unwarrantable analysis for Order No. 7711666 examined the evidence relating to when the excavator versus the front-end loader had been used to feed the crusher, he did not make a finding on the issue. Thus, the judge did not conclude in his unwarrantable failure analysis for Order No. 7711667, which references his unwarrantable failure analysis for Order No. 7711666, that only the excavator had been used to feed the crusher.

In sum, we vacate and remand the judge's negative unwarrantable failure determination for Order No. 7711667 and instruct him to analyze the unwarrantability issue separate from Order No. 7711666, taking into consideration all relevant aggravating as well as mitigating factors.

4. Order No. 7711681²⁰

The judge concluded that Virginia Slate violated section 56.14100²¹ by failing to perform adequate preshift examinations of mobile equipment. 22 FMSHRC at 390. He determined that the violation was S&S but did not result from the operator's unwarrantable failure because the record did not contain sufficient facts to establish that the operator's actions constituted aggravated conduct. *Id.*

The Secretary argues that the judge erred by not considering the nature of violative conditions which went undetected and uncorrected as a result of the operator's failure to carry out an adequate preshift examination of mobile equipment. PDR at 21-24. She also asserts that the judge erred by refusing to admit into evidence citations which allegedly showed a number of violations which went undetected or uncorrected because of Virginia Slate's inadequate preshift inspections of mobile equipment. *Id.* at 24. Virginia Slate responds that some of the alleged violations which may have gone undetected or uncorrected as a result of the operator's alleged failure to carry out an adequate preshift examination were not violations. V. Br. at 4-6.

²⁰ Commissioners Riley, Verheggen, and Beatty vote to vacate and remand and Chairman Jordan votes to reverse the judge's negative unwarrantable failure determination for Order No. 7711681.

²¹ Section 56.14100 provides in pertinent part that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

We conclude that the judge failed to examine aggravating factors that may have been relevant to his unwarrantability analysis, such as the extent and duration of the operator's failure to carry out adequate preshift examinations or its knowledge that it was not adequately carrying out such examinations. The judge also failed to consider the underlying violations which went undetected or uncorrected because of the operator's inadequate preshift examinations and conditions. He found that the presence of safety violations involving inoperable horns and defective seatbelts on Virginia Slate's mobile equipment indicated that adequate preshift examinations had not been carried out. 22 FMSHRC at 390. The judge should have considered the obviousness posed by these underlying violations as a relevant factor in his analysis of whether the operator's failure to carry out the examinations was unwarrantable.²²

In sum, we vacate the judge's determination that Order No. 7711681 was not due to unwarrantable failure and remand for reconsideration.²³ On remand, the judge must address all the relevant factors relating to the preshift examination violation, including the underlying violations that were not detected or corrected because of the inadequate examinations.

B. Penalty Assessment Issues²⁴

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in

²² Commissioner Beatty believes that the judge should consider the danger posed by these underlying violations, as well as their obviousness, in determining whether the operator's failure to adequately conduct the preshift examinations was unwarrantable. See *Consol*, 22 FMSHRC at 350-55 (failure to ensure that methane checks were made was unwarrantable because a dangerous methane accumulation went undetected as a result); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998), *aff'd in relevant part*, 170 F.3d 148 (2d Cir. 1999) (failure to search for undetonated explosives was unwarrantable because dangerous undetonated explosives went undetected as a result). He notes that it is well established Commission law that the danger posed to miners by a violation is an important factor in unwarrantability analysis. See *Rock of Ages Corp.*, 20 FMSHRC at 115; *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997); *Midwest Material*, 19 FMSHRC at 34.

²³ Contrary to our dissenting colleague's opinion (slip op. at 18-19), we do not think the record evidence is so one-sided as to allow only the conclusion that the operator's actions were unwarrantable. When a judge fails to adequately address the evidentiary record, a remand is necessary for fuller evaluation. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994). Here, the judge, as fact finder, is in the best position to evaluate the relevant factors.

²⁴ All Commissioners vote to vacate the judge's penalty assessments for all the orders and citations on review and to remand for reassessment of appropriate penalties.

section 110(i) and the deterrent purpose of the Act.²⁵ *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make “[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.” *Sellersburg*, 5 FMSHRC at 292-93. Assessments “lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal.” *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In reviewing a judge’s penalty assessment, we must determine whether the judge’s findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.

The Commission has recently reiterated the need for its judges to fully satisfy the statutory requirements of section 110(i) by providing findings of fact on each of the six penalty criteria when assessing a penalty. *Cantera Green*, 22 FMSHRC 616, 620-26 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600-02 (May 2000); *Hubb Corp.*, 22 FMSHRC 606, 611-13 (May 2000). Such findings of fact are necessary to provide respondents with notice as to the basis upon which the penalty is being assessed and to provide the Commission and any reviewing court with the information they need to accurately determine whether a penalty is appropriate. *Rushford Trucking*, 22 FMSHRC at 601. An explanation is particularly essential when a judge’s penalty assessments substantially diverge from the Secretary’s proposed penalties. *Sellersburg*, 5 FMSHRC at 293. As we noted in *Sellersburg*, without an explanation for such a divergence, “the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.” *Id.*

For each of the orders and citations on review, the judge’s penalty assessments indicate that he failed to consider relevant penalty criteria when assessing penalties. In his penalty assessment for Order No. 7711661, the judge did not make findings regarding each of the penalty criteria for that order but merely referenced his penalty assessment for Citation No. 7711660. 22

²⁵ Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

[1] the operator’s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator’s ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

FMSHRC at 382.²⁶ Because he merely referenced his penalty assessment for Citation No. 7711660 when assessing the penalty for Order No. 7711661, his penalty assessment for Order No. 7711661 includes the same failings discussed with respect to that prior penalty assessment. Further, although Citation No. 7711660 and Order No. 7711661 both involve missing guard violations, the circumstances of the violations are different. Thus, the judge should have made findings of fact specific to Order No. 7711661 concerning the gravity of the violation, the operator's abatement efforts,²⁷ and the operator's negligence.

In his penalty assessment for Citation No. 7711663, apart from an analysis of the gravity of the violation, the judge did not make findings regarding any of the other penalty criteria specific to that citation but instead referenced his penalty assessment for Citation No. 7711660. *Id.* at 383. As a consequence, his penalty assessment for Citation No. 7711663 contains the same problems as his penalty assessment for Citation No. 7711660. Additionally, the judge should have made findings of fact specific to Citation No. 7711663 concerning the operator's abatement efforts and the operator's negligence.

In his penalty assessment for Citation No. 7711665, the judge made penalty criteria findings specific to that citation for the gravity of the violation and for whether the operator was negligent. *Id.* at 384. For the remaining four penalty criteria, the judge referenced his penalty assessment for Citation No. 7711660. *Id.* As a result, his penalty assessment for Citation No. 7711665 contains the same problems as his penalty assessment for Citation No. 7711660. Additionally, the judge should have made findings specific to Citation No. 7711665 about the operator's abatement efforts.

In his penalty assessment for Order No. 7711667, the judge made no findings regarding the penalty criteria specific to that order but referenced back to his penalty assessment for Order No. 7711666. 22 FMSHRC at 386. In his penalty assessment for Order No. 7711666, the judge made specific findings on the gravity of the violation and on the operator's degree of negligence.

²⁶ The judge's penalty assessment for Citation No. 7711660 mentioned the six section 110(i) penalty criteria but his analysis was insufficient. 22 FMSHRC at 382. He found that the penalty would not adversely affect the operator's ability to remain in operation and that the penalty should not be mitigated by the size of Virginia Slate's operation. *Id.* He also found that "[t]he violative condition was abated in a timely fashion." *Id.* The judge mentioned Virginia Slate's "history of violations" but he did not make findings about that history or state whether he considered it a mitigating or aggravating factor in assessing the penalty. *Id.*

²⁷ While Citation No. 7711660 indicates that the violation was terminated about 4 hours after it was cited (Gov't Ex. 1), Order No. 7711661 states that the violation was terminated approximately 27 hours after it was cited (Gov't Ex. 2 at 2).

Id. at 385. He also concluded that the violation was abated in a timely fashion.²⁸ *Id.* For the remaining three penalty criteria in Order No. 7711666, the judge referenced his penalty assessment for Citation No. 7711660. *Id.* Thus, the judge's penalty assessment for Order No. 7711667 is confusing and appears to merely reference his two previous deficient penalty assessments for Citation No. 7711660 and Order No. 7711666.

The judge erred when he applied his findings on gravity, negligence, and abatement from his penalty assessment for Order No. 7711666 to his penalty assessment for Order No. 7711667 because the circumstances involved in the two orders are not similar. With reference to Virginia Slate's history of violations, the judge also erred in his penalty assessment for Order No. 7711667 by referencing his penalty assessment for Citation No. 7711660 (by reference to his penalty assessment for Order No. 7711666) in which he did not make adequate findings on the operator's history of violations.

In his penalty assessment for Order No. 7711681, the judge concluded that the gravity of the violation was high and "the level of negligence was no more than moderate." 22 FMSHRC at 390. For the remaining four penalty criteria, however, he failed to make any findings of fact but only stated that he had taken them into account. *Id.*

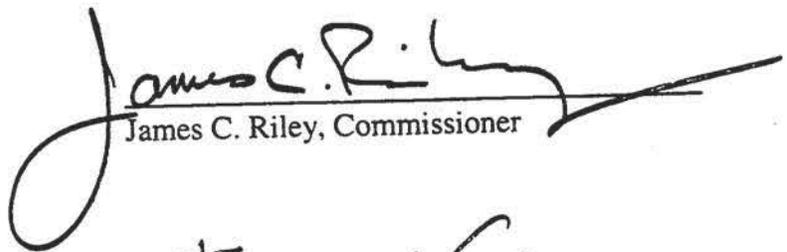
On the basis of the foregoing, we conclude that the judge failed to adequately explain the basis for the penalties he assessed for the violations at issue herein. We vacate the judge's penalty assessments for all of the orders and citations on review and remand for detailed findings of fact as to each of the six section 110(i) criteria and reassessment of an appropriate penalty for each of the violations at issue.

²⁸ Order No. 7711666 indicates that the violation was terminated approximately 2 days after it was cited. Gov't Ex. 5.

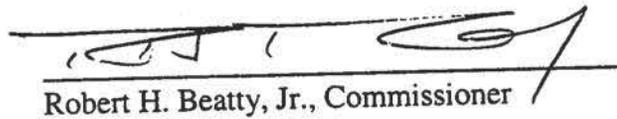
III.

Conclusion

For the foregoing reasons, we vacate the judge's negative unwarrantable failure determinations for Order Nos. 7711661, 7711667, and 7711681 and for Citation No. 7711663, and remand for further consideration consistent with our decision. The judge's negative unwarrantable failure determination for Citation No. 7711665 stands as if affirmed. Further, we vacate the judge's penalty assessments for all of the orders and citations on review and remand for reassessment of an appropriate penalty for each violation consistent with this decision.


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

Chairman Jordan, concurring in part and dissenting in part:

I agree with my colleagues' decision to vacate and remand the judge's negative unwarrantable failure determinations for Order No. 7711661 (lack of a protective guard on the V-belt drive and pulleys for the feeder attached to the crusher), for Citation No. 7711663 (no protective guard on the tail pulley for the No. 2 belt on the crusher), and for Order No. 7711667 (lack of impeding devices for front-end loader). However, for the reasons set forth below, I disagree with their decision to affirm the judge's negative unwarrantable failure determination as to Citation No. 7711665. As I explain below, I also disagree with their decision to vacate and remand the judge's negative unwarrantable failure determination for Order No. 7711681.

1. Citation No. 7711665¹

The judge found that Virginia Slate violated 30 C.F.R. § 56.11001 because of the lack of guard rails or catwalks to provide safe access to the clutch and throttle levers used to operate the crusher. 22 FMSHRC 378, 383 (Mar. 2000) (ALJ). However, he determined that the violation was not the result of the operator's unwarrantable failure. *Id.* at 383-84. The focus of his reasoning, as well as that of my colleagues, centers mostly on evidentiary questions regarding the role of foreman Roy Terry, and on the testimony of Leroy Williams (which the judge refused to credit) that this condition had existed for an extended period of time. These tangential issues needlessly complicate this question, as the undisputed evidence shows that the violation, which was plainly visible and took place in the presence of mine supervisors, created a highly dangerous situation, thus warranting a finding of unwarrantable failure.

The judge concluded that the violation was significant and substantial, and acknowledged that a serious injury could have developed. *Id.* To access the levers of the crusher, a miner had to walk on an I-beam, approximately 6 inches wide, and located about 6 feet above the ground. *Id.* at 383. As the judge noted, according to the uncontradicted testimony of Inspector Horn, a miner walking on the beam while operating the motor could lose his or her balance. *Id.* According to Horn, the miner could quite easily fall into the rotating pulley or V-belt drive. Tr. I at 76.

Inspector Horn testified that to start the engine, it was necessary to hold on with one hand and push the clutch down and in with the other, while standing on the metal frame. Tr. I at 69. He testified that a fall into the V-belt drive would probably result in a permanently disabling injury and would be reasonably likely to "cut his arm off or leg, whatever went into it." Tr. I at 76-77. He was also quite clear that the risk of injury would be the same whether the operator was producing or just test firing the engine. Tr. I at 78-79.

¹ Commissioner Beatty votes with Chairman Jordan to reverse the judge's negative unwarrantability finding. See slip op. at 6 n.12.

The judge's finding that the new motor in the crusher was tested for 10 minutes on June 1 without protective catwalks, 22 FMSHRC at 384, is uncontroverted. Adamson, Jr. testified that he and the foreman started the engine and fed six buckets of rock into the feeder. Tr. II at 13-14. Commission precedent makes clear that these individuals should be held to a high standard of care. See *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) ("section foreman is held to a 'demanding standard of care in safety matters,'" quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Moreover, their actions were particularly egregious, involving intentional conduct, as Adamson, Jr. admitted. He testified quite candidly that a decision was made to test the crusher for 10 minutes, despite the fact that the catwalks were not in place. Tr. II at 12-17. Permitting this test run in the absence of guard rails or catwalks needlessly placed individuals in a precarious, dangerous situation, constituting aggravated conduct.

As we noted in *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997), the Commission has relied upon the high degree of danger caused by a violation to support an unwarrantable failure determination. See *Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams posed a danger to miners entering the area); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure when roof conditions were extremely dangerous). In *Midwest Material*, which involved a violation for improperly dismantling a crane boom, we reversed the judge's finding that the violation was not an unwarrantable failure, basing our conclusion on the extreme danger, the obvious nature of the hazard, and the fact that the violation took place in the presence of a foreman, 19 FMSHRC at 35, all factors that are present in this case as well. Moreover, in *Midwest Material*, we found that the judge had erred by relying on the relatively brief duration of the violative conduct, in light of the high degree of danger posed by the hazard and its obvious condition. *Id.* at 36.

Similarly, in *Lafarge Construction Materials*, 20 FMSHRC 1140 (Oct. 1998), which involved a violation for failure to remove loose materials before allowing a miner to enter a surge bin, we affirmed the judge's holding of unwarrantable failure, again relying on the high degree of danger and heightened standard of care required of a foreman. *Id.* at 1147. We noted that when violations have exposed miners to very dangerous conditions, we have not always relied on most of the remaining factors in the Commission's traditional unwarrantable failure test. *Id.*

Accordingly, I would reverse the judge and find that this citation was the result of the operator's unwarrantable failure.

