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COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

May 11, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2004-108-M
v.	:	A.C. No. 38-00007-17075
GIANT CEMENT COMPANY	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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 March 24, 2004, the Commission received from Giant Cement Company ("Giant Cement") a motion filed by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

In its motion, Giant Cement states that on or about November 14, 2003, it was issued a pair of citations (Citation Nos. 6111285 and 6111286). Mot. at 1; Declaration of Lloyd C. ("Buddy") Hartzog, Jr. ("Declaration") at 1. Giant Cement also states that it timely contested the citations on November 17, 2003, and that the contest proceedings were assigned to an administrative law judge. Mot. at 1; Dec. at 1. Giant Cement further states that on or about January 8, 2004, while the contest proceedings were pending, the Secretary proposed a penalty for Citation No. 611286. Mot. at 2; Dec. at 2. The operator asserts that, mistakenly believing that the pendency of the contest proceedings obviated the need to respond to the proposed penalty, and without consulting counsel, it failed to challenge the proposed penalty assessment.

Mot. at 2; Dec. at 2.[1] Giant Cement contends that on or about March 11, 2004, counsel for the Secretary advised Giant Cement's attorneys that the Secretary had agreed to vacate Citation No. 6111286. Mot. at 2; Dec. at 2. It further contends that even before it learned that the Secretary would vacate the citation, it intended to contest the penalty and ask the judge to consolidate the penalty proceeding with the contest proceedings. Dec. at 2. The Secretary states that she does not oppose Giant Cement's request for relief.

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

[1] Giant Cement states that it realized its mistake before it received the penalty proposal for Citation No. 6111285, and that shortly after it arrived, on or about March 2, 2004, it advised MSHA of its intent to contest it. Dec. at 2.

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

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500

May 18, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2003-86-M
	:	A.C. No. 33-04220-05519
MUNN ROAD SAND & GRAVEL	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, Commissioners

ORDER

BY: Duffy, Chairman; Beatty, Suboleski, and Young, 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 February 24, 2003, the Commission received a request made by Munn Road Sand & Gravel ("Munn Road") to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

The proposed penalty assessment that is the subject of this proceeding (A.C. No. 33-04220-05519) was issued on May 17, 2002. The assessment covers 11 citations issued to Munn Road by the Department of Labor's Mine Safety and Health Administration ("MSHA") in early April 2002. MSHA proposed penalties totaling $860. Munn Road's request to reopen, originally made in a letter to MSHA that was forwarded to the Commission, was prompted by a delinquency letter from MSHA. In its request to reopen Munn Road states that it "did not receive any notice or info prior to" the proposed assessment.

The Secretary of Labor filed a response in opposition to Munn Road's request for relief. The Secretary contends that reopening is not justified by the circumstances, given the evidence that Munn Road did not claim the certified letter containing the proposed assessment when it was delivered to a post office box that MSHA verified to be Munn Road's correct address. Sec. Resp., Attachment A and Decl. of Charlene Lyles.[1]

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). However, a party which refuses to accept certified mail from MSHA will most likely be unable to establish good cause. *Cf. Michigan Expediting Serv.*, 282 NLRB 210 n.6 (1986) (holding that party's failure or refusal to accept certified mail could not be used to defeat purpose of National Labor Relations Act).

[1] The Secretary subsequently reported to the Commission via letter dated March 31, 2003, that it had attempted to serve its response on Munn Road by certified letter but that it went unclaimed as well after three unsuccessful attempts at delivery.

Having reviewed Munn Road's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge. It is appropriate that an administrative law judge address the issues presented in this case, particularly the dispute raised in the Secretary's response regarding the delivery and receipt of the proposed assessment, and then determine whether good cause exists for Munn Road's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny the operator's request for relief from the final order. The Secretary has offered evidence that Munn did not claim the certified letter with the proposed penalty assessment when it was delivered to a post office box that was verified as Munn Road's correct address. Sec. Resp. at 1-2; Attach A and Decl. of Charlene Lyles at 1-2. In fact, the Secretary states that the Postal Service made three attempts to deliver the certified letter (on May 22, 28 and June 7, 2002), and she has submitted the envelope on which the Postal Service documented these attempts. Sec. Resp. at 2; Attach. Munn Road did not rebut these allegations (although admittedly, this could well be because the Secretary's opposition containing these assertions, served on Munn Road by certified letter, also went unclaimed after three unsuccessful attempts at delivery. Letter to Richard L. Baker from Jack Powasnik, March 31, 2003).

The law is clear that when the evidence supports only one conclusion, a remand to the judge serves no purpose. *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (affirming judge's finding of no unwarrantable failure, despite judge's error in not addressing some of the Secretary's evidence). Here, the record compels the conclusion that Munn Road refused to accept certified mail from MSHA regarding the penalty assessment. Accordingly, I would deny the requested relief.

Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 19, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2002-242-M
v.	:	A.C. No. 41-03882-05515
ARNOLD CRUSHED STONE	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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 17, 2003, the Commission received from Arnold Crushed Stone ("Arnold") correspondence which we construe as a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On December 21, 2001, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 41-03882-05515) to Arnold's mine in Blum, Texas. The record indicates that Arnold failed to timely submit a request for hearing to contest the proposed penalty assessment for the three citations in question. Pursuant to section 105(a) of the Mine Act, the penalty proposal became a final order of the Commission thirty days after Arnold received it. On May 24, 2002, the Commission received from Arnold correspondence which it construed as a request to reopen the final order. That request did not explain the basis for reopening the matter. On July 10, 2002, the Commission issued an order remanding the matter to an administrative law judge to determine whether

Arnold had met the criteria for obtaining relief from a final section 105(a) order. 24 FMSHRC 635.

On July 18, 2002, Chief Administrative Law Judge David Barbour issued an order directing Arnold to submit information within 20 days providing "a thorough explanation of why it failed to timely file the notice of contest." On October 24, 2002, the judge issued a show cause order directing Arnold to submit information within 20 days explaining its failure to timely file a notice of contest or to show cause for its failure to submit the information. The order provided that if Arnold failed to comply with the order, "the penalty assessment will *not* be reopened and *Arnold will be required to pay the proposed penalty assessment in full*" (emphasis in original). Arnold did not respond to either of these two orders.

On December 12, 2002, the judge issued a second show cause order which was similar to the prior order. On December 19, 2002, Arnold faxed to the Commission's docket office three letters which briefly disputed the substantive basis for each of the three citations involved. Mot., Attachment. None of the three letters addressed the show cause orders or otherwise explained why Arnold had failed to timely file a notice of contest regarding the proposed penalty assessment.

On December 24, 2002, the judge issued an order which (1) denied Arnold's May 24, 2002, request to reopen the penalty assessment, (2) ordered Arnold to pay the penalty assessment of $3,412 within 30 days, and (3) dismissed the case. 24 FMSHRC 1070. The order stated that the record showed Arnold had received the three orders that had previously been issued and that the letters faxed by Arnold did not respond to the show cause orders' requirement that Arnold explain why it did not timely file a notice of contest.

On January 17, 2003, the Commission received a letter from Mike Arnold, company president, dated January 14, 2003, in which the company requested that the Commission reopen this matter. Mot. The company stated that after receiving the original citations in this matter it had contacted an individual in the regional office of the Secretary and requested a conference. *Id.* The company further stated that it understood that the regional office would take some action to address the citations in question. *Id.* According to the letter, the company did not receive anything further until it received the order of December 24, 2002, denying its request to reopen. *Id.* The letter provided no explanation of why Arnold had not initially filed a notice of contest concerning the proposed penalty assessment, why Arnold had not responded to the judge's order to provide additional information, or why Arnold had not responded to the judge's two show cause orders, notwithstanding clear record evidence that Arnold had received all the orders.

Having reviewed Arnold's most recent request and the record in this matter, we hereby deny the request for relief from the final order of December 24, 2002. By its order of July 10, 2002, the Commission remanded the matter to an administrative law judge so that Arnold would have the opportunity to explain why this matter should be reopened. It was incumbent upon Arnold to comply with the judge's subsequent, clearly worded orders and to provide a

justification for reopening. However, Arnold made no attempt to comply with the judge's orders or to otherwise explain in a timely fashion why it believed that it was unnecessary to do so. We therefore conclude that there is no basis for reopening the judge's December 24, 2002, final order dismissing this case.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 21, 2004

SECRETARY OF LABOR,	:	Docket No. WEST 2004-149-M
MINE SAFETY AND HEALTH	:	A.C. No. 10-01827-05516
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2004-150-M
	:	A.C. No. 10-01827-05518
	:	
	:	Docket No. WEST 2004-151-M
	:	A.C. No. 10-01827-05519
	:	
	:	Docket No. WEST 2004-152-M
v.	:	A.C. No. 10-01907-14547
	:	
	:	Docket No. WEST 2004-153-M
	:	A.C. No. 10-01907-00002819
	:	
	:	Docket No. WEST 2004-154-M
	:	A.C. No. 10-01907-12100
	:	
	:	Docket No. WEST 2004-155-M
BECO CONSTRUCTION COMPANY	:	A.C. No. 10-02031-05501

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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 22, 2004, the Commission received from Beco Construction Company ("Beco") a request made by counsel 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). On February 3, 2004, the Secretary of Labor filed a Response to Request to Reopen Penalty Assessments. On February 23, 2004, Beco filed a reply to the Secretary's response.

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

In its request, Beco seeks to reopen ten proposed penalty assessments for which it failed to timely file requests for hearing ("green cards"). Mot. at 1-3. Two proposed assessments, in Docket Nos. WEST 2003-104-M and WEST 2003-105-M, are the subject of an earlier request to reopen filed by Beco, which the Commission has considered and remanded to the Chief Administrative Law Judge for further proceedings. *See Beco Constr. Co.*, 26 FMSHRC 171 (Mar. 2004). Another assessment, in Docket No. WEST 2004-106-M, is still pending before a Commission Administrative Law Judge and thus is not ripe for review. Beco has moved to withdraw its request to reopen a fourth assessment, Docket No. WEST 2004-153-M, on the basis that it paid the underlying proposed assessment. B. Reply at 2. Thus, pending before the Commission in this request to reopen are a motion to withdraw and a request to reopen six proposed assessments that became final orders of the Commission pursuant to section 105(a) thirty days after Beco received them.[1]

A. Motion to Withdraw Docket No. WEST 2004-153-M

In Beco's reply to the Secretary's response, Beco states: "The Respondent hereby withdraws its request to open this assessment [A.C. No. 10-01907-00002819][2] inasmuch as it has been paid." B. Reply at 2. Commission Procedural Rule 11 states, "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the . . . Commission." 29 C.F.R. § 2700.11. Under Rule 11, we construe Beco's withdrawal of its request as a motion to withdraw. The Secretary has not stated a position on Beco's motion to withdraw.

Upon consideration of Beco's motion to withdraw, it is granted.

