MAY 2002

COMMISSION DECISION AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

MAY 2002

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

Baylor Mining, Inc., v. Secretary of Labor, MSHA, Docket No. WEVA 2001-124-R.
(Judge Hodgdon, May 1, 2002)

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

Louis Dykhoff, Jr. v. U. S. Borax Incorporated, Docket No. WEST 2001-409-D.
(Judge Manning, March 27, 2002)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 7, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2002-299-M
	:	WEST 2002-300-M
CDG MATERIALS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 11, 2002, the Commission received from CDG Materials, Inc. ("CDG") a request to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On or approximately October 24, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to CDG two proposed penalty assessments totaling $9,550 for 14 citations that it issued to CDG on March 2 and 5, 2001. In its motion, CDG contends that it timely submitted a request for a hearing on these proposed assessments to MSHA, but on March 6, 2002, was notified by MSHA's Civil Penalty Compliance Office that its hearing request was denied because it was untimely. Mot. It maintains that "due to recent current events the efficiency of the U.S. Postal Service may have been compromised during and around the time frame" for filing its request. *Id.* CDG asserts that it "has valid points pertaining to this case" and requests that the Commission reopen the proposed assessments so that it may proceed to a hearing on the merits. *Id.* CDG did not attach any documents to its request.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of CDG's position. Other than CDG's assertions, the record contains no information regarding whether CDG submitted a request for a hearing, and if it did, when it was sent by CDG and whether and when it was received by MSHA. Nor is it clear which proposed penalties CDG intended to contest. Accordingly, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Kerr Enterprises, Inc.*, 24 FMSHRC 1, 2 (Jan. 2002) (remanding to judge where pro se operator offered no explanation for failure to timely file request for hearing); *BR&D Enterprises*, 22 FMSHRC 479, 480-81 (Apr. 2000) (remanding to judge where operator alleged that it timely filed a hearing request by certified mail, but never received return receipt); *H & D Coal Co.*, 23 FMSHRC 382, 383 (Apr. 2001) (remanding to judge where operator allegedly mailed hearing request, but MSHA did not receive it). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant CDG's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and that the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). In addition, the timing of MSHA's delivery of the proposed assessments and the deadline for CDG to file hearing requests fell shortly after the events of September 11, 2001, a time during which the U.S. mails were severely disrupted. Under these circumstances, and because no other circumstances exist that would render a grant of relief here problematic, I fail to see the need or utility for remanding this matter. I therefore dissent.

Theodore F. Verheggen, Chairman

Distribution

Kelly A. Crown
CDG Materials, Inc.
P.O. Box 20758
Riverside, CA 95216

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 7, 2002

SECRETARY OF LABOR,	:		CENT 2002-159-M
MINE SAFETY AND HEALTH	:		A.C. No. 23-00454-05592
ADMINISTRATION (MSHA)	:		
	:		CENT 2002-160-M
	:		A.C. No. 23-00454-05593
	:		
v.	:	Docket Nos.	CENT 2002-161-M
	:		A.C. No. 23-00454-05594
	:		
	:		CENT 2002-162-M
	:		A.C. No. 23-00454-05595
	:		
	:		CENT 2002-163-M
PEA RIDGE IRON ORE COMPANY	:		A.C. No. 23-00454-05596

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 1, 2002, the Commission received from Pea Ridge Iron Ore Co. ("Pea Ridge") two requests to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its first request, Pea Ridge seeks relief for four proposed penalty assessments (A.C. Nos. 23-00454-05592 through 05595) totaling $8,854 for 67 alleged violations. Mot. dated March 29, 2002 ("Mot. I"). In its second request, it seeks to reopen one proposed assessment (A.C. No. 23-00454-05596) totaling $297 for two alleged violations. Mot. dated March 30, 2002 ("Mot. II"). In both requests, Dwight A. Miller, Pea Ridge's executive vice president and general counsel, asserts that, due to internal mismanagement, Pea Ridge failed to timely submit a request for a hearing on the proposed penalty assessments to the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mots. I & II. Miller contends that Pea Ridge ceased all mining operations and began liquidating its assets in August, 2001. *Id.* He asserts that all but two employees involved in the liquidation have been terminated. *Id.* Miller explains that "[a]s a result of the administrative turmoil resulting from the cessation of operations and employee terminations, the deadline for contesting 4 cases were inadvertently missed" for A.C. Nos. 23-00454-05592 through 05595. Mot. I.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997). However, where an operator has failed to timely submit a hearing request due to internal mishandling, the Commission has remanded the matter to a judge for further consideration. *See, e.g.*, *Georges Colliers, Inc.*, 22 FMSHRC 939, 939-41 (Aug. 2000) (remanding to judge where operator misfiled proposed penalty assessment due to changes in office personnel); *E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 981-83 (Sept. 1999) (same).

Pea Ridge alleges that it failed to timely request a hearing because of the cessation of mining operations and termination of its employees. We note that Pea Ridge recently made a similar request to reopen a proposed assessment claiming that it failed to timely file a hearing request due to personnel lay-offs. *Pea Ridge Iron Ore Co.*, 24 FMSHRC 4, 4-5 (Jan. 2002) ("*Pea Ridge I*"). In *Pea Ridge I*, we remanded the matter to a judge to determine whether relief was warranted. *Id.* Here, the operator received the five proposed penalty assessments between approximately December 21, 2001 and February 15, 2002, which overlaps our decision in *Pea Ridge I*. Because the operator is requesting relief on the same basis it submitted its prior request to reopen nearly five months ago, and consistent with our decision in *Pea Ridge I*, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate.

If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

Consistent with my dissent in *Pea Ridge Iron Ore Co.*, 24 FMSHRC 4, 6 (Jan. 2002), I would grant Pea Ridge's request for relief. The Secretary does not oppose the operator's request. Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Dwight A. Miller, Executive Vice President
Pea Ridge Iron Ore Company, Inc.
231 South Bemiston Avenue, Suite 1100
St. Louis, MO 63105

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 7, 2002

SECRETARY OF LABOR,	:	Docket Nos.	WEST 2002-202-M
MINE SAFETY AND HEALTH	:		A.C. No. 35-02479-05515
ADMINISTRATION (MSHA)	:		
	:		WEST 2002-203-M
v.	:		A.C. No. 35-02479-05516
	:		
	:		WEST 2002-222-M
TIDE CREEK ROCK, INC.	:		A.C. No. 35-02479-05508

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 5, 2002, the Commission received from Tide Creek Rock, Inc. ("Tide Creek") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Tide Creek contends that it did not receive the proposed penalty assessments from the Department of Labor's Mine Safety and Health Administration ("MSHA") because the certified mailings could not be delivered to the mine and were returned to MSHA undelivered due to the mine's remote location and the absence of a person to receive the mailings. Mot. at 13, 16; Ex. 3. The operator claims that John A. Petersen, the representative of miners at Tide Creek responsible for MSHA matters, never received the proposed assessments and if he had, the operator would have contested all penalty assessments. *Id.* at 12-15. It explains that it received over 70 citations between September 29, 1999 and April 6, 2000, and that contest proceedings for many of these citations and penalty assessments were pending before Chief Administrative Law Judge Barbour while it was awaiting proposed assessments for 36

outstanding citations. *Id.* at 4-5. The operator asserts that during this time, it called MSHA on numerous occasions and sent several letters inquiring about the status of these outstanding proposed assessments in an effort to file a hearing request. *Id.* at 6-11.[1]

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

In essence, Tide Creek, which is proceeding pro se, claims that it did not receive the penalty assessments at issue because MSHA's certified mailings were unsuccessful. Tide Creek's motion clearly demonstrates that numerous attempted deliveries of certified mail to the company were unsuccessful. A letter from Tide Creek to MSHA dated May 7, 2001 states that the company "received a notice of a certified letter on April 16, 2001, but it [i.e., the letter] was returned to you and we do not know what it was." Mot. Ex. 2. A later letter from MSHA to Tide Creek confirms that "no one picked up the certified return receipt mail containing [two of] the assessments" at issue here, despite three delivery attempts by the U.S. Postal Service. Mot. Ex. 3 (Dec. 28, 2001). The delivery attempts were made during June and July of 2001. *Id.*

It is also clear from the attachments to Tide Creek's motion that the company intended to contest any penalties assessed for citations it received from September 1999 through April 2000. The company's May 7, 2001 letter to MSHA, for example, includes a long list of citation numbers and states that, if the certified mail it failed to receive was a penalty assessment, the company wanted "to contest the proposed assessments and . . . REQUEST A HEARING ON THE VIOLATIONS." Mot. Ex. 2.

---

[1] In its motion, Tide Creek also argues that MSHA unreasonably delayed assessing many of the penalties at issue, that the company's ability to continue in business would be compromised if the assessments must be paid, that the company failed to receive adequate notice of the assessments, that the company's communications with MSHA should be deemed to constitute adequate hearing requests, and that the company is entitled to attorney's fees and expenses under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1). All these matters fall outside the scope of our review of Tide Creek's motion, and we thus do not reach them.

It is not clear, however, from Tide Creek's motion exactly why the company was unable to either receive certified mail[2] or, more importantly, respond to notices of attempted delivery of certified mail by retrieving the mail at the local post office. In one of its exhibits, the company admits it received such a notice. *Id.* (May 7, 2001) ("We received a notice of a certified letter . . ."). The company asserts that its address "is a rural mail box, and that certified mail often did not get delivered." Mot. at 16 ¶ 23. But no further explanation is offered regarding efforts to address these mailing difficulties, in the absence of which we are unable to determine whether Tide Creek's failure to file the penalty contests was the result of mistake or inadvertence.

In the interests of justice, however, we remand this matter for assignment to a judge to determine whether relief from the final orders is appropriate. *See Pasco Gravel Co.*, 24 FMSHRC 16 (Jan. 2002) (remanding default motion to judge to determine whether relief from final order was appropriate where operator alleged that it did not receive proposed assessments and had requested a hearing twice on the telephone to an MSHA supervisor). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

[2] Under 30 C.F.R. Part 41, a mine operator is required to file with MSHA detailed information regarding its legal identity, including its address.

Distribution

Agnes Marie Peterson
Tide Creek Rock, Inc.
33625 Tide Creek Road
Deer Island, OR 97054

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 7, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2002-276-M
	:	WEST 2002-277-M
CHOLLA READY MIX, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 4, 2002, the Commission received from Cholla Ready Mix, Inc. ("Cholla") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request submitted by Cholla's President, Dale McKinnon, the operator, which is unrepresented by counsel, asserts that it filed a hearing request to contest the proposed penalties in A.C. No. 02-01823-05517, which is the subject of Docket No. WEST 2002-165-M, and mistakenly believed that its request applied also to the proposed penalties in A.C. Nos. 02-01823-05516 and 02-01823-05518, which are the subjects of this request to reopen. Mot.

Cholla explains that it "thought [it] had already contested them when [it] contested 19 other violations." *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, however, we are unable to evaluate the merits of Cholla's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Cholla has met the criteria for relief under Rule 60(b). *See Eclipse C Corp.*, 23 FMSHRC 134, 135 (Feb. 2001) (remanding to a judge where operator failed to timely file hearing request because it mistakenly believed that its filing of a contest for one proposed assessment also applied to two other proposed assessments it received at the same time). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Cholla's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need for or utility of remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Dale McKinnon, President
Cholla Ready Mix, Inc.
P.O. Box 789
Holbrook, AZ 86025

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 7, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2002-74-M
v.	:	A.C. No. 41-03307-05564
HOLNAM TEXAS LIMITED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 7, 2002, the Commission received from Holnam Texas Limited ("Holnam") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, Holnam asserts that it intended to contest the proposed penalty relating to Citation No. 7895146 but that it did not submit a green card because it inadvertently paid the assessment. Mot. at 2-3. Holnam contends that the citation was issued pursuant to an inspection by the Department of Labor's Mine Safety and Health Administration ("MSHA") on November 16, 2000. *Id.* at 1. It is a matter of record that Holnam filed a Notice of Contest for the citation

underlying the penalty at issue here, Docket No. CENT 2001-60-RM, and that this contest proceeding is currently stayed pending the issuance of a proposed penalty assessment. MSHA issued a proposed penalty assessment for the contested citation on August 23, 2001. Mot. at 2. Holnam points out, however, that on September 24, 2001, its plant safety director, Andy Yuhas, inadvertently initiated payment of the civil penalty after failing to recognize the modified citation as being related to the original contested citation. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record and based on counsel's representations in their motion, we grant Holnam's motion for relief, reopen the penalty assessment that became a final order, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

William K. Doran, Esq.
Heenan, Althen & Roles, LLP
1110 Vermont Ave., N.W., Suite 400
Washington, D. C. 20005

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 9, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 2000-65-M YORK 2000-66-M
VERMONT UNFADING GREEN SLATE COMPANY, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman; Beatty, Commissioner

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. ("Mine Act"), Administrative Law Judge T. Todd Hodgdon affirmed five citations, modified and affirmed two citations, and vacated four citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Vermont Unfading Green Slate Company ("Vermont Slate"). 23 FMSHRC 310, 320 (Mar. 2001) (ALJ). Vermont Slate filed a petition for discretionary review ("PDR") challenging the judge's decision on procedural grounds and requesting that the Commission vacate the judge's findings of six violations. PDR at 1-5. The Commission subsequently granted Vermont Slate's petition. For the reasons that follow, we vacate the judge's decision with respect to one citation, and affirm the judge's decision in all other respects.

I.