2. Order No. 7711681

Inspector Horn testified that he found several obvious defects on the mobile equipment, Tr. III at 36, 42-43, 52, including defective horns, parking brakes and seat belts. On the basis of this testimony, the judge found that Virginia Slate violated 30 C.F.R. § 56.14100 because it failed to perform adequate preshift examinations of mobile equipment, and determined that the violation was S&S. 22 FMSHRC at 390. I believe he erred, however, in concluding that it did not result from Virginia Slate's unwarrantable failure.

The operator had been on notice of the duty to perform preshift examinations when the inspector had explained the standard to management officials during a September 1997 special investigation. Tr. III at 33, 46-47. Moreover, the record showed that the failure to perform a proper preshift posed a danger to miners, Tr. III at 50-51, and the judge's designation of the violation as S&S reinforces the Secretary's claim that danger was an aggravating factor.

Nonetheless, Virginia Slate failed to note these conditions on preshift and failed to remedy them. The omission of any mention of these numerous hazards on the preshift reports indicates an indifferent attitude towards the preshift regulation, which is designed to inform the oncoming shift foreman about safety problems, so they can be corrected. The importance of the requirement is underscored by Adamson Jr.'s testimony on the citation charging Virginia Slate with a missing seat belt (which the judge eventually found was S&S and a result of the operator's unwarrantable failure). The judge credited Adamson's testimony that he "neither knew nor reasonably should have known" that part of the seatbelt was missing. 22 FMSHRC at 387. In support of that assertion, Adamson Jr. testified that he "reviewed the pre-shift inspection reports for the time period. . . . [I]t's all checked off on the safety features as being satisfactory, with no exceptions, on that vehicle." Tr. II at 238. It is disingenuous for an operator to claim ignorance of a safety hazard on the basis of defective preshift reports which, if completed correctly, would have alerted management to the problem.

Even more troubling is the judge's finding that the violation of the horn regulation was not the result of unwarrantable failure because the fork lift operator had not communicated the existence of defective horns to any of the operator's managers, and that consequently there was no evidence that the operator had engaged in aggravated conduct. 22 FMSHRC at 386. Had the preshift been properly conducted and the report accurately completed, these hazards would have been noted. Instead, because the operator failed to abide by the preshift regulation, management successfully pleaded ignorance to any knowledge of the defective horns, and was rewarded by the judge's determination that there was no unwarrantable failure.

Finally, the judge erred in stating that evidence regarding the operator's failure to correct violations is not relevant to the degree of operator negligence, *id.* at 390, as section 56.14100(b) specifically requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

The omission of several safety defects on the preshift report, and the lack of any effort to correct these hazards, reflects a reckless disregard for the requirements of the preshift standard. Because the only conclusion one can draw from the record evidence is that this violation was the result of the operator's unwarrantable failure, I would reverse the judge. *Am. Mine Servs. Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).


Mary Lu Jordan, Chairman

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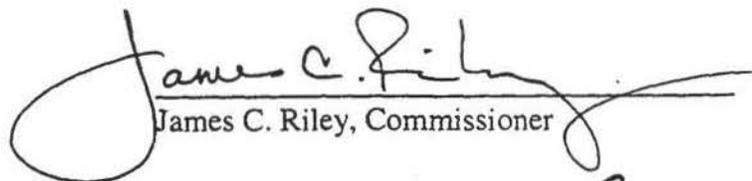
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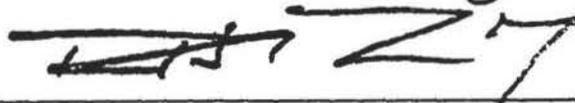
Administrative Law Judge Avram Weisberger
Federal Mine Safety & Health Review Commission
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For the foregoing reasons, Davidson's petition for discretionary review is denied.


Mary Lu Jordan, Chairman


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

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May 9, 2001

AMERICAN COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 2000-111-R
	:	Citation No. 7572545; 6/26/2000
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2000-112-R
ADMINISTRATION (MSHA),	:	Citation No. 7572546; 6/26/2000
Respondent	:	
	:	Galatia Mine
	:	Mine ID 11-02752

ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION

These cases are before me on Notices of Contest filed by American Coal Company under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(d). American Coal contests the issuance of two citations by an MSHA inspector charging that diesel engines used in its underground coal mine did not comply with regulations governing approval for such use. The parties have stipulated to certain facts and have moved for summary decision, pursuant to Commission Procedural Rule 67. 29 C.F.R. § 2700.67. The Secretary has supported her motion with additional factual assertions contained in affidavits and related materials. I find that there exists no genuine issue as to any material fact and that the Secretary is entitled to judgment as a matter of law.

Facts

The parties stipulated to the following facts:

1. Contestant, American Coal Company, operates the Galatia Mine, a large underground coal mine located near Harrisburg, Illinois.
2. The Galatia Mine utilizes diesel powered personnel carriers.
3. The Mine Safety and Health Administration published a final rule on October 25, 1996, establishing new safety standards (30 C.F.R. §§ 75.1900-1916) and new approval regulations for diesel engines and equipment (30 C.F.R. Part 7) used in underground coal mines.

4. Part 7, Subpart E (30 C.F.R. §§ 7.81 through 7.92) establishes approval requirements for diesel powered engines in areas where permissible equipment is required (permissible diesel equipment), and for diesel powered engines used in areas where permissible equipment is not required (non-permissible diesel powered equipment).

5. The engines at issue in [these cases] are used in non-permissible diesel powered equipment.

6. As of November 25, 1999, non-permissible diesel powered equipment used in underground coal mines must meet the requirements of 30 C.F.R. § 75.1909.

7. Under 30 C.F.R. § 75.1909(a), non-permissible diesel powered equipment such as that which is the subject of the citations at issue here, must be equipped with engines approved under subpart E of 30 C.F.R. Part 7; this includes the approval marking requirement at 30 C.F.R. § 7.90.

8. The engines at issue in this case were manufactured and placed in use before the November 25, 1999 effective date for § 75.1909(a).

9. The engines at issue in [these cases] were manufactured by American Isuzu Motors, Inc.

10. American Isuzu Motors, Inc. applied for and received MSHA approval under Part 7 Subpart E for diesel engine model numbers Isuzu QD 100-301 and Isuzu C240MA (QD60).¹

11. The American Coal Company and Galatia Mine do not have access to the approval documentation submitted by American Isuzu Motors, Inc. on which the MSHA approval under Part 7 Subpart E was based.

12. Extensive dialogue took place between local MSHA representatives and Galatia mine management regarding the quality of Isuzu's markings, the cost of obtaining the approval markings from Isuzu, and the development of an in house approval marking.

13. Marvin Nichols, MSHA Administrator for Coal Mine Safety and Health, issued a "Procedure Instruction Letter" (PIL) on April 1, 2000, which stated that all approval markings must be provided by the engine manufacturer. This PIL also addressed the poor quality of the approval marking being provided and the actions being taken to rectify this situation.

¹ MSHA approved Isuzu's application for engine model number QD 100-301 (also known as 4DB1PW) on January 15, 1998. The application for engine model number C240MA (also known as C240PW) was approved on April 28, 1999.

14. The American Coal Company did not obtain Part 7 approval markings from Isuzu. Instead, the maintenance department at the Galatia Mine purchased and utilized a labeling machine to produce what it believed to be a suitable tag, and marked its Isuzu diesel engines with tags it produced with this labeling machine.

15. On June 6, 2000, MSHA issued Citation No. 7572545, alleging that the Contestant's Isuzu 4BD1 PW diesel engine in the MT13 diesel mantrip was not being maintained in accordance with Subpart E of 30 C.F.R., Part 7. A legible and permanent approval marking as required by 30 C.F.R. § 7.90 was installed but it had not been supplied by the engine manufacturer.

16. The serial number of the diesel engine which was the subject of Citation No. 7572545 is 201526.

17. On June 26, 2000, MSHA issued Citation No. 7572546, alleging that the Contestant's Isuzu C240PW diesel engine in the PV 55 diesel personnel carrier was not being maintained in accordance with Subpart E of 30 C.F.R., Part 7. A legible and permanent approval marking as required by 30 C.F.R. § 7.90 was installed but it had not been supplied by the engine manufacturer.

18. The serial number of the diesel engine which was the subject of Citation No. 7572546 is 814472.

The following additional facts are established by Affidavits submitted by the Secretary.

Isuzu's 4DB1PW diesel engine has been manufactured since before 1980 and continued in production until 1998. The C240PW engine was first manufactured prior to 1980 and has continued to be produced to present. Over time, changes may be made in the manufacture of a particular model engine, such as changes in parts used, settings or configuration of the engine. Consequently, engines with the same model number are not necessarily identical. For example, during the years that the 4DB1PW engine was manufactured a change was made to the camshaft. Some engines with that model number have the type of camshaft upon which the MSHA approval was based. Others do not. Only engines that have been manufactured in accordance with the design drawings and specifications submitted to MSHA can be approved and so marked pursuant to the regulations. For Isuzu to determine whether a particular engine was manufactured in accordance with the design drawings and specifications upon which MSHA's approval was based, it must compare the serial number of the engine with records it maintains of the design and specifications to which that engine was manufactured.

Accurate approval markings on diesel engines are critical to MSHA's enforcement of health and safety provisions designed to protect miners. In order to determine whether a mine has sufficient ventilation to dissipate emissions of a diesel engine used underground, an MSHA inspector must rely upon the engine's approval marking as establishing that it was manufactured

according to the design and specifications approved by MSHA and that the ventilation rate specified on the marking is accurate.

As noted above, the parties have stipulated that American Coal does not have access to the documentation submitted by Isuzu in its approval application. Nor does it appear that American Coal has access to Isuzu's records reflecting which engines of a particular model number were manufactured according to the design drawings and specifications for which the approval was obtained. The only way that American Coal could determine whether its engines had been approved was to apply to Isuzu for an approval marking. No application was ever submitted to Isuzu for an approval plate for either of the engines at issue in these cases and no such approval plate was ever issued by Isuzu.

American Coal was able to ascertain, from public records maintained by MSHA, that Isuzu diesel engines with the same model number as its engines had been approved by MSHA. Consequently, it fabricated its own approval marking and affixed it to the engines. MSHA determined that the approval markings did not comply with the regulatory requirement and the instant citations were issued. While the markings included the categories of information required by the regulation, MSHA enforced its interpretation of the regulation that the approval marking must be supplied by the manufacturer, and in the absence of such a marking, the engine was not approved, nor could it have any confidence that the engine had been approved.

Conclusions of Law

The ultimate issue in these cases is whether the approval marking required by 30 C.F.R. § 7.90 must be issued by the engine manufacturer. American Coal argues that the clear wording of the regulation² contains no such requirement, that the Secretary's attempt to incorporate such a requirement short of formal rulemaking must fail and that the identity of the entity that supplies the approval marking is "irrelevant" and "superfluous to the need addressed by the regulation." The Secretary argues that the intent of the regulation, as determined from the regulatory scheme,

² **§ 7.90 Approval marking.**

Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall contain the following information:

- (a) Ventilation rate.
- (b) Rated power.
- (c) Rated speed.
- (d) High idle.
- (e) Maximum altitude before deration.
- (f) Engine model number.

is that the marking must be issued by the manufacturer and that her interpretation of the regulation is entitled to deference. The legal framework for resolving the issues was described by the Commission in *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (January 1998):

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted). See also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. See *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C.Cir. 1994). Accord *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C.Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function." *General Electric Co v. EPA*, 53 F.3d 1324, 1327 (D.C.Cir. 1995) (citation omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C.Cir. 1989)). See also *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

See also, *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1059-61 (Sept. 2000).

Ambiguity

The regulation requires that each approved diesel engine bear a permanent approval marking showing the MSHA approval number and other information. American Coal correctly notes that the clear wording § 7.90 contains no requirement that the marking be issued by the manufacturer. However, neither does the regulation clearly state that the marking can be fabricated by the engine's owner, a supplier, or any other person or entity. The regulation itself, is silent as to the source of the approval marking.

The Secretary argues that the regulatory scheme discloses an intent that the marking must be supplied by the manufacturer, and that Contestant's interpretation would eviscerate the entire enforcement scheme to the detriment of miners' safety. As the Secretary points out, MSHA and its predecessor agencies have historically required that applications for approval of equipment for use in mines be submitted by the manufacturer. 30 C.F.R. Part 7 was originally promulgated in

1988 to establish the application procedure and requirements for MSHA approval of certain products for use in underground mines. The preamble to the final rule for 30 C.F.R. Parts 7 and 18, specified that:

Once MSHA has approved a product, the manufacturer is authorized to place an approval marking on the product that identifies it as approved for use in underground mines. Use of the MSHA marking obligates the manufacturer to maintain the quality of the product. The MSHA marking indicates to the mining community that the product has been manufactured according to the drawings and specifications upon which the approval was based.

53 Fed. Reg. 23486 (June 22, 1988).

Only the manufacturer can apply to MSHA for approval of a diesel engine. 30 C.F.R. § 7.2 defines applicant as: "An individual or organization that manufactures or controls the assembly of a product and that applies to MSHA for approval of that product." Approval is defined as: "A document issued by MSHA which states that a product has met the requirements of this part and which authorizes an approval marking identifying the product approved." *Id.*

Applications for approval of diesel engines for use in underground coal mines must include extensive information on the engine's design and specifications as well as testing data. 30 C.F.R. § 7.83. Each approved product is required to have an approval marking and applicants are required to maintain records of the initial sale of each unit having an approval marking. *Id.* § 7.6. Once approval is obtained, an applicant, referred to as "the approval holder", is responsible for future quality assurance and for making the product available to MSHA for post-approval audit. *Id.* §§ 7.7 and 7.8.

Approvals are restricted to the specific design and specifications submitted by the manufacturer. For example, the MSHA approval for the Isuzu's model QD100-301 diesel engine states:

All engines of this type that are marketed as approved under 30 C.F.R., Part 7, must be manufactured in accordance with the drawings and specifications on file at the Mine Safety and Health Administration and maintained in strict accordance with the instructions set forth in the engine maintenance and service manual. Any change in the design must be accepted in writing by the Mine Safety and Health Administration before you are authorized to make any such change.

While § 7.90 is silent as to the source of the approval marking, the regulatory scheme envisions that the manufacturer, the approval-holder, and the only entity that can determine whether a particular diesel engine satisfies the requirements of the MSHA approval, must issue the approval marking. Ambiguity exists when a regulation is capable of being understood by reasonably well-informed persons in two or more different senses. *Island Creek Coal Co.*,

supra, 20 FMSHRC at 19. The regulation's silence creates ambiguity as to permissible sources for the approval marking.

The Secretary's Interpretation - Deference

It is well-established that the Secretary's interpretation of her own regulations in the complex scheme of mine health and safety is entitled to a high level of deference and must be accepted if it is logically consistent with the language of the regulation and serves a permissible regulatory function. *Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 121261-62 (D.C.Cir. 1994), *cert. denied*, 115 S.Ct. 2611 (1995); *Island Creek Coal Co.*, *supra*, and cases cited therein.

For the reasons discussed above, the Secretary's interpretation of the regulation, i.e., that the approval marking must be issued by the manufacturer, is reasonable. There is also little question but that the Secretary's interpretation is more consistent with the safety promoting purposes of the Act. The Secretary argues, forcefully, that allowing operators or others to fabricate and affix approval plates would virtually nullify the Secretary's enforcement efforts in a critical area of safety and health. The operator cannot determine that a particular engine is covered by an MSHA approval because it has no way of determining whether the engine was manufactured according to the design drawings and specifications upon which the MSHA approval was based. Only the manufacturer, the approval-holder, can make that determination.