B. Docket Nos. WEST 2004-150-M, WEST 2004-151-M, WEST 2004-152-M, and WEST 2004-154-M

Beco requests the Commission to reopen two proposed assessments, A.C. Nos. 10-01827-05518 (WEST 2004-150-M) and 10-01907-14547 (WEST 2004-152-M) (Mot. at 2), neither of

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate the dockets before us, WEST 2004-149-M, WEST 2004-150-M, WEST 2004-151-M, WEST 2004-152-M, WEST 2004-153-M, WEST 2004-154-M, and WEST 2004-155-M, all captioned *Beco Construction Company* and all involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

[2] "A.C. No." is the Assessment Control Number, which MSHA assigns to a proposed penalty assessment.

which the Secretary opposes (S. Response at 4). With respect to A.C. No. 10-01827-05518, Beco alleges that it contested the proposed assessment, but misread the A.C. number and put the wrong number on its contest. Mot. at 2. When the Department of Labor's Mine Safety and Health Administration ("MSHA") notified Beco of the delinquent payment status of this assessment, Beco requested to proceed with its contest, but states that it now understands that it should have filed a request to reopen. *Id.* With respect to A.C. No. 10-01907-14547, Beco alleges that it filed a timely contest on December 19, 2003. Mot. at 2. Attached to Beco's request are copies of correspondence with MSHA and the proposed penalty assessments referenced in its request. Attachs.

Beco also states that it never received the proposed assessments for A.C. Nos. 10-01827-05519 (WEST 2004-151-M) and 10-01907-12100 (WEST 2004-154-M), and thus, failed to timely file hearing requests. Mot. at 2-3. The Secretary asserts, however, that she has proof that the proposed assessments were delivered and that Beco received them. S. Response at 3. She states that she needs further explanation from Beco before she can state her position on its request to reopen these proposed assessments. *Id.* Attached to her response are both proposed assessments and signed return receipt verification cards for each assessment. Attachs. D and E.

Beco's counsel replies that Beco never gave its counsel the two proposed assessments at issue, that he is located across the state approximately 300 miles away from Beco, and that he has tried to establish a system for forwarding proposed assessments for review and discussion, which sometimes fails. B. Reply at 3-4. Beco further states that because counsel never received the assessments, no decision was ever made whether to contest them. *Id.* Beco requests a hearing on the proposed assessments. *Id.*

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

Having reviewed Beco's request, in the interests of justice, we remand these four proposed assessments to the Chief Administrative Law Judge for a determination of whether good cause exists for Beco's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

C. Docket Nos. WEST 2004-149-M and WEST 2004-155-M

MSHA issued proposed assessment A.C. No. 10-01827-05516 (WEST 2004-149-M) to Beco on June 21, 2001. S. Response at 2-3 & n.4. Based on the Secretary's submissions, Beco received the proposed assessment on June 26, 2001, and it became a final order on July 30, 2001. *Id.* Beco's request to reopen was filed on January 22, 2004. Beco explains that it failed to provide its counsel this proposed assessment. Mot. at 2; B. Reply at 2. Beco also states that its counsel is located across the state, and that they have tried to establish a system for forwarding proposed assessments for review and discussion, which sometimes fails. B. Reply at 2-3. Beco explains that because counsel never received this assessment, no decision was ever made whether to contest it. *Id.* at 3. Beco requests a hearing. *Id.*

MSHA issued proposed assessment A.C. No. 10-02031-05501 (WEST 2004-155-M) to Beco on September 5, 2002. S. Response at 1-2 & n.2. Based on the Secretary's submissions, Beco received the proposed assessment in September 2002, and it became a final order on October 20, 2002. *Id.* Beco alleges that it sent a notice of contest for this proposed assessment at the same time it contested two other unrelated proposed assessments. Mot. at 1; B. Reply at 2. Attached to its request is a copy of the late-filed notice of contest dated November 11, 2002. Attach. Beco states that it did not know that its contest was untimely because counsel did not receive the proposed assessment until November 20, 2002. Mot. at 1-2; B. Reply at 2. Beco asserts that if it had known its contest was untimely, it would have requested the Commission to reopen this assessment as it did with the other two unrelated proposed assessments (*see Beco*, 26 FMSHRC at 171-72). Mot. at 1; B. Reply at 2.

The Secretary opposes reopening both proposed assessments because Beco's requests were filed approximately two and one-half years and 15 months, respectively, after the assessments became final. S. Response at 1-3. The Secretary attached to her response both proposed assessments, signed return receipt verification cards for each assessment, and MSHA's delinquent payment notice for A.C. No. 10-02031-05501 dated November 20, 2002. Attach.

Beco has requested to reopen these two proposed assessments more than one year after the assessments became final orders. In *Lakeview Rock Products*, the Commission rejected an operator's request to reopen a proposed penalty assessment that became a final order more than one year prior to its request. 19 FMSHRC 26, 28-29 (Jan. 1997). The Commission noted that 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.' . . . This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls

within subsections (1) through (3)."[3] *Id.* at 28 (citation omitted). *See also Klapport v. United States*, 335 U.S. 601, 613 (1949) ("one year limitation would control if no more than 'neglect' was disclosed by the petition"); *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 827 (5th Cir. 1986) ("'where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause ... (b)(6)'") (citation omitted).

Beco's requests to reopen the proposed assessments under Rule 60(b)(1) are subject to the one-year time bar and are, therefore, untimely. *See Lakeview*, 19 FMSHRC at 28-29. Based on the foregoing, we deny Beco's motion for relief from the final orders in Docket Nos. WEST 2004-149-M and WEST 2004-155-M.

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[3] Rule 60(b) states, in 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).

Accordingly, we grant Beco's motion to withdraw its request for relief in Docket No. WEST 2004-153-M and hereby dismiss that docket; we deny Beco's request to reopen the penalty assessments in Docket Nos. WEST 2004-149-M and WEST 2004-155-M; and we remand Docket Nos. WEST 2004-150-M, WEST 2004-151-M, WEST 2004-152-M, and WEST 2004-154-M for further proceedings as appropriate.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

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Washington, D.C. 20001

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

May 25, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2004-111-M
v.	:	A.C. No. 08-01203-18680
YOUNGQUIST BROTHERS ROCK	:	

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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 March 29, 2004, the Commission received from Youngquist Brothers Rock ("Youngquist") correspondence that we construe as a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On February 10, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Youngquist a proposed penalty assessment (A.C. No. 08-01203-18680). In its motion, Youngquist explains that it was not aware of the proposed assessment until March 15, 2004, when it received from MSHA a notice of an outstanding balance for the proposed assessment. Mot. Youngquist states that it contacted MSHA's Civil Penalty Compliance Office to inquire about the proposed assessment, and on March 17, 2004, was faxed a copy of the proposed assessment. *Id.* Youngquist also learned from MSHA that the original certified letter from MSHA, containing the proposed assessment, was postmarked February 12, 2004, and was returned to MSHA unclaimed. *Id.* Youngquist further states that it contacted its local post office

and learned that there was staff turnover, which may have resulted in confusion about road addresses and caused delivery problems during the time that the proposed assessment was sent. *Id.* The Secretary states that she does not oppose Youngquist's request for relief.

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

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

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

May 27, 2004

SECRETARY OF LABOR,	:	Docket No. LAKE 2004-63-M
MINE SAFETY AND HEALTH	:	A.C. No. 20-02957-05509
ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2004-64-M
	:	A.C. No. 20-02957-05511
	:	
v.	:	Docket No. LAKE 2004-65-M
	:	A.C. No. 20-02957-05512
	:	
	:	Docket No. LAKE 2004-66-M
JOHN R. SAND AND GRAVEL	:	A.C. No. 20-02957-05513

BEFORE: Duffy, Chairman; Beatty, Jordan, Suboleski, and Young, 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").[1] On March 29, 2004, the Commission received from John R. Sand and Gravel ("JR") correspondence that we construe as a motion to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2004-63-M, LAKE 2004-64-M, LAKE 2004-65-M, and LAKE 2004-66-M, all captioned *John R. Sand and Gravel* and all involving similar issues. 29 C.F.R. § 2700.12.

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued to JR four proposed penalty assessments. In its motion, JR explains that on January 26, 2004, it received notices of past due penalties. Mot. JR further states that it requested hearings on certain citations and is still awaiting the results of those hearings. *Id.* JR asserts that the penalties were subsequently issued, but the paperwork was misfiled, and was not found until after it received the notices of past due penalties. *Id.* JR explains that it called MSHA after receiving the notice because the proposed penalties "seem very high in lieu of the circumstances leading to the citations." *Id.* JR maintains that it is contesting several citations contained in the proposed penalty assessments it seeks to reopen, and once it receives the results of the hearings and reviews the facts and findings, it can then address the remaining issues. *Id.* JR requests these assessments be reopened so it can have a hearing. *Id.* Attached to its request are copies of the proposed penalty assessments and underlying citations it wishes to contest. Attachs.

The Secretary opposes JR's request to reopen the proposed assessment in Docket No. LAKE 2004-63-M because it was filed almost one year and seven months after the assessment became a final Commission order.[2] S. Resp. at 1. She notes that contrary to JR's assertions, there are no active hearings or conferences on any of these cases, nor have there been since the penalties were issued.[3] Attached to the Secretary's response is a copy of MSHA's delinquent payment notice for A.C. No. 20-02957-05509. Attach A.

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

JR's request to reopen the proposed assessment in Docket No. LAKE 2004-63-M was filed more than one year after the assessment became a final order. In *Lakeview Rock Products*, the Commission rejected an operator's request to reopen a proposed penalty assessment that became a final order more than one year before its request was filed. 19 FMSHRC 26, 28-29

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[2] Based on the Secretary's submission, proposed penalty assessment A.C. No. 20-02957-05509 became a final Commission order on July 31, 2002; JR's request to reopen was filed on February 27, 2004.

[3] The Commission has no records of any contests of the citations involved in these proceedings.

(Jan. 1997). The Commission noted that 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.' . . . This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3)."[4] *Id.* at 28 (citation omitted). *See also Klapport v. United States*, 335 U.S. 601, 613 (1949) ("one year limitation would control if no more than 'neglect' was disclosed by the petition"); *Newball v. Offshore Logistics Int'l*, 803 F.2d 821, 827 (5th Cir. 1986) ("'where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of Clause . . . (b)(6)'") (citation omitted).

JR's request to reopen the proposed assessment in Docket No. LAKE 2004-63-M under Rule 60(b)(1) is subject to the one-year time bar and is, therefore, untimely. *See Lakeview*, 19 FMSHRC at 28-29; *Thomas Hale*, 17 FMSHRC 1815, 1816-17 (Nov. 1995). Based on the foregoing, we deny JR's motion for relief from the final order in Docket No. LAKE 2004-63-M.

In the interests of justice, we remand Docket Nos. LAKE 2004-64-M, LAKE 2004-65-M, and LAKE 2004-66-M to the Chief Administrative Law Judge for a determination of whether good cause exists for JR's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

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[4] Rule 60(b) states, in 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).

Accordingly, we deny JR's request to reopen the penalty assessment in Docket No. LAKE 2004-63-M, and remand Docket Nos. LAKE 2004-64-M, LAKE 2004-65-M, and LAKE 2004-66-M for further proceedings as appropriate.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

May 21, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-86-M
Petitioner	:	A. C. No. 02-02166-11087
v.	:	
	:	
CALMAT COMPANY OF ARIZONA,	:	
Respondent	:	West Plant

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf the Petitioner;
Rochelle R. Dunham, Esq., O'Melveney & Myers, LLP, Los Angeles, California, on behalf of the 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 "Mine Act," charging the Calmat Company of Arizona (Calmat) in two citations with violations of mandatory standards and proposing civil penalties of $2,975.00, for the alleged violations. The pivotal issue before me is whether the Department of Labor's Mine Safety and Health Administration had jurisdiction under the Mine Act to issue the citations at bar.[1] Calmat maintains that the citations were issued in an area of its facility that was explicitly excluded from such jurisdiction by the interagency agreement between the Department of Labor's Occupational Safety and Health Administration (OSHA) and the Department's Mine Safety and Health Administration (MSHA), *i.e.*, the "Interagency Agreement."