Summary Factual and Procedural Background

Vermont Slate operates the Blissville Quarry and Mine, a slate quarry in Rutland County, Vermont. 23 FMSHRC at 310. On January 19, 2000, Inspector Brett Budd and Inspector-trainee Robert Tango arrived at the Blissville Quarry to conduct a semi-annual inspection. *Id.* After completing the inspection, the inspectors issued 11 citations to the operator. *Id.*

Vermont Slate contested all 11 violations and penalties. *Id.* at 311-18. MSHA subsequently filed a petition for assessment of penalties in the amount of $904. *Id.* at 310. On December 14, 2000, a hearing was held in Rutland, Vermont. *Id.* Vermont Slate Supervisor Shawn Camara represented the operator at the hearing. In his decision, the judge concluded, inter alia, that the operator had committed the six violations at issue here, and assessed penalties totaling $470. *Id.* at 319-20.

II.

Disposition

A. Citation No. 7720771

1. Contest of Violation

MSHA issued Citation No. 7720771 to Vermont Slate for an unguarded v-belt drive on the slate trimmer, alleging a violation of 30 C.F.R. § 56.14107(a).[1] 23 FMSHRC at 313. The citation stated that "[a] machine guard was not provided to prevent accidental contact with the v belt drive system, exposing the pinch points that are about 5 feet from ground level, located on the left side of the slate trimmer." *Id.*; G. Ex. 5. The trimmer was about three to four feet high and three feet wide, and was located in the garage on a stack of pallets about four to five feet high. 23 FMSHRC at 313; Tr. 64-66, 70-71. A wheelbarrow was located on the ground below the trimmer to catch chips of slate from the machine. Tr. 65, 163, 167. Budd testified that the operating station on the trimmer had a drive wheel which turned the blade to trim the slate, and that below the drive wheel was an electrical motor that drove the pulley to operate the machine. 23 FMSHRC at 313; Tr. 67. He also testified that the v-belt drive was not guarded, exposing a miner standing on the platform to operate the trimmer to two pinch points. Tr. 67. According to Budd, the upper pinch point was located where the v-belt drive contacted the upper drive pulley, which was about three to four feet above the platform, and the lower pinch point was located where the v-belt came in contact with the drive pulley onto that system, which was about one foot above the platform. Tr. 67-69.

---

[1] Section 56.14107 provides in pertinent part:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head tail and takeup pulleys . . . and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

30 C.F.R. § 56.14107.

Camara admitted that the v-belt was not guarded, but testified that the pulley had a guard on the front. Tr. 165, 169. He also testified that a person would not be standing on the platform while the trimmer was running, and that the only way a person could get caught in the moving parts was if he was standing on the ground pointing a stick into the belt drive or was nine feet tall. Tr. 164, 166, 168-69. On cross-examination, Camara admitted that a miner operating the machine would stand on the pallets, but testified that "where the guy sits or where the guy stands, that's where it's guarded." Tr. 165, 167. Camara also testified that the exposed moving parts were towards the back on the side of the trimmer, but did not pose a hazard because benches on both sides of the machine prevented access from the platform. Tr. 163-65, 167-68. He also testified that the moving parts did not pose a hazard to someone standing on the ground because it was about eight feet off the ground. Tr. 163-64.

The judge found that the exposed moving parts on the trimmer were not properly guarded, posing a hazard to the machine operator standing on the pallet platform. 23 FMSHRC at 314. He dismissed Camara's testimony as irrelevant because it addressed whether the exposed moving parts posed a hazard to a person standing on the ground. *Id.* The judge concluded that the violation was not significant and substantial,[2] and assessed a penalty of $55. *Id.* at 313-14, 319.

On review, Vermont Slate asserts that the evidence does not support a finding of a violation because Budd testified that the hazard existed to someone standing on top of the pallets next to the machinery, but Tango's notes and the citation indicate that the hazard exists to someone standing beneath the machinery. PDR at 3. It contends that the v-belt is adequately guarded and that "a worker on top operating the machine would [not] be exposed to any danger." *Id.* The Secretary argues that Budd testified that a miner standing on top of the pallets is subject to the hazard and that he had explained this to Camara during the inspection. S. Br. at 13-14. She asserts that the citation states that "pinch points are about 5 feet from ground level," which corroborates Budd's testimony that the hazard was to a miner standing or working on the platform. *Id.*

The judge's characterization of Camara's testimony as "irrelevant" because it dealt "only" with "someone standing on the ground" is incorrect. Some of Camara's testimony was an attempt to refute the danger posed by the pinch points to a miner standing on the pallets. Specifically, the judge did not consider Camara's testimony that the exposed moving parts did not pose a hazard because benches on the side of the trimmer prevented access from the platform.

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). As

---

[2] The S&S terminology is taken from section 104(d)(1) of the 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."

the D.C. Circuit has emphasized, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and some justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981). We thus have held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994).

Camara's testimony regarding the hazard to miners on the platform is clearly relevant. Because the judge did not consider this testimony, he erred by failing to analyze and weigh all the probative record evidence to determine whether the moving parts posed a hazard to miners on the platform.

Our dissenting colleague appears to agree with our conclusion that the judge erred when he dismissed Camara's testimony based on irrelevance. Slip op. at 11. However, our colleague makes the mistake of evaluating Camara's testimony here as "muddied and inconsistent" and suggests that remanding to the judge is not necessary.[3] *Id.* It is for the judge in the first instance, not the Commission on review, to evaluate testimony and make findings of fact. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096 (4th Cir. 1993) (ALJs have "sole power to make credibility determination and resolve inconsistencies in the evidence") (citation ommitted).

2. Tango's Testimony

In conjunction to its challenge to the citations, Vermont Slate argues that the judge erred when he refused to allow it to call Tango to testify about his notes and the citations written on the date of the inspection. PDR at 1. At the hearing, when Camara cross-examined Budd about Tango's notes, he stated, "Mr. Baskin [the Secretary's counsel] said on the phone that Mr. T[a]ngo and Mr. Budd was [sic] going to be here, and Mr. T[a]ngo is not here. Now I would think that maybe possibly he should be here." Tr. 114. The judge responded, "that's up to Mr. Baskin or you, not — if he's [Tango] not here, he's not here." Tr. 114. At another point during the hearing, Camara stated, "I would like Mr. T[a]ngo to be here during these questions. He's obviously not here." Tr. 132. The judge responded, "Well it may be, but the Government chose

---

[3] Our dissenting colleague relies on the Commission's decision in *Arch of Kentucky*, 20 FMSHRC 1321 (Dec. 1998), to support her opinion that remanding this matter to the judge is unnecessary. In *Arch*, the Commission held harmless the judge's error in sustaining the Secretary's objection to the operator's questioning of her witness on cross-examination, effectively excluding evidence the operator sought to submit. *Id.* at 1328-29. However, *Arch* is distinguishable because in that case, the judge had the opportunity to consider the value of the excluded evidence in light of the Secretary's objection and the parties' arguments at the hearing. Unlike *Arch*, here, Vermont Slate did not know at the hearing that the judge would not consider Camara's testimony and thus did not have an opportunity to present alternative evidence or its arguments below.

not to call him." Tr. 132. Camara then asked the judge, "Can I call him?" Tr. 132. The judge replied, "To get him here, we're going to have to continue the case." Tr. 132. He explained to Camara that he doesn't "tell the parties who they have to present as witnesses, they decide," and that it was "up to the solicitor [what witnesses to call], and they are not calling him [Tango]." Tr. 132-33. Camara asked "What do I do?" Tr. 133. The judge explained that he could "tell us your versions of all these citations." Tr. 133. The judge then recessed for 15 minutes, and upon resuming, asked Camara "[w]hat would you like to do?" Tr. 133-34. Camara responded that he wanted to call Carl Onder and proceeded with the presentation of his case. Tr. 134. After Camara questioned Onder, he stated that he did not want to testify and attempted to rest his case. Tr. 147-48. The judge persuaded Camara to take the stand to testify about each citation. Tr. 148.

On review, Vermont Slate contends that it did not subpoena Tango because counsel for the Secretary indicated that Tango would be present at the hearing. PDR at 1. The operator points out that much of the testimony of Budd, the inspector who accompanied Tango on the inspection, was inconsistent with Tango's notes, and that it was more appropriate for Tango to testify about his notes. *Id.* at 1-2. Vermont Slate thus contends that it was prejudiced by Tango's absence. *Id.* The Secretary responds that the record does not support Vermont Slate's assertion that she indicated Tango would be at the hearing, and also denies that the operator made a showing of prejudice. S. Br. at 5-9.

While the judge did provide a measure of guidance to Camara, a pro se litigant, we find he sent mixed signals to Camara in response to his request to call Tango as a witness. For example, when Camara asked the judge whether Tango should be present, the judge did not inform Camara that he could call Tango, or of the procedure for doing so. In fact, when Camara specifically asked the judge whether he could call Tango, the judge responded that the case would have to be continued, and did not directly respond to Camara's question. The judge's response may have confused Camara, because he again asked the judge what he could do, and ultimately did not pursue calling Tango in spite of his insistence that the inspector's testimony would be key to Vermont Slate's case.

We do not suggest that the judge abused his discretion. However, as a matter of fairness and in the interest of justice, Vermont Slate should be given an opportunity to present Tango's testimony in support of its case, particularly in light of the fact that the company is proceeding pro se. Based on the record, the company clearly expressed its intention to call Tango to testify and offered an explanation for its failure to subpoena him. It also points to inconsistencies in Tango's inspection notes, the citations, and Budd's testimony as a basis for its allegation of prejudice. In light of these circumstances and the judge's dismissal of Camara's testimony, Tango's absence from the hearing may have prejudiced Vermont Slate.

Accordingly, we vacate the judge's finding of a violation and remand to him with instructions that he reopen the record and permit Vermont Slate to present Tango's testimony relating to the guarding hazard on the trimmer. At the same time, the judge must reconcile any

conflicting evidence and determine if the guarding was adequate to protect a miner standing or working on the platform next to the trimmer.[4]

B. Citation No. 7720768

MSHA issued Citation No. 7720768 to Vermont Slate for insufficient lighting in an area of the garage where the control panels were located, alleging a violation of 30 C.F.R. § 56.17001.[5] Budd described the area as a "dark closet," a two foot by seven foot open space next to the garage entrance. Tr. 34. The electrical control panel boxes and first aid supplies were located in this space. Tr. 34. Budd testified that in order to read the panel boxes, "you had to get right up in front of them and really look," which he asserted was unsafe if the power needed to be shut down to a piece of equipment in an emergency. Tr. 35-36. Budd admitted that he could read the tag on the fire extinguisher which was the subject of Citation No. 7720767 and was kept in this area, but explained that the extinguisher was located immediately next to the doorway where there was more natural light from the garage. Tr. 38-40. The Secretary contends that the area's lighting was "not sufficient to provide safe working conditions" as required by the standard because in an emergency, a miner could mistakenly switch the wrong electrical box off due to the lack of light. S. Br. at 12.

The judge found that the space in question had no artificial lighting and that the only lighting in the area was natural light which came into the area through the garage door. 23 FMSHRC at 312. He found that the lighting was insufficient to illuminate the interior space where the switch panels were located. *Id.* The judge concluded that Vermont Slate violated the regulation, affirmed the citation, and assessed a penalty of $55. *Id.* at 312, 319.

On review, we first note that the judge credited Budd's testimony that the natural light in the control panel area was not adequate to permit a person to read the labels on the panels.[6] A

---

[4] We agree with the Secretary that the record does not support Vermont Slate's assertions that the judge refused to allow it to call Okey Reitter, MSHA's Assistant District Manager, to testify. First, contrary to the operator's suggestion, there is no indication in the record that at any time before the hearing, Vermont Slate requested that Reitter be present at the hearing, or that the Secretary objected to its request, or that the judge considered the matter and sustained the Secretary's objection. In fact, the record indicates that at the hearing, Camara did not attempt to call Reitter to testify. Moreover, Reitter's absence from the hearing did not prejudice Vermont Slate, because Reitter was neither present at the inspection nor a party to the post-inspection telephone conference between MSHA and the operator.

[5] Section 56.17001 provides in pertinent part: "Illumination sufficient to provide safe working conditions shall be provided in and on all . . . switch panels." 30 C.F.R. § 56.17001.

[6] We also note that it is undisputed that the only light in the control panel area was natural light coming from the garage, and that the panels faced the interior of the space, away

judge's credibility determinations are entitled to great weight. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992). The Commission has noted that "the general rule [is] that, absent exceptional circumstances, appellate courts do not overturn findings based on credibility resolutions." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Here, we find nothing in the record that would warrant us taking the extraordinary step of reversing the judge's credibility determinations with regard to this citation.[7] Accordingly, we affirm the judge's finding of a violation.

C. Citation No. 7720772

Vermont Slate received Citation No. 7720772 for failing to provide a safe means of access to the trimmer, allegedly in violation of 30 C.F.R. § 56.11001.[8] This is the same trimmer that was the subject of Citation No. 7720771, located on a stack of pallets about five-feet high. 23 FMSHRC at 315. Budd testified that Camara told the inspectors that an operator accessed the trimmer by climbing the pallets. *Id.* Budd also testified that a miner had to stick his feet in the holes between the pallets and pull himself up. Tr. 79-80. There were no handrails, steps, or ladder provided for miners accessing the trimmer. 23 FMSHRC at 315. Camara's testimony corroborated Budd's description of this arrangement. *Id.*; Tr. 170-71. The judge found that the pallets, without steps or handrails, failed to provide a safe means of access to the trimmer. 23 FMSHRC at 315. He concluded that Vermont Slate violated the standard, affirmed the citation, and assessed a penalty of $55. *Id.* at 315, 319.