Even though American Coal could determine that engines of that model had been approved, it could not determine whether its engines had been manufactured according to the design and specifications upon which the approval was obtained. Consequently, it could not determine whether its engines had, in fact, been approved and an MSHA inspector attempting to determine whether a mine met applicable ventilation requirements for dissipating the emissions of Contestant's engines could not rely upon the marking fabricated by Contestant.

Due Process -- Fair Notice

Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C.Cir. 1986).

Island Creek Coal Co., *supra*, 20 FMSHRC at 24.

American Coal does not, nor could it reasonably, assert that it was not afforded sufficient

notice of the Secretary's interpretation of the regulation prior to the issuance of the citations here at issue. The Secretary's interpretation is consistent with the long-standing approval scheme for mining equipment, which contemplates that the manufacturer, as the approval-holder, is authorized to place the approval marking on the engine. Moreover, American Coal and other operators were specifically put on notice of the Secretary's interpretation of this particular regulation. As the parties stipulated, there were extensive discussions between the Secretary and Contestant during which the requirement that the approval marking be obtained from the manufacturer was discussed. The issuance of the Procedure Instruction Letter, on April 1, 2000, clearly apprized operators of the Secretary's interpretation some two months prior to the issuance of the citations.

Based upon the foregoing, American Coal's motion for summary decision is denied, the Secretary's motion is granted, Citations numbered 7572545 and 7572546 are affirmed and the Notices of Contest are hereby **Dismissed**.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

May 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-349
Petitioner	:	A.C. No. 48-01186-03641
	:	
v.	:	
	:	Shoshone #1 Mine
RAG SHOSHONE COAL CORP.,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Contestant.

Before: Judge Cetti

On July 12, 2000, at the request of the parties, an Order was issued consolidating the above-captioned penalty case with the corresponding contest cases WEST 99-342-R and WEST 99-384-R. All three cases concern the validity of the 060 code. Although this penalty proceeding was consolidated with the corresponding contest proceedings I did not assess a penalty in the consolidated penalty case when I issued my decision in the consolidated cases on April 9, 2001. Consequently I do so now, as requested by the parties. I assess the penalty on the facts and circumstances established at the hearing where RAG Shoshone Coal Corp. is challenging the validity of the 060 code. On the basis of the hearing record, including the stipulations of the parties I find the appropriate penalty under the facts and circumstances establish at the hearing a civil penalty of \$55.00 for each of the two citations involved in this matter. It is clear from the record, however, that Shoshone does not waive its right to seek review of the decision of April 9, 2001, at Docket Nos. WEST 99-342-R and WEST 99-384-R.

ORDER

It is **ORDERED** that **RESPONDENT PAY** civil penalty assessments in the amounts shown above for each of the violations set forth in the two affirmed citations in this docket.

Payment is to made to the Secretary of Labor within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.



August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-231-M
Petitioner	:	A.C. No. 04-04785-05553
	:	
	:	Docket No. WEST 2000-232-M
	:	A.C. No. 04-04785-05554
	:	
	:	Docket No. WEST 2000-239-M
v.	:	A.C. No. 04-04785-05555
	:	
	:	Docket No. WEST 2000-240-M
	:	A.C. No. 04-04785-05556
	:	
	:	Docket No. WEST 2000-241-M
	:	A.C. No. 04-04785-05557
	:	
MARIPOSA AGGREGATES,	:	Docket No. WEST 2000-520-M
Respondent	:	A.C. No. 04-04785-05560
	:	
	:	Docket No. WEST 2000-521-M
	:	A.C. No. 04-04785-05561
	:	
	:	Mariposa Aggregates Quarry

DECISION

Before: Judge Manning

These cases commenced when the Secretary of Labor filed proposed penalty assessments against Mariposa Aggregates under the authority of section 105(a) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act" or the "Act"), 30 U.S.C § 815(a) and the Commission's Procedural Rules at 29 C.F.R. § 2700.25. Bevan Builders, Inc., doing business as Mariposa Aggregates ("Mariposa Aggregates") contested the proposed penalties in accordance with 29 C.F.R. § 2700.26, by checking the boxes on the preprinted forms that state "I wish to contest and have a formal hearing on ALL of the violations listed in the Proposed Assessment." (emphasis in original). These cases involve 107 citations and orders of withdrawal (the "citations") issued at the Mariposa Aggregates Quarry. The Secretary proposes a total civil penalty of \$108,067.

In response to Mariposa Aggregates' contests of the penalties, the Secretary filed a petition for assessment of civil penalty in each case as required by 29 C.F.R. § 2700.28. When Mariposa Aggregates did not file an answer within thirty days as required by 29 C.F.R. § 2700.29, the Commission's Chief Administrative Law Judge issued an order to show cause. In response, Mariposa Aggregates filed a document entitled: "Notice of Fraud; Certified Demand to Cease and Desist Collection Activities Prior to Validation of Purported Debt" ("Notice of Fraud"). The Chief Judge assigned the cases to me.

In its Notice of Fraud, Mariposa Aggregates did not address the citations, orders, or the proposed penalties. Instead, it stated that the Secretary had failed to establish that she had jurisdiction over its quarry. Its notice of fraud also raised a number of other issues that are irrelevant to these proceedings. In my prehearing order, I described the broad nature of Mine Act jurisdiction and suggested that it may be more efficient to resolve any jurisdictional issues prior to hearing. I also explained how cases proceed before the Commission and stated that many of the issues raised by Mariposa Aggregates were not relevant to these proceedings. When the parties were unable to settle the cases, I set them for hearing. I canceled the hearing well before the hearing date on motion of the Secretary. The Secretary filed a motion for summary decision that counsel stated would dispose of all issues in the cases.

The first part of the Secretary's motion for summary decision concerns MSHA's jurisdiction to inspect the quarry. The Secretary argued that there were no genuine issues of material fact on this issue and that she was entitled to summary decision as a matter of law. 29 C.F.R. 2700.67(b). She relied on the declaration of MSHA Inspector Jaime Alvarez and an order of the U.S. District Court. She stated that Mariposa Aggregates has been periodically obstructing MSHA inspections by denying entry to MSHA inspectors. On September 12, 1996, the U.S. District Court for the Eastern District of California granted the Secretary's motion for summary judgment and permanent injunction against Mariposa Aggregates. *Sec'y of Labor v. Bevan Builders, Inc.*, No. CV-F-95-5842 REC (E. D. Cal.) (S. Motion Ex. A). The court found that "defendants' quarry operation, 'Mariposa Aggregates,' constitutes a mine whose products affect commerce and which, as such, is subject to the jurisdiction of the [Act]." Slip op. at 20. The court also found that MSHA "has clear and express authority under the Act to conduct periodic, warrantless, and unannounced health and safety inspections of [the quarry]. . . ." *Id.* The court also enjoined Mariposa Aggregates from obstructing or impeding future MSHA inspections.

Mariposa Aggregates responded to the Secretary's motion for summary decision with a document entitled "Petition for Redress of Grievance" (the "Grievance Petition"). This Grievance Petition was signed by Mr. Wayne R. Bevan, President of Mariposa Aggregates and Bevan Builders, Inc. It is styled as a "Private International Administrative Remedy" brought against the undersigned, the Commission's Chief Administrative Law Judge and two employees of the Department of Labor. The Grievance Petition contains a series of "Statements of Fact." In these statements, Mariposa Aggregates maintains that its quarry is "within the boundaries of Mariposa County in the Republic of California" and the quarry is "outside the exclusive legislative jurisdiction of the United States." (G.P. at 4). It also states that it "is not the operator

of the quarry” and that there are no employees at the quarry. *Id.* The Grievance Petition contains numerous other “statements of fact” relating to the Uniform Commercial Code (“UCC”) and previous correspondence with representatives of the Secretary. The Grievance Petition also contains a series of inquiries directed to MSHA and the undersigned. For example, it asks whether the United States is a municipal corporation, whether California is a republic, and whether the persons to whom it is addressed are “willing participants in aiding or abetting in carrying out a deceptive, false and fraudulent scheme to extort contracts, signatures, funds and/or securities from the citizens of the several united States.” *Id.* at 8.

Mariposa Aggregates also filed another document entitled “Notice of Return of Erroneous Presentments.” Attached to this document are the cover pages of the Secretary’s motion and the attachments for the motion. Handwritten across each of these pages are the words, “Returned, Erroneous, January 25, 2001, Wayne R. Bevan.” The Notice of Return of Erroneous Presentments states:

I am returning your erroneous presentments WITHOUT DISHONOR,
UCC 3-501. You have sent me incomplete instruments. UCC 3-115.
These documents are returned timely, in according to all applicable rules.

This notice makes additional references to the UCC and demands that the Secretary provide “proof of your claim that you maintain a security interest, UCC 1-102(37)(A).”¹

I granted the Secretary’s motion for summary decision on the jurisdictional issue by order dated March 15, 2001. 23 FMSHRC 354. In granting the motion, I relied upon the Secretary’s motion, the order of the District Court, and the declarations of Jan M. Coplick and MSHA Inspector Alvarez.

In her motion for summary decision, the Secretary also sought summary decision on the merits in these cases because Mariposa Aggregates did not deny the allegations set forth in the citations and orders. She argued that she was entitled to summary decision because the answer filed by Mariposa Aggregates did not contain a short and plain statement responding to each allegation in the petition for assessment of penalty, as required by 29 C.F.R. § 2700.29. The Secretary also stated that the other documents filed by Mariposa Aggregates in these cases indicate that Mr. Bevan does not contest the citations and orders.

Counsel for the Secretary stated that she filed this motion because Mariposa Aggregates has a history of “raising a kaleidoscope of ever-shifting yet always meritless objections.”

¹ Mariposa Aggregates also filed a document entitled “Notice of Fault - Opportunity to Cure.” This document noted that I had not responded to Mr. Bevan’s Grievance Petition and “granted” me an extension of time to respond. Apparently the Postal Service failed to deliver this document to my office. Mariposa Aggregates also filed a copy with the Commission’s Chief Judge on March 1, 2001, and that copy was immediately forwarded to me.

(Motion at 11). For example, she notes that, in its Order Granting the Secretary's Motion for Summary Judgment, the District Court stated that the arguments set forth by Mariposa Aggregates were "without merit," were "frivolous," and were made in "bad faith." (S. Motion at 9-10; slip. op. at 15 and 18). Counsel further states that "[r]equiring the Secretary to repeatedly relitigate these legally insupportable objections, interposed for wrongful reasons, is a waste of taxpayer dollars

... [and] threatens the safety and health of Respondent's miners, and of other miners employed by other operators who may be encouraged to emulate Respondent's blatant defiance of a remedial statute designed to save worker's lives." (S. Motion at 11-12).

The declaration of Inspector Alvarez states that when he arrived at the quarry for one of the inspections involved in these cases, he could see by the activities that were occurring that it was in operation. (Alvarez Decl. ¶¶ 4-7). After the person in charge at the quarry called Mr. Bevan by telephone, the operations were shut down and everyone was sent home. *Id.* at ¶ 12. Inspector Alvarez was told that he was free to look around but that no questions would be answered and no information would be provided. *Id.* Inspector Alvarez was also told that the people who work at the quarry are not employees because they all signed a "unique labor agreement." *Id.* at ¶ 16. Inspector Alvarez, who is a health specialist, was unable to sample for silica dust because the operations were shut down. *Id.* at ¶ 18. In his declaration, he stated that during the previous inspection, MSHA determined that miners were "significantly overexposed to silica-bearing dust." *Id.* Thus, it appears that although Mr. Bevan permitted MSHA inspectors in the quarry, he continued to impede inspections in violation of the District Court order.

In an order dated March 15, 2001, I held that I could not grant summary decision on the merits of the citations. 23 FMSHRC 350. I further held that the Secretary's motion could be more accurately described as a motion, filed under 29 C.F.R. §§ 2700.10 and 2700.66, requesting that Mariposa Aggregates' contest of the proposed penalty assessments, brought under 29 C.F.R. § 2700.26, be dismissed. I noted that Mr. Bevan stated "I deny having requested a hearing before your commission" in his Notice of Fraud. (N.F. at 1). Because none of the documents filed by Mariposa Aggregates actually contested the merits of the penalty petitions, I ordered it to show cause why its contests of the citations, orders, and proposed penalties should not be dismissed. 23 FMSHRC at 352. Mariposa Aggregates was ordered to state whether it was contesting the allegations set forth in the citations and orders. If so, Mariposa Aggregates was ordered to briefly state the basis for its contests. I also warned Mariposa Aggregates that if it failed to comply with my order to show cause, I would dismiss its contests of the citations, orders, and penalties, and that I would assess MSHA's proposed penalties.

In response, Mariposa Aggregates filed a document entitled "Notice of Additional Time to Answer Notice of Fraud, Demand to Answer Prior to Taking Any Official Acts," dated April 20, 2001. This Notice of Additional Time did not address the concerns of my order to show cause. Instead, it states that I again failed to respond to Mariposa Aggregates' Grievance Petition and, for that reason, I admitted all of the statements contained in it by operation of law. The Notice of Additional Time "granted" me another extension of time to respond.

The Notice of Additional Time also contains the following:

Your [order to show cause] . . . is refused for fraud since there is no contract with the court to hear any matter it may have before it involving Mariposa Aggregates. Your contention that MSHA had received a request from Mariposa Aggregates for a hearing is clearly fraudulent and there has been no attempt on MSHA's part to provide the document whereby Mariposa Aggregates requested such a hearing. . . .

DEMAND is made that you answer fully the Petition for Redress of Grievances referenced above prior to taking any further actions. Should you not do so you may be personally liable in a court of law for operating under color of law, color of office in a conspiracy to extort money from this company and violating other rights that even a corporation has under the Constitution and International Treaty subjecting yourself to treble damages and RICO charges.

(Notice at 2).

On April 20, 2001, in response to Mariposa Aggregates' Notice of Additional Time, I issued an order requiring it to file an amended answer in these cases. This order was another order to show cause giving Mariposa Aggregates a second opportunity to state whether it was contesting the merits of the citations and whether it wanted a hearing. In this order I stated that I had addressed the issues raised in its Grievance Petition in my order granting the Secretary's motion for summary decision on the jurisdiction issue. I also reminded Mr. Bevan that the other issues it raised are irrelevant to these proceedings, including its arguments concerning the law of contracts, the UCC, and the "Republic of California." I also described how these cases arose, what a mine operator's rights are under the Mine Act, and the Commission's Rules of Procedure.

I explained in this order that the only way for Mariposa Aggregates to contest the citations, orders, and penalties proposed by MSHA is at a hearing before me. I stated that if Mariposa Aggregates did not file an appropriate response to my order I would affirm all of the citations and that I would assess MSHA's proposed penalty of \$108,067.

In response, Mariposa Aggregates filed a document entitled "Notice of Fraud, Demand to Answer Prior to Taking Any Official Acts," dated May 8, 2001. In this document, Mr. Bevan repeats the demands he made in previous documents. He "refused for fraud" my order requiring an amended answer; he states that he did not request a hearing; and he demands that I answer his Grievance Petition. With respect to his Grievance Petition, Mr. Bevan states:

DEMAND is made that you timely answer fully the [Grievance Petition] . . . prior to taking any further official actions. The proper

method of answering the Petition would be to change any answer with which you disagree. For example, you refer to the issue of the California Republic. I have not put it forth as an argument, but as a simple statement of fact. If you should disagree, then change the answer, e.g. Item number # I disagree. The State of California is not a republic because, with evidence in support. Should you take any official actions prior to answering or challenging the Petition, you may be personally liable in a court of law for operating under color of law, color of office in a conspiracy to extort money from this company and violating other rights that even a corporation has under the constitution and International Treaty subjecting yourself to treble damages and RICO charges. Your failure to answer will be deemed an exhaustion of my administrative remedies and your permission for me to remove this matter to a court of competent jurisdiction, of my choice, to have it resolved.