The starting point for an analysis of Mine Act jurisdiction is the definition of the term "coal or other mine," in Section 3(h)(1). A coal or other mine is there defined, in relevant part, as "(A) an area of land from which minerals are extracted . . ., (B) private ways and roads appurtenant to such area, and (C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of extracting minerals from their natural deposits, . . . or used in . . . the milling of such minerals . . ." 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine

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[1] Calmat has agreed to pay the penalties proposed by the Secretary should jurisdiction be found under the Mine Act.

and to be regulated under this Act be given the broadest possible interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess.14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 9th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978)("Legis. Hist"); *See also Donovan v. Carolina Stalite Co.,* 734 F.2d 1547 (D.C. Cir. 1984).

The Secretary argues that the cited conditions fall within Mine Act jurisdiction because they involved a haul truck that had been "used in" extracting minerals from their natural deposits and that the violations took place on "private ways and roads appurtenant to such area." Indeed, Respondent acknowledges that the citations would have been within the Secretary's jurisdiction under the Mine Act, but for its claimed exemption under the Interagency Agreement for concrete batch plants (Tr. 14-15).

There is no dispute that the Interagency Agreement, executed pursuant to the authority of Section 3(h)(1) of the Mine Act, places concrete batch plants under OSHA's exclusive jurisdiction whether or not they would otherwise be considered to be part of a "mine." The agreement provides that OSHA's authority over concrete ready-mix and batch plants, "commences after [the] arrival of sand and gravel or aggregate at the plant stockpile." The precise question to be resolved in this case then, is whether the violations were cited within or outside of the concrete ready-mix batch plant at the Calmat facility on August 11, 2003.

The Calmat facilities are clearly depicted in the to-scale photographic map in evidence as Exhibit R-1. A not-to-scale reduced copy of that map was admitted as Exhibit P-1 and is attached hereto as an appendix. The perimeter of the facility is defined with a fence. There are two gated entrances through which a variety of vehicles must pass to enter or exit. Mine Act jurisdiction in the areas within the facility involving the extraction of sand and stone (area E-3 on Exhibit R-1) and the processing and storage of such material in designated areas (E-2 and E-3 on Exhibit R-1) is undisputed. It is also undisputed that certain areas are excluded from Mine Act jurisdiction by the Interagency Agreement. The Secretary acknowledges that these excluded areas include the concrete batch plant (area "B" on Exhibit R-1) and the specific aggregate stockpiles associated with the concrete batch plant (areas P ½ , P 3/8, P 1 ½ , PL and PS on Exhibit R-1) (Tr. 148).[2]

The subject citations were issued on August 11, 2003, for the alleged failure to provide safe access for a truck driver who had climbed to a position 14 feet above ground on top of a haul truck and the alleged failure to provide specific on-site training for that driver. The driver was standing on a Caterpillar Model 773 haul truck positioned on a lowboy trailer. (See Exhibit P-3). A second Caterpillar haul truck was also parked nearby. These haul trucks had been used

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[2] It is undisputed however that the stockpile identified as "K" on Exhibits R-1 and P-1 is depicted as larger and closer to the location of the cited violations (position "H") than was extant at the time of those alleged violations.

in the past to haul mine product (sand and rock) within the facility but had not been recently used. The trucks in fact had recently been sold and were being loaded onto the lowboy for removal from the facility. They had been driven to this site by a Calmat mechanic who was also supervising their removal. Shortly before the time the citation was issued the tires had been removed from one truck by a tire contractor to facilitate its transport on the lowboy. The second truck was about to be likewise handled.

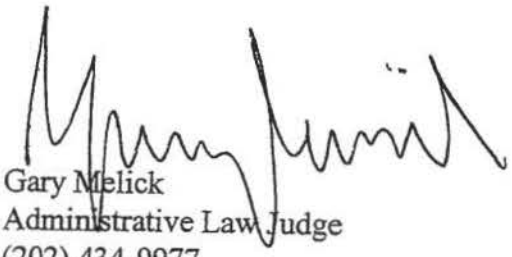
The alleged violations took place on a flat area (identified on Exhibits R-1 and P-1 as "H") used to park the cited vehicles and located adjacent to the dirt roadway (identified by yellow marker on Exhibits R-1 and P-1) leading from the 51st street entrance in the facility. This roadway was also used by various vehicles including those miners (as defined in the Mine Act) coming to and leaving work, trucks carrying mine personnel and trucks used to maintain equipment under admitted Mine Act jurisdiction. In addition, haul trucks for outside contractors travel this roadway carrying sand and stone from the area within admitted Mine Act jurisdiction.

Within this framework of evidence it is clear that the area in which the violations were cited was a private way or road appurtenant to "an area of land from which minerals are extracted." Therefore, unless specifically excluded by the Interagency Agreement as a concrete batch plant the cited area was within Mine Act jurisdiction. Indeed, as previously noted, Calmat acknowledged this at hearing. (Tr. 14-15).

The site of the alleged violations was a significant distance (about 400 feet) from the concrete batch plant but was also located near an aggregate stockpile (Area "K" on Exhibit R-1) used to supply the concrete batch plant - - a stockpile which the Secretary acknowledges was outside Mine Act jurisdiction. However, since the area of Calmat property on which the lowboy and haul trucks were parked and where the violations were cited was not within that specific excluded area, of the mine, *i.e.*, the concrete batch plant or its stockpiles, the cited area was within Mine Act jurisdiction. Accordingly the citations herein were properly issued. I further find that the Secretary's proposed penalties, which Calmat has agreed to pay should Mine Act jurisdiction be found, are appropriate considering the criteria under Section 110(i) of the Act.

ORDER

Citation Nos. 6293819 and 6293820 are hereby affirmed and the Calmat Company of Arizona is hereby ordered to pay civil penalties of $1,750.00 and $1,225.00 respectively for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
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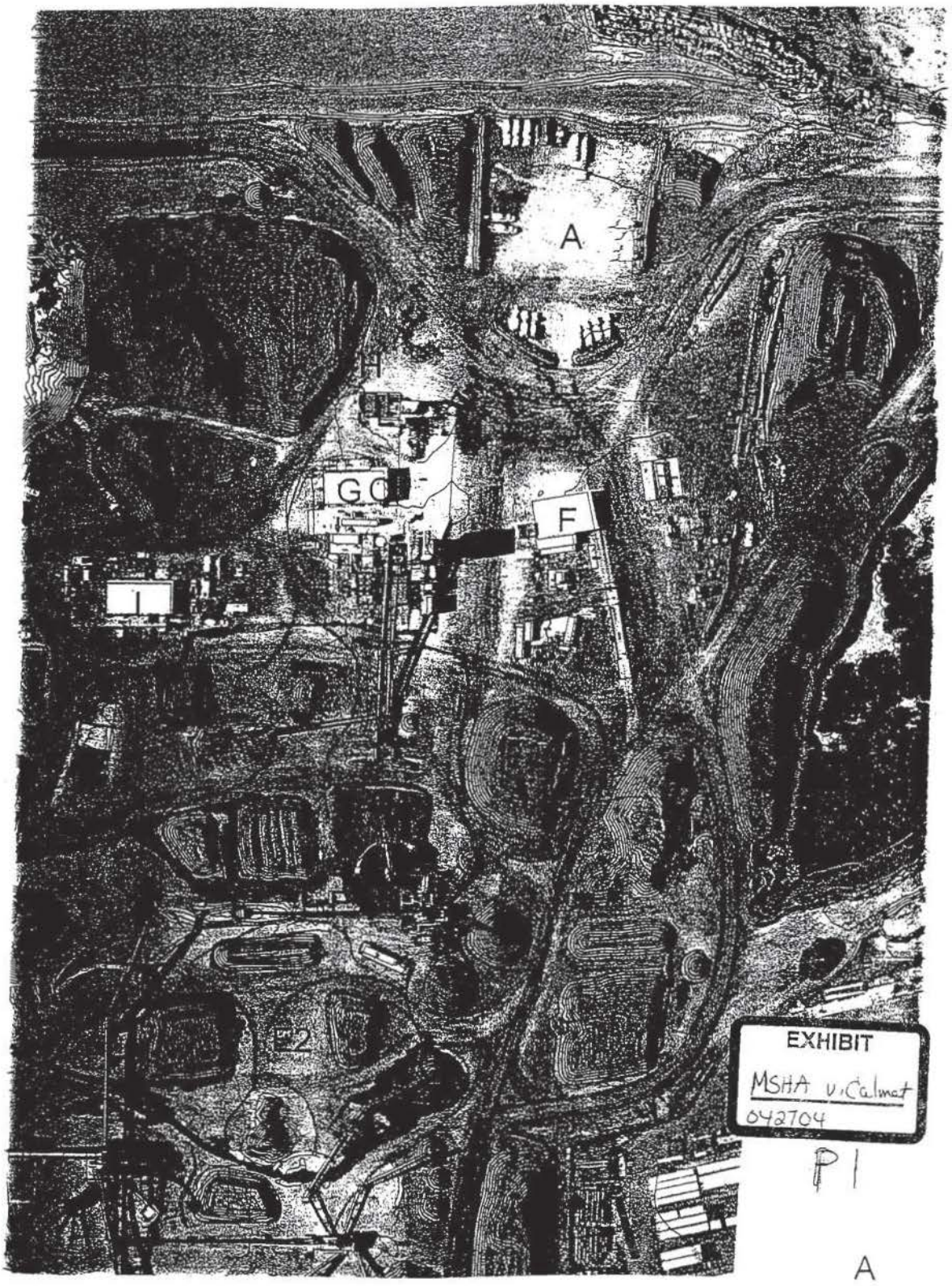
Exhibit R-1 - photographic map



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 24, 2004

JOHN D. TORNBOM, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2004-28-DM
	:	WEST MD 2003-08
v.	:	Mine I.D. 26-00002
	:	Premier Chemicals
PREMIER CHEMICALS, LLC, Respondent	:	

DECISION

Appearances: John D. Tornbom, Hawthorne, Nevada, pro se;
Steven S. Becker, Esq., Premier Chemicals, LLC, King of Prussia, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by John D. Tornbom against Premier Chemicals, LLC, ("Premier"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Tornbom alleges that Premier terminated him from his employment with the company because of protected activities he engaged in while an employee of Premier. An evidentiary hearing was held in Fallon, Nevada.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Premier operates a surface mine and plant near Gabbs, Nevada. Material containing magnesite is mined, crushed, milled, and then processed at this facility. The end product has various applications including use in animal feed and water treatment facilities. Mr. Tornbom was hired at the plant on February 25, 2000, and was terminated on May 15, 2003.