Notwithstanding Vermont Slate's assertion that the pallets were a safe means of access to the trimmer (PDR at 3-4), the judge's conclusion that, in the absence of steps or handrails, the pallets were an unsafe means of access is both reasonable and amply supported by the record. *See Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983) (the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached"). Accordingly, we affirm the judge's finding of a violation.

---

from the doorway.

[7] Vermont Slate asserts that the judge's decision to vacate another citation at issue at the hearing (No. 7720769) based on his decision to credit Camara over Budd undermines Budd's credibility with respect to Citation No. 7720768. PDR at 2. The Commission has rejected, however, the "false in one, false in everything" rule of testimonial evidence, noting that "it is not uncommon, and certainly not reversible error, for the trier of fact to find a witness to be credible on some, but not other, matters." *Ankrom v. Wolcottville Sand & Gravel Corp.*, 22 FMSHRC 137, 145 n.7 (Feb. 2000), *aff'd*, No. 00-3374 (6th Cir. Dec. 4, 2000). We thus reject Vermont Slate's argument.

[8] Section 56.11001 provides: "Safe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001.

D. Citation No. 7720773

MSHA issued Citation No. 7720773 to Vermont Slate for allegedly violating 30 C.F.R. § 56.15004[9] because the slate saw operator was not wearing eye protection. The saw was "a radial saw arm" with a circular blade about 28 inches in diameter and a half hood over the blade. 23 FMSHRC at 315; Tr. 87-88. The saw operator worked at the control station with the saw in front of him and positioned the slate between himself and the blade. 23 FMSHRC at 315. The blade cut through the slate moving towards the sawyer while water sprayed onto the saw to keep the dust down. *Id.* Budd testified that chips of slate could fly off the block posing a hazard of eye injury while a miner positioned the slate with a crowbar, which could slip, and while a miner operated the saw. Tr. 91-92.

It is undisputed that the saw operator was not wearing eye protection. 23 FMSHRC at 315. Camara testified that the common practice at most quarries was not to wear eye protection. Tr. 158. However, he also admitted that most of the miners at the quarry put on eye protection whenever inspectors visited the site. Tr. 158, 180. He testified that there was no risk of eye injury because the saw had a hood over the blade and sprayed water, and denied that chips would fly off the block of slate. Tr. 178-79.

The judge credited Budd's testimony and found that the saw posed a hazard of eye injury, and concluded that Vermont Slate violated the standard by not requiring the saw operator to wear eye protection. 23 FMSHRC at 316. He also found that the evidence was insufficient to support a finding that the violation was significant and substantial and modified the citation, deleting the S&S designation. *Id.* The judge affirmed the citation as modified and assessed a penalty of $55. *Id.* at 316, 319.

First, we find no reason to disturb the judge's crediting Budd's testimony that the saw posed a hazard that required eye protection. *Farmer*, 14 FMSHRC at 1541. As for whether Vermont Slate violated the standard, while the operator argues that it was not aware of the requirements of section 56.15004, the record reveals that saw operators at the mine did wear eye protection. In fact, Camara admitted that saw operators would wear eye protection when MSHA inspectors visited the site. Tr. 158, 180. Accordingly, we affirm the judge's finding of a violation.

---

[9] Section 56.15004 provides: "All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." 30 C.F.R. § 56.15004.

E. Citation No. 7720775

MSHA issued Citation No. 7720775 to Vermont Slate for failing to provide a safety lock on the hose to a jack hammer, alleging a violation of 30 C.F.R. § 56.13021.[10] Budd testified that the hose connected to the jack hammer was making a hissing sound and concluded that it was bleeding air. 23 FMSHRC at 317; Tr. 105. He also testified that he saw slate and other materials in the area that are used in conjunction with hammering. 23 FMSHRC at 317; Tr. 105. Budd testified that although the hammer was not being used at the time of the inspection, because the hammer could be used, the lack of a safety device on the hose to prevent it from coming apart and causing a whipping action was a violation of the standard. 23 FMSHRC at 317; Tr. 104-05. In support of the S&S designation on the citation, Budd testified that it was likely that during use the hose would disconnect if no safety lock was in place, and that if it disconnected, the hose would whip around out of control and potentially inflict serious of even fatal injuries. 23 FMSHRC at 317. Camara admitted that the hose did not have a safety device, but testified that the hammer was not in use on the day of the inspection. Tr. 182-83. The judge credited Budd's testimony and found that Vermont Slate violated the standard. 23 FMSHRC at 317. He also found that the violation was significant and substantial and assessed a penalty of $140. *Id.* at 317, 319.

On review, there is no dispute that the connection between the hose and the jack hammer had no safety lock. We also find nothing in the record that would lead us to overturn the judge's crediting of Budd's testimony regarding his observations that he heard air hissing out of the hose and saw materials used in connection with hammering activities lying in the same area as the jack hammer. *Farmer*, 14 FMSHRC at 1541. Finally, the judge's conclusion that the hammer had recently been used was a reasonable inference for him to draw from Budd's testimony. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984) (emphasizing that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred."). Accordingly, we affirm the judge's finding of a violation.

F. Citation No. 7720778

MSHA issued Citation No. 7720778 to Vermont Slate for failing to provide a miner trained in first aid at the site during the work shift, alleging a violation of 30 C.F.R. § 56.18010.[11] The individual trained in first aid was sent to another site because there was not enough work at

---

[10] Section 56.13021 provides: "Except where automatic shutoff valves are used, safety chains or other suitable devices shall be used at connections to machines of high pressure hose lines . . . and between high-pressure hose lines . . . where a connection failure would create a hazard." 30 C.F.R. § 56.13021.

[11] Section 56.18010 provides in pertinent part: "An individual capable of providing first aid shall be available on all shifts." 30 C.F.R. § 56.18010.

the Blissville Quarry. 23 FMSHRC at 318; Tr. 128-29. The judge found that the evidence regarding this citation was undisputed, that the miner trained in first aid was sent to another location, and that there was no one at the quarry trained in first aid. 23 FMSHRC at 318. He rejected Vermont Slate's argument that the absence of a first aid miner was not a violation of the regulation because the medical center was only 1.3 miles from the quarry, and concluded that Vermont Slate violated section 56.18010. *Id.* The judge assessed a penalty of $55. *Id.* at 319.

The record evidence clearly supports the judge's finding that Vermont Slate failed to provide a miner trained in first aid at the Blissville Quarry on the date of the inspection. Accordingly, we affirm the judge's finding of a violation.

III.

Conclusion

For the foregoing reasons, we vacate and remand Citation No. 7720771, and affirm the judge's decision with respect to Citation Nos. 7720768, 7720772, 7720773, 7720775, and 7720778.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring in part, and dissenting in part:

I join the majority in affirming the judge's decision with respect to five of the citations at issue in this case. However, I would also affirm the judge's finding that the operator failed to adequately guard the trimmer, in violation of 30 C.F.R. § 56.14107(a).[1] Inspector Budd presented detailed testimony regarding the lack of guarding of the moving parts of the v-belt drive of the trimmer. Tr. 64-69. As my colleagues note, slip op. at 2, the inspector clearly delineated the location of the two pinch points. He testified that the trimmer was unguarded and that the machine operator would stand within a foot of the v-belt, and "about arm's reach, maybe a little less" from the pinch points. Tr. 64, 67, 69. He stated that because the v-belt areas were not guarded, an individual could possibly stick a hand in the v-belt drive or be drawn in from clothing, possibly resulting in the loss of fingers or a hand. Tr. 64. Consequently, I would hold that substantial evidence supports the judge's determination, as a reasonable person could certainly find this testimony adequate to support the judge's conclusion that the trimmer was not adequately guarded.

My colleagues in the majority find that the judge erred by failing to properly analyze all of the probative evidence to determine whether the moving parts on the v-belt drive posed a hazard to miners on the platform who were operating the trimmer. Slip op. at 4. Specifically, the majority faults the judge's conclusion that the evidence Camara presented on that issue was irrelevant because the testimony addressed only whether the exposed moving parts on the equipment were hazardous to a person standing on the ground. *Id.* at 3-4.

While the judge characterized Camera's evidence (which consisted solely of his testimony and a drawing of the trimmer) as irrelevant, I would call it muddied and inconsistent. It was not clear from his statements whether he actually ever confronted MSHA's concern about the dangers of the v-belt to a trimmer operator, because he spent a lot of time discussing how impossible it would be to reach the pinch points from the ground. Tr. 164, 166, 168-69. He never clearly explained how a machine operator would be protected from contact with the pinch point areas. Tr. 162-70. In fact, when asked about the v-belt, Camera testified: "Was not guarded." Tr. 169.[2]

This case is in a procedural posture similar to that of *Arch of Kentucky*, 20 FMSHRC 1321 (Dec. 1998). There, the Commission found that the judge had improperly sustained an objection by the Secretary, thus excluding evidence the operator had tried to have admitted. *Id.* at 1328. However, a unanimous Commission held that although the judge's evidentiary ruling

---

[1] Section 56.14107(a) requires that moving machine parts be guarded to protect persons from moving parts that may cause injury.

[2] Camara did initially insist that the trimmer was guarded, but apparently only in the front. Tr. 163-65. The inspector clarified that there was a guard on the trimmer itself, but not on the v-belt drive. Tr. 72-73.

was incorrect, his error was harmless, in part because the excluded testimony could not have overcome the credited testimony of some of the other witnesses (together with other evidence). *Id.* at 1328-29. Thus the Commission did not find it necessary to remand the case to the judge so that he could take into account the improperly excluded testimony. Here as well, it is a needless exercise to remand the case to the judge to review Camara's testimony once again.

In a perplexing procedural move, my colleagues also vacate and remand this case based in part on the operator's argument that the judge erred by refusing Camera's request to allow Tango to testify.[3] At the same time, they admit that the judge "did not directly respond to Camara's question." Slip op. at 5. I am hard pressed to think of another case where the Commission (or any appellate body) vacated a decision without even deciding whether the claimed error occurred.[4]

It appears as if my colleagues are actually vacating and remanding this case because they believe the judge failed to provide the operator, who was appearing pro se, with adequate guidance about its right to call the witness. *Id.* This flies in the face of the well-accepted precept that matters relating to the orderly and expeditious conduct of a trial are within the sound discretion of the trial judge. Jane C. Avery, Annotation, *Propriety and Prejudicial Effect of Federal District Judge's Granting or Denying Brief Recess During Trial*, 21 A.L.R. Fed. 948, 950 (1974); *see also* 75 Am. Jur. 2d Trial § 180 (1991) (court has supervisory power to control proceedings at trial, and its authority to control the overall direction of the trial will only be overturned when it abuses its discretion by acting in an unreasonable, arbitrary, or unconscionable manner); *In re: Contests of Respirable Dust Sample Alternation Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995) (under an abuse of discretion standard, a trial judge's decision will not be disturbed unless it made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances). Given that my colleagues agree with my conclusion that the judge did not abuse his discretion, slip op. at 4, (the applicable standard of review, with which they do not quarrel), I fail to understand the legal basis for their ruling.

---

[3] The operator based its request on its assertion that counsel for the Secretary had told Camera that Tango would be at the hearing. PDR at 1. No evidence in the record supports this contention, and the Secretary's witness list on her Preliminary Statement does not include Tango. S. Pre-Hearing Statement.

[4] Even if the judge had issued an outright denial when the operator requested Tango's presence at the hearing, the operator made no showing that it had attempted to produce the witness itself. Most courts have concluded that a party who relies on its adversary to produce a witness has not demonstrated the diligence required to the granting of a continuance and that therefore the trial court acts within its discretion in denying the continuance. Annotation, *Prejudicial Effect, in Civil Case, of Denial of Continuance to Call Nonappearing Witness Whom Adversary had been Expected to Call*, 39 A.L.R. 2d 1445, 1446 (1955); *see also* 17 Am. Jur. 2d Continuance § 14 (1991) (request for a continuance based on absence of a witness is properly refused when applicant has not used due diligence to procure the attendance of the witness).

My colleagues also suggest that "Tango's absence from the hearing *may* have prejudiced Vermont Slate," slip op. at 4 (emphasis added), but stop short of making a finding that prejudice actually occurred. Thus it appears that Vermont Slate has failed to convince any of us that its inability to call Tango resulted in substantial prejudice to its case. *See Capitol Cement Corp.*, 21 FMSHRC 883, 889-890 (Aug. 1999) (operator failed to provide convincing evidence that its inability to question a witness resulted in substantial prejudice). Accordingly, because I conclude that the judge's actions regarding the request to call Tango as a witness did not constitute an abuse of discretion, I decline to join my colleagues in vacating and remanding this case with instructions to the judge to permit the operator to present Tango's testimony.

For the foregoing reasons, I would affirm the judge's finding that the operator failed to adequately guard the v-belt drive, in violation of 30 C.F.R. § 56.14107(a).