(Notice at 2).

Mr. Bevan made no attempt to advise me of his position on the allegations contained in the citations. He also did not request that these cases be set for hearing. The documents that Mr. Bevan filed on behalf of Mariposa Aggregates do not contest the merits of the Secretary's penalty petitions. Instead, Mr. Bevan raises irrelevant issues or makes meaningless arguments. Another example is instructive. In his Notice of Fraud, Mr. Bevan stated that the failure of counsel for the Secretary to produce a valid licence to practice law constitutes a fraud on the court which "is further exacerbated by [counsel's] deliberate usage of foreign private copyrighted 'law' owned by British companies." (N.F. at 4). He further stated that "British companies own United States and State of California copyrighted 'law' commonly known as 'codes.'" *Id.* Mr. Bevan based this argument on the fact that some legal publishers, including West Publishing Company, are owned by British companies. On this basis, he stated that counsel for the Secretary is legally required to be registered as a foreign agent and demanded a copy of the attorney's foreign agent registration card. *Id.* at 5. Despite my best efforts, Mariposa Aggregates continued to offer such arguments rather than "a short and plain statement responding to each allegation of the petition," as required by 29 C.F.R. 2700.29.

ORDER OF DEFAULT

I provided Mariposa Aggregates two opportunities to comply with the Commission's Procedural Rules and my orders. Mariposa Aggregates did not make any attempt to comply with my order to show cause or my order to file an amended answer. Consequently, under the authority set forth in 29 C.F.R. § 2700.66, I hold that Mariposa Aggregates is in **DEFAULT** and that it has waived its right to a hearing in these cases.

Each of the citations and orders of withdrawal in these cases are hereby **AFFIRMED**, as written by the MSHA inspector. Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I base my findings with respect to the civil penalty criteria on the information contained in the Secretary's petitions for assessment of penalty. I find that 62 citations were issued at the quarry during the two years preceding the first inspection involved in these cases. Mariposa was a relatively small operator that worked about 38,480 hours in the previous year. Section 104(b) orders of withdrawal were issued for four citations. The Secretary determined that with respect to 39 citations and orders, the penalties should not be reduced because Mariposa Aggregates failed to demonstrate good faith in attempting to achieve rapid compliance after notification of the violation. Mariposa Aggregates did not submit any evidence that the proposed penalties will have an adverse effect on its ability to continue in business. My gravity and negligence findings are as set forth in the citations and orders. Penalties for 21 of the citations and orders were specially assessed by the Secretary under 30 C.F.R. § 100.5. Thirty of the citations and orders were issued under section 104(d) of the Mine Act. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and the information contained in the Secretary's penalty petitions, I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2000-231-M		
7969028	56.14103(b)	\$5,280.00
7969029	56.14132(a)	2,531.00
7969030	56.14130(a)(3)	2,531.00
7969031	56.14107(a)	1,247.00
7969053	56.4203	2,531.00
7969033	103(a) of Act	6,000.00
3914242	56.9100(a)	760.00
3914243	56.4430(a)(2)	760.00
3914244	56.4200(b)(2)	475.00
3914245	56.12004	993.00
3914246	56.14205	340.00
3914247	56.12018	340.00
3914248	56.12032	224.00
3914249	56.16006	277.00
3914250	56.16005	340.00
3914251	56.14115(b)	340.00
3914252	56.12004	1,771.00
3914253	56.11027	1,771.00
3914254	56.12004	340.00

WEST 2000-232-M

3914255	56.12032	\$1,771.00
3914256	56.4011	340.00
3914257	56.12030	2,531.00
3914258	56.12013(a)	475.00
3914259	56.12008	277.00
3914260	56.11003	760.00
3914401	56.12034	340.00
3914402	56.11001	1,270.00
3914403	56.12004	1,771.00
3914404	56.12004	1,771.00
3914405	56.4202	277.00
3914406	56.12005	1,771.00
3914641	56.15003	1,815.00
3914642	56.14107(a)	1,270.00
3914643	56.4102	1,270.00
3914644	56.4200(a)(1)	340.00
3914645	56.14100(b)	4,400.00
3914646	56.4402	993.00
3914648	56.4101	1,771.00

WEST 2000-239-M

3914649	56.16006	1,957.00
3914650	56.14100(b)	475.00
3914653	56.9300(a)	1,771.00
3914654	56.20003(a)	1,270.00
3914655	56.14107(a)	1,815.00
3914656	56.14107(a)	1,086.00
3914657	56.14112(b)	1,815.00
3914658	56.14112(b)	1,815.00
3914659	56.14112(b)	1,815.00
3914660	56.3131	2,391.00
3914663	104(d) of Act	3,000.00
3914664	104(d) of Act	3,000.00
3914665	104(d) of Act	2,000.00
7969088	56.12028	655.00
7969117	56.12032	993.00
7969118	56.12004	993.00
7969119	56.14107(a)	872.00
7969120	56.14107(a)	1,247.00
7969121	56.14107(a)	399.00

WEST 2000-240-M

7969122	56.12008	\$655.00
7969123	56.15006	655.00
7969124	56.15001	277.00
7969125	56.20003(a)	1,086.00
7969126	56.4102	475.00
7969127	56.12004	317.00
7969128	56.14107(a)	655.00
7969129	56.14101(a)	993.00
7969131	56.14100(c)	993.00
7969134	56.14112(a)(2)	347.00
7969135	56.16005	264.00
7969142	50.30(a)	55.00
7969186	56.12034	55.00
7969187	56.12004	55.00
7969188	56.4603	55.00
7969189	56.12032	161.00
7969190	56.12028	264.00
7969191	56.4402	131.00
7969192	56.14107(a)	131.00

WEST 2000-241-M

7969193	56.14109(b)	131.00
7969194	56.12004	161.00
7969195	56.12004	161.00
7969196	56.20001	55.00
7969197	56.11003	97.00
7969198	56.12004	161.00
7969199	56.20003(a)	97.00
7969200	56.12013(a)	55.00
7981001	56.14101(a)(2)	161.00
7981002	56.14100(c)	161.00
7981004	56.14100(b)	55.00
7981005	56.14132(a)	55.00
7981006	56.12005	55.00

WEST 2000-520-M

7981052	56.5002	850.00
7981056	56.5001(a)/.5005	850.00
7981059	104(b) of Act	750.00

7981060	104(d)(2) of Act	\$3,500.00
7981061	109(a) of Act	55.00
7981063	104(d)(2) of Act	3,500.00

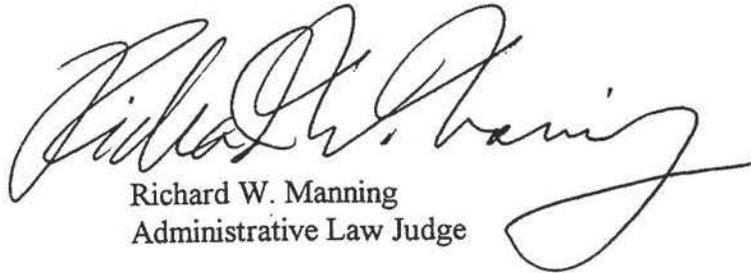
WEST 2000-251-M

7969707	56.12002	550.00
7969709	56.12002	550.00
7969710	56.12002	550.00
7969711	56.12001	550.00
7969712	56.14100(b)	300.00
7969713	56.12002	550.00
7969714	56.12002	550.00
7969715	56.12008	300.00
7969716	56.12001	550.00
7969717	56.12002	550.00
7969718	56.12002	550.00
7969722	56.12008	550.00

Total Penalty	\$108,067.00
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ORDER DIRECTING THAT PENALTIES BE PAID

Bevan Builders, Inc., doing business as Mariposa Aggregates, is **ORDERED TO PAY** the Secretary of Labor the sum of \$108,067.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

Distribution:

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Wayne R. Bevan, President, Mariposa Aggregates, P.O. Box 942, Mariposa, CA 95338 (Certified Mail)

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 18, 2001

COMPLAINANTS:	:	DISCRIMINATION PROCEEDINGS
	:	
JOHN SASSE,	:	Docket No. LAKE 2000-150-DM
	:	NC MD 00-07
ERNEST SHIMPA,	:	Docket No. LAKE 2000-151-DM
	:	NC MD 00-08
JOEL LAWRENCE,	:	Docket No. LAKE 2000-152-DM
	:	NC MD 00-09
KERRY GERSICH,	:	Docket No. LAKE 2000-153-DM
	:	NC MD 00-10
NOLAN POITRA,	:	Docket No. LAKE 2000-154-DM
	:	NC MD 00-11
ALAN POITRA,	:	Docket No. LAKE 2000-155-DM
	:	NC MD 00-12
DEAN BREKKE,	:	Docket No. LAKE 2000-156-DM
	:	NC MD 00-13
KEVIN FIDELDY,	:	Docket No. LAKE 2000-157-DM
	:	NC MD 00-14
DONALD RAGSTED,	:	Docket No. LAKE 2000-158-DM
	:	NC MD 00-15
PAUL HAFF,	:	Docket No. LAKE 2000-159-DM
	:	NC MD 00-17
JEFF GOVI,	:	Docket No. LAKE 2000-160-DM
	:	NC MD 00-18
RANDY HUSETH,	:	Docket No. LAKE 2000-161-DM
	:	NC MD 00-19
RANDY GREEN,	:	Docket No. LAKE 2000-162-DM
	:	NC MD 00-20
LANCE OMERSA,	:	Docket No. LAKE 2000-163-DM
	:	NC MD 00-21
JEFF GRAVES,	:	Docket No. LAKE 2000-164-DM
	:	NC MD 00-22
DOUG HOFFET,	:	Docket No. LAKE 2000-165-DM
	:	NC MD 00-27
SHAWN MORGAN,	:	Docket No. LAKE 2000-168-DM
	:	NC MD 00-30
FRED MILLER,	:	Docket No. LAKE 2000-169-DM
	:	NC MD 00-31

RHYS G. LAYTON,	:	Docket No. LAKE 2000-170-DM
	:	NC MD 00-39
v.	:	
	:	
LAKEHEAD CONSTRUCTORS,	:	Minntac Plant
Respondent	:	Mine ID 21-00820 AQF

DECISION

Appearances: Thomas F. Andrew, Esq., Brown, Andrew & Signorelli, P.A., Duluth, Minnesota, for Complainants,
Joseph J. Mihalek, Esq., Fryberger, Buchanan, Smith & Frederick, P.A., Duluth, Minnesota, for Respondent.

Before Judge Zielinski

These cases are before me on complaints of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c). A hearing was held on March 15, 2001, in Duluth, Minnesota. Following receipt of the hearing transcript, the parties submitted briefs. For the reasons set forth below, I find that Lakehead did not discriminate against the Complainants and dismiss the complaints.

The Controversy

The Complainants were referred by their union, Plumbers & Pipefitters Local Union #589 (Local 589), to perform work for Lakehead Constructors. The job was at a mine site and was to begin on January 4, 2000. In order to satisfy the training requirements of the Act they attended a Mine Safety and Health Administration (MSHA) certified training course on January 3, 2000, which lasted four hours.¹ They contend that 30 U.S.C. § 825(b)² requires that they be paid by Lakehead at their regular hourly rate for attending the training.

¹ Complainant Layton attended a three hour training session on February 25, 2000.

² 30 U.S.C. § 825(b) provides:

Any health and safety training provided under subsection (a) of this section shall be provided during normal working hours. Miners shall be paid at their normal rate of compensation while they take such training, and new miners shall be paid at their starting wage rate when they take the new miner training. If such training shall be given at a location other than the normal place of work, miners shall also be compensated for the additional costs they may incur in attending such training sessions.

Lakehead contends that Complainants were not “miners” as defined by the Act at the time of the training and, consequently, are not entitled to compensation. When Lakehead did not pay Complainants for attending the training, they filed complaints of discrimination with MSHA, pursuant to 30 U.S.C. § 815(c)(2). MSHA investigated the complaints, determined that Lakehead had not violated the Act and notified Complainants of their right to file an action on their own behalf before the Commission. These complaints followed.

Findings of Fact

Lakehead Constructors is a heavy industrial contractor that performs construction and maintenance work for various companies, some of which operate mines. When the work is performed at a mine site, Lakehead is an independent contractor subject to the Act. 30 U.S.C. § 802(d). Any of its employees working at a mine site are miners who must be trained, as required by the Act. Many of Lakehead’s jobs are of short duration, e.g., two to three weeks, and it does not maintain a large permanent work force. In order to obtain tradesmen, it contracts with local unions, including Local 589.³ The contracts contain exclusive hiring clauses that require Lakehead to contact the union for tradesmen that it will need for a particular job.⁴ The union then identifies members who are available and meet the qualifications of workers needed and refers the applicants to Lakehead. Lakehead may reject a referred applicant for any non-discriminatory reason.⁵

Prior to January 2000, Lakehead had provided MSHA training to tradesmen when required and paid them at their regular hourly rate for the time spent in training sessions. It passed the cost of these payments through to the mining companies it had contracted to perform work for. By early 1999, however, some companies were beginning to object to paying for the cost of training. Specifically, U.S. Steel Group, a Unit of USX Corporation (USX), advised Lakehead, by letter dated March 18, 1999, that it expected “that all employees working at our plant site have previously received all necessary MSHA certification prior to entering our facility,” the import being that USX would no longer pay for training costs. USX’s position was based on cost containment considerations and its belief that unions were being compensated separately for training expenses through contributions to various fringe benefit funds. Lakehead advised USX that changes to the existing training compensation practice could not be implemented prior to expiration of its union contracts in June of 1999.

Lakehead’s president and chief executive officer, Dennis Hallberg, informed the

³ Lakehead is a party to a collective bargaining agreement entitled National Maintenance Agreement (NMA), which incorporates the provisions of Local 589’s contract with the Iron Range Plumbing Contractors Association.

⁴ Article V, Section 1 of the contract with Local 589, provides that the union “shall be the exclusive source of referrals of applicants for employment.” Resp. Ex. 13, at p. 5.

⁵ Article V, Section 6 of the contract provides, *inter alia*, that the “Employer retains the right to reject any job applicant referred by the Union.” *Id.* at p. 6

tradesmen unions of USX's position and warned them, prior to expiration of the contracts, that it would soon come to pass that Lakehead would no longer be reimbursed for payments made to tradesmen attending MSHA training and that it would not assume that cost. Rather, it would insist that tradesmen referred by the unions have all necessary MSHA training as a condition of eligibility for employment with Lakehead for any work on mine properties. Lakehead attempted to negotiate provisions in new contracts covering the post-June, 1999, period that addressed the issues raised by USX. It was successful in securing agreement with several local unions.⁶ However, Lakehead was unable to reach an agreement with Local 589 on the training issue and the current contract provides only that the parties will attempt to negotiate a supplemental contractual provision regarding training. In many discussions between Hallberg and John Grahek, Local 589's business manager, Lakehead consistently took the position that it would insist that tradesmen referred by Local 589 for work at a mine site have current MSHA training certificates as a condition of employment and Local 589 insisted that miners be paid for time spent in training.