Tornbom contends that starting in February 2003, Jim Loeppky, the maintenance superintendent, and other management officials decided to separate him from his employment because he was raising too many safety issues. On February 2, 2003, Larry Ratta injured his eye at the plant. At that time, Tornbom was the fire chief of the Gabbs Volunteer Fire Department. Ratta was brought to him and, after he examined Ratta, Tornbom recommended that he go to the hospital. Tornbom rode along with him in the ambulance to the hospital in Fallon, Nevada. The

following day, Bobby Adamson, Tornbom's supervisor who is a leadman on the maintenance crew,[1] talked to Tornbom in the lunchroom, asked why he had called the Care Flight helicopter, and complained that it cost the company money. Tornbom denied that he called for the helicopter. Tornbom believes that someone at the hospital ordered that the helicopter be standing by in case it was needed. It is about 80 miles to Fallon from Gabbs.

Sometime later in February or March, Tornbom discovered about 85 drums of acidic chemicals at the plant and he reported it to the Nevada fire marshal's office. A few days later, Loeppky called him into his office and asked him why he was "causing all these problems." (Tr. 10). Loeppky accused Tornbom of calling state inspectors on the Larry Ratta injury. Tornbom denied that he did. Loeppky said that his call to the fire marshal's office was causing problems. He also told Tornbom that everyone at the upper shop was having to work harder because of his call and that he was not getting along very well with others at the plant. (Ex. G-1, pp. 2, 11). Apparently, the state fire marshal's office told Premier that it must store these chemicals in accordance with state regulations.

Tornbom testified that on or about April 8, 2003, there was a pine oil spill inside a building at the plant. He stated that this material traveled into the reclaim system for industrial water. The pumps for this reclaim system shut down because some of the spilled material was in clumps. Tornbom found out about the spill when he was asked to go to the HMS (Heavy Media Separation) plant to shut it down. After Tornbom determined that the substance spilled was pine oil, he looked it up in the Department of Transportation's emergency response guide and reported the spill to the Nevada Fire Marshal's office. When advised that this event should be reported to the EPA, Tornbom contacted that agency. Tornbom believes that this spill exposed employees to a hazardous substance.

On or about April 24, 2003, Mr. Loeppky told Tornbom that pine oil is not toxic and that all he was doing was causing problems. Loeppky also told Tornbom that he "had better get all [his] ducks in a row because when this is investigated [he will] look like a fool." (Tr. 14). When Tornbom showed Loeppky the emergency response guide, he replied that it did not apply to the plant.

Loeppky testified that prior to 1988, Premier used pine oil in a flotation process at the plant. That process is no longer used, but some sludgy residue was left in the bottom of a tank. He described pine oil as a soap that is similar to Pine-Sol. (Tr. 70). When this tank was washed out on April 8, a lot of bubbles were created and a Pine-Sol odor was emitted. Fire hoses were used to wash the material down into the tailing system below the plant. This material had been used at the plant for years. Loeppky testified that when the tanks were cleaned in April, nobody knew that there was any pine oil left in them. Premier took measures to force the material down into the tailings ponds with large quantities of water. Much of this material was in chunks.

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[1] The "leadman" on a crew functions as a foreman at Premier.

The Material Safety Data Sheet ("MSDS") for pine oil lists the hazards associated with pine oil. (Tr. 73; Ex. R-8). The MSDS states that there are hazards associated with contact with the skin and eyes, ingestion, and inhaling the fumes. Loeppky does not believe that the pine oil presented a hazard to Premier's employees because it was released in a ventilated building, it traveled through pipes to the HMS, which is a well-ventilated building, and then it went outside in a ditch to the tailings pond. He testified that pine oil had been released during a cleaning operation a few years earlier without adversely affecting employees. (Tr. 78). Loeppky testified that he told Tornbom that he had better "get his ducks in a row . . . because he was just ranting and raving." *Id.* He further testified that "[t]here's no talking to [Tornbom] when he's in one of his temper tantrums, you can't -- you're not going to reason with him." *Id.* Loeppky also testified that employees working at the plant were familiar with pine oil, but he does not believe that any formal instruction was given on the hazards listed in the MSDS. (Tr. 84). Premier did not report this spill to any governmental agencies because its chemist determined that reporting was not required.

Tornbom testified that on April 9, 2003, Bobby Adamson ordered him to pull the motor at the Sweco screen area in the Magox plant along with Jamie Harris. They used a chain fall to pull the motor and set it on the adjacent deck on the third floor of the building. A chain fall is a winch equipped with chains that is used to raise and lower heavy equipment. (Tr. 33). Adamson wanted them to use a chain fall to bring the motor down to the lower level so that it could be moved out of the building on a cart. Tornbom testified that he does not believe that "hanging a chain fall off either the handrail or the [fixed] ladder . . . was a safe thing." (Tr. 16). He did not believe it was safe because he was not sure if the welds on the handrail would hold and he was concerned about an employee who was cleaning up on the ground level. Tornbom estimates that the motor weighed about 160 pounds. Tornbom testified that when he raised this objection, Adamson said he did not care how the motor was taken down to the ground level, but he wanted it done. Tornbom testified that he felt threatened by Adamson's attitude and that Adamson was abusive toward him. Tornbom eventually carried the motor down the stairs to the ground floor. He was issued a reprimand for not completing the job in the manner in which he was instructed. Tornbom testified that he feels that "carrying it down by hand was still safer than trying to lower [it] down with a chain fall with somebody working down below in case something happened." (Tr. 18).

Adamson testified that Tornbom and Harris had already pulled the motor when he arrived. Adamson stated that, as soon as he arrived, Tornbom "jumped into my face and started getting mad at me." (Tr. 32). He testified that he told Tornbom to lower it down to the next level using a chain fall so it could be carried on a cart to the electric shop. He also testified that he told Tornbom not to try to carry the motor. Soon after he gave that instruction, Adamson went to the electric shop to get the replacement motor so it could be installed at the Sweco screen. Adamson testified that when he returned to Magox, Tornbom yelled at him again about moving the motors. Adamson carried the new motor a few steps into the building from his pickup and Harris then took it up to the Sweco deck.

The next day, Adamson learned that Tornbom had carried the old motor down the stairs rather than using a chain fall or other means to lower it down. Upon hearing this, Adamson talked to Loeppky about the incident and recommended that Tornbom be reprimanded for insubordination because he was "yelling," being "disrespectful," and "making a bad work environment." (Tr. 36). Loeppky issued the reprimand on April 14, 2003, which states:

> You were insubordinate and did not follow directions when told how to remove the motor at Sweco screen area in Magox. Also, you refused to perform a task assigned to you by not using the chain fall to lower a motor to a lower level from where you were working because you said it was unsafe. When another suggestion was made for two people to carry the motor you refused to follow that instruction was well. You displayed anger to your supervisor, which you have been reprimanded for in the past. After the supervisor left the premises you then moved the motor in an unsafe manner causing a supposed injury to yourself.

(Ex. R-2).

Tornbom testified that Adamson was the individual who started yelling that day. At the hearing, Tornbom asked Adamson why he was reprimanded for carrying the old motor down the stairs while Harris was not reprimanded when he carried the new motor up the stairs. In reply, Adamson testified that Tornbom was reprimanded because he was told not to try to carry the motor while Harris was not. Adamson testified that Tornbom kept yelling at him that he did not want to carry the motor and Adamson did not want Tornbom to lift something that he did not think he could handle. (Tr. 38). Adamson also stated that Harris is strong "like a bull" so he can carry heavier objects than Tornbom can. Adamson weighed the old motor after this incident and determined that it weighed 160 pounds. (Tr. 39). Loeppky testified that because Harris worked for a contractor, Premier could not discipline him directly. Loeppky said that he told Harris that he did not want him to carry heavy equipment around because he did not "want him to be an old man before his time." (Tr. 80). Loeppky also talked to Harris's supervisor about the incident.

James Harris, a contract mill mechanic in the upper shop, testified that after he and Tornbom removed the old motor they removed the counterweights from the motor. When Adamson arrived, Tornbom and Adamson started "going at it" about how the old motor would be lowered to the bottom level and how the new motor would be brought up. (Tr. 46). Harris testified that he and other employees have used chain falls to bring up and lower heavy equipment in the past without any difficulty. (Tr. 45-46). As a consequence, he did not get involved in or understand Tornbom's argument with Adamson. Harris testified that when Adamson arrived with the new motor, he reached down, picked it up, and brought it up to the Sweco deck without any difficulty. On June 19, 2003, Harris signed a written statement about this incident. (Ex. R-3; Tr. 44, 48). In the statement, he said that when Tornbom raised questions about the safety of using a chain fall, Adamson replied that they could weld a "pad eye

(or lifting eye) to the stationary ladder to use the chain fall." *Id.* At that point Tornbom started screaming that Adamson was going to get someone killed. *Id.* Harris confirmed that someone was cleaning in the area below the deck. He also confirmed that Adamson told Tornbom not to try to carry the old motor down the stairs. (Tr. 49). Harris offered to carry the old motor down the stairs, but Tornbom insisted that he carry the motor down. (Tr. 50).

On April 9, 2003, Tornbom reported that he injured his right shoulder while carrying the old motor down the stairs the day before. (Ex. R-4). In his report of injury, Tornbom stated that he carried the motor because he was "told by Bobby Adamson to move the motor in an unsafe way." *Id.*

On May 15, 2003, Tornbom and John Chappalear were repairing the D-119 bucket elevator. Tornbom testified that he noticed that no product was running on a nearby conveyer belt. He testified that they decided to travel to the HMS to find out why no product was on the belt. John Gentry, a mill shift leadman, asked Tornbom what he was doing down at the HMS. Tornbom testified that he responded by saying that the whole plant was his work area and he flipped Gentry off. It was established at the hearing that, at the time these events occurred, it was a common practice of employees to flip each other off as a joke.

John Gentry, a mill shift leadman, testified that Tornbom and Chappalear were assigned work at the D-119 elevator that day. At about 3:30 p.m., he noticed Tornbom's vehicle approaching the HMS. At the end of the shift, Gentry asked him why he left his work area by traveling to the HMS. (Tr. 53). Tornbom replied that the whole plant is his work area. Gentry testified that he pressed the matter because Tornbom was working on a priority project that day. Gentry said that Tornbom replied by flipping him off and saying something like "do what you F'g have to do" before he walked away. *Id.* Although it was a common practice for employees to flip each other off, Gentry "got the feeling that he'd either slapped me or spit in my face." (Tr. 54). He did not think that Tornbom was joking around.

John Chappalear, who was a contract employee in 2003, no longer works at Premier. He testified that he and Tornbom did not particularly like working on the bucket elevator and decided to take a break. (Tr. 60-61). The work they were assigned was to replace the metal sides of the bucket elevator, which is not a pleasant task. (Tr. 63). He testified that when Gentry confronted them, Tornbom flipped Gentry off and may have cursed at him. (Tr. 61, 64-65; Ex. R-7). Chappalear believes that Tornbom had a bad attitude toward management. Chappalear also testified that the story about there being no product on a nearby belt line was just a cover to tell anyone who saw them out of their work area. (Tr. 65). He stated that "our specific task that day was to work on the D-119 elevator not go gallivanting around the plant." (Tr. 67). He testified that he may have told Tornbom the day after this incident that he thought the whole thing was a joke. Tornbom received a written reprimand for this incident, which states:

> You were out of your work area (down by the HMS at 3:30).
> When I advised you of this, you gave me the finger and told me the

> whole plant was your work area. You had a bad attitude and [were] supposed to be working [on the] D-119 elevator.