Mary Lu Jordan, Commissioner

Distribution

Shawn Camara
Vermont Unfading Green Slate Company
P.O. Box 210
Poultney, VT 05764

Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-109-M
v.	:	A.C. No. 35-03516-05502
B & B CRUSHING	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On December 5, 2001, the Commission received from B & B Crushing ("B & B") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On August 13, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 35-03516-05502) to B & B for the sum of $321 relating to Citation No. 07986780. In its request, B & B asserts that it did not file a hearing request to contest the proposed penalty because it believed the civil penalty should have been included in an Order of Dismissal issued by Administrative Law Judge Jerold Feldman on July 18, 2001 (Docket No. WEST 2001-408-M). Mot. Apparently proceeding pro se, B & B attached a copy of the dismissal order to its request. *Id.*, Attach. The dismissal order involved

another proposed penalty assessment (A.C. No. 35-03516-0551) issued to B & B on April 13, 2001, involving Citation Nos. 7986781, 7986782, and 7986784. In the dismissal order, the judge vacated the three citations and dismissed the proceedings. There is nothing in the record for Docket No. WEST 2001-408-M to indicate that the dismissal order should have included Citation No. 07986780.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, however, we are unable to evaluate the merits of B & B's position. In particular, B & B provides no explanation or supporting evidence for its assertion that Citation No. 07986780 should have been included in the dismissal order issued on July 18, 2001. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Eclipse C Corp.*, 23 FMSHRC 134, 134-36 (Feb. 2001) (remanding to judge where operator filed request for hearing in one proceeding and mistakenly believed that request applied to other citations it received at the same time). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

George J. Bora
B & B Crushing
P.O. 3500-181
Sister, OR 97759

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 10, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2002-50
v.	:	A.C. No. 36-08862-03509
ROSEBUD MINING COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 8, 2002, the Commission received from Rosebud Mining Company ("Rosebud") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Rosebud, through counsel, indicates that on August 30, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Rosebud a proposed penalty assessment totaling $553 for seven alleged violations. Mot., Attach. Rosebud asserts that it did not contest four of the citations and paid their penalties to MSHA, but that it filed a proposed assessment form ("green card") signed by counsel for the operator on September 25, 2001, contesting the penalties for the remaining three citations. *Id.* Apparently, however, MSHA did not receive the green card. *Id.* Attached to Rosebud's request is a copy of the green

card which indicates that the company intended to contest the penalties (totaling $291) for three of the listed citations (Citation Nos. 07060863, 07060868, and 07060869). *Id.*, Attach.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

Rosebud has offered a sufficient explanation demonstrating that it intended to contest the penalties relating to Citation Nos. 07060863, 07060868, and 07060869, and that the proposed penalty assessment as to those citations became final as a result of "inadvertence" or "mistake." *See Eighty Four Mining Co.*, 23 FMSHRC 1102, 1102-04 (Oct. 2001) (granting relief where operator paid some of the penalties and allegedly submitted green card contesting the other penalties but MSHA did not receive the green card); *Eighty Four Mining Co.*, 21 FMSHRC 876, 876-78 (Aug. 1999) (same). Rosebud's intention to contest these penalties is supported by the copy of the green card, signed and dated by counsel, attached to its request, and by its uncontested assertion that it paid the remaining uncontested penalties. In addition, no other circumstances exist that would render a grant of relief here problematic.

Accordingly, in the interest of justice, we grant Rosebud's unopposed request for relief to reopen the penalty assessment that became a final order with respect to Citation Nos. 07060863, 07060868, and 07060869. We remand to the Chief Administrative Law Judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Joseph A. Yuhas, Esq.
P.O. Box 1025
Northern Cambria, PA 15714

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

May 10, 2002

RONALD HARRISON	:	
	:	
v.	:	Docket No. CENT 2000-88-DM
	:	
SIDCO MINERALS	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arose under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3), when Ronald Harrison filed a discrimination complaint against Sidco Minerals on December 6, 1999. Over six months later, Chief Administrative Law Judge David F. Barbour dismissed Harrison's complaint after Harrison failed to respond to two show cause orders directing him to file with the judge a copy or restatement of his original discrimination complaint. Order of Default (June 22, 2000). On July 20, 2001, Harrison filed with the Commission a request to vacate the judge's default order. Sidco Minerals opposes Harrison's request for relief. SM Mot. (Aug. 9, 2001).

In his request, Harrison, apparently proceeding pro se, asserts that he never received any requests from the judge to which he did not respond. H. Mot. at 4. Thus, we assume Harrison is contending that he either did not receive a copy of the second show cause order or that he responded to the order but the Commission did not receive his response. We note, however, that the record contains the certified mail receipt for the judge's second show cause order issued on May 5, 2000, indicating that it was received and signed for by Harrison on May 9, 2000. In addition, Harrison provides no explanation for the late filing of his request for relief from the default order. The remainder of his request goes to the merits of the discrimination case.

The judge's jurisdiction in this matter terminated when his default order was issued on June 22, 2000. 29 C.F.R. § 2700.69(b). Relief from a judge's order may be sought by filing a

petition for discretionary review within 30 days of its issuance. 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission received Harrison's request on July 20, 2001, almost a year after the judge's default order had become a final decision of the Commission.

When considering whether relief from a final Commission order is appropriate, we have found guidance in, and have applied "so far as practicable," Fed. R. Civ. P. 60(b).[1] *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). In accordance with Rule 60(b)(1), the Commission previously has afforded a party relief from a final order of the Commission on the basis of "inadvertence" or "mistake." *See Kinross DeLamar Mining Co.,* 18 FMSHRC 1590- 1590-92 (Sept. 1996). A Rule 60(b) motion "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3). *Id.*; *Lakeview Rock Prods., Inc.*, 19 FMSHRC 26, 28 (Jan. 1997) (holding that requests for relief under Rule 60(b)(1) must be made within one year of entry of order); *see* 12 James Wm. Moore, et al., Moore's Federal Practice ¶ 60.65[2][a] (3d ed. 1997).

Harrison does not explicitly assert in his request that he is entitled to relief under Rule 60(b). However, we construe the basis of his request — that he either did not receive the second show cause order or responded to it and his response was not received by the Commission — as falling squarely within the coverage of the "inadvertence" or "mistake" provisions of Rule 60(b)(1). We therefore conclude that Harrison's request is not entitled to relief under Rule 60(b)(1) because it was filed over a year after the default order was issued. *See Newball v.*

---

[1] Rule 60(b) states, in pertinent part:

> [T]he court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Offshore Logistics Int'l, 803 F.2d 821, 827 (5th Cir. 1986) (holding that one-year time limit under Rule 60 (b) begins to run from date order is issued). Furthermore, Harrison provides no explanation in his request why he failed to file a timely petition for discretionary review after the default order was issued. *See Haro v. Magma Copper Co.*, 5 FMSHRC 9, 9-11 (Jan. 1983) (denying request to reopen final Commission decision where request failed to adequately explain its late filing).

Accordingly, we deny Harrison's request for relief under Rule 60(b).

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Ronald Harrison
P.O. Box 736
Linden, TX 75563

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 14, 2002

DISCIPLINARY PROCEEDING : Docket No. D 2001-1

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman; Jordan, Commissioner

This disciplinary proceeding arises under Commission Procedural Rule 80.[1] On November 21, 2000, the Commission received a disciplinary referral under Rule 80(a) from a miner who filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") and was temporarily reinstated during the pendency of his case. In the referral, the miner alleges that "there was unprofessional conduct on the part of the attorneys handling [his] case," including the failure of his counsel to follow up on overtime pay of over $13,000 to which he believed he was entitled under the judge's temporary reinstatement order; and that he was "coerced into making a settlement" of the discrimination case brought by the Secretary on his behalf. In support of his allegations, the miner attached to his referral copies

---

[1] Commission Procedural Rule 80 provides in part:

> (b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct. . . . (c) Disciplinary proceedings shall be subject to the following procedures: (1) Disciplinary referral. . . . [A] person having knowledge of circumstances that may warrant disciplinary proceedings against an individual . . . shall forward to the Commission for action such information . . . (2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted.

29 C.F.R. § 2700.80.

of notes of several phone conversations with counsel in the Solicitor's Office, and an April 2000 letter from counsel in the Solicitor's Office to the operator's counsel inquiring about the status of the miner's overtime pay, which the solicitor stated was due under the judge's order of temporary reinstatement, but which had not been paid to the miner.

This is the second of two disciplinary matters arising from the miner's discrimination case. In D 2000-1, we considered a disciplinary referral based on a 19-month delay by MSHA and the Office of the Solicitor of Labor in applying to the Commission for the miner's temporary reinstatement. 24 FMSHRC 28 (Jan. 2002) ("*Disciplinary Proceeding I*"). A majority of Commissioners dismissed the referral in *Disciplinary Proceeding I.*

In reaching our conclusion in this matter, we considered the material submitted by the miner as well as the record of the Commission's investigation into *Disciplinary Proceeding I*, which includes testimony from the Solicitor of Labor, interviews with the miner, and the record in the underlying discrimination proceeding. Regarding the miner's allegation that he was "coerced into making a settlement," we find no evidence that the miner was subjected to undue pressure or compelled, against his will, to settle. We also note that the parties' settlement agreement was approved by a Commission Administrative Law Judge after a brief hearing. During the hearing, the judge asked whether the settlement disposed of any claims the miner might have, and was assured that it did. In response to the judge's questions, the miner confirmed that he had read the agreement, discussed it with counsel, and agreed to it. In his decision approving settlement, the judge also stated that he confirmed that all the parties understood and agreed to the settlement agreement. The record of this proceeding clearly indicates that no coercion occurred.

As for the other allegations made by the miner, even assuming that the allegations are a true and unbiased recitation of what occurred, we find no indication that any individual attorney acted unethically.

Regarding the issue of the miner's overtime pay, in his decision temporarily reinstating the miner, the judge awarded the miner his former position with full pay and benefits, which under Commission case law customarily includes overtime pay. *See Sec'y of Labor on behalf of Franco v. W.A. Morris Sand & Gravel Inc.*, 18 FMSHRC 278, 289 (Feb. 1996) (ALJ); *Sec'y of Labor on behalf of Walker v. Dravo Basic Materials Co.*, 12 FMSHRC 1127, 1128 (May 1990) (ALJ). As reflected in the April 2000 letter from the miner's attorney in the Solicitor's Office to the operator's counsel, the operator failed to include overtime in the checks it sent to the miner pursuant to the judge's reinstatement order.

The miner maintains that he contacted the solicitor by phone to ask about the letter that was sent to the operator's counsel, and that he was told there had been no response. The miner recalls the solicitor telling him that he (the solicitor) had not had the time to follow up on it, and that it would be better to do so after trial. The miner's case was to have gone to trial during August 2000, but settled the same day. A hearing was held during which the judge approved the

parties' settlement agreement. Although the agreement the miner signed states that "he waives any further claim to payment pursuant to [the temporary reinstatement order]," the miner insists that he was not told at any time before settlement that a settlement agreement would include or cover past-due overtime payments. In the weeks following settlement, the miner recalls that he asked attorneys in the Solicitor's Office about the overtime pay, but was told that under the settlement agreement, he was not entitled to any such money.

Notwithstanding whether the miner would have been able to prove entitlement to overtime pay,[2] we cannot overlook the settlement agreement that the miner signed. The agreement clearly states that the miner "waives any further claim to payment pursuant to [the] Order of Temporary Reinstatement." The agreement also includes a separate Release and Waiver of All Claims, which contains very comprehensive language in which the miner releases the operator "from any and all actions, claims, causes of action, demands, costs and expenses." Furthermore, as we state above, the judge who approved this settlement agreement questioned the parties and satisfied himself that the parties, including the miner, understood the settlement.

It is difficult to conceive how anyone could read the releases in the settlement agreement and sign the document if they felt there was more due to them than the consideration offered in the agreement, particularly in light of the judge's questions regarding whether the parties understood the settlement. If anything, the release ought to have put the miner on notice that it was his last chance to resolve any remaining matters, and the judge's questions provided him the opportunity to raise any lingering concerns.

We will refrain from responding to all of the assertions made in our colleague's opinion, but feel compelled to speak to some of the more serious allegations. First, our colleague's opinion suggests that the mere existence of *Disciplinary Proceeding I* (which was based on the 19-month delay in filing the application for temporary reinstatement) precluded the ability of attorneys in the Solicitor's Office to objectively recommend a fair settlement. Our colleague postulates that attorneys in the Solicitor's Office wanted to settle the case to avoid a trial where

---

[2] Our colleague contends the miner's unrebutted testimony at the temporary reinstatement hearing proved his entitlement to 20 hours a week overtime. Slip op. at 14-15 & n.14. We disagree. Pleadings filed on behalf of the miner, both before and after that hearing (including the discrimination complaint and a declaration by the Solicitor representing the miner), allege entitlement to only half as much overtime. Moreover, due to the necessarily truncated nature of temporary reinstatement proceedings, parties must not be expected to conduct a preliminary adjudication of the merits of a discrimination claim. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987) ("[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought"), *aff'd*, 920 F.2d 738 (11th Cir. 1990). To expect parties to go into a temporary reinstatement proceeding, ready to litigate not only the entitlement to reinstatement but also the dollar amount of damages at issue should a violation ultimately be found, would unduly burden the proceeding.

information adverse to their interests in the disciplinary proceeding might surface. Slip op. at 6-7, 10. This speculative theory is based on the unsupported assumption that the hearing would somehow have focused on the Secretary's delay in filing the temporary reinstatement application, and not on whether the miner was fired in violation of section 105(c). We choose not to engage in any such speculation, and refuse to draw any such conclusions.

To the contrary, we find that the record before us belies Commissioner Beatty's suggestion that the attorneys in the Solicitor's office rushed to settlement to avoid a trial that would reveal information harmful to them. Conversations about settling the discrimination case occurred many months before the case actually settled in August 2000, and *before* the Disciplinary Referral was filed on May 17, 2000. In fact, the judge himself, in his April 12, 2000 Prehearing Order, directed the parties "to confer for the purpose of discussing settlement."