The present controversy had its origin on December 28, 1999, when Lakehead's director of human resources, Brian Johnson, called Grahek and informed him that union members were needed to perform work during a 2-3 week shutdown at USX's Minntac plant beginning on January 4, 2000. Because the plant was a mine site, he advised Grahek that the workers referred would have to have current MSHA training certificates. Grahek was unable to locate enough certified workers, so arrangements were made to conduct training sessions. Local 589 did not have a certified MSHA trainer. Lakehead agreed to provide one of its certified trainers to conduct the sessions. Grahek offered use of the Local 589 union hall, because it was more convenient for the prospective trainees. Local 589 handled all of the administrative tasks associated with the training. It determined who to invite to the training sessions and notified those members of the time and location. Lakehead did not know who had been invited to, or who would attend, the training sessions until they appeared for training. While Local 589 instructed the Complainants to attend the sessions in order to qualify to work at USX's mine site, they were not obligated to attend the training sessions. Likewise, those who attended were not obligated to work for Lakehead and could use their MSHA certification to work at any mine site.

While there are some minor disagreements over the language used during the discussions about the training sessions, the lines of this controversy were clearly drawn prior to the January 3, 2000, session. As Grahek acknowledged on cross-examination, prior to the training session, he knew that Lakehead was not going to pay the union members for attending the training session. He informed union members attending that if Lakehead did not pay them, that a grievance would be filed. Lakehead, conversely, knew that Local 589 would file a grievance and

⁶ Under the typical agreement, the unions would establish MSHA training programs and provide training to their members and Lakehead would make payments based upon the number of hours union members worked for it. For the first year of the five year contracts Lakehead would contribute \$0.05 per hour worked by a union member to a union training fund. The payments would increase by \$0.05 per hour each year, reaching \$0.25 per hour worked in the fifth year of the contract. The payments could be used at the union's discretion to cover training costs and/or compensate members for time spent in training.

take every step it could to secure payment of its members.⁷

Union members who responded affirmatively to Local 589's solicitation of workers for the Lakehead/USX job, reported to the union hall prior to the 7:00 am start of the January 3, 2000 training session. There they received from Grahek a referral slip for the Lakehead job and turned it over to a union steward for that job. Steven Jones, Lakehead's safety manger, who conducted the training session distributed certain forms required of prospective Lakehead employees.⁸ Complainants filled out and executed the forms and returned them to Jones.⁹ He was the only representative of Lakehead at the training session and was not authorized to hire Lakehead employees. At the end of the session, Jones issued training certificates to Complainants. The following morning they reported to USX's Minntac plant and began working on Lakehead's project.

Conclusions of Law

Judicial and Commission precedent frame the ultimate issue in these cases as being whether Complainants were miners at the time they attended the MSHA training sessions. In *Emery Mining Corp. v. Secretary of Labor*, 783 F.2d 155 (10th Cir. 1986), the court reversed a Commission decision requiring payment of persons who voluntarily obtained MSHA training prior to becoming employed as miners by Emery Mining Corporation. The claimants in that case had contacted Emery directly or a job placement service and had been advised to secure MSHA training to enhance their chances of employment. They obtained the training at their own expense, were subsequently hired by Emery and sought compensation for time spent in training and other expenses. The court held that the clear wording of the Act restricted entitlement to compensation to "miners" and, since it was undisputed that the complainants there were not

⁷ Complainants filed a grievance under the NMA that eventually resulted in a decision that they were entitled to be paid for the hours spent in MSHA training. Lakehead has not sought judicial review of the decision and Complainants have not taken any steps to enforce it. Lakehead later unilaterally decided to give each of the complainants two hours of pay. As a result of those payments the present claims are reduced to two hours' pay (one hour for Complainant Layton). Lakehead had asserted in its answer to the petition that the payments were in settlement of the NMA grievances and these claims. However, its president and chief executive officer testified that the decision to make the payment was voluntary and was not part of an agreement to settle any claims.

⁸ The forms were a Dept. of the Treasury Form W-4, a U.S. Dept. of Justice Immigration and Naturalization Service Employment Eligibility Verification, Lakehead's New Employee Registration form, Lakehead's Alcohol/Drug Testing Program Acknowledgment Form, and, Lakehead's Disciplinary Policy & Procedure Acknowledgment Form.

⁹ Section 3 provided that required forms were to be completed "prior to being hired." Resp. Ex. 13, at p 5.

“miners”¹⁰ or employed by Emery at the time they obtained the training, Emery had no obligation under the Act to compensate them.

Subsequently, in *Westmoreland Coal Co.*, 11 FMSHRC 960 (June 1989), the Commission held that individuals who had been laid off by Westmoreland Coal Company and who Westmoreland advised would enhance their chances of being recalled if they obtained MSHA training were not entitled to compensation for time spent in training prior to being recalled. The Commission concluded that its prior precedent to the effect that individuals were entitled to such compensation if the operator relied upon the training they had obtained to hire or recall them had been overruled by *Emery*. It rejected the Secretary’s argument in that case that the complainants’ “established relationship with the operator”, i.e., their prior employment and their recall rights under a union contract, distinguished their case from *Emery*. Rather, the Commission found “no persuasive basis upon which to distinguish this case from the Tenth Circuit’s decision in *Emery* and in the absence of contrary judicial precedent we will follow that decision.” *Id.* At 964.

Complainants attempt to distinguish their cases from *Emery* and *Westmoreland* by arguing that they had been hired by Lakehead prior to commencement of the training sessions. Complainant Haff testified that he felt that he was hired by Lakehead when Grahek gave him a referral slip. Complainant Fideldy testified that he felt that he was hired by Lakehead when he gave his introduction slip to his union steward. Complainants’ attempt to distinguish themselves from the complainants in *Emery* and *Westmoreland* fails, both factually and legally.

As noted above, Local 589’s contract clearly gives it the exclusive right to refer “applicants for employment,” not the right to determine who will be employed by Lakehead, which retained the contractual “right to reject any job applicant referred by the Union.” Neither Haff, nor Fideldy, had spoken to anyone associated with Lakehead up to the time they claim to have been hired. At that time, Lakehead knew nothing about them and did not know that they had been referred as applicants for employment. Lakehead’s only representative at the training sessions had no hiring authority.¹¹ While complainants filled out employment forms, the forms are required prior to commencement of employment with Lakehead and Local 589’s contract clearly states that required forms must be completed “prior to being hired.” Complainants were applicants for employment at the time they attended the training sessions and were fulfilling a qualification for employment with Lakehead to work at USX’s mine site. Like the applicants in *Emery*, they were not miners at the time and are not entitled to compensation for the time spent in

¹⁰ The Act defines a “miner” as “any individual working in a coal or other mine.” 30 U.S.C. § 802(g).

¹¹ Complainants argue that Jones should be found to have had hiring authority because the training process was virtually the same as it was prior to January 2000 and union members had been paid for attending training in the past. That history, however, does not evidence that Jones had hiring authority at any time. The un rebutted testimony of Lakehead’s president and chief executive officer, its director of human resources and Jones himself, established that he had no authority to hire Lakehead employees.

training.

Even if they had become employees of Lakehead at the beginning of the training sessions, that would not bring them within the definition of miners. Lakehead is not a mining company. It is an independent contractor subject to the Act only when it performs work at a mine site. There is no evidence that Lakehead was performing any work at a mine site on January 3, 2000, the date of the first training session. As the Commission reiterated in *Westmoreland*, “the Mine Act is a health and safety statute, not an employment statute.”

11 FMSHRC at 964 (citing, *Peabody Coal Co.*, 7 FMSHRC 1357 (Sept. 1985) and *Jim Walter Resources*, 7 FMSHRC 1348 (Sept. 1985), *aff'd sub nom, Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C.Cir. 1987)). Rights bestowed and obligations mandated by the Act are not to be determined through interpretation of private contractual agreements, such as employment or collective bargaining contracts. *Id.*¹² As in *Peabody*, the question of whether complainants have a claim for wages based upon their claimed status as employees, is essentially “of a private, contractual nature . . . [and is] appropriately resolved by the grievance-arbitration process.” *Peabody*, 7 FMSHRC at 1364. The instant dispute was, indeed, resolved *in complainants' favor* through the grievance process under the National Maintenance Agreement. See n. 7, *supra*.

I find no reason to distinguish the claims here from those in *Emery* and *Westmoreland* and, in the continued absence of contrary judicial opinions and the failure by Congress or the Secretary to address the issue, hold that the Complainants were not “miners” at the time they attended the training and are not entitled to compensation under the Act.

¹² See also, *Brock v. Peabody Coal Co.*, 822 F.2d at 1149, n. 54 (“We have no reason to disagree with the statement by the court in *National Indus. Sand Ass'n [v. Marshall]*, 601 F.2d 689 (3rd Cir. 1979)] 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 operations.’ 601 F.2d at 704 (emphasis in original).”).

Order

Based upon the foregoing, Complainants' claims of discrimination are dismissed.¹³



Michael E. Zielinski
Administrative Law Judge

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Joseph J. Mihalek, Esq., Teresa O'Toole, Esq., 700 Lonsdale Building, 302 West Superior Street, Duluth, MN 55802 (Certified Mail)

/mh

¹³ Resp. Ex. 3 purports to be a copy of a letter, dated November 22, 1999, from an attorney to an official of another local union, Painters Local 106. It discusses Lakehead's position of requiring current MSHA certifications for workers referred for employment. Complainants objected to introduction of the letter on grounds of relevance and attorney-client privilege. Respondent claims the letter is relevant and that the privilege has not been properly asserted and/or has been waived. There is no need to resolve the privilege issues because the letter is not probative of any factual issue in these cases. While it discusses the ultimate issue presented here, there is no evidence connecting it to any party in these cases. It has not been considered in reaching this decision.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2001-22-M
Petitioner	:	A.C. No. 31-02130-05502
v.	:	
	:	
MARTIN MARIETTA AGGREGATES,	:	
Respondent.	:	Franklin Quarry

DECISION

Appearances: Melody S. Wesson, and Terry Lingenfelter, U. S. Department of Labor, MSHA, Birmingham, Alabama, for the Secretary;
W. Scott Hunt, Martin Marietta Aggregates, Castle Hayne, North Carolina, for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Civil Penalty filed by the Secretary of Labor alleging that Martin Marietta violated 30 C.F.R. Section 56.14132(a).

The basic underlying facts in this case are not disputed. On August 10, 2000, MSHA Inspector Darrell Brennan inspected Martin Marietta's Franklin Quarry, an open pit quarry. He inspected a water-haul truck which was parked at a stockpile. The truck was provided with a reverse activated alarm, but it did not work. Brennan issued a citation alleging a violation of Section 56.14132(a) which provides as follows: "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

Martin Marietta did not contest any of the above facts. As a defense, it argues that it was improperly cited, as the truck was not available for use on August 10. In this connection, John W. Allgood, Jr., the assistant plant manager at the quarry, indicated that on August 10 it was not intended by Martin Marietta, to use the water-haul truck, which is used to control dust on the site, inasmuch as the roads were wet, as about a half inch of rain had fallen the night of August 9 and the morning of August 10 prior to the inspection. He indicated that according to company policy, the truck is not ready to be used until a pre-shift examination is performed. Since at the time of the inspection the pre-shift had not yet been performed as the roads were still

wet, Martin Marietta had not intended to use the truck at that time. In this connection Martin Marietta further argues that since 30 C.F.R. Section 56.14100 requires a pre-shift examination of equipment before placing that equipment in operation, the haul truck could not have been put in use prior to the completion of the pre-shift examination, and it was improperly cited.

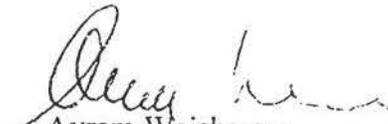
According to the unambiguous wording of Section 56.14132(a) supra, an audible warning device provided on equipment as a safety feature "... shall be maintained in functional condition." Nothing in the plain wording of Section 56.14132(a), supra, limits its applicability to self-propelled mobile equipment that is in use or available for use. To make such a ruling, as in essence urged by Martin Marietta, would have the effect of amending a regulation that is clear on its face. Accordingly, I find Martin Marietta's position to be without merit.

Further, I note that Martin Marietta's reliance on Secretary of Labor v Giant Cement Co. 13 FMSHRC 286 (Judge Melick, Feb. 25, 1991), is misplaced. In Giant Cement supra, the issue presented was whether the operator violated 30 C.F.R. Section 56.14100(b) which provides, that safety defects "... shall be corrected in a timely manner." Judge Melick held that it was premature to find a violation under Section 56.14100(b) i.e., that corrections were not made in a "timely" fashion, since a pre-shift examination had not yet been made when cited, nor was it required before the cited loader would next be operated. In contrast, the cited standard herein does not pertain to correcting safety defects in a timely manner, but requires that warning devices on mobile equipment be maintained in functional condition. Inasmuch as the evidence establishes that the alarm did not operate, it had not been maintained in functional condition, and Martin Marietta was properly cited.

According to Allgood, the truck had been used on August 9 and no defects were noted; normally a pre-shift is performed prior to use; that there was no intention to use the truck when cited as it was not needed since the roads were wet; and that it is standard procedure that if a defect is found on pre-shift examination, the equipment is tagged out and the defect is repaired. Considering these facts, which have not been rebutted by the Secretary, I find that the level of Martin Marietta's negligence was negligible. Take into account the factors set forth in Section 110(i) of the Act as stipulated to by the parties, I find that a penalty of \$25.00 is appropriate for this violation.

Order

It is Ordered that Martin Marietta shall, within 30 days of this Decision, pay a total civil penalty of \$25.00.


Avram Weisberger
Administrative Law Judge

Distribution List (Certified Mail)

Melody S. Wesson, Conference and Litigation Representative, and Terry Lingenfelter conference & Litigation Representative, MSHA, U. S. Department of Labor, MSHA, 135 Gemini Circle, Suite 212, Birmingham, AL, 35209

W. Scott Hunt, Safety Engineer, Martin Marietta Aggregates, P.O. Box 398, Castle Hayne, NC, 28429

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3868

May 21, 2001

ALEXIS M. HERMAN	:	DISCRIMINATION PROCEEDINGS
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), <u>ex rel.</u>	:	Docket No. WEVA 99-152-D
JESSIE A. DANIEL et al.,	:	HOPE-CD-99-05
Complainants,	:	
v.	:	Mine: Douglas No. 1 Mine
HUBERT PAYNE, ERIC CHARLES,	:	Mine ID: 46-08462
WYOMING POCAHONTAS LAND	:	
COMPANY, INC., PAUL STOVER,	:	Mine: War Eagle
P.E.S. ENTERPRISES AND SKIN	:	Mine ID: 46-08550
POPLAR COAL CORP.,	:	
Respondents	:	Docket No. WEVA 99-153-D
	:	HOPE-CD-99-06
ALEXIS M. HERMAN	:	
SECRETARY OF LABOR	:	
UNITED STATES DEPARTMENT	:	Mine: Douglas No. 1 Mine
OF LABOR (MSHA) <u>ex rel.</u>	:	Mine ID: 46-08462
BETTY MULLINS,	:	
Complainants,	:	
	:	Mine: War Eagle
HUBERT PAYNE, ERIC CHARLES,	:	Mine ID: 46-08550
WYOMING POCAHONTAS LAND	:	
COMPANY, INC., PAUL STOVER,	:	
P.E.S. ENTERPRISES AND SKIN	:	
POPLAR COAL CORP.	:	
Respondents.	:	

DECISION

Appearances: Emily Goldberg-Kraft, Esquire, Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Complainants;
James F. Bowman, Mine Safety & Health Administration, Mount Hope, West Virginia, for the Complainants;
James G. Jones, Mine Safety & Health Administration, Mount Hope, West Virginia, for the Complainants;
Mark E. Heath, Esquire, Charleston, West Virginia, for Respondents, Payne, Charles and Wyoming Pocahontas Land Company;
William D. Stover, Esquire, Beckley, West Virginia, for Respondents, Stover, P.E.S. Enterprises and Skin Poplar Coal Corporation.