(Ex. R-5). Tornbom was terminated from his employment following this incident. Tornbom believes that he was terminated for reporting the pine oil spill, refusing to bring down the motor at Sweco screen area in Magox using a chain fall, and reporting the acidic chemicals to the fire marshal.[2]

Jennifer Williamson, human resources and safety coordinator, testified that MSHA Inspector Jerry Killian and his supervisor Tyrone Goodspeed traveled to the mine for a regular inspection and to investigate a section 103(g) complaint MSHA received on April 21, 2003, about the pine oil spill and the Sweco motor incident. The inspectors investigated the complaints and talked to employees about the conditions, including Tornbom. No citations were issued for either condition. (Tr. 90). The inspectors determined that the pine oil was not toxic and that the company's procedure of using a chain fall to move the motors to and from the Sweco deck was safe. (Ex. R-10).

When MSHA investigated Tornbom's discrimination complaint, the investigator asked the company to produce its history of reprimands. These reprimands show that employees have been disciplined for being out of their work area, for being insubordinate, and for failing to follow a leadman's orders. (Ex. R-11). Ms. Williams testified that an employee is terminated on a third notice of reprimand of the same violation. (Tr. 97). As a consequence, an employee can receive three reprimands without being terminated if the reprimands are for different violations of the company's rules.

Tornbom received his first reprimand on July 23, 2002. Adamson testified that following a dispute with Tornbom just before lunch, Tornbom became angry and headed to his pickup truck. Adamson testified that he walked up behind Tornbom toward the truck. When Tornbom got into the truck, he "tore out of there as fast as he could" which caused Adamson to be peppered with rocks from the gravel roadway. (Tr. 29). Adamson testified that he discussed the incident with Tornbom later that day and recommended to Loeppky that Tornbom be reprimanded. Loeppky issued the reprimand later that day, which states:

> You were spinning the tires on the pickup, you were driving in front of the upper shop. Any repetition of the act or any other fit of anger with your supervisor or fellow workers will be cause for your immediate termination.

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[2] Tornbom filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") on or about June 2, 2003. By letter dated August 20, 2003, MSHA notified Tornbom that it determined that the facts disclosed during its investigation of his complaint did not constitute a violation of section 105(c) of the Mine Act. On October 15, 2003, Tornbom filed the complaint in this proceeding.

(Ex. R-1). Tornbom testified that he did not know that Adamson was behind the truck when he spun out and that he apologized after the incident. Premier classified this reprimand as discipline taken for insubordination. (Tr. 105).

Don Pressey, general manager for Premier's Gabbs facility, testified that he determined that Tornbom should be terminated from his employment. (Tr. 99). Gentry came into his office to discuss the incident of May 15 and asked if "he had to stand for this treatment that he got." *Id.* Gentry described the incident to Pressey without mentioning Tornbom's name. (Tr. 99-100). Pressey replied that he did not have to put up with such behavior from an employee. When Pressey found out it was Tornbom, he left a message with him to meet him the following Monday, May 19. Before talking with Tornbom, Pressey discussed Tornbom's conduct with Adamson and Loeppky, after which he decided to terminate Tornbom. Tornbom was notified on May 19, 2003, that he was terminated effective May 15.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) ("*Legis. Hist.*")

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Protected Activity

Tornbom engaged in a number of safety-related activities that are protected by the Mine Act. He complained about the storage of acidic chemicals at the mine, he complained about the release of pine oil at the mine, and he complained about the manner in which his supervisor wanted him to lower the Sweco screen motor to the bottom of plant. Premier does not dispute that Tornbom "believes in his heart" that he raised serious safety issues at the mine. (Tr. 105). As a consequence, I find that Tornbom engaged in protected activity while employed at Premier.

B. Adverse Action

Tornbom suffered an adverse action when he was separated from his employment. The issue is whether Tornbom was terminated from his job as a result of his protected activities. In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.

It is clear that Premier management had knowledge of Tornbom's protected activities. In addition, there is a coincidence in time between the protected activities and the adverse action. The safety complaints that Tornbom relies upon were made in February, March, and April 2003. He was terminated effective May 15, 2003. The key issues are whether management displayed hostility or animus toward the protected activities and whether there was disparate treatment of Tornbom. I discuss each incident individually.

1. <u>The Larry Ratta Injury</u>.

The events surrounding the injury to Larry Ratta do not constitute activities protected by the Mine Act. Adamson apparently confronted Tornbom about the fact that Premier might have to pay for the Care Flight helicopter. Since Tornbom was the local fire chief and he tended to Ratta's injuries at the plant, Adamson assumed that he had called for the helicopter. Tornbom denies that he called Care Flight. Tornbom did not complain about safety or health conditions at the mine, so there were no protected activities associated with this incident. In addition, Tornbom was not disciplined by Premier as a result of this incident.

2. Drums of Acidic Chemicals.

Tornbom reported to the fire marshal that there were drums of acidic chemicals stored at the facility. I find that his complaint was protected under the Mine Act because Tornbom believed that the chemicals posed a health and safety risk to himself and other employees. It appears that Premier had to change the manner in which it stored these chemicals after Tornbom's call to the fire marshal because Loeppky told Tornbom that his complaint was requiring everyone in the upper shop to work harder. I find that Loeppky's response to Tornbom's complaint displayed hostility and animus toward his protected activity, but Tornbom was not disciplined for calling the fire marshal.

3. Pine Oil Incident.

Tornbom complained about the presence of pine oil to the Nevada Fire Marshal's office and the EPA. He also filed a complaint with MSHA. Thus, I find that Tornbom engaged in protected activity. Premier contends that pine oil is not hazardous and that it is similar to Pine-Sol. The primary ingredient in Pine-Sol is pine oil. Pine-Sol also contains surfactants used as cleaning agents. The hazards associated with Pine-Sol are the same as the hazards listed on the MSDS for pine oil. (*See* National Institutes of Health, National Library of Medicine, Specialized Information Services, Household Products Database, *available at* http://householdproducts.nlm.nih.gov/cgi-bin/household/brands?tbl=brands&id=3007020). I find that the release of pine oil at Premier did not pose any health or safety risk to Tornbom or other employees at the facility. The MSHA inspectors who investigated the hazard complaint reached same conclusion. (Ex. R-10). Nevertheless, Tornbom sincerely believed that a safety and health risk was present. I also believe that his concerns were reasonable. I find that his complaints to governmental authorities are protected by section 105(c) of the Mine Act.

I believe that Loeppky's response to Tornbom's complaint was not particularly hostile. Loeppky felt that the release of the pine oil did not pose a safety or health risk to employees. He knew that pine oil had been used in the plant in the past and that it is similar to Pine-Sol. He simply told Tornbom that he better get his ducks in a row before he makes a big issue out of it. I credit Loeppky's testimony that he made this statement to Tornbom because he was "ranting and raving" about it. Nevertheless, I give Tornbom the benefit of the doubt and assume that Loeppky displayed some degree of hostility toward his complaint. He interpreted Loeppky's statements as a threat.

4. Sweco Screen Motor Incident.

Tornbom complained about the manner in which Adamson wanted him to lower the Sweco screen motor to the floor of the plant. He also refused to comply with Adamson's order to use the chain fall. As a consequence, this incident can more accurately be described as a work refusal.

The Commission and the courts have recognized the right of a miner to refuse to work in the face of perceived hazards. *See Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990); *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 520 (Mar. 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985). A miner refusing work is not required to prove that a hazard actually existed. *See Robinette*, 3 FMSHRC at 810-12. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.* at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *See Robinette*, 3 FMSHRC at 809-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810.

I find that Tornbom was proceeding in good faith when he refused to use a chain fall to lower the motor. Whether he was acting reasonably is a closer issue. Harris credibly testified that chain falls are used to raise and lower heavy equipment at the Magox plant. The company proposed to use a handrail or fixed metal ladder to support the motor. The motor only weighed 160 pounds, which is not particularly heavy, but the weight of the chain fall is not in evidence. The MSHA inspectors who investigated the section 103(g) complaint entered the following findings and conclusions in their report:

> Bobby Adamson had employee hang a 160 lb motor from a ladder. He refused to do as instructed, for he thought that MSHA has a rule against this. He was told to do it anyway. . . . MSHA has no rule to that effect as long as they do it as safe as possible. Looked the area in question over. Could see nothing wrong with their procedure. The ladder was substantially constructed. Issued negative findings.

(Ex. R-10). Handrails and fixed metal ladders are designed to take weight. Although Tornbom was concerned about an employee cleaning up in an area below, that problem could have been solved by removing the employee once the chain fall operation was started. There is no evidence that Adamson would have allowed employees to continue working under the area where the motor was to be lowered. Nevertheless, for purposes of my analysis, I will assume that Tornbom had a reasonable basis for his concern. He believed that the motor could accidently fall and hit an employee under the chain fall. On that basis, I find that Adamson displayed some animus toward Tornbom's safety complaint, although Adamson was mostly concerned with Tornbom's belligerent attitude.

5. Incident of May 15, 2003

The event that led to Tornbom's termination occurred on May 15, 2003, when Gentry confronted Tornbom about his presence at the HMS plant. The events that transpired that day do not involve protected activity. Gentry believed that Tornbom displayed a lack of respect for

management and that he was insubordinate. It is this incident that precipitated Tornbom's termination. Tornbom believes that his termination following this incident was pretext to cover up the real reason for his termination, his protected activities. He claims that employees frequently flip each other off without being disciplined or terminated.

C. Sufficiency of Tornbom's Case

Because Tornbom engaged in protected activities and Premier was hostile to at least some of his safety concerns, I find that Tornbom established a *prima facie* case. He was terminated for insubordination shortly after he made these complaints.

D. Analysis of Premier's Defense

As stated above, an operator can rebut a *prima facie* case by presenting evidence that either no protected activity occurred, no adverse actions were taken, or that the actions taken with respect to the employee were in no part motivated by the protected activity. An operator can also rebut the *prima facie* case by presenting evidence that the actions it took with respect to the employee were also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

I hold that Premier successfully rebutted Tornbom's case. I find that Premier did not terminate Tornbom for his protected activities. I also find that, even if Premier took some of these activities into consideration when it terminated Tornbom, it would have terminated Tornbom for his unprotected conduct alone.

Tornbom was terminated following three reprimands for insubordination. The final reprimand was for being out of his work area and showing disrespect to his supervisor. I find that this reprimand and the resulting discharge was not a pretext to cover an unlawful motive for the termination. Tornbom had no reason for being at the HMS plant at that time. When Gentry questioned him about it, Tornbom responded in a belligerent and antagonistic manner. Chappalear testified that there was no reason for them to be at the HMS plant and confirmed Tornbom's display of belligerence. There was absolutely no safety component to this incident. In addition, Tornbom's aggressive attitude toward Gentry was not provoked by Premier. A Commission judge must "determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity. . . ." *Sec'y of Labor on behalf of McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 992 (Sept. 2001). Mr. Gentry had not been involved in Tornbom's previous discipline. Moreover, Gentry's questioning of Tornbom was legitimate and totally unrelated to Tornbom's protected activities. I credit Gentry's testimony on this issue. I also credit the testimony of Pressey that he decided that the employee Gentry complained about on May 15 should be reprimanded before he learned that Tornbom was the employee involved. (Tr. 98-99).