Commissioner Beatty also asserts that the attorneys in the Solicitor's Office pressured the miner to settle the case. However, the notes submitted by the miner reveal no undue pressure or improper conduct. Indeed, they depict dialogue typical of the kind that occurs between a lawyer and client on the subject of settlement. In one conversation, which according to the miner's notes occurred about three weeks before the case settled, the lawyer asked the miner what he would accept to settle the case. The miner responded with a figure. The lawyer explained the problems of proof he expected to confront at trial and proposed a lower figure, suggesting the employer would be more inclined to consider this to be a reasonable offer. The miner agreed to the figure and the case ultimately settled for this amount.[3]

Finally, our colleague implies that an attorney from the Solicitor's office might have pressured the miner into accepting the settlement by suggesting that a hearing on the miner's 105(c) complaint might lead to the resurrection of the 110(c) investigation of the miner. We find this assertion completely unfounded and without record support. According to the miner's notes, one of the attorneys did mention that the operator could argue that the miner should be held personally liable for the safety violations that led MSHA to investigate the miner under section 110(c). However, the attorney was simply repeating what the operator had argued at the temporary reinstatement hearing. In any event, the miner's notes state that one of the other attorneys from the Solicitor's Office had previously assured the miner that MSHA had already decided not to bring a 110(c) charge against him, and that he had been "let off the hook."

---

[3] Commissioner Beatty also makes the serious charge that attorneys in the Solicitor's Office refused to relay the miner's settlement offer. Slip op. at 12-13. Our colleague cites nothing in the record to support this assertion, and we have found none. The miner's notes describe a conversation in which one of the attorneys reacts to the miner's settlement proposal with skepticism, but says nothing about refusing to convey it. The notes also reflect a subsequent conversation that same day between the miner and another attorney. The attorney expressed concern that the offer was so high that it would stymie settlement discussions. The miner told him he would consider a lower figure and call him back.

In light of the foregoing considerations, we thus conclude that assignment of this matter to an administrative law judge for further proceedings is unwarranted. Accordingly, this disciplinary referral is terminated.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Commissioner Beatty, dissenting:

I respectfully dissent from my colleagues' decision to dismiss this proceeding without further investigating the complaint made by the miner regarding the quality of the representation he was provided by the Solicitor's Office with respect to settlement of his discrimination complaint and economic reinstatement pending resolution of his complaint.

The background of this proceeding must be fully considered to understand the gravity of the miner's complaint. Much of that factual background is set forth in the opinions of the Commission in *Disciplinary Proceeding*, 24 FMSHRC 28 (Jan. 2002) ("*Disciplinary Proceeding I*"). In short, despite the Mine Act's requirement that the Secretary of Labor act expeditiously on a discharged miner's request for temporary reinstatement under section 105(c), the Secretary did not act on the miner's request for temporary reinstatement for 19 months.[1] Upon the application's eventual filing, a Commission administrative law judge ordered the operator to reinstate the miner and the Commission quickly affirmed that order. The miner did not return to work, but instead the parties agreed to economic reinstatement which, according to the judge's order, was supposed to return the miner to the same economic position he was in before his termination.

In light of the 19-month delay in the filing of the application — a period of time so contrary to the intent of the Mine Act's temporary reinstatement provision that it stands as a monument to the Secretary's failure to comprehend the purpose of the remedy — I became concerned that Department of Labor attorneys may have been involved in failing to timely act upon the miner's reinstatement application. Consequently, I filed a disciplinary referral with the Commission on May 17, 2000, which eventually resulted in *Disciplinary Proceeding I*. It is important to note that my referral to the Commission was pending for nearly 3 months *before* the scheduled hearing date on the merits of the miner's discrimination complaint, August 15, 2000.

Ironically, on the day of the hearing, the miner, at the Secretary's insistence, settled his case with the operator. Approximately 3 months later, the miner filed a disciplinary referral with the Commission, taking issue with the representation he was provided by the Solicitor's Office attorneys in connection with the settlement agreement, and, more importantly, the terms of the settlement agreement as they related to the money he was owed as part of his temporary economic reinstatement.

In response to the disciplinary referrals, the former Solicitor of Labor, Henry Solano, appeared before the Commission to discuss both the miner's disciplinary referral and *Disciplinary Proceeding I*. During our meeting the Solicitor attempted to explain away the first

---

[1] As I outlined in my dissenting opinion in *Disciplinary Proceeding I*, the miner's discrimination complaint against the operator here was clearly not frivolous, thus satisfying the extremely low standard necessary for the Secretary to seek immediate temporary reinstatement on behalf of the miner. 24 FMSHRC at 36, 46.

12 months of the 19-month delay because of a potential conflict of interest. According to the Solicitor, his agency made a decision to forego pursuing temporary reinstatement for the miner because of an alleged investigation by MSHA for possible 110(c) charges against the miner. He opined that while MSHA was investigating the miner for a potential 110(c) charge, the case presented a potential "conflict of interest" between the Solicitor's obligation to represent its client, MSHA, and their statutory obligation to pursue temporary reinstatement for the miner.[2] Because the majority in *Disciplinary Proceeding I* refused to conduct a complete investigation into Salono's explanation, no one outside the Department of Labor, including the miner, knows why or how the investigation could have resulted in a delay of an entire year.

It is only after a year had elapsed that MSHA decided to forward the case to the regional Solicitor's Office to process the miner's discrimination case, its section 110(c) investigation of the miner having apparently concluded without the filing of charges against him. *Disciplinary Proceeding I*, 24 FMSHRC at 31. Notwithstanding the previous 12-month delay, the Solicitor's Office held the case an additional 7 months before acting on the miner's temporary reinstatement application. Salono again attempted to explain away this delay by suggesting that his office needed to conduct an additional investigation into the miner's complaint because they were concerned about the strength of the case.

The factual background of this case makes it unlike any case that has ever come before the Commission. In spite of the Solicitor's Office slothful lawyering during the 19 months that led up to the miner's temporary reinstatement,[3] my colleagues in the majority now choose to treat the miner's *post-settlement* complaints as if he was any other litigant before the Commission, merely expressing the normal after-the-fact "buyer's remorse." In my opinion, when the circumstances in which the miner was put by the Department of Labor are fully considered, the

---

[2] As I stated in *Disciplinary Proceeding I*, the "conflict of interest" excuse was simply one of the ever-changing explanations offered by the Solicitor's Office of how and why it took 19 months to file a temporary reinstatement application. It should be noted that previous explanations included: a lengthy investigation of the miner's allegations, requests for additional information by the district and the Solicitor's Office, a delay in forwarding the case to the regional Solicitor's Office, and a 7-month delay in reviewing and filing the temporary reinstatement application by the regional office. We were also informed by the Solicitor that regardless of how dilatory his office was in filing a temporary reinstatement application, it was an exercise of prosecutorial discretion and therefore not subject to the Commission's disciplinary rules. Finally, the Solicitor offered the conflict of interest explanation that provided the impetus for my colleagues' decision to dismiss the disciplinary referral in *Disciplinary Proceeding I*. 24 FMSHRC at 41-43.

[3] In *Disciplinary Proceeding I*, my colleagues in the majority described the delay in the filing of the temporary reinstatement application, as, inter alia, "unacceptable, inexcusable, and wholly avoidable," and based in part on the Solicitor's Office failure to properly implement the discrimination provisions of the Mine Act. *Disciplinary Proceeding I*, 24 FMSHRC at 31.

majority's decision to summarily dismiss this proceeding without seriously examining the allegations does a grave disservice to the mining community that looks to the Commission as an objective evaluator of cases involving the Secretary.

Before addressing the specific allegations made by the miner and the inadequacy of the majority's response in light of the attention those allegations merit, I cannot leave unremarked upon the extremely truncated nature of the Commission's "investigation" of the miner's disciplinary referral. In reaching its decision, the majority had before it for consideration a very limited amount of the information relevant to the miner's allegations. Quite conspicuous by its absence is the most probative information in the case: the recollections of the three Solicitor's Office attorneys directly involved in the settlement. During our investigation, I attempted to fill that glaring hole in the record by preparing a short set of specific interrogatories that I suggested we submit to the three attorneys. An abridged version of those questions is attached as Appendix A. As the record in this case reflects, we never received any of the information sought because the majority simply refused my attempts to submit these questions to the Solicitor's Office.

As a result of the majority's decision to limit our investigation into the miner's disciplinary referral, we are without any first-hand account of how and why the Solicitor's Office attorneys came to strongly recommend settlement of the miner's case, and what steps they took to quickly effectuate the settlement agreement that is now the subject of controversy. The majority's decision to dismiss this matter without a complete look at what occurred, in my opinion, does nothing to exonerate those involved in representing the miner, as a dismissal of a proceeding properly conducted normally would.[4]

A. The Questions Surrounding the Miner's Agreement to Settle the Cases

The miner, in his letter referral, alleges he was "coerced" into settling his cases. In this case, the Commission should have simply followed the same practice it historically has followed when reviewing disciplinary referrals against individuals in the private sector, that is, to establish what it expects of those practicing before us, and conduct an objective inquiry into the matter designed to gather the facts necessary to establish whether the person met the expected standard. *See, e.g., Disciplinary Proceeding*, 22 FMSHRC 1289, 1289-90 (Nov. 2000) (dismissing disciplinary referral because allegations, even if true, did not support disciplinary proceeding); *see also In the Matter of Connie Prater*, 22 FMSHRC 733, 738-39 (June 2000) (ALJ) (at Commission's direction, examining practitioner's conduct at issue and whether it violated Commission's disciplinary rules).

---

[4] I emphasize at the outset that I have no opinion on the propriety of the conduct of the Solicitor's Office attorneys involved in the settlement. There simply is not a sufficient record on which to base any opinion, positive or negative. Consequently, I believe the majority does a disservice to these individuals in giving such plainly limited consideration to the miner's complaints.

In this proceeding, a case not involving the private sector but instead involving the conduct of attorneys in the Solicitor's Office, the majority has decided to do neither. My colleagues do not bother to discuss what it expected of the Solicitor's Office attorneys in recommending that the miner settle his cases, or the allegations raised by the miner concerning how the Solicitor's Office effectuated the settlement. Instead, the majority, citing the notes provided by the miner and the Commission's limited investigation in the first disciplinary proceeding, as well as the miner's acquiescence to the settlement before the judge, concludes that there was no "coercion" because there is "no evidence that the miner was subjected to undue pressure or compelled, against his will, to settle." Slip op. at 2.

Leaving aside for now how incomplete the record is in support of the majority's factual conclusion, the question of whether this, or any, disciplinary proceeding should be dismissed does not hinge on whether the evidence supports the exact terminology chosen by the person making the referral, especially when that person is not even a practitioner before the Commission. Rather, we should look to our own disciplinary rules, which require that "[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. § 2700.80(a). The majority, inexplicably, has failed to so in this case.[5]

Looking to the American Bar Association's ("ABA") Model Rules of Professional Conduct as a general guide to the "standards of ethical conduct required of practitioners in the courts of the United States,"[6] *see* 29 C.F.R. § 2700.80(a), a number of the Model Rules govern what transpired between the miner and the Solicitor's Office attorneys with respect to the settlement. For instance, a lawyer is expected to explain a matter to a client in a manner sufficient to permit the client to make an informed decision. ABA Model Rule 1.4(b). Also, according to ABA Model Rule 2.1, the lawyer is required to exercise *independent* professional

---

[5] As discussed in *Disciplinary Proceeding I*, the Solicitor has claimed that no attorney-client relationship exists between the Solicitor and a miner in a discrimination case. 24 FMSHRC at 34. However, the Commission pointed out that the Solicitor had failed to inform the miner in this case of that position, so the Solicitor's Office would not be permitted to escape the duties the attorney-client relationship imposes upon the attorney. *Id.* at 31-35. Included in those duties are the ethical obligations that govern the attorney-client relationship. *See, e.g.*, American Bar Association Model Rules of Professional Conduct 1.1 to 1.17 (2001) ("ABA Model Rules"). Clearly, permitting an attorney to appear before the Commission "on behalf of a miner," as Solicitor's Office attorneys do in discrimination cases, without having to adhere to the ethical obligations imposed upon attorneys, would result in a huge loophole in the Commission's disciplinary rules.

[6] Reference to the Model Rules is also appropriate because the Commission is without information as to the states the involved attorneys are admitted in, and the fact that the miner lived on one state while the attorneys were based in one or more other states.

judgment and render candid advice, drawing upon not only the law but other factors that may be relevant to the client's situation.

Of course, because the Commission has failed to conduct a complete investigation into the miner's allegations, we do not have the information necessary to draw any reasoned conclusions regarding the extent to which, if at all, these or other ethical guidelines were actually violated. What we do have is evidence that should have raised a red flag with the majority that a thorough investigation was warranted. Most significantly, there is no disputing that the Solicitor's Office found itself in an awkward position here, representing a miner in a discrimination case when it had failed to act on his temporary reinstatement application for 19 months. This fact alone should have been a cause for concern to the majority because the Solicitor's Office continually recommended settlement while its actions were under review in *Disciplinary Proceeding I* for that extended delay.[7]

In an effort to provide further guidance with respect to the independent professional judgment an attorney is required to exercise, ABA Model Rule 1.7 recites extensive requirements designed to *prevent* representational conflicts from arising, both between *the interests of the attorney* and the client and between *the different clients* of the attorney.[8] Here, both types of

---

[7] That the Solicitor's Office began actively promoting settlement some 3 months before I filed the original disciplinary referral hardly absolves it of a conflict, the majority's suggestion to the contrary notwithstanding. Slip op. at 4. It surely became apparent to the Solicitor's Office well before that time that, as long as the miner's case remained unresolved, it would reflect poorly upon the Solicitor's Office.