Before: Judge Barbour

These consolidated discrimination cases arise under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815 (c)(2)). In Docket No. WEVA 99-152-D, the Secretary alleges that Jessie Daniel and nine other named Complainants were unlawfully discriminated against by Hubert Payne, Eric Charles, Wyoming Pocahontas Land Company, Inc., Paul Stover, P.E.S. Enterprises and Skin Poplar Coal Corporation. The Complainants are coal haulage truck drivers who worked for B&J Trucking Company. The Secretary charges that on or about January 24 and January 25, 1999, they were illegally discharged by the Respondents because the Complainants refused to haul coal over allegedly hazardous roads and because they complained to the Secretary's Mine Safety and Health Administration (MSHA) about the roads' conditions. In addition to relief for the Complainants, the Secretary proposes the Respondents pay a civil penalty of \$4,500.00 for their violation of Section 105(c).

B&J Trucking Company is owned and operated by Betty Mullins. In Docket No. WEVA 99-153-D, the Secretary alleges that Mullins was illegally discriminated against on or about January 24 and January 25, 1999, when her company was replaced by other coal haulage companies because she supported her drivers' refusal to haul coal due to the allegedly hazardous roads and because she supported her drivers' right to file a complaint reporting the conditions. In addition to relief for Mullins, the Secretary proposes that the Respondents pay a civil penalty of \$4,500.00 for their violation of Section 105(c).

The Respondents denied all of the allegations, asserting in part that the Respondents quite their jobs and freely chose to work elsewhere.

The cases were called for hearing in Beckley, West Virginia. On the morning of the second day of the hearing, counsels engaged in extensive off-the-record discussions regarding a proposed settlement of the cases. In order to evaluate the settlement proposals and to consider new information regarding the financial condition of one of the main Respondents, Wyoming Pocahontas Land Company, the parties requested the hearing be adjourned. The request was granted (Tr. I at 363-365).

For the next several months counsels exchanged information and further consulted with one another and their clients. Indeed, negotiations continued almost until the day the hearing resumed. Shortly before it reconvened, the parties agreed to settle all of the claims set forth in Docket No. WEVA 99-152-D, and counsel for the Secretary filed a motion to approve the settlement.

When the hearing reopened, I orally approved the motion. I stated that I would confirm the approval in writing when a decision was issued (Tr. II at 7). Counsel for the Secretary also announced that in the remaining case, Docket No. WEVA 99-153-D, Mullins had reached a settlement with Paul Stover, P.E.S. Enterprises and Skin Poplar Coal Corp. In view of the settlement, counsel requested the three Respondents be excused from further participation in the hearing. I stated that I understood counsel subsequently would file a motion to approve the partial settlement and as requested I excused the Respondents and their counsel from the resumed

hearing (Tr. II at 4-5).

Counsel for the Secretary then began to present evidence regarding Mullins' complaint against the remaining Respondents. After one a full day of testimony, I received a telephone call from counsel for the remaining Respondents advising me that he had reached a settlement with Mullins and the Secretary. When the hearing was called to order the following morning, counsel for the remaining Respondents reiterated that the matter had been fully and finally settled. Counsel stated the terms of the settlement. I inquired of counsel for the Secretary whether she and her client agreed with the terms. She answered that they did (Tr. II 142-143). I orally approved the settlement and stated that I would formally approve the settlement once a settlement motion was received (Tr. II 143).

**THE SETTLEMENTS, THEIR APPROVAL AND
THE ORDERS TO PAY**

DOCKET NO. WEVA 99-152-D

On June 16, 2000, the Wyoming Pocahontas Land Company filed for Chapter 11, bankruptcy protection in the U.S. Bankruptcy Court for the Eastern District of Kentucky. In view of the bankruptcy, the parties agree that the Respondents will pay a total settlement amount of \$15,000.00 to the Complainants to be paid in 10 equal amounts of \$1,500.00 to each Complainant.

Counsel for the Secretary states on behalf of the Complainants that the settlement amount will effectuate the intent and purposes of the Act. In addition, the parties agree to bear their own expenses (Sec. Motion 2-3). The settlement motion also states that nothing in the settlement shall be construed as an admission of a violation of the Act by any of the Respondents (Mot. 3).

I conclude that the settlement amount is reasonable and that it comports with the Act. Accordingly, the settlement is **APPROVED**. The Respondents are **ORDERED** to pay each of the Complainants \$1,500.00, a total of \$15,000.00, and upon payment of the total amount, the proceeding is **DISMISSED**.

DOCKET NO. WEVA 99-153-D

On June 16, 2000 the Wyoming Pocahontas Land Company filed for Chapter 11, bankruptcy protection in the U.S. Bankruptcy Court for the Eastern District of Kentucky. In view

of the bankruptcy the parties have agreed to pay a total of \$10,000 to Betty Mullins within one month of the agreement to settle. Of the total, \$5,000.00 is to be paid by Paul Stover, P.E.S Enterprises and Skin Poplar Coal Corp. and \$5,000.00 is to be paid by Hubert Payne, Eric Charles, and Wyoming Pocahontas Land Company, Inc.

Counsel for the Secretary states on behalf of the Complainant that the settlement amount will effectuate the intent and purposes of the Act. In addition, the parties agree to bear their own expenses (Mot. 2-3). The settlement motion also states that nothing in the settlement shall be construed as a violation of the Act by any of the Respondents (Mot. 3).

I conclude that the settlement amount is reasonable and that it comports with the Act. Accordingly, the settlement is **APPROVED**. If they have not already done so, the Respondents are **ORDERED** to pay Betty Mullins a total of \$10,000.00. Of the total, \$5,000.00 is to be paid by Paul Stover, P.E.S Enterprises and Skin Poplar Coal Corp. and \$5,000.00 is to be paid by Hubert Payne, Eric Charles, and Wyoming Pocahontas Land Company, Inc. Upon payment of the total amount this proceeding is **DISMISSED**.¹


David F. Barbour
Chief Administrative Law Judge

Distribution:

Emily Goldberg-Kraft, Esquire, Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203

James F. Bowman, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 100 Bluestone Road, Mount Hope, WV 25880

James G. Jones, Investigator, Mine Safety and Health Administration, 100 Bluestone Road, Mount Hope, WV 25880

Mark E. Heath, Esquire, HEENAN, ALTHEN & ROLES, One Valley Square, Suite 1380, P. O. Box 2549, Charleston, WV 25329-2549

William D. Stover, Esquire, United National Bank Building, 129 Main Street, Beckley, WV 25802-1732

¹ Counsels orally advised me that the Bankruptcy Court has approved the financial obligations undertaken by Wyoming Pocohontas Land Company.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 29, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-112-M
Petitioner	:	A.C. No. 02-02618-05507
v.	:	
	:	South West Sand & Gravel
SOUTH WEST SAND & GRAVEL, INC.,	:	
Respondent	:	

DECISION

Appearances: Rebecca A. Baird, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Roger A. Van Camp, President, South West Sand & Gravel, Inc., Glendale, Arizona, *pro se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against South West Sand & Gravel, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$590.00. A hearing was held in Phoenix, Arizona. For the reasons set forth below, I vacate three citations, affirm the rest and assess a penalty of \$425.00.

Settled Citations

Prior to the hearing the parties filed a Partial Settlement Agreement in which the Secretary moved to vacate Citation Nos. 7945392, 7945394 and 7945395 and the Respondent agreed to pay the proposed penalties for Citation Nos. 7945228, 7945229, 7945393 and 7945400 in full. The parties reaffirmed this agreement at the hearing. (Tr. 6-8.) Accordingly, the provisions of the agreement will be carried out in the order at the conclusion of this decision.

Background

As its name suggests, South West Sand & Gravel is sand and gravel operation in Maricopa County, Arizona. It is a small company consisting of four employees.

On July 6, 2000, MSHA Inspector Keith J. Campbell and MSHA Inspector-trainee Terry L. Ward conducted an inspection of the mine. They issued several citations to the company, two of which were contested at the hearing.

Citation No. 7945397 charges a violation of section 56.14100(d), 30 C.F.R. § 56.14100(d), because:

There was a Ford 8000 truck with a 1000 gallon water tank installed on it taken out of service, allegedly. The tank was secured onto the truck frame with 1 inch cables. One cable was loose and one cable had fallen off. There was no record available as to when this truck was first removed from service. It was parked on the ready line with keys in it and not tagged out.

(Jt. Ex. 2.)

Citation No. 7945398 alleges a violation of section 56.14103(b) of the regulations, 30 C.F.R. § 56.14103(b), because:

The caterpillar 988 B front end loader had 2 broken and cracked front windows. One window had several holes and numerous cracks directly in front of the operators station and the other was to the right of the operators station. This was severely cracked. Both windows made visibility an unsafe condition and the large window created a hazard to the operator.

(Jt. Ex. 1.)

Findings of Fact and Conclusions of Law

Citation No. 7945397

Section 56.14100(d) requires that:

Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

The inspectors observed a water truck during the inspection which appeared to be defective because the straps holding the water tank on the back of the truck were not properly

attached. The rear strap had come loose and one end of it was lying on the ground. The front strap was still around the tank, but was loose. The inspectors were told by Mr. Van Camp that the truck had been taken out of service so that the tank could be safely secured to the back of the truck. Inspector Campbell asked to be shown the records recording the defects and the fact that the truck had been taken out of service. The company could not produce the records.

Based on this, I conclude that the Respondent violated section 56.14100(d) of the regulations as alleged.

Citation No. 7945398

Section 56.14103(b) provides, in pertinent part, that: "If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed." The Respondent argues that windows were not unsafe. I find that the evidence does not support its position.

Inspector Ward testified that as he and Inspector Campbell approached the front-end loader, he noticed that the front windshield was broken. He stated that he climbed up into the cab to see how badly it was broken and he found that it had multiple cracks in it that "went above my line of vision." (Tr. 27.) He said that the cracks covered 60 to 70 percent of the windshield from top to bottom and went all the way across the windshield. He related that vision through the windshield was "all distorted." (*Id.*) He also testified that the left corner glass was "totally spiderwebbed." (Tr. 28.) Inspector Campbell testified that the windows were "so badly holed and cracked that I don't know how the driver made it from the pit to where he parked it." (Tr. 95.)

Mr. Van Camp testified that neither of the inspectors got into the driver's compartment of the loader. He further stated: "Quite frankly, I can't tell you how the cracks arranged in the windshield at the time in July 2000. I can testify to you there were no holes in the windshield, and the safety glass was not broken on the inside." (Tr. 158.) In addition, the company offered into evidence the affidavits of two employees and a former employee which stated that the windshield did not have any holes "in the glass area." (Resp. Exs. B, C and D.)

I find the inspectors' testimony convincing. Their descriptions were detailed and leave little doubt as to the condition of the windshield and side glass on the loader. Furthermore, on April 9, 2001, Inspector Ward drew pictures of the two windows from memory which demonstrate that visibility through the windows was obscured so that the loader could not be operated safely.¹ (Govt. Ex. 1.)

¹ The Respondent argues that because the drawings are not the same shape as the windows on the loader, which are triangular, they are somehow not valid. The issue, however, is whether visibility was obscured, not the shape of the windows. The drawings vividly depict obscured windows.

On the other hand, the company does not dispute that the windows were cracked, only that the windshield did not have holes in it.² I find that the windshield did have holes in it, but even if it did not, the cracks alone were severe enough to obscure the operator's vision.³ Accordingly, I conclude that the Respondent violated section 56.14103(b).

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

² I give little weight to the three affidavits for the following reasons: (1) No reason was given why the two employees and former employee were not available to testify at the hearing. (2) The three affidavits are worded almost identically, stating only that the windshield did not have holes in it and providing no other details. (3) One of the employees was not present on the day of the inspection. (4) The employees were not subject to cross-examination by the Secretary and I did not have an opportunity to observe them while they testified.

³ The Respondent correctly argues that a photograph would have greatly aided in the resolution of this citation. However, that argument cuts both ways. There does not appear to be any reason the company could not have taken a photograph of the loader at the time of the inspection to support its position.

The inspectors testified that there are several safety hazards contributed to by the loaders' windows being cracked and having holes in them. The loader is used to dig into a 30 foot high bank. When the digging occurs, loose and unconsolidated material, including rocks, falls on the loader. The windshield protects the operator from the falling material. When the windshield is cracked and has holes in it, it may not prevent the falling material from hitting the operator, or the falling material may shatter the windshield onto the operator. Moreover, with the operator's vision obscured, he could run into, or over, other pieces of equipment, he could run off of the road and tip the loader over, or he could run over another employee.

Since the loader spends most of its time digging into the bank, and since the material falling from the bank apparently caused the cracks and holes in the windshield, I find that if the windshield were not replaced that it is reasonably likely that an injury would result from the violative windshield and side window. I further find that the injury would be reasonably serious, ranging from cuts and bruises to the operator to the death of the operator or another employee.

Other than asking Inspector Campbell what data he had concerning injuries resulting from damaged windshields in Arizona (he had none), the Respondent did not present any evidence on the S&S issue. Accordingly, I accept the testimony of the inspectors concerning the hazards resulting from this violation and conclude that the violation was "significant and substantial."

Civil Penalty Assessment

The Secretary has proposed penalties of \$205.00 for two contested violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

The company has four employees. Therefore, I find that it is a small company. I further find that the company was moderately negligent in committing the contested violations. I find that the gravity of the violation concerning the loader was fairly serious, but that the gravity of the violation concerning the water truck was not serious.

The Respondent did not present any evidence to show that the penalty in this case would adversely affect its ability to continue in business. Accordingly, I find that the penalty will not adversely affect the company's ability to remain in business.

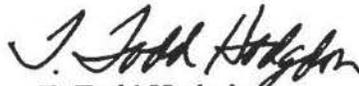
The Secretary did not present any evidence concerning the operator's history of previous violations or whether the company demonstrated good faith in attempting to achieve rapid compliance after notification of the violations. Consequently, I find that the operator has a good history of prior violations and did demonstrate good faith in abating the violations.

Taking all of these factors into consideration, I conclude that the penalties proposed by the Secretary are appropriate. Therefore, I assess the following penalties:

<u>Citation</u>	<u>Penalty</u>
7945228	\$ 55.00
7945229	\$ 55.00
7945393	\$ 55.00
7945397	\$ 55.00
7945398	\$150.00
7945400	<u>\$ 55.00</u>
Total	\$425.00

Order

Citation Nos. 7945392, 7945394 and 7945395 are **VACATED**. Citation Nos. 7945228, 7945229, 7945393, 7945397, 7945398 and 7945400 are **AFFIRMED**. Accordingly, South West Sand & Gravel, Inc., is **ORDERED TO PAY** a civil penalty of **\$425.00** within 30 days of the date of this decision.


T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Rebecca A. Baird, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105

Roger A. Van Camp, South West Sand & Gravel, Inc., P.O. Box 12455, Glendale, AZ 85318

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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 31, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2001-18
Petitioner	:	A.C. No. 46-07809-03525
v.	:	
	:	Kiah Creek Preparation Plant
PEN COAL CORPORATION/KIAH	:	
CREEK DIVISION,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration (“MSHA”), against Pen Coal Corporation (“Pen Coal”), pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), for an alleged violation of 30 C.F.R. § 77.1109(c)(1).

The parties filed Joint Stipulations (“JS”), Joint Findings of Fact (“JF”) and Joint Exhibits (“JEx.”), and cross Motions for Summary Decision and Responses, pursuant to 29 C.F.R. § 2700.67, asserting, among other things, that there are no genuine issues as to any material facts in this case.