Tornbom's complaint about the presence of pine oil at the plant was at least initially reasonable. Loeppky was primarily hostile to Tornbom's agitated state over the issue. Loeppky knew that pine oil was not toxic and that the health hazards presented were not significant because employees were simply diluting the material with water and letting it run into the tailings pond. Loeppky did not do a particularly good job of addressing Tornbom's concerns, however. When "a miner expresses a reasonable, good faith fear [of] a hazard, the operator has a corresponding obligation to address the perceived danger." *Gilbert v. FMSHRC*, 866 F.2d 1433, 1440 (D.C. Cir 1989). If an operator adequately addresses a miner's concerns so that "his fears reasonably should have been quelled," an otherwise reasonable work refusal can become unreasonable. *Id.* at 1441. Loeppky did not quell Tornbom's fears by stating that he had better get his ducks in a row. Tornbom took that statement as a threat rather than a caution that his concerns were not reasonable. Nevertheless, Tornbom was not disciplined for raising concerns about the release of pine oil. In addition, I find that the concern Tornbom raised about the release of pine oil did not contribute to his termination from employment on May 15.

Tornbom was disciplined for the events surrounding his refusal to use a chain fall to move the old motor from the Sweco deck to the lower level. Tornbom seemed to be concerned that the welds on the frame of the permanent ladder on the Sweco deck could not hold the weight of the motor and chain fall. He was also concerned that someone could be cleaning in the area below. I did not personally visit the Sweco deck but, based on my knowledge of industrial installations, Tornbom's concerns seem rather far fetched. The motor only weighed 160 pounds and chain falls had been used in the past. The MSHA inspectors who investigated the section 103(g) safety complaint determined that there was "nothing wrong with [Premier's] procedure." (Ex. R-10). I find that Tornbom was disciplined for the angry manner in which he discussed the issue with Adamson and the fact that he carried the 160 pound motor down the stairs by himself, thereby injuring his shoulder. I credit the testimony of Harris and Adamson on the belligerent attitude displayed by Tornbom. I find that his belligerent attitude was not provoked by management because Tornbom became hostile the moment Adamson arrived at the deck. Adamson attempted to quell Tornbom's fears by explaining how a chain fall could be used safely, but Tornbom simply kept on yelling at him. (*See* Exs. R-2 & R-3). I find that, even if his protected activity played a part in this reprimand for this work refusal, he would have been reprimanded in any event for his unprotected activities alone.

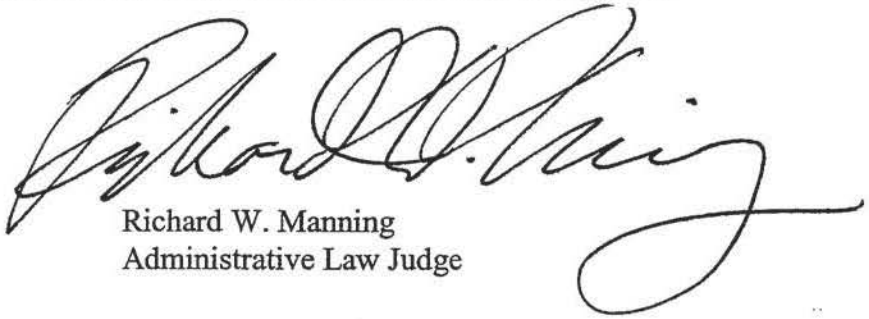
Loeppky made disparaging remarks about Tornbom's complaints concerning the storage of drums of acidic chemicals at the plant. Tornbom was not disciplined for his complaint and, based on evidence presented by Premier, I find that these complaints did not contribute to the two subsequent reprimands that he received for insubordination. Tornbom did not allege that the reprimand he received in 2002 for spinning his tires in front of the upper shop was a result of any protected activity.

Finally, Tornbom alleges that he was treated differently from other similarly situated employees. He points to the fact that many employees who have received three reprimands are

still working for Premier. He also argues that employees often flipped each other off as a joke. I credit the testimony of Williamson that Tornbom was terminated because he had received three reprimands for the same offense. She testified that if an employee is remanded for three unrelated offenses, such as tardiness, leaving a work area, and failing to wear an hard hat, he will usually not be terminated. (Tr. 92, 97). She believes that this rule is set forth in the collective bargaining agreement. I credit the testimony of Gentry that Tornbom was not joking when he told Gentry that the whole plant was his work area and flipped him off.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by John D. Tornbom against Premier Chemicals, LLC, under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 25, 2004

SAN JUAN COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. CENT 2004-35-R
	:	Citation No. 7605607; 11/10/2003
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	San Juan South Mine
	:	Mine ID No. 29-02170

DECISION

Appearances: Timothy M. Biddle, Esq., Crowell & Moring, LLP, Washington, D.C., on behalf of Contestant;
Timothy S. Williams, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Notice of Contest filed by the San Juan Coal Company ("San Juan") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The notice challenges the validity of a citation issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") on November 10, 2003. Citation No. 7605607 alleges a violation of air quality standards in an area adjacent to the last shield on the tailgate side of San Juan's longwall panel. San Juan contends that the site of the alleged violation is not an area where persons work or travel, rendering the regulation inapplicable. A hearing was held in Farmington, New Mexico, and the parties submitted briefs following receipt of the transcript. For the reasons set forth below, I find that San Juan did not commit the alleged violation and vacate the citation.

Findings of Fact – Conclusions of Law

San Juan operates the San Juan South Mine, an underground coal mine located near Farmington, New Mexico, where longwall equipment is used to extract coal from a seam that is 10-12 feet thick. A double-drum shearing machine travels back and forth across the 1,000 foot coal face, depositing coal onto a chain conveyor, which moves it to the headgate side of the longwall where it is loaded out by belt conveyor. Temporary roof support is provided by 178 shields, which are advanced by a computerized system as the shearer advances the face. Each

shield has a base, with "toes" that extend toward the face. Two hydraulic cylinders apply pressure between the base and the upper portion of the shield that extends out over the shield toes and longwall equipment, pressing against the mine roof. Miners travel along the face by walking on the toes of the shields, in the space between the shearer/conveyor equipment and the shields' hydraulic cylinders.

There are three entries to the longwall face. Two are located at the headgate. They provide both the primary and alternate escapeways, a path for intake air to ventilate the face, and space for transport of miners and equipment, as well as conveyor belts to remove coal from the mine. The entry at the tailgate provides a path for return air. It also must be maintained as an escapeway, except in limited circumstances.[1] The entries were driven with continuous mining machines and their roofs are supported by bolts, wire mesh and cable trusses.

As with any longwall mining operation, the roof is supported only temporarily by the shields. As the longwall shearing machine and shields advance, the unsupported roof is allowed to fall into the area behind the shields, the "gob."[2] The roof generally falls as the support provided by the shields is removed. However, roof falls in the entries, where the roof is supported by bolts, are more sporadic. Tr. 368-69. In the tailgate entry, for example, the roof may not fall until the face has advanced as much as 20 or 30, or even 100 feet. Tr. 229. More importantly, the falling roof can pull down the roof adjacent to the shields. San Juan has experienced tailgate roof falls three feet outby the shield legs, and, on one occasion, as far as the face. Tr. 269-71. In order to prevent rocks and other debris from entering the working area under the shields, a two-inch thick steel plate is mounted on the outside of the last shield. That plate, which will be referred to as the gob separation plate, is approximately three feet high, and is attached to the shield by a hinge, which allows it to move as the shield advances. The longwall drive equipment housing also has heavy plate on the tailgate side.

San Juan's mine liberates large amounts of methane and is subject to inspections by MSHA every five days, pursuant to section 103(i) of the Act. In addition, the coal in San Juan's mine has characteristics that make it susceptible to spontaneous combustion. To address these problems, San Juan employs a bleederless ventilation system, does not allow wood products in the mine, and has an exacting cleaning program. The ventilation system is designed to achieve substantial air flow across the face and to reduce the oxygen content of the atmosphere in the gob to below five percent as soon as possible. Under the mine's approved ventilation plan, 65,000 to 100,000 cubic feet of air per minute flows in the headgate entry, across the face and out the

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[1] If the tailgate travelway becomes unavailable, an operator may resume mining, with the permission of MSHA, by implementing its tailgate blockage plan. *See* 30 C.F.R. §§ 75.215.(b), 75.222(g), 75.384(c).

[2] "Gob" is "[t]he space left by the extraction of a coal seam into which . . . the immediate roof caves." Am. Geological Institute, *Dictionary of Mining, Mineral and Related Terms*, 239 (2d ed. 1997).

tailgate entry.[3] In order to reduce the concentration of oxygen in the gob, the gob atmosphere is ventilated to the surface. Six-inch diameter boreholes are drilled from the surface on 500-foot centers down to close proximity to the top of the coal seam.[4] As the longwall face advances and the roof of the gob falls, the boreholes are opened to the surface. Pumps at the top of the boreholes draw air out of the gob. That air is replaced by nitrogen, which is injected into the gob through seals separating it from an adjoining entry.

The large quantity of air ventilating the face of the longwall tends to cause the low-oxygen gob atmosphere to remain in the gob, and quickly dilutes and renders harmless any gob atmosphere that infiltrates through the spaces between the shields. However, San Juan has had difficulty maintaining air quality in an area in the tailgate entry adjacent to the last shield. As the air current ventilating the face sweeps around the corner of the face and out the tailgate entry it has a tendency to draw low-oxygen atmosphere out of the gob, especially when outside atmospheric pressure declines. The oxygen content of the air in that area, where gob atmosphere mixes with ventilation air, can drop below 19.5%, the concentration required in areas where persons work or travel. 30 C.F.R. § 75.321(a).

The area where low concentrations of oxygen have been found is depicted on exhibit C-4 as a rectangle labeled "AA," and has been referred to throughout this proceeding as the "Affected Area."[5] It extends across the 18-20 foot width of the tailgate entry from the last shield to the rib. The inby border, a line starting at the shield legs drawn perpendicular to and across the entry, represents MSHA's view of the extreme inby active workings of the section. The outby border is represented by a line approximately 12 feet from the inby border. The most problematic portion of the Affected Area is in the lower right corner and along the rib. Tr. 343.

Events of November 10 - 16, 2003

On November 10, 2003, William E. Vetter, an experienced MSHA inspector, conducted a spot inspection of the mine pursuant to section 103(i) of the Act. He reviewed the mine's preshift inspection books and noted that low concentrations of oxygen, 18.3-19.4%, had been reported in the tailgate area of the longwall several times from November 6 through 10. The reports described the corrective action taken, i.e., the area had been "dangered off." He spoke to David Hales, San Juan's safety manager, and Scott Langly, the mine manager, and was told that San Juan's attorney had advised that adverse observations should be recorded, along with the

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[3] 30 C.F.R. § 75.325(c)(1) requires that a minimum quantity of 30,000 cubic feet of air per minute reach the working face of a longwall, unless a different amount is specified in the mine's approved ventilation plan.

[4] The borehole spacing exceeds the current 1,000 foot requirement in San Juan's approved ventilation plan.

[5] A replica of exhibit C-4 is attached as an Appendix to this Decision.

corrective action, and that the tailgate blockage plan should not be implemented because the tailgate travelway was not, in fact, blocked.