[8] ABA Model Rule 1.7 states that:

> (a) A lawyer shall not represent a client if the representation of that client will be *directly adverse to another client*, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client *may be materially limited* by the lawyer's responsibilities to another client or to a third person, or *by the lawyer's own interests*, unless:
>
> > (1) the lawyer reasonably believes the representation will not be adversely affected; and

conflict were arguably present. First, settlement of the miner's case eliminated the need for a trial on the merits of the miner's discrimination complaint, at which one of the primary issues may have been the reasons for the 19-month temporary reinstatement application delay also at issue in *Disciplinary Proceeding I*.[9] As mentioned, the first 12 months of delay was attributed to MSHA, which, like the miner, was a client of the Solicitor's Office.

In addition, the other 7 months of delay was attributable to the Solicitor's Office itself. In defending itself in *Disciplinary Proceeding I*, the Solicitor's Office took the position that the delay was the result of the weakness of the miner's case. Of course, settlement of the miner's discrimination case before trial prevented that claim from being tested.

Despite the fact that both MSHA, a client of the Solicitor's Office, as well as individual attorneys in that office, stood to be in a better position in *Disciplinary Proceeding I* from settlement of the miner's case, to my knowledge none of the safeguards in Model Rule 1.7 that should have protected the miner's interests in light of the conflicts faced by his attorney, the Solicitor's Office, were in place at any point during which settlement was being considered. In addition, the Solicitor's Office did not mention the *Disciplinary Proceeding I* and the settlement's relation to it to the judge who approved the settlement agreement, and it is unrealistic to expect the miner to have *ever* recognized the import of the issue. Thus, a case that was delayed for a year by the Solicitor's Office, allegedly because of concerns that it faced a conflict in its dual representation of the miner and the Secretary, was nevertheless settled by the

---

> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(Emphasis added).

[9] Amazingly, the majority questions whether the issue of the Secretary's delay in filing for temporary reinstatement, and bringing the miner's discrimination case, would have been an issue at the scheduled hearing. Slip op. at 4. I believe the operator's 40-page motion for summary decision, which was almost entirely based on the Secretary's failure to bring the case in a timely manner, and was pending at the time of settlement, provides more than sufficient grounds to suggest that the operator was not going to drop the issue. The operator clearly would have continued arguing that the delay prejudiced its ability to defend against the miner's claims. Interestingly, in another MSHA Western District case, with even less of a delay, the Secretary eventually bowed to such a defense. *See United Metro Materials*, 24 FMSHRC 140, 141 (Feb. 2002) (vacating direction of review that Commission had issued sua sponte upon Secretary's subsequent vacation of citation, leaving standing judge's decision dismissing proceeding on ground that Secretary unreasonably delayed 14 months in proposing a penalty).

Solicitor's Office in the face of a direct conflict of interest. In my opinion, nothing shines a brighter light on the credibility of the Solicitor's Office's reason for the delay in bringing the miner's case than the realization that, in spite of the fact that the Solicitor's Office's was the subject of an investigation for ethical violations in its representation of the miner, Solicitor's Office attorneys not only continued to represent the miner, but also counseled the miner to settle the case before trial.

The majority's willingness to dismiss the miner's complaints regarding the validity of the settlement in this case leaves us to ponder two important questions: if the miner's discrimination case had been heard by a judge on the merits, or if the Commission would have conducted a complete investigation into the attorneys' involvement, what would we have learned about the validity of the Solicitor's excuse that MSHA took 12 months to conduct a 110(c) investigation, and more importantly what was the *true* strength of the miner's discrimination case against his employer? In my view, answers to these questions would have laid the groundwork for a significantly different outcome in this case, and the disciplinary referral tossed out by the majority in *Disciplinary Proceeding I.*

The majority has also dismissed the referral without giving objective consideration to the miner's notes that reflect various conversations he had with the Solicitor's Office attorneys. Specifically the miner's notes reflect that:

> (1) Despite making the miner wait 19 months before filing his temporary reinstatement application, in the conversation informing the miner of the reinstatement ordered by the judge, the Solicitor's Office trial attorney immediately raised the prospect of settling the case, months before trial and even before the commencement of discovery, as the complaint had not yet been filed;
>
> (2) Less than 2 weeks later, the same attorney raised the possibility that the Secretary could drop the case;
>
> (3) The attorney later informed the miner that the judge did not seem sympathetic to the miner's position, and to get around that they would need to make it very clear that the operator's witnesses were "bad actors;"
>
> (4) Within days after the filing of the original disciplinary referral, the trial attorney requested the miner to specify a compromise back pay figure. However, the attorney did not relay to the operator the miner's offer to accept approximately 75% of his estimated lost earnings, despite the miner's request that the attorney do so. Instead, another Solicitor's Office attorney called the miner that same day to persuade him to accept "a figure a lot lower." The

> miner was told by still another Solicitor's Office attorney that, having experience in many cases like the miner's, such cases settle for $15,000 or $20,000, and the lower figure is what eventually made its way into the settlement agreement.

The majority opines that the dialogue that occurred between the miner and the Solicitor's Office attorneys was typical of the kind that occurs between lawyer and client on the subject of settlement. Slip op. at 4. I disagree. The miner's notes reflect that he requested that the trial attorney make a settlement offer of $50,000, yet there is no record evidence of the operator being provided with that offer, or any other amount that it rejected as excessive. Moreover, even if the figure suggested by the miner may have been deemed excessive by the operator if it had been forwarded, my colleagues' unquestioning treatment of the handling of the matter by the Solicitor's Office is hardly appropriate. The significantly lower $15,000 figure the Solicitor's Office encouraged the miner to offer to settle the case for was accepted by the operator. The wisdom of choosing that figure as an opening offer, which is what apparently occurred, speaks for itself in light of the operator's acceptance of it.

In addition to his notes, the miner reported to the Commission that he was told by one Solicitor's Office attorney that the judge sent a "clear signal" at the miner's reinstatement hearing that "unless there is a ton of new evidence" they would have a "steep uphill battle" prevailing at trial on his discrimination claim.[10] The miner describes the pressure as coming to a head on the day of the discrimination hearing, to such an extent that he felt "bulldozed" into agreeing to settle his cases.

As the foregoing shows, the miner is alleging that the Solicitor's Office attorneys did not base their settlement recommendations solely on their estimates of the strength of the miner's discrimination case.[11] I am especially concerned about the miner's allegation that the third Solicitor's Office attorney indicated that, at trial, the operator could urge that section 110(c) charges be pursued against the miner, and the judge would permit into evidence support for that

---

[10] However, a review of the transcript of the hearing, as well as the judge's subsequent decision, reveals no such signal. At a minimum, the Commission should have requested the attorney to provide his version of the events.

[11] A number of the statements appear to be without support under Mine Act precedent or usual trial procedures.

proposition.[12] I am aware of no precedent which would permit such to occur. The miner, on the other hand, who was not an attorney, could not be expected to know this.

It is important to recognize that the facts contained in this decision are only the miner's version of what occurred in this case as we do not have any accounting of the settlement negotiations from the attorneys involved. It is just as important to recognize, again, that we do not have those accounts because the majority has steadfastly denied my attempts to seek information from the Solicitor's Office regarding their attorneys' involvement in the case. In my opinion, this single fact stands as a true testament of the validity of the majority's decision to dismiss the miner's referral without first ascertaining those attorneys' versions of the events surrounding the settlement negotiations.

Simply stated, this proceeding should not have been dismissed by the majority with so many questions left unanswered. There is no excuse for the majority's reluctance to submit a series of short questions, such as those set forth in Appendix A, to the three attorneys involved requesting, at a minimum, some response to allegations raised by the miner. Without this information, the majority's conclusion about the conduct of the Solicitor's Office attorneys simply lacks the necessary evidentiary support expected of Commission decisions. Under the Mine Act, the Commission's factual conclusions must be supported by substantial evidence *on the record as a whole* to be upheld on review. 30 U.S.C. § 816(a)(1). Here, the majority's decision to stop the inquiry into the miner's referral before developing the entire record not only deprives the miner of his right to have his complaint completely investigated, but also calls into question the Commission's willingness to enforce its disciplinary rules against individuals in the Solicitor's Office.

B. The Overtime Pay Issue

Regardless of how the majority views the miner's allegations regarding the Solicitor's Office attorneys' efforts to bring about a settlement of the case prior to the hearing, it is hard to understand the majority's acceptance of the attorneys' conduct with respect to the overtime pay owed the miner during his economic reinstatement. However, similar to its treatment of the miner's coercion allegation, the majority treats his complaints regarding the overtime pay issue as if he was any other miner appearing before the Commission complaining about the terms of a settlement into which he entered. And, just as we saw in *Disciplinary I*, the majority has again

---

[12] The majority claims this to be "unfounded and without record support." Slip op. at 4. My colleagues are mistaken. According to the miner's notes, which are a matter of public record, he was clearly left with the impression from the conversation that section 110(c) charges against him remained a live issue. The majority also supports its decision to terminate the proceedings by cherry-picking the record to find an earlier conversation in which another of the Solicitor's Office attorneys had assured the miner that MSHA would not bring section 110(c) charges. *Id.* Unlike the majority, I will not impute to the miner the sophistication necessary to discern which of the Solicitor's Office attorneys was more accurate.

refused to conduct a complete inquiry into the allegations raised in the miner's disciplinary referral in spite of the fact that many unanswered factual questions cry out for a continued inquiry into this matter.

As the record indicates, and the majority acknowledges, within weeks of his economic reinstatement the miner alerted the Solicitor's Office attorney representing him that the payments he was receiving from the operator did not include any overtime pay.[13] The miner's unrebutted testimony at the reinstatement hearing was that he was working 20 hours of overtime per week at the time of his discharge. Consequently, in a letter dated April 14, 2000, his attorney wrote the operator's counsel citing that, under Commission law, the miner was due overtime pay. Even though the settlement agreement would not be entered into for another 4 months, the Commission has no further evidence that the miner's attorney did anything more to pursue the overtime issue with the operator. Further, there is no evidence that the attorney ever raised the overtime issue with the judge.[14]

According to the miner, he was provided with a number of excuses for the Solicitor's Office failing to address the overtime issue. For example, when he raised the issue with the trial attorney in June 2000, after the April 14, 2000 letter, the trial attorney responded that he had been too busy to deal with the matter. The attorney opined that it may be best to raise the issue with the judge *after* the hearing on the miner's discrimination complaint.

Next, the miner alleges that, approximately a week before the settlement was reached, he again raised the overtime issue with his counsel, but was told it was not important at that time. There is no evidence in our limited record that the issue was ever raised as part of the settlement discussions.

---

[13] As the majority states (slip op. at 2), the judge awarded the miner his former position *at the same pay and benefits*, which under Commission law *includes* overtime pay.

[14] The majority clearly errs when it suggests that the miner would have to "prove" his entitlement to overtime pay. Slip op. at 3. Evidence on the issue of overtime pay was submitted by the Secretary through the miner's testimony at the reinstatement hearing, and was not rebutted by the operator. Consequently, under the terms of the judge's order and Commission case law cited by the majority (slip op. at 2), the miner was plainly entitled to overtime pay as part of his economic reinstatement. The only question was whether the Solicitor's Office would see fit to advance his claim to it, beyond of course the letter the Solicitor's Office sent to the operator setting forth the exact same explanation why the miner was due 20 hours of overtime per week. In light of the foregoing, I simply cannot understand why my colleagues in the majority, who affirmed the judge's decision temporarily reinstating the miner at the same pay and benefits, now find it necessary to cull the record for other evidence that the miner was due 10 hours of overtime pay per week, not 20. *See* slip op. at 3 n.2. To what end? The issue before us is whether the miner was adequately represented in his pursuit to recover *any* overtime pay during his economic reinstatement.

The miner further contends that, after the settlement, he asked another Solicitor's Office attorney about the overtime pay, as he thought it remained a live issue notwithstanding the settlement. At that point he received an acknowledgment from that attorney that the issue had been forgotten during the settlement agreement discussions. The miner steadfastly contends that he was never told, prior to the settlement, that the agreement would include or cover any money for the past due overtime payments.

For my colleagues in the majority, the terms of the settlement agreement are enough to dispose of the miner's claim that he did not realize that the agreement included his outstanding claim to overtime payment during his economic reinstatement. Slip op. at 3. The majority finds that because the language of the settlement releases the operator from further claims under the reinstatement order, and contains comprehensive language ending the litigation, "[i]t is difficult to conceive how anyone could read these releases in the settlement agreement and sign the document if they felt there was more due to them." *Id.*

I find several things troubling about the majority's approach on this issue. First, the majority treats the issue before us as one of contract, as if the miner were seeking further compensation from the operator. As he is not, resort to the terms of the agreement hardly disposes of the miner's claim that he received poor representation in entering into an agreement by which he forfeited his right to the overtime pay due him.

Secondly, the terms of the settlement agreement are not as clear on the overtime issue as the majority apparently views them. As the majority acknowledges, the miner waived "further claim to payment pursuant to" the temporary reinstatement order. *Id.* In the miner's eyes, his claim to overtime pay was not a "further" claim to payment, as in a new one; rather, it was an existing claim, made months previous. Buttressing the miner's belief was what he had been told by the Solicitor's Office attorney with whom he discussed the issue: that it was best addressed after the upcoming hearing.