I. Joint Stipulations

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.
2. Pen Coal Corporation is the owner and operator of the Kiah Creek Preparation Plant.
3. Operations of the Kiah Creek Preparation Plant are subject to the jurisdiction of the Act.

4. Pen Coal Corporation may be considered a large mine operator for purposes of 30 U.S.C. § 820(i).
5. The maximum penalty which could be assessed for this violation, pursuant to 30 U.S.C. § 820(a), will not affect the ability of Pen Coal Corporation to remain in business.
6. The inspector was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7192431.
7. A true copy of the citation listed in Paragraph 6 was served on Pen Coal Corporation or its agent, as required by the Act.
8. The citation listed in Paragraph 6 is authentic and may be admitted into evidence for the purpose of establishing its issuance, and not for the purpose of establishing the accuracy of any statements asserted therein.
9. MSHA's Proposed Assessment Data Sheet accurately sets forth: (a) the number of assessed penalty violations charged to the Pen Coal Corporation, Kiah Creek Preparation Plant, for the period from January 1997 through March 1999, and (b) the number of inspection days per month for the period from January 1997 through October 2000.
10. MSHA's Assessed Violations History Report, R-17 Report, may be used in determining appropriate civil penalty assessments for the alleged violation.

II. Joint Findings of Fact

1. On October 29, 1997, Terry Price, MSHA supervisor, held a meeting with Bruce Short, general manager for Pen Coal; Bill Gilkerson, T&R Trucking; and Millard Brewer, truck foreman for T&R Trucking. During the meeting, Price explained overlapping compliance measures to ensure compliance.
2. On April 24, 1998, Pen Coal and T&R Trucking ("T&R") entered into a Coal Transportation Agreement, whereby T&R would provide services as an independent contractor for the haulage of coal to Pen Coal's Kiah Creek Preparation Plant (the "preparation plant"). A copy of the Coal Transportation Agreement is attached as Exhibit 1.
3. Without Pen Coal's knowledge, on or about August 18, 2000, T&R subcontracted with Bill Walters Trucking to perform coal haulage services for T&R to the preparation plant.
4. On August 24, 2000, Bill Walters, the principal of Bill Walters Trucking, was driving the Western Star coal truck, number SR59-4.

5. Bill Walters was hauling coal from the Copley Trace surface mine to the Kiah Creek Preparation Plant.
6. On August 24, 2000, truck number SR59-4 was not equipped with a portable fire extinguisher.
7. Truck number SR59-4 was owned, maintained, serviced and driven exclusively by Bill Walters, a principal/employee of Bill Walters Trucking.
8. On August 24, 2000, MSHA Inspector Johnny E. Brown issued Citation No. 7192431 to Pen Coal for violation of 30 C.F.R. § 77.1109(c)(1). The citation charged low negligence, but was modified on October 3, 2000 at a conference to charge no negligence, stating, "In this particular instance, the negligence is reduced to one level below that of the contractor." A penalty of \$55.00 was assessed. A copy of Citation No.7192431 is attached as Exhibit 2.
9. On August 24, 2000, Inspector Brown issued Citation No. 7192430 to T&R Trucking for a violation of 30 C.F.R. § 77.1109(c)(1). A copy of Citation 7192430 is attached as Exhibit 3.
10. No citation was issued to Bill Walters Trucking for its failure to equip truck number SR59-4 with a portable fire extinguisher.
11. At the time of the August 24, 2000 inspection, Inspector Brown told J.R. Mullins, Pen Coal's safety director, that he had previously been instructed by his supervisors to write the next violation by Pen Coal's contractor as a citation against Pen Coal.
12. T&R has its own maintenance and service department, which is responsible for inspecting, maintaining and servicing trucks used for haulage of coal to the preparation plant.
13. Pen Coal did not hire or contract with Bill Walters Trucking to perform services for Pen Coal.
14. Neither Pen Coal's employees, equipment nor activities contributed to the absence of a portable fire extinguisher on truck number SR59-4.
15. The violation was committed by Bill Walters Trucking's principal/employee.
16. The violation was abated by the principal/employee of Bill Walters Trucking.
17. Neither T&R nor Bill Walters Trucking submit inspection, maintenance or service reports to Pen Coal.

18. Pen Coal does not provide supplies, materials, machinery or tools to T&R or Bill Walters Trucking.

19. Pen Coal does not supervise the employees of T&R or Bill Walters Trucking.

20. Pen Coal employees never drive, ride in, or otherwise use vehicles owned by T&R or Bill Walters Trucking.

21. Pen Coal had no notice or reason to believe that T&R would subcontract with a subcontractor that would fail to equip its truck with a portable fire extinguisher.

22. Bill Walters Trucking had never worked as a contractor for Pen Coal or as a subcontractor for T&R at the preparation plant prior to approximately August 18, 2000.

23. The portable fire extinguisher in Western Star trucks, such as SR59-4, is stored inside the cab of the truck behind the driver's seat. It is not possible to tell from the outside of the truck whether the fire extinguisher is in place or not.

24. Pen Coal's employees had not observed that truck number SR59-4 was not equipped with a portable fire extinguisher.

25. Pen Coal's employees were not exposed to the danger posed by the absence of a portable fire extinguisher.

26. The loader operator, who was an employee of an independent contractor and who was the only employee working in the area, was stationed outside and was provided with and had access at all times to his own portable fire extinguisher.

III. Joint Exhibits

1. Coal Transportation Agreement
2. Citation No. 7192431
3. Citation No. 7192430
4. Violation history of T&R Trucking at the Kiah Creek Preparation Plant
5. Conference Report dated October 2, 2000

IV. Factual Background

As an independent contractor of Pen Coal at its Kiah Creek Preparation Plant, T&R Trucking (“T&R”) hauls coal from Pen Coal’s various mines to the preparation plant, and from the preparation plant to one of Pen Coal’s various coal loading facilities (JF 2). On or about August 18, 2000, without Pen Coal’s knowledge, T&R subcontracted with Bill Walters Trucking (“Bill Walters”) for assistance in its coal haulage services to the preparation plant (JF 3). Subsequently, on August 24, 2000, principal/employee Bill Walters, operating a Western Star truck, was hauling coal from the Copley Trace surface mine to the preparation plant (JF 4, 5). MSHA Inspector Johnny E. Brown inspected Walters’ truck at that time and discovered that it was not equipped with a portable fire extinguisher, which is normally stored in the cab behind the driver’s seat (JF 6, 23). As a consequence, Inspector Brown cited T&R and Pen Coal, but not Bill Walters, respecting this condition (JF 8, 9, 10). Citation No. 7192430, issued to T&R, alleged a violation of 30 C.F.R. § 77.1109(c)(1), for failure to equip the coal truck with a portable fire extinguisher; T&R did not contest the citation. Citation No. 7192431, at issue in this proceeding, charges Pen Coal with a “non-significant and substantial” violation of 30 C.F.R. § 77.1109(c)(1), describing the violation as follows:

The Western Star Coal Truck company number SR59-4 was not equipped with a portable fire extinguisher

(JE 2). The citation was abated twenty minutes later by principal/employee Bill Walters (JF 16).

V. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F. R. § 77.1109(c)(1) requires the following:

Mobile equipment, including trucks, front-end loaders, bulldozers, portable welding units, and augers, shall be equipped with at least one portable fire extinguisher.

The parties are in agreement that the violation occurred (JF 6, 15). The dispute arises out of Pen Coal’s position that the Secretary abused her discretion in citing the operator for a violation which none of its employees, equipment or activities caused (JF 7, 14). Pen Coal argues that it does not inspect the trucks of its contractors and is under no legal requirement to do so, and that it is reasonable for the company to have relied on T&R to maintain its vehicles and those of any subcontractor in good working condition. Furthermore, Pen Coal points out, none of its employees work with or alongside Bill Walters employees, it does not supervise T&R or Bill Walters employees, and the sole employee working in the area when the citation was issued (contract loader operator) had been provided with his own portable fire extinguisher. Finally, Pen Coal contends, citing Pen Coal for the violation at issue is based upon the Secretary’s erroneous position that she has unfettered discretion to hold the operator liable for every violation on its property, irrespective of the circumstances.

The Secretary argues that the production operator bears the overall responsibility for health and safety at the mine, as well as compliance with applicable laws and regulations, and that Pen Coal, although without fault, is strictly liable for all violations of the Act occurring on mine property, including those committed by its contractors. Moreover, the Secretary points to several citations issued to T&R exclusively, and overlapping compliance discussions MSHA held with Pen Coal and T&R management as a consequence, to establish that Pen Coal had been put on notice that it was liable for the violations of its contractors. Finally, the Secretary asserts that Pen Coal was cited for the instant violation because the operator was not providing any oversight of its independent contractors' inspection and maintenance programs, and that the decision to cite both operator and contractor was consistent with the safety promotion purpose of the Act.

Commission and court precedent support the Secretary's authority to hold an operator, although faultless itself, strictly liable for all violations of the Act occurring on its mine site, whether committed by its own employees or those of its contractors. *Mingo Logan Coal Company*, 19 FMSHRC 246, 249 (February 1997), *aff'd*, 133 F.3d 916 (4th Cir. 1998)(table) (citing *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981)). In instances of multiple operators, the Commission has also recognized the Secretary's "wide enforcement discretion" in proceeding against an operator, its independent contractor, or both, for violations committed by a contractor. *Id.* (citing *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 534, 538-39 (D.C. Cir. 1986) (reversing 6 FMSHRC 1871 (August 1984)). In recognizing the Secretary's enforcement authority, however, the Commission has noted its role in guarding against "abuse of discretion". *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994). A litigant challenging the Secretary's enforcement discretion bears a heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on a misunderstanding of the law. *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998) (citing *Mingo Logan*, 19 FMSHRC at 249-50 n. 5).

In reaching a conclusion as to whether an enforcement action constitutes an abuse of the Secretary's discretion, the Commission has considered, among other factors, the operator's day-to-day involvement in the mine activities, whether the operator is in the best position to affect safety, and whether the enforcement action is consistent with the purpose and policies of the Act. *Id.*

Review of the contract between Pen Coal and T&R for coal haulage services in no way delegates to T&R operation of Pen Coal's mines, including the Kiah Creek Preparation Plant, and the contract also contemplates subcontracting by T&R. Therefore, as production operator with the overall responsibility of running the plant, Pen Coal was properly held strictly liable for Bill Walters' failure to equip his truck with a portable fire extinguisher during its operation at Kiah Creek, despite the fact that no negligence was attributed to Pen Coal. Moreover, Pen Coal's reliance on the fact that it was ignorant of T&R's contract with Bill Walters neither negates its

overall responsibility of assuring compliance with applicable standards and regulations nor relieves it of liability. On the contrary, it emphasizes the soundness of holding the production operator liable. See, for example, the Commission's conclusion in *Mingo Logan*, 19 FMSHRC at 251, that holding a production operator liable for its independent contractors' violations provides an incentive to use contractors with strong health and safety records, where it quotes the Ninth Circuit's rationale in *Cyprus*, 664 F.2d at 1119-20:

The Court stated that holding owner-operators liable for violations committed by independent contractors promotes safety because "the owner is generally in *continuous* control of the *entire* mine" and "is more likely to know the federal safety and health requirements." *Id.* at 1119. The court also posited that "[i]f the Secretary could not cite the owner, the owner could evade responsibility for safety and health requirements by using independent contractors for most of the work." *Id.*

In this case, while Pen Coal was under no legal obligation to inspect T&R's and Bill Walters' trucks, its failure to inspect or monitor inspection of its contractors' trucks contributed to the violation. It is reasonable to conclude, for example, that Pen Coal's review of its contract truckers' daily inspection reports would have disclosed T&R's contract with Bill Walters and the condition of all trucks operating on the mine property. To the extent that Pen Coal failed to exercise any compliance oversight whatsoever, in light of repeated citations issued to T&R for safety violations and after MSHA had explained overlapping compliance, Pen Coal was negligent and courted being cited for the violations of its trucker contractors. Under these circumstances, I find that the Secretary did not abuse her discretion in citing both T&R and Pen Coal for the violation of Bill Walters.

B. Penalty

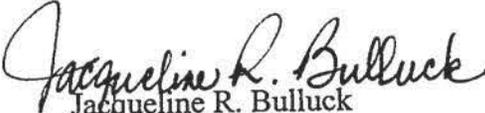
While the Secretary has proposed a civil penalty of \$55.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). See *Sellersburg Co.* 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

In assessing the appropriate penalty for this violation, I have considered the stipulations of the parties that Pen Coal is a large operator (JS 4), and that the proposed penalty will not affect the company's ability to remain in business (JS 5). The parties have provided T&R's history of violations, and while I note three similar violations within the same year, I do not find its history to be an aggravating factor in assessing the penalty. I also find the violation to be relatively serious, given the truck's mobility from coal mine to preparation plant on public roads, as well as on mine properties, thereby potentially exposing individuals and property in close proximity to the hazards of a burning truck. Moreover, considering that Pen Coal's failure to insure inspection of the numerous trucks operating in its mine facilities contributed to the violation, I

ascribe low negligence to the company. Therefore, having considered Pen Coal's large size, ability to remain in business, history of violations, seriousness of violation, low degree of negligence, good faith abatement and no other mitigating factors, I find that the \$55.00 penalty proposed by the Secretary is appropriate.

ORDER

Accordingly, the Secretary's Motion for Summary Decision is **GRANTED**, Respondent's Motion for Summary Decision is **DENIED**, Citation No. 7192431 is **AFFIRMED**, as modified to reflect low negligence, and Pen Coal Corporation is **ORDERED** to pay a civil penalty of \$55.00 within 30 days of the date of this decision. Upon receipt of payment, this case is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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Melanie J. Kilpatrick, Esq., Wyatt, Tarrant & Combs LLP, 1700 Lexington Financial Center, 250 West main Street, Lexington, KY 40507

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 2, 2001

GTI CAPITAL HOLDINGS LLC dba	:	CONTEST PROCEEDINGS
ROCKLAND MATERIALS,	:	
Contestant	:	Docket No. WEST 2000-638-RM
	:	Citation No. 7945881; 7/26/2000
	:	
v.	:	Docket No. WEST 2000-639-RM
	:	Citation No. 7945882; 7/26/2000
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2000-640-RM
MINE SAFETY AND HEALTH	:	Order No. 7945883; 7/26/2000
ADMINISTRATION, (MSHA),	:	
Respondent	:	Rockland Materials Pit 1
	:	Mine Id 02-02867

ORDER DENYING ROCKLAND'S MOTION FOR SUMMARY DECISION
ORDER DENYING THE SECRETARY'S
CROSS-MOTION FOR SUMMARY DECISION
ORDER DENYING ROCKLAND'S MOTION TO COMPEL PRODUCTION

These proceedings are before me on notices of contest filed by GTI Capital Holdings, LLC, doing business as Rockland Materials ("Rockland") against the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Mine Act"). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued two citations and one order of withdrawal (the "citations") against Rockland following its investigation of a fatal accident that occurred at its facility in Phoenix, Arizona. This facility includes a sand and gravel quarry and a concrete batch plant.

Rockland filed a motion for summary decision asserting that MSHA lacked the requisite jurisdiction to issue the citations. Rockland argues that, because the citations were issued at stockpiles for its concrete batch plant, the citations are invalid and should be vacated. It relies upon the language of the Mine Act, the agreement entered into between MSHA and the Department of Labor's Occupational Safety and Health Administration, and case law. The Secretary opposed Rockland's motion for summary decision and also filed a cross-motion for summary decision asserting that the undisputed facts make clear that MSHA had jurisdiction to issue the citations.