Vetter knew that there had been repeated problems maintaining oxygen levels in the area and had been "trying to work with" San Juan, employing a flexible enforcement policy. Tr. 122-23. If he found low oxygen in the area, he did not issue a citation if San Juan had detected the problem and was working to correct it.[6] Tr. 120. On November 10, he was concerned that low oxygen levels had been found periodically over four days and that the only corrective action that had been taken was that the area had been dangered off. He believed that it was permissible to danger off the area temporarily, but not as a permanent fix, and it "look[ed] like it [was] going to be permanent." Tr. 124-25. He called MSHA supervisory personnel in Denver, Colorado, and was advised to travel underground and enforce the regulation, which he interpreted to mean that he was to inspect the Affected Area and issue a citation if he found low oxygen. He traveled to the tailgate area of the longwall and observed a "danger" sign posted so as to bar persons from passing through an opening, or "notch," in the gob separation plate adjacent to the shield's toes. He advised San Juan personnel that it was not permissible to danger off the area in lieu of taking other actions to correct the problem. The sign was taken down, and he entered the Affected Area, holding a multi-function atmospheric monitoring system ("AMS") meter in front of him. As he proceeded, he observed meter readings showing low levels of oxygen, as well as elevated levels of methane. He took two bottle samples of air and issued Citation No. 7605607, alleging a violation of 30 C.F.R. § 75.321(a)(1), which requires that air in "areas where persons work or travel" contain a minimum of 19.5% oxygen. Ex. S-3. Vetter's observations were recorded in the "condition or practice" section of the form as follows:

> The air quality in an area of the working section (MMU-010), LW102 tailgate, was not being maintained to contain at least 19.5% oxygen. The oxygen level ranged from 18.8% to 19.3% at a location 8 feet from the coal rib, 2 feet from the roof, and aligned with the tailgate shield walkway and at a location 3 feet from the rib and 3.5 feet from the roof the oxygen level ranged from 16.5% to 17.3%. This area of inadequate air quality extended along the rib from the extreme inby active workings to a point approximately 12 feet outby. Bottle samples E0313 and E0341 were collected from the aforementioned locations.

Vetter determined that the violation was unlikely to result in an injury, and that it was not significant and substantial. He assessed the operator's negligence as moderate, because the area had been dangered off. He specified that the condition was to be corrected by November 12, 2003, at 1400 hours. That deadline was subsequently extended and the condition was abated on November 16, 2003, after San Juan implemented an amendment to its ventilation plan establishing a diffusion zone further outby in the tailgate travelway. Implementation of the plan

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[6] San Juan had many discussions with MSHA about the problem, and the enforcement policy followed by Vetter was consistent with that described by Donald A. Gibson, an MSHA field office supervisor. Tr. 62-63.

amendment did not permanently remedy the problem, although it "appeared to have helped for a period of time." Tr. 69. The company eventually stopped using the diffusion zone, and MSHA subsequently rescinded its approval of the amendment, because it resulted in other hazards that could not be effectively addressed.[7] Tr. 80-81.

The Dispute

30 C.F.R. § 75.321, provides, in pertinent part:

§ 75.321 Air Quality

> (a)(1) The air in *areas where persons work or travel*, except as specified in paragraph (a)(2) of this section, shall contain at least 19.5 percent oxygen and not more than 0.5 percent carbon dioxide, and the volume and velocity of the air current in these areas shall be sufficient to dilute, render harmless, and carry away flammable, explosive, noxious, and harmful gases, dusts, smoke and fumes (emphasis added).

The issue to be decided is whether section 75.321(a)(1) applies at the locations where low oxygen levels were found. In other words, on November 10, 2003, was the Affected Area an area where persons work or travel, within the meaning of the regulation.[8] While the parties advance strongly opposing views on that issue, they agree that the regulatory language is unambiguous, and that application of the plain meaning of the phrase "work or travel" dictates an outcome in their favor.[9]

The rules governing statutory and regulatory interpretation are well-settled, though their application may prove difficult. As the Commission recently explained in *Cannelton Industries, Inc.*, 26 FMSHRC 146, 150-51 (Mar. 2004):

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[7] A number of other measures to address the problem have been considered. However, they, too, pose additional potential problems. For example, increasing the amount of air drawn out through the boreholes would reduce the likelihood of gob air infiltrating the Affected Area. However, it would also draw oxygen bearing air into the gob, increasing the risk of spontaneous combustion.

[8] The parties agree that the exception contained in paragraph (a)(2), which deals with bleeder entries and worked out areas, is not applicable to this case.

[9] The Secretary argues, in the alternative, that if the regulatory language is found to be ambiguous, that her interpretation is entitled to deference. San Juan counters that the Secretary's interpretation is unreasonable and inconsistent with the legislative and regulatory scheme.

> The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.; Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). . . .
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> "In determining the meaning of regulations, the Commission . . . utilizes 'traditional tools of . . . construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union [1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-46 (D.C. Cir. 1990)]). In a plain meaning analysis, a provision at issue must be considered in the context of the language and design of the Secretary's regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996); *see Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999) (stating that reading the plain words of a provision *literally* can carry a different meaning than intended; meaning of the language, plain or not, depends on the context). The Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions. *New Warwick*, 18 FMSHRC at 1368. Additionally, "a regulation must be interpreted so as to harmonize with and not conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citations omitted); *see also Canterbury Coal Co.*, 20 FMSHRC 718, 721-22 (July 1998) (referring to both Mine Act and regulatory history in plain meaning analysis).

Work or Travel in the Affected Area

The Secretary contends, and San Juan does not dispute, that persons have worked and traveled in the Affected Area on numerous occasions prior to November 10, 2003, and thereafter. It is also undisputed that, on November 10, Vetter and others entered the area for the inspection and miners were later required to enter the area to install and maintain ventilation controls. However, San Juan contends that no one could work or travel in the dangered off Affected Area on November 10, 2003, that no one was scheduled to work or travel in the Affected Area under normal work conditions, and that persons have entered the Affected Area only because MSHA has insisted that it be maintained as active workings.

San Juan had been a surface mine. It started its underground longwall operations about one year before the citation was issued. When it developed its ventilation and other plans, it originally proposed to bar persons from entering the Affected Area. However, MSHA rejected

that proposal, and required that the area be treated as active workings, mandating preshift examinations and compliance with the ventilation standard.[10] Tr. 265-67.

It was not necessary for an examiner to physically enter the Affected Area in order to conduct the preshift examination. The existence of hazards was typically determined through visual inspection from adjacent locations under the shield or in the tailgate travelway, and air quality was checked by extending an AMS meter into the area on a probe. When low oxygen levels were detected, however, miners often had to enter the area to install or adjust ventilation control devices, typically air curtains, to address the problem. On one occasion, a miner entered the Affected Area to retrieve an AMS meter that had fallen from a probe. Tr. 47-48.

The Secretary asserts, based upon non-specific hearsay statements, that miners enter and work in the Affected Area to service and maintain the longwall equipment. However, I reject that assertion. Scott Jones, an engineer and longwall coordinator, testified as an expert on longwall equipment and operations. He participated in the design of San Juan's longwall, coordinating with the original equipment manufacturer, Joy Mining. Jones explained that the equipment was designed to assure that no one would go beyond the last shield, i.e., into the Affected Area. No equipment is accessible from that area, and no servicing or maintenance of the longwall equipment can be done from the Affected Area. As noted above, the longwall drive equipment is protected by heavy steel plate on the side that faces the tailgate entry, and the gob separation plate protects the lower portion of the last shield. Servicing and maintenance of the longwall equipment is performed from positions under the shields. A catastrophic failure of the longwall drive, that would necessitate replacement of the motor or transmission, may require that work be performed in the Affected Area. However, in 18 months of operation, that has been required only once.

Miners travel from the face into the tailgate travelway for a number of reasons. Various ventilation control devices, including a gob isolation stopping, are located outby in the tailgate travelway, and must be inspected every shift. Miners also enter the tailgate travelway to maintain AMS components and dewatering pumps, and perform other tasks. The tailgate travelway must be maintained as an escapeway. It is also the return air course, and air courses must be inspected weekly.

There are two routes from the face to the tailgate travelway. The route that San Juan has designated for such travel, and has trained its miners to follow, starts under the shields near the longwall drive. The mining equipment must be deenergized and locked-out, after which the

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[10] 30 C.F.R. § 75.360(a)(1) requires, generally, that preshift examinations be conducted by certified persons before any shift in which "any person is scheduled to work or travel underground." It also provides that no person other than a certified examiner may remain in any underground area unless a preshift examination has been completed for the shift. 30 C.F.R. § 75.2 defines active workings as, "Any place in a coal mine where miners are normally required to work or travel."

miner steps up onto and across the face conveyor, which typically would have some coal on it, and travels along the face into the tailgate travelway. That route is depicted on exhibit C-4 as a hand-drawn line (green on the original) with an arrowhead at its end in the tailgate travelway. A miner following that route would not enter the Affected Area.[11]

The second route passes through the Affected Area. From the end of the walkway along the toes of the shields, a miner could step through the notch in the gob separation plate, crawl or walk over rubble from roof falls, travel through the Affected Area, and enter the tailgate travelway. Tr. 280. When a preshift examination disclosed no ventilation or other hazards in the Affected Area, miners were free to enter, work in, and travel through it during the subsequent shift. Many have done so, both before and after the citation was issued.

While San Juan disputes the Secretary's assertion that miners found it more "convenient" to travel through the Affected Area to reach the tailgate travelway, it does not dispute that miners, including foremen, used that route. It also does not dispute that miners are required to enter the Affected Area to maintain ventilation controls required by MSHA, because of its insistence that the area be maintained as an active working area.

I find that persons frequently traveled through the Affected Area, prior to and after November 10, 2003, in order to perform various tasks outby in the tailgate travelway. With the exception of actions required to address ventilation problems, all such travel occurred after a preshift examination had been conducted and the area was found to be free of hazards. Persons have also been required by MSHA to be in the Affected Area to conduct inspections and maintain ventilation controls, because of its determination that the area must be maintained as an active working area. Vetter entered the Affected Area on November 10 to perform the inspection, and others entered it after the citation was issued, in order to take corrective action. Persons are not required to enter the Affected Area to perform service or maintenance on the longwall equipment.

San Juan has consistently maintained that the Affected Area is not an area where persons should work or travel, and that its miners should not be exposed to the hazard of roof falls. Because of that hazard, San Juan's miners have complained about being forced to enter the Affected Area. Contestant's exhibit C-9 is a photograph, taken through the opening in the gob separation plate, depicting fallen roof in the Affected Area. Tr. 282. Exhibit C-5 is a copy of an MSHA accident report form submitted by San Juan on December 7, 2003, reporting a roof fall in the tailgate travelway that extended through the Affected Area outby the face. David C. Hales, San Juan's underground safety coordinator, testified that MSHA had written a letter to San Juan a week prior to the hearing, expressing concern that roof falls might destroy ventilation controls

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[11] The route to the tailgate travelway designated by San Juan passes somewhat closer to the corner of the face than the route through the Affected Area, and miners using it would be exposed to a marginally increased risk of a rib failure due to the pressures on that corner of the face.

located in the Affected Area. He noted that miners examining the area or working on the ventilation controls would also be exposed to the hazard. Tr. 303.