Instead of a hearing on the merits on the day scheduled, however, the judge heard the parties' motion to settle the case. I do not believe that the miner, as a layman, should have been expected to comprehend that what was occurring that day was nullifying what the attorney had told him previously regarding how it would be more appropriate to raise the overtime pay issue at some later time. The majority Commissioners, though, disagree.

Conspicuously absent from the majority's analysis is any discussion of whether the Solicitor's Office even attempted to explain to the miner the ramifications of the settlement agreement with respect to his outstanding claim for economic reinstatement overtime pay. The disciplinary rules set forth the standards of communication expected of a lawyer advising a

client.[15] Consequently, the terms of the settlement agreement are not by themselves dispositive of the issue before us.

My colleagues and I clearly disagree on the issue of whether the miner really understood the legal mumbo-jumbo in the settlement agreement and release, and how that language ultimately effected his right to a post-settlement recovery of the overtime compensation he was entitled to. But, if we simply take a common sense approach to this issue and review the numbers involved, we see strong evidence that it was unlikely the miner actually understood he was waiving his right to payment for overtime regardless of his decision to sign the agreement.

For example, during the Commission's cursory investigation, the miner provided his estimate of the overtime compensation he believes he was entitled to receive, based on the 20 hour per weeks of overtime the Solicitor's Office used in its letter to the operator. The miner calculated that over the course of his 6-month economic reinstatement he was entitled to $13,260 in overtime pay. While standing alone this is a significant sum, it becomes much more so when viewed in light of the *total* amount the miner received from the settlement: $15,000. It is important to remember that the miner was out of work for a total of 19 months *before* his application for temporary reinstatement was processed by the Secretary. During this time period, assuming a typical 40 hour work week, the miner would have logged approximately 3040 work hours. If we deduct the overtime pay the miner and the Solicitor's Office alleged the miner was entitled to ($13,260) from the total settlement ($15,000), we find that the miner then would have settled the case for $1,740, or 57 cents for each hour of labor he would have provided ($1,740 divided by 3040 hours).

In spite of these alarming figures, the majority maintains that this miner was fully aware of the compensatory terms of the agreement he was signing. Given all that this particular miner has been through, it is startling to me that the majority would suggest that he knowingly agreed to a settlement amount that paid him pennies on the dollar for his labor. It seems just as likely to me that because of the confusing nature of the proceedings,[16] and representations made by the solicitors, the miner truly believed that the overtime issue would survive the settlement.[17] As I

---

[15] According to ABA Model Rule 1.4(a), a lawyer is to keep a client "reasonably informed about the status of a matter and promptly comply with reasonable requests for information." Moreover, Model Rule 1.4(b) goes on to require a lawyer to "explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation."

[16] The discrimination proceeding involved two separately docketed cases, with a docket number for the discrimination case, and a docket number for the temporary reinstatement application.

[17] As the majority recognizes, the miner's recollection was that the solicitor told him it would be better to follow up on the overtime issue after the trial. Slip op. at 2. The miner further

have stated before, "I have confidence that miners understand, better than anyone else, the value of their labor when it comes to negotiating a back pay award." *Sec'y of Labor on behalf of Maxey v. Leeco, Inc.*, 20 FMSHRC 707, 711 (July 1998) (Commissioner Beatty, dissenting).

Again, the foregoing account is all based on the miner's version of events. I am certain that the attorneys from the Solicitor's Office who were involved in this matter would add much to our understanding of this controversy if given the opportunity. The majority, however, has steadfastly refused to seek information from them regarding their recollections.

Here, the majority once again misses the forest for the trees, and, in the process, avoids addressing the ultimate issues the miner's disciplinary referral poses. As the decisions in *Disciplinary Proceeding I* make plain, this miner was uniquely situated, given his treatment by the Secretary's representatives. Moreover, as discussed previously, the issue of how well informed the miner was when he decided to settle his cases is open to a very serious debate. In my view, it is hardly appropriate for the majority to look to the terms of a settlement agreement, especially one which resulted from such controversial circumstances, as the only source of resolving the miner's overtime pay dispute. It is especially inexcusable to do so after foregoing the opportunity to fully investigate the Secretary's crafting of the settlement agreement.

Again, the ABA Model Rules of Professional Conduct provide several standards that may be relevant to the allegations made by the miner regarding the overtime pay issue. Rule 1.1 requires a lawyer to "provide competent representation to a client." This rule specifies that competent representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Rule 1.3 instructs attorneys to "act with reasonable diligence and promptness in representing a client." Clearly, these standards are potentially implicated by the miner's allegations, both with respect to the Solicitor's Office apparent failure to follow up on the April 14, 2000 letter to the operator's attorney concerning the miner's entitlement to overtime pay as part of his temporary economic reinstatement, and if the Solicitor's Office failed to raise the overtime issue during the course of negotiations to settle the discrimination case. Also open to question under these standards is the trial attorney's alleged statement to the miner that it would be better to raise the overtime issue with the judge after the trial.

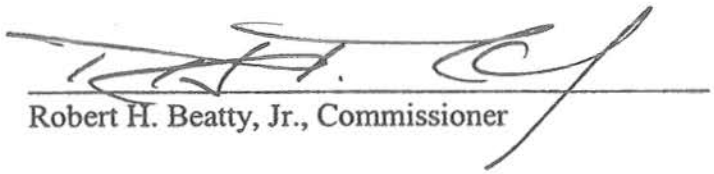
At a minimum, read against these standards, the miner's allegations raise the issue of whether the involved Solicitor's Office attorneys breached ethical standards by failing to provide the miner with a reasonable explanation of the consequences of entering into the settlement agreement. This would of course include his waiver of any potential entitlement to overtime pay as part of the temporary reinstatement previously ordered by the judge.

---

alleges that approximately a week before the settlement was reached he again raised the overtime issue with his counsel, but was told it was not important at that time.

Of course, the Commission cannot consider these issues without gathering the relevant facts, and that the majority refuses to do. Consequently, the full story behind the treatment of the overtime pay dispute by the Solicitor's Office will never be known. If all of the facts were known, it may become apparent that the attorneys from that office handled the dispute appropriately. However, given how the miner's case was handled during the preceding two years by the Department of Labor and its representatives, I, unlike the majority, am not inclined to blithely assume that was the case.

For the foregoing reasons, I respectfully dissent.



Robert H. Beatty, Jr., Commissioner

APPENDIX A

Questions for All Three Solicitor's Office Attorneys

1. Describe your efforts to pursue the miner's entitlement to overtime pay as part of his temporary economic reinstatement following the April 14, 2000 letter to the operator's attorney concerning this issue. If no such efforts were undertaken, please explain why not.

2. Describe the content of any and all conversations you had with the miner concerning his entitlement to overtime pay as part of his temporary economic reinstatement by the operator during the period following the issuance of the judge's temporary reinstatement order.

3. Was it your understanding that the miner was entitled to receive some amount of overtime pay as part of his temporary economic reinstatement by the operator? If so, approximately how many hours of overtime pay per week was the miner entitled to? Describe with particularity the basis for this assessment.

4. Was the issue of the miner's entitlement to overtime pay as part of his temporary economic reinstatement discussed with the operator's counsel in the course of negotiations to settle the miner's discrimination complaint? If so, describe each instance in which the issue was raised, by whom, and the response by opposing counsel.

5. Describe the entire course of negotiations with the operator's counsel to settle the miner's discrimination complaint? Include a description of how many meetings/conversations were held to negotiate the settlement, the miner's initial settlement proposal, the operator's response, and any subsequent proposals and counter-proposals.

6. Did the miner waive his entitlement to overtime pay as part of his temporary economic reinstatement as a result of the settlement reached with the operator in the discrimination case? If so, please describe with particularity the basis for your understanding that the miner had so waived his entitlement to overtime pay.

7. Did you or any other attorney in the Solicitor's Office ever explain to the miner that he was waiving his right to overtime pay as part of his temporary economic reinstatement as a result of the settlement reached with the operator in the discrimination case? If so, describe with particularity the substance of any such conversation with the miner. If not, please explain why this issue was not discussed with the miner.

8. Did the miner ever raise the question of his entitlement to overtime pay as part of his temporary economic reinstatement by the operator during the negotiation of the settlement agreement with the operator, or subsequently? If so, describe the

circumstances of each instance when this question was raised by the miner, and how you responded to him.

9. What was your overall assessment of the strength of the miner's discrimination case against the operator? Describe with particularity the basis for your assessment.

10. What is your overall assessment of the fairness of the settlement reached with the operator in the miner's discrimination case? Describe with particularity the basis for your assessment, and how it would be influenced by the fact that the miner was entitled to a significant amount of overtime pay as part of his temporary economic reinstatement by the operator.

For Trial Attorney:

1. Did you ever advise the miner to the effect that, at the temporary reinstatement hearing, the judge sent a clear signal that a considerable amount of new evidence would be required to enable the miner to prevail on his discrimination complaint and/or that the miner would have a steep uphill battle to win his case? If so, describe with particularity the basis for that advice, and describe the miner's response.

2. Did you ever advise the miner that it would be better to pursue the issue of his entitlement to overtime pay as part of his temporary economic reinstatement following the trial in his discrimination case? If so, describe with particularity the circumstances under which that advice was given to the miner, and your basis for doing so.

3. Did you ever advise the miner that the lack of follow-up on the issue of his entitlement to overtime pay as part of his temporary economic reinstatement was not "that important of an issue"? If so, describe with particularity the circumstances under which that statement was made to the miner, and describe the miner's response.

4. Did you ever advise the miner that an initial settlement demand of $50,000 would be excessive, and would probably not even prompt a response from the operator? If so, describe with particularity the basis for that advice, and describe the miner's response.

For Other Two Solicitor's Office Attorneys:

1. Did you ever advise the miner that an initial settlement demand of $50,000 would be excessive, and would probably not even prompt a response from the operator? If so, describe with particularity the basis for that advice, and describe the miner's response.

2. Did you ever advise the miner that the issue of his potential liability under section 110(c) of the Mine Act could be raised by the operator as a defense in the trial of his discrimination case and/or was a significant impediment to prevailing in the

discrimination case? If so, describe with particularity the basis for that advice, and describe the miner's response.

3. Did you ever advise the miner to the effect that discrimination cases similar to his usually settle for somewhere around $15,000 or $20,000? If so, describe with particularity the basis for that advice, and describe the miner's response. Did you ever suggest to the miner that an initial offer to A&K to settle his case for about $15,000 would be appropriate? If so, describe with particularity the basis for that advice, and describe the miner's response.

Distribution

Edward Clair, Esq.
Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 16, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-259-M
v.	:	A.C. No. 05-04456-05529
HOCKER CONSTRUCTION	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 19, 2002, the Commission received from Hocker Construction ("Hocker") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has

found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

In its request, Hocker, apparently proceeding pro se, asserts that its failure to timely file a hearing request to contest the proposed penalty assessment was due to lack of familiarity with Commission procedures. H Mot. In a March 6, 2002 response to Hocker's request to reopen, the Secretary argued that the Commission should direct Hocker to provide a more detailed explanation of why its unfamiliarity with Commission procedures warrants reopening. Sec'y Mot. at 2-3.

On the basis of the present record, we are unable to evaluate the merits of Hocker's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Hocker has met the criteria for relief under Rule 60(b). *See Upper Valley Materials*, 23 FMSHRC 130, 130-32 (Feb. 2001) (remanding to a judge where operator failed to file hearing request due to unfamiliarity with Commission procedures); *Eclipse C Corp.*, 23 FMSHRC 134, 134-36 (Feb. 2001) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Roy Hocker
Hocker Construction
4167 Co. RD 321
P.O. Box 627
Ignaci, CO 81137

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:		
v.	:	Docket No.	CENT 2002-192-M
	:		A.C. No. 39-01447-05504
WEBSTER SCALE, INC.	:		

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 24, 2002, the Commission received from Webster Scale, Inc. ("Webster") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In the request, John Shoemaker, Vice President of Sales at Webster, seeks relief for a proposed penalty assessment (A.C. No. 39-01447-05504) totaling $1,563 for five alleged violations. Mot. The operator asserts that, due to employee changes, it failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* It contends that the employee responsible for handling MSHA matters is no longer with the company and requests that the Commission reopen the proposed assessment. *Id.* Attached to its request is a copy of the proposed penalty assessment.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997). However, where an operator has failed to timely submit a hearing request due to internal mishandling, the Commission has remanded the matter to a judge for further consideration. *See, e.g., E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 983 (Sept. 1999) (remanding where operator failed to timely file hearing request due to a change in personnel which resulted in mishandling of the proposed penalty assessment).

On the basis of the present record, we are unable to evaluate the merits of Webster's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Webster has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Webster Scale's request for relief and reopen these penalty assessments. Webster Scale has provided a reasonable explanation for its failure to timely request a hearing which I find qualifies as "inadvertence" or "mistake" under Rule 60(b) of the Federal Rules of Civil Procedure. I also note that the Secretary does not oppose the operator's motion. In addition, the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Under these circumstances, and because no other circumstances exist that would render a grant of relief here problematic, I fail to see the need or utility for remanding this matter to determine if relief would be appropriate. I therefore dissent.