The Commission's Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

The Commission has long recognized that summary decision is an "extraordinary procedure." *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). The Commission adopted the Supreme Court's holding that summary judgment is authorized only "upon proper showings of the lack of a genuine, triable issue of material fact." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 327 (1986)). I believe summary decision is especially inappropriate where the motion raises jurisdictional issues and the parties do not even agree on what facts are correctly before the court.

In these cases, the parties are at odds as to what facts I should consider in analyzing the motions for summary decision. Indeed, Rockland filed a motion to strike the Secretary's opposition to its motion for summary decision on the basis that she relies on facts that, according to Rockland, have not been disclosed by the Secretary in her discovery responses. In response to Rockland's motion to strike, the Secretary states that she relied on facts supplied by Rockland's managers during MSHA's accident investigation. Thus, it has not been shown that there "is no dispute as to any material fact." Neither party established that there is a "lack of a genuine, triable issue of material fact." The parties are not in agreement as to what facts are properly before the court and they also dispute the material facts relied upon in the other party's motion for summary decision. Consequently, summary decision cannot be granted at this time.

Rockland's motion that its reply to the Secretary's opposition to its motion to strike be accepted for filing is **GRANTED**. Rockland's motion to strike the Secretary's opposition to its motion for summary decision is **DENIED**. Rockland's motion for summary decision is **DENIED**. The Secretary's cross-motion for summary decision sustaining MSHA jurisdiction is **DENIED**.

Rockland requests that, in the alternative, I grant its motion to compel the Secretary to respond to its discovery requests. Rockland filed its first set of interrogatories and requests for production on or about October 27, 2000. According to Rockland, the Secretary's responses to this discovery were "entirely non-responsive." (R. Motion to Strike 3).

In her discovery responses, the Secretary invoked the informant's privilege, the deliberative process privilege, the attorney-client privilege, and the work product doctrine. In addition the Secretary attempted to rely on Fed. R. Civ. P. 33. That rule provides that a party may serve no more than 25 interrogatories without leave of the court. The rule further provides

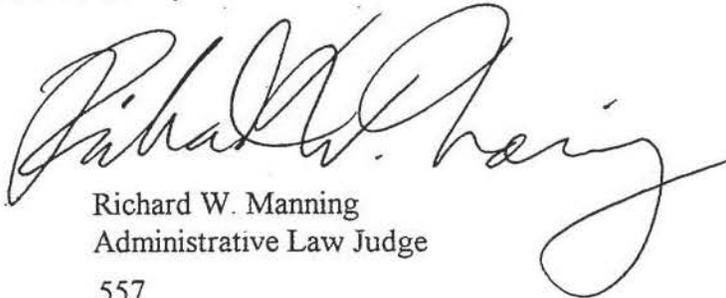
that a party may seek leave of the court to serve more than 25 interrogatories, which leave shall be granted to the extent that it is consistent with Rule 26(b)(2). Rockland served 37 interrogatories in these cases. The parties made attempts to resolve their discovery disputes.

Federal Rule 33 does not apply to Commission proceedings. The Commission's procedural rule provides that parties "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Commission Rule 56(c) provides that, for good cause shown, a judge may "limit discovery to prevent undue delay or to protect a party ... from oppression or undue burden or expense." Consequently, I reject the Secretary's argument that it is not obligated to answer Rockland's interrogatories on the basis that Rockland did not seek leave of the court to file 37 interrogatories. If the Secretary believes that a party's discovery should be limited, she must file a motion under Commission Rule 56(c).

In correspondence dated April 23, 2001, counsel for Rockland states that the Secretary is taking the position that because Rockland's motion for summary decision is pending, she "should not be required to answer interrogatories that go beyond the scope of [Rockland's] motion for summary decision." If that statement correctly states the Secretary's position, it is rejected. The Secretary is obligated to answer all discovery requests including those that go beyond the scope of Rockland's motion for summary decision. In addition, I have denied Rockland's motion for summary decision so the issue is now moot.

Rockland's motion to compel is, in large measure, based on its request to be permitted to file a more detailed response to the Secretary's opposition to its motion for summary decision after it receives complete answers to its discovery. Rockland's motions are intertwined to the extent that Rockland seeks information to respond to the Secretary's opposition to its motions. I have denied both motions for summary decision. For this and other reasons, Rockland's motion to compel discovery response is **DENIED**.

Notwithstanding the above, the Secretary is hereby **ORDERED**, on or before **May 28, 2001**, to supplement its answers to Rockland's first set of interrogatories and requests for production, taking into consideration the court's rulings in this order. The Secretary shall answer each request based on information presently available to her. If the Secretary objects to any request or raises any privileges, she shall clearly state the basis for such objection or privilege. The parties shall make every effort to resolve all discovery disputes without involving the court. Future discovery disputes shall be brought to the attention of this court only if the parties are unable to resolve their differences after making a considered effort to do so. Any pending motions that are not discussed in this order are hereby **DENIED**.



Richard W. Manning
Administrative Law Judge
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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 2001

DYNATEC MINING CORPORATION,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
	:	Docket No. EAJ 2001-3
v.	:	
	:	Formerly WEST 94-645-M
	:	
	:	Magma Mine
SECRETARY OF LABOR,	:	ID. No. 02-00152 WJ6
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER DENYING SECRETARY'S MOTION TO STAY

The Secretary filed a motion to stay this Equal Access to Justice Act ("EAJA") case on the basis that Dynatec appealed the Commission's decision in the underlying case with respect to Citation No. 4410466 and Order No. 4410468. She states that she is requesting the stay to avoid unnecessary fragmentation of fee petitions and the resultant waste of judicial resources. She requests that this proceeding be stayed until the court of appeals issues its decision with respect to the citation and order.

Dynatec opposes the stay. Dynatec argues that the Secretary is not entitled to a stay and that proceeding with this fee petition will not result in the unnecessary fragmentation of fee petitions. For the reasons set forth below, I agree with Dynatec and deny the motion for a stay.

The Secretary relies, in part, on 29 C.F.R. § 2704.206(b). That rule provides, in pertinent part, that if "review . . . is sought or taken of a decision on the merits as to which an applicant has prevailed or has been subjected to a demand from the Secretary substantially in excess of the decision of the Commission and unreasonable when compared to that decision, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy." In this case, the Secretary did not appeal the Commission's decision. As stated above, Dynatec appealed the Commission's decision affirming Citation No. 4410466 and Order No. 4410468. The Secretary contends that, as a consequence, this EAJA proceeding should be stayed.

The Secretary's reliance on section 2704.206(b) is misplaced. Although the regulation does not directly limit its application to situations in which the Secretary appeals a Commission decision, I believe that the Commission did not intend to force an ALJ to stay an EAJA proceeding under the present circumstances. The language of the EAJA provides that when "the United States appeals the underlying merits" in a case, "no decision on an application for fees and other expenses shall be made . . . until a final and unreviewable decision is rendered by the court of appeals. . . . 5 U.S.C § 504(a)(2). The government should not be required to pay

attorney's fees in a case where it has appealed the merits of the adjudicator's decision. The Commission's regulation was designed to implement this statutory provision.

Before the EAJA was amended to allow recovery of attorney's fees in Mine Act cases in situations where the demand by the Secretary is substantially in excess of the decision of the Commission and unreasonable when compared to that decision, it was clear that this stay regulation concerned appeals taken by the Secretary of the underlying decision. The former stay regulation, at section 2704.204(b), applied if review was "sought or taken of a decision on the merits as to which an applicant believes it has prevailed. . . ." Only the Secretary could normally appeal such a decision. The EAJA was amended for the benefit of EAJA applicants to include recovery where the applicant did not prevail but the demand made by the government was substantially in excess of the decision of the adjudicative officer and unreasonable. The language in section 2704.206 implements that change. The change in the statute and the Commission's EAJA regulations was designed to expand the rights of applicants not narrow them. I hold that I am not required to stay this proceeding under section 2704.206(b). My holding is consistent with the language in sections 2704.206(a) and (c).

The Secretary also relies on *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1206-07 (5th Cir. 1991). This case arose under the Occupational Safety and Health Act ("OSHA"). The OSHA Commission judge affirmed one citation and vacated another citation. The applicant appealed the judge's decision with respect to the citation that was affirmed. The Secretary did not appeal the citation that was vacated. When the applicant filed its application for attorney's fees after appeal, the Secretary argued that the applicant was time-barred with respect to fees related to the citation that was vacated. The Secretary argued that the applicant was required to file its application for attorney's fees for that citation within 30 days after the judge vacated the citation. The court of appeals rejected the Secretary's argument. It held that the applicant was not required to apply for attorney's fees until the conclusion of all appeals. The court stated that there is no final disposition in a case until the entire decision is final and unappealable.

I find that the court's reasoning does not apply to the facts in this case. The court was protecting the applicant in *Phoenix Roofing* from having its application dismissed. It stated that "Congress intended to make it easier, not harder, for people of limited means to collect their small claims from the government." 922 F.2d at 1207 (citation omitted). The Secretary is attempting to use that decision as a sword to delay possible fee recovery in this case when the court intended to provide a shield to protect applicants from having their claims dismissed. Although some of the language in *Phoenix Roofing*, when taken out of context, appears to support the Secretary's motion, I find that the decision does not apply.

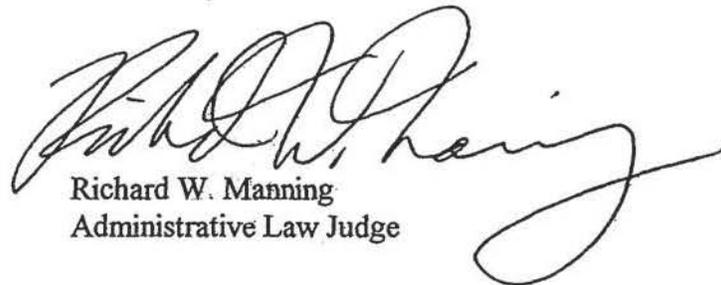
The court in *Phoenix Roofing* was also attempting to avoid "the unnecessary fragmentation of the fee petitions and the waste of judicial resources that would result from filing multiple petitions in different courts for fees incurred in one case." *Id.* Dynatec is seeking attorney's fees and costs on the basis that it prevailed in a significant and discrete substantive portion of the underlying proceeding. It states:

The portion of the underlying proceeding at issue in the EAJA proceeding is "significant" in that it represents the bulk of the Secretary's charges in terms of the number of citations (12 of 14) and the amount of fines (\$650,000 of 700,000). The portion of the underlying proceeding at issue in the EAJA proceeding is "discrete" in that it involves separate orders . . . and separate standards . . . , which are not at issue in Dynatec's appeal to the United States Court of Appeals.

(D. Opposition at 2). Dynatec's application includes Order No. 4410468. It contends that it is entitled to fees and costs because the penalty for that order was reduced from \$50,000 to \$20,000 and the original penalty was unreasonable. The appeals court will not increase the penalty so there is no risk that requiring the Secretary to proceed will require it to pay more than it would if the case were stayed. In addition, Dynatec maintains that it is "virtually impossible, for purposes of apportionment, to isolate the few substantially justified positions" taken by the Secretary in the underlying proceeding from the "morass of substantially unjustified positions." (D. Application at 33). Thus, it is arguing that it is entitled to full recovery of fees and expenses.

Based on the above, I find that this case does not present a situation in which the risk of unnecessarily fragmenting fee applications outweighs Dynatec's interest in proceeding with its application. It is not clear that I even have the authority to stay this case. I find that the Secretary has not presented good cause for a stay.

For the reasons set forth above, the Secretary's motion to stay this case is **DENIED**. The Secretary's answer in this case shall be filed on or before **May 24, 2001**.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

May 22, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-353-M
Petitioner	:	A. C. No. 45-03334-05508
v.	:	
	:	
NORTHWEST AGGREGATES,	:	DuPont Pit
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-481-M
Petitioner	:	A. C. No. 45-03334-05518 A
v.	:	
	:	
RICHARD INWARDS, employed by,	:	
NORTHWEST AGGREGATES,	:	DuPont Pit
d/b/a, GLACIER NORTHWEST,	:	
Respondent	:	

ORDER DENYING RESPONDENTS' MOTION TO DISMISS

Respondents, Northwest Aggregates and Richard Inwards, have moved to dismiss the petitions for assessment of civil penalties filed against them and as grounds therefore, assert that the settlement and dismissal of a petition against another individual that had been based upon the same underlying citations warrants dismissal of the petitions against them. Respondents' motion is based upon an erroneous factual predicate and does not otherwise establish grounds to dismiss the petitions. Accordingly, the motion is denied.

The instant proceedings were initiated on September 7, 1999, by the filing of a petition for assessment of civil penalties against Northwest Aggregates. The petition was based upon two citations alleging violations of safety and health standards that had been issued on February 11, 1999. Subsequently, following an investigation, petitions were also filed against two individual Respondents; Richard Inwards and Mark Snyder, pursuant to § 110(c) of the Mine Safety and Health Act of 1977. 30 U.S.C. § 820(c). Those petitions were also based upon the February 11, 1999 citations. Mark Snyder was the work-site foreman and Richard Inwards was the plant superintendent at the time of the alleged violations. The petitions against the individual respondents alleged that they were agents of Northwest Aggregates.

The Secretary subsequently moved to vacate the petition filed against Snyder. The motion was styled "Joint Motion to Approve Settlement" and represented that the Secretary had agreed to "vacate the Petition for Assessment of Civil Penalty against Mark Snyder. This vacation is based on subsequent interviews and statements of miners employed by the above-referenced mine." Motion, at p. 2. On March 7, 2001, an Order of Dismissal" was entered in that case. The Order stated:

The Secretary has filed a motion to approve settlement. However, the grounds for the motion are that the Secretary has agreed to vacate the two citations at issue in this case. The Secretary has the discretion to vacate the subject citations, prompting dismissal of this case.

Respondents argue that since there has never been any contention by the Secretary that Snyder was not an agent of Northwest Aggregates or that he had not acted knowingly when carrying out his duties, the vacating of the citations as to Snyder indicates that the citations "lacked substantive merit . . . [and] must also be vacated against Respondents Inwards and Northwest Aggregates." Motion to Dismiss, at p. 4. The factual premise for this argument is that the Order of Dismissal is a final order of the Commission "that the two citations at issue are **vacated**" (*Id.* at p. 6), thereby establishing the lack of substantive merit of the citations for these cases.

The Order of Dismissal erroneously stated that the Secretary had agreed to vacate the *citations* rather than the petition against Snyder. In fact, the citations have never been vacated and the Order did not purport to vacate them. It merely dismissed the "case", i.e., the petition for assessment of civil penalties that had been filed against Snyder. The dismissal was based upon the Secretary's determination not to prosecute the petition for civil penalties against Snyder. The Secretary has unreviewable discretion to make such determinations. *Bixler Mining Co.*, 16 FMSHRC 1427 (July 1994); *RBK Constr., Inc.*, 15 FMSHRC 2099 (Oct. 1993). She can do so for any reason or no reason at all. There is no inference that can be drawn from the Secretary's decision not to prosecute a case against Snyder.

While the reasons underlying the Secretary's determination are not normally discoverable, the Secretary has represented in her opposition to the motion that through interviews with other witnesses it was determined that Snyder had been placed in "an impossible position" such that he should not be held individually liable. Rightly or wrongly, the Secretary's asserted reason for deciding not to proceed against Snyder does not implicate the validity of the underlying citations as to Respondents Northwest Aggregates and Inwards.

Based upon the foregoing, Respondents' Motion to Dismiss is **Denied**.



Michael E. Ziehnski
Administrative Law Judge

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