Theodore F. Verheggen, Chairman

Distribution

John Shoemaker, Vice President of Sales
Webster Scale, Inc.
P.O. Box 127
North Highway 25
Webster, SD 57274

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 21, 2002

SECRETARY OF LABOR,	:	Docket Nos.	WEST 2002-367-M
MINE SAFETY AND HEALTH	:		A.C. No. 35-03526-05501
ADMINISTRATION (MSHA)	:		
	:		WEST 2002-368-M
v.	:		A.C. No. 35-03526-05502
	:		
	:		WEST 2002-369-M
APPLEGATE SHALE	:		A.C. No. 35-03526-05503

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 16, 2002, the Commission received from Applegate Shale ("Applegate") a request to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Between November 2001 and January 2002, Applegate received three proposed assessments from the Department of Labor's Mine Safety and Health Administration ("MSHA"). The assessments totaled $620 for 10 alleged violations. In Applegate's request for relief, Thomas Vallejo, the company's owner, asserts that it failed to timely submit a request for a hearing on the proposed penalty assessment to MSHA due to a recalcitrant employee. Mot. Vallejo contends that his former secretary, who was delegated the task of filing the hearing requests for proposed assessments A.C. Nos. 35-03526-05501 and 35-03526-05502, assured him

that she had mailed the requests. *Id.* He explains that he only became aware that the proposed assessments were uncontested when he received the last assessment A.C. No. 35-03526-05503. *Id.* Vallejo claims that at that time, he verified with her again that she would submit the requests for all three assessments, but subsequently discovered the employee did not follow through. *Id.* Vallejo maintains that the employee, who refused to return the proposed assessments and hearing request forms to him, is no longer employed by Applegate, and that he is awaiting additional copies of the assessments from MSHA. *Id.* Vallejo also offers that business is slow and that these penalties would affect the company's ability to continue in business. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997). However, where an operator has failed to timely submit a hearing request due to internal mishandling, the Commission has remanded the matter to a judge for further consideration. *See, e.g., E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 983 (Sept. 1999) (remanding where operator failed to timely file hearing request due to a change in personnel which resulted in mishandling of the proposed penalty assessment).

On the basis of the present record, we are unable to evaluate the merits of Applegate's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Webster has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Applegate Shale's request for relief and reopen these penalty assessments. Applegate has provided a reasonable explanation for its failure to timely request a hearing which I find qualifies as "inadvertence" or "mistake" under Rule 60(b) of the Federal Rules of Civil Procedure. I also note that the Secretary does not oppose the operator's motion. In addition, the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Under these circumstances, and because no other circumstances exist that would render a grant of relief here problematic, I fail to see the need or utility for remanding this matter to determine if relief would be appropriate. I therefore dissent.

Theodore F. Verheggen, Chairman

Distribution

Thomas Vallejo
Applegate Shale
233 Rogue River Highway, Suite 269
Grants Pass, OR 97527

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

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 23, 2002

SECRETARY OF LABOR, MSHA, on behalf of KENNETH KUNKEL, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. KENT 2002-225-D
v.	:	BARB CD 2002-09
SILVER CLOUD COAL, INC., Respondent	:	Mine ID 15-18317

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Complainant,
Robert Copeland, Esq., Copeland & Bieger, Abingdon, Virginia, for Respondent.

Before: Judge Zielinski

A hearing on the Application for Temporary Reinstatement was scheduled for May 3, 2002 at the United States Courthouse in Big Stone Gap, Virginia. The hearing was convened, as scheduled, at 9:00 a.m. Kenneth Kunkel, on whose behalf the application was filed, had experienced transportation problems and was present by phone. The parties advised that they had reached an agreement to settle all claims that Kunkel may have under Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801, et seq., related to his discharge on March 14, 2002.

Pursuant to the agreement, as explained by the parties at the hearing, Respondent will pay to Kunkel, wages from March 11, 2002 through May 3, 2002, based upon a 40 hour week (without overtime) at the rate of $18.00 per hour, less lawful deductions. Respondent will also remove any adverse information from Kunkel's personnel file, and will assure that it reflects that he was laid off on May 3, 2002, due to lack of work. In response to any inquiries regarding Kunkel's employment, Respondent will advise of Kunkel's job classification, rate of pay, dates of employment and reason for termination, as stated. Respondent will not oppose any claim by Kunkel for unemployment benefits. In consideration of Respondent's obligations, the Application for Temporary Reinstatement will be withdrawn and Kunkel will withdraw the complaint of discrimination filed with MSHA on or about March 15, 2002. The Secretary will not seek to impose a civil penalty on Respondent and will terminate the investigation of the discrimination complaint.

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

ORDER

Based upon the foregoing, the motion to approve settlement is **GRANTED**. The parties shall comply with the provisions of the agreement as stated on the record and this matter is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge
703-756-6232

Distribution:

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Mr. Kenneth Kunkel, P.O. Box 256, Littcarr, KY 41834 (Certified Mail)

Robert Copeland, Esq., Copeland & Bieger, P.O. Box 1296, 212 West Valley St., Abingdon, VA 24210 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 28, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-428
Petitioner	:	A. C. No. 15-17587-03582
v.	:	
	:	
OHIO COUNTY COAL COMPANY,	:	
Respondent	:	Freedom Mine

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, Professional Corporation, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," charging the Ohio County Coal Company (Ohio County) with one violation of the mandatory standard at 30 C.F.R. § 75.1700 and proposing a civil penalty of $2,000.00, for that violation. The general issue before me is whether Ohio County violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7646849, as first issued on November 21, 2000, alleged a "significant and substantial" violation of the standard at 30 C.F.R. § 75.1700 and charged that "MMU OO1 located in the first south main has intersected two unlocated wells on the active unit located approximately at spad 33+00, in entries 2 and 8 respectively." The citation was twice modified on November 28, 2000, to increase the negligence allegations from "moderate" to "high" and to charge an "unwarrantable failure" violation under Section 104(d)(1) of the Act.[1] The Secretary

---

[1] Section 104(d)(1) provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger,

alleges that the modifications were made "because the wells that were intersected by the #1 unit were found in other sources of information readily available and not utilized by the operator."

The citation was terminated on November 28, 2000. The termination notice states as follows:

> Information has been sent from the operator which shows that five wells have now been found and located in the "3C" panel and that two more wells have approximate locations in the said panel and are not located. The information further shows that another six wells are within the 500 feet [*sic*]barrier of the "3C" panel and are not located. A well was also shown to have an approximate location in the "4C" panel.

The cited standard, 30 C.F.R. § 75.1700, as relevant hereto, provides that "each operator of a coal mine shall take reasonable measures to locate oil and gas wells penetrating coal beds or any underground area of a coal mine." At hearings, counsel for the Secretary stated that the only violations actually charged relate to those wells found on November 20 and 21, 2000, and as initially cited on November 21, 2000. Counsel explained that the additional wells mentioned in the November 28, 2000, termination notice were cited, not as additional charges, but only as purported violative conditions evidencing high negligence and "unwarrantable failure."

The conditions alleged in the initial citation are undisputed. On the morning of November 20th, 2000, an oil well casing was struck by the continuous miner in the No. 8 entry, two feet off of the right rib at crosscut 33+00. The continuous miner also broke a coupling off of the well casing. This incident was reported to the Mine Safety and Health Administration (MSHA) that same morning. MSHA Inspector Archie Coburn, proceeded to the mine later that morning and observed that the well casing had been cut, resulting in a five inch gap. Crude oil, water and mud were emitted from the broken casing. Coburn checked the mine ventilation map in the mine office (Gov't Exh. 4) and observed that this oil well had not been plotted on the map.

---

such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

Mine Superintendent Ricky Brown also told Coburn that he had called Associated Engineers (Associated), an independent contractor who had prepared the map, and was told that the oil well had not been plotted on their maps either. Coburn observed that no methane was being emitted from the well and the oil and water had stopped flowing. Coburn issued a "Section 103(k)" order to ensure the safety of mine personnel and terminated the order later on the same date after the well had been sealed off with a wrap-around coupling. At that time Coburn concluded that, since the well had not been identified on any map, it must have been a "wildcat" well. No evidence of any well was found on the surface above the casing discovered underground.

Coburn testified that he later learned that, on November 21, 2000, at around 9:10 a.m., the miner had cut into another oil well this time in the No. 2 entry, 62 feet inby the last open crosscut. This well was not cased. He learned that the miner had automatically deenergized when it cut into the well indicating the presence of at least 2% methane. Oil and water were also emitted from this well but the methane was diluted and removed by mine ventilation. The well was plugged off and the mine resumed production. This well had also not been plotted on the required ventilation plan map (Gov't Exh. 4).

MSHA Inspector Charles Jones testified that he was present at the scene shortly after the second well was discovered on November 21. When he arrived he detected small amounts of methane on his hand held monitor. According to Jones, methane continued to be emitted from the well until it was plugged. Jones found the ventilation to be appropriate and that no methane was found at the face.

MSHA Mining Engineer Robert Simms was directed to investigate the matter after the second unplotted oil well was discovered. He too verified that the then-current mine ventilation map (Gov't Exh. 4) failed to identify the position of the two wells at issue. According to Simms, there are three sources of information for determining the location of oil wells in the vicinity of the subject mine: (1) Kentucky Geological Service maps from oil well permits, (2) Kellar Maps prepared by a commercial enterprise, and (3) Scout-Check maps also prepared by a commercial enterprise. According to Simms, mine superintendent Ricky Brown told him that he had called Associated President, David Lamb, who told Brown that the two wells at issue were in fact plotted on the Kellar map. Sims did not however testify as to when this conversation occurred. Simms apparently also confirmed on his own that the two wells were in fact plotted on a Kellar map. Simms thereafter issued the modifications on November 28th, to the citation he had issued on November 21st.

Simms testified that he told "them" on November 21, to research all the oil wells in the areas to be mined. A map subsequently produced by Associated on November 25, 2000, which Simms received on November 27, 2000, showed a number of additional wells that had not been plotted on the approved map utilized by Ohio County (Gov't Exh. 4). The new map showed not only the two wells at issue but nine additional wells. Simms testified that he modified the November 21 citation, increasing the degree of negligence and adding unwarrantability findings, based on this newly discovered evidence.

The critical issue in this case is whether Ohio County had taken "reasonable measures" within the meaning the cited standard to have located the cited oil wells. In this regard it is undisputed that Ohio County had engaged the services of the engineering firm, Associated, to provide accurate mine ventilation maps required by the Secretary. Such maps are required by law to show, *inter alia*, the location of oil wells within projected mining areas. According to Associated president, David Lamb, they have been in the business of providing such engineering services to most of the mining companies in the Illinois basin since 1958. Hundreds of mining companies have used their services. According to Lamb, who has a bachelor's degree in civil engineering from the University of Kentucky and is a licensed professional engineer, Associated utilizes a number of informational sources to develop a database of oil wells. Because of inadequacies in each source they use all the sources to cross-check and confirm the location of wells. They utilize the Kentucky Geologic Survey, the Kentucky Division of Oil and Gas, "Kellar Maps," maps developed by scouts for oil companies and individual private records. None of the sources are absolutely reliable however and, especially in the area of the Freedom Mine, there is always a possibility of unmapped (wildcat) wells. There is no evidence that Associated had previously provided any faulty information regarding the location of oil wells. In addition, according to Ohio County Mine Superintendent Ricky Brown, they had been relying upon Associated's well mapping services since they had begun mining the Freedom Mine in 1993 and had, to his knowledge, never previously mined into any unlocated oil wells.

According to Ohio County Mining Engineer Kenneth Moore, in November 2000, mining activities at the Freedom Mine were premised on the most recently MSHA approved mine map which had been prepared by Associated on March 17, 2000, (Gov't Exh. 4). This map had been generated by Associated from a computer disk containing digitalized information in hundreds of "layers." The system is known as computer assisted drafting or "CAD". Moore testified that he had used the same computer disk to prepare an updated map which was later submitted to the Secretary.

As it was later learned, after the two wells at issue herein were mined into, the Associated engineer who prepared the March 17, 2000, map (Gov't Exh. 4) failed to discover a "frozen layer" of digitalized information on the CAD which contained information relating to the cited wells. Accordingly the printed map (Gov't Exh. 4) relied upon by Ohio County failed to identify the two wells cited herein (as well as the additional wells cited in the November 28 termination notice).

Within this framework of evidence, however, I conclude that Ohio County had taken "reasonable measures" to locate the wells at issue. It had contracted with a long established engineering firm with whom they had a long standing relationship and which had never previously failed to locate an oil well in areas mined by Ohio County. It may reasonably be inferred that the firm was reputable in that it had been relied upon since 1958 to provide such services for most of the mining companies in the region.

In reaching these conclusions I have not disregarded the Secretary's contention that, after the discovery of the first unplotted well on November 20, and of previous oil seepage, Ohio County should have been on heightened alert for any mapped or unmapped wells. It is undisputed, however, that the previously discovered seepage was not associated with any oil well and that the well discovered on November 20, was thought by everyone, including the MSHA inspector and an Associated engineer to have been an unmapped "wildcat" well. It was only after further investigation by Associated after the discovery of the second unmapped well on November 21, that the "frozen layer" on the CAD computer disk was discovered by an Associated engineer. However, I find that in any event, reliance by Ohio County upon a reputable engineering firm under the circumstances herein constitutes "reasonable measures" to locate oil wells within the meaning of the cited standard. Accordingly there is no violation as charged and the citation herein must be vacated.

ORDER

Citation No. 7646849 is hereby vacated.

Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

R. Henry Moore, Esq., Buchanan Ingersoll, Professional Corporation, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, Pennsylvania 15219

\mca

 ☆ U.S. GOVERNMENT PRINTING OFFICE: 2002 492-135/65256