Prompted, in part, by miners' complaints, San Juan submitted a request to MSHA for a modification of the air quality standard, proposing that a diffusion zone be established in the vicinity of the Affected Area. Concentrations of oxygen lower than those required in section 75-321(a)(1) would be allowed in the diffusion zone, and miners would not be permitted to work or travel in it. MSHA has investigated the proposal, which had been submitted over a year before the hearing, but no decision has yet been made. MSHA's concern with the proposal is apparently the size of the diffusion zone proposed by San Juan. Notably, on the day that MSHA conducted an on-site inspection in conjunction with the petition, a roof fall, extending three feet into the Affected Area, occurred. Tr. 270.

The Validity of the Citation

The Notice of Contest filed by San Juan challenges the validity of Citation No. 7605607, alleging that on November 10, 2003, the air in the Affected Area contained insufficient oxygen. The parties agree that oxygen levels in the Affected Area were less than 19.5%. They disagree on whether the Affected Area was an area where persons work or travel within the meaning of the regulation.

The main argument advanced by the Secretary is that persons entered the Affected Area on many occasions, both to travel through it and to perform work, mandating application of the regulation. Had the area not been dangered off, I would be compelled to agree. While San Juan argues that none of its miners were ever scheduled to work or travel in the area, it is clear that many did so, both as a matter of convenience and to perform tasks mandated by MSHA's directive that the standard applied. Absent the danger sign, miners would have been free to enter the area and may well have done so. Consequently, application of the standard would be entirely consistent with its plain wording, and logically necessary to protect persons from hazardous air, whether or not anyone actually traveled or worked in the area, or was scheduled to, on November 10.

However, on November 10, 2003, the date the citation was issued, San Juan had taken effective steps to assure that no person worked or traveled in the Affected Area. Vetter testified that when he arrived, he observed a danger sign that had been posted on the gob separation plate, and he determined that it was an effective measure to bar persons from entering the area. Tr. 128, 145-46. Despite a possible suggestion by the Secretary to the contrary, there is no evidence that the Affected Area was not effectively dangered off, and that miners and others who might have been in the vicinity had been put on notice that entry and travel through the Affected Area was prohibited.[12] Vetter had not observed anyone in the Affected Area prior to entering it

[12] The Secretary notes, in a footnote in her brief, that there was no physical barrier preventing entry to the Affected Area by persons approaching from the tailgate travelway. Sec.

for the inspection, and the Secretary does not contend that any San Juan miners or other persons were in the Affected Area on November 10, 2003, other than in conjunction with the inspection and any remedial measures generated as a result of issuance of the citation. I find that, in the absence of the Secretary's intervention, no person would have worked or traveled in the Affected Area on November 10, 2003.

The Secretary counters that dangering off is "a temporary measure designed to prevent access to a dangerous area until the hazard can be eliminated, which must be undertaken immediately," and that dangering off "is prohibited in this case."[13] However, the regulation on which she primarily relies, 30 C.F.R. § 75.363(a), does not prohibit dangering off an area of poor air quality.[14] Nor does it compel immediate corrective action under the circumstances presented here. In fact, section 75.363(a) provides that when San Juan detected low oxygen levels in the Affected Area, it was compelled to danger it off. Thereafter, the regulation dictates that the "condition shall be corrected immediately *or the area shall remain posted until the hazardous condition is corrected* (emphasis added)." Further immediate actions are required only if the condition is found to constitute an imminent danger. The condition found on November 10 and, apparently, on other occasions when low oxygen levels have been found, did not remotely approach the seriousness of an imminent danger.[15]

The Secretary's witnesses, in essence, agreed that it was appropriate to danger off the area. Vetter sanctioned it as a temporary corrective action, but not a permanent one. Tr. 124-25.

Br. at 23, n. 13. However, any such person would have entered the travelway by the route designated by San Juan and would have been aware that entry into the Affected Area had been prohibited. The danger sign would also have been visible from the tailgate travelway.

[13] Sec. Reply Br. at 12.

[14] § 75.363 Hazardous conditions; posting, correcting and recording

> (a) Any hazardous condition . . . shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

[15] Vetter determined that an injury was unlikely, and MSHA extended the time when abatement was required to November 16, 2003. MSHA's enforcement policy, whereby citations for low oxygen levels were not issued if some corrective action was underway, also indicates the relative seriousness of the hazard.

He also maintained that dangering off is not an appropriate corrective action for low air quality because it can't be isolated from the rest of the environment, and because the Affected Area is part of the return air course that must be inspected weekly. Tr. 124, 159-60. Gibson testified that it would not only be acceptable to danger the area off, but that it would be required by the regulation if a hazard were found. Tr. 90, 93-95, 100-01, 104-05.

The Secretary also argues that dangering off the Affected Area is impermissible because the tailgate travelway is a return air course that must be inspected weekly, and that it must be maintained as an escapeway.[16] Barring travel through the Affected Area, however, would not appear to interfere with either of those functions. The route established by San Juan from the longwall face to the tailgate travelway does not pass through the Affected Area. The main flow of air also follows that route.[17] That route remained open to travel for escape and inspection purposes on November 10. San Juan's witnesses testified that all longwall mines have ventilation problems on the tailgate side, and that MSHA has not enforced the ventilation standard at several other mines with comparable areas where persons did not work or travel. Tr. 379-80, 417-21. The Secretary's witnesses maintained that such areas have been considered part of the tailgate travelway. Tr. 43.

Underlying the Secretary's argument is the contention that, unlike at least some other hazards, an area with sub-standard air quality cannot simply be dangered off because that action does not physically isolate or contain the bad air. The contention cannot be disputed. However, on the facts of this case, any low quality air in the Affected Area is effectively contained by the characteristics of the air flow, itself. While low oxygen levels have been found on numerous occasions, there is no evidence that they have migrated out of the Affected Area, or that sub-standard air has ever been found in adjacent working areas. The quantity of air in the Affected Area is about 2,000 cubic feet. In contrast, 65,000-100,000 cubic feet of air is being drawn across the face and out the tailgate travelway every minute. As air in the Affected Area escapes the localized air flow anomalies that can result in low oxygen levels, it is promptly diluted. The same is true for any gob air that might seep between shields and the air under the last shield, inby its legs, where the standard has been made inapplicable by a provision in San Juan's ventilation plan. Tr. 235.

The Secretary notes that if section 75.321(a)(1) does not apply in the Affected Area, then no atmospheric standards would apply and very low concentrations of oxygen and/or very high concentrations of methane or other gasses could exist without violating any standard. She then posits that a roof fall in, or adjacent to, the Affected Area, could force any sub-standard air onto

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[16] *See* 30 C.F.R. §§ 75.215(a), 75.364(b). To the extent that the Secretary suggests that dangering off the Affected Area may violate other standards, the merits of such a charge would have to be decided in a subsequent case.

[17] Restrictions in air flow caused by the five-foot-high gob separation plate and other equipment contribute to the air quality problems in the Affected Area.

the working face and/or into the tailgate travelway, exposing persons in those areas, and if high methane levels were present, ignition sources might be encountered, with potentially disastrous results. The argument is unconvincing for several reasons.

There is no evidence that explosive concentrations of methane or excessively low concentrations of oxygen have ever been found in the Affected Area, and there is no reason to believe that concentrations in a dangered off Affected Area would be any different than the relatively benign concentrations historically experienced. There is also no evidence that sub-standard air has been found in areas adjacent to the Affected Area. Assuming that air temporarily displaced by a roof fall might be forced out of the Affected Area, it is highly unlikely that it would enter the working area of the face because of the relatively massive quantities of ventilation air flowing across the face and out the tailgate travelway, which would quickly dilute it and render it harmless.

All of the electrical and other equipment on the longwall face is maintained in permissible condition. Two AMS meters are mounted adjacent to the Affected Area, one behind the legs of the last shield and one in front of the legs of the second to last shield. Those meters continuously monitor the concentration of methane and alert when concentrations reach one percent. The alert is visible at the meter and on screens at the headgate controls, and in a control room on the surface. An alert requires that operations be stopped, and that measures be taken to address the presence of methane. If methane concentrations reach 1.5%, the longwall equipment is automatically deenergized. A similar meter is mounted on the shearing machine and deenergizes the equipment if the concentration of methane reaches 2%. Methane is explosive at concentrations of 5-15%. Tr. 243-45. One potential ignition source identified by the Secretary would occur if the shearer cut into the tailgate travelway and encountered roof bolts. However, San Juan's ventilation plan requires that the shearer be stopped ten shields from the tailgate entry, and that the air in the tailgate entry be checked for the presence of methane before cutting out to the travelway.

There is no question that roof falls occur, both in and adjacent to the Affected Area. As noted above, the supported roof of the tailgate travelway falls sporadically as the shields pass. Fortunately, the falls generally occur inby the Affected Area. There is no evidence that roof falls, even those that extended into the Affected Area, have ever resulted in sub-standard atmospheric conditions in the working face or outside of the Affected Area. Assuming that a roof fall could force air out of the Affected Area into working areas, there is no evidence that dangering off the Affected Area would increase whatever risk already exists.

The Secretary attempts to draw a comparison with the application of safety standards to mobile equipment, asserting that deenergizing or tagging out equipment is not sufficient to abate a violation, citing *Eastern Ass. Coal. Corp.*, 1 FMSHRC 1473 (Oct. 1979) (defective parking brake violation not abated by danger tag, where equipment was capable of operation and was located in work area - tag could have been ignored). However, the Commission has indicated that tagging out a piece of mobile equipment may be sufficient to effectively take the equipment

out of service and avoid a violation. *See Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960 (May 1996); *Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843 (April 1981).

Dangering off an area may be similar, in some respects, to tagging out a piece of mobile equipment. However, danger signs are universally recognized as a means to identify and emphasize the existence of a hazardous condition, and are effective measures to bar access to unsafe areas, a concept recognized in the Secretary's regulations. For example, 30 C.F.R. § 75.208 provides that posting a "readily visible warning" (typically referred to as "dangering off") is sufficient to identify areas of a mine without permanent roof support. Here, Vetter verified the effectiveness of the danger off sign, and testified that it would have been unlikely that a miner would have entered the Affected Area on the date in question. Tr. 146-47. Of course, a miner might ignore a danger sign and proceed into a prohibited area, conceivably even beyond the imaginary line at the shield legs into the gob. That highly improbable possibility cannot transform the Affected Area, or the gob, into an area where persons work or travel.

I agree with the parties that the wording of the regulation is plain on its face. It mandates specified air quality in "areas where persons work or travel." I find that, on November 10, 2003, the Affected Area was effectively dangered off, and was not an area where persons work or travel, within the meaning of the regulation.[18]

Interpreting the plain meaning of the standard's language in this manner is consistent with both the design of the regulations and the objective of the Act. The parties have devoted considerable attention to the announced intent of the 1992 and 1996 amendments to regulations governing air quality, each arguing that its position is harmonious with that intent and that the other's is not. The most significant change occurred in 1992, when the Secretary re-formulated regulations governing air quality to assure that areas where persons worked or traveled were required to have an atmosphere with at least 19.5% oxygen, specifically extending that requirement to bleeder entries, which several administrative law judges had found to be not covered by the previous regulation. Requiring appropriate air quality wherever miners work or travel, even if infrequently, would be consistent with the regulatory scheme. However, imposing upon operators a requirement to maintain air quality in areas where no miner or other person

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[18] I reject the Secretary's "bootstrap" contention that the violation was established by Vetter's entry into the area and the subsequent entry of other persons to effectuate remedial measures dictated by the issuance of the citation. Certainly, MSHA inspectors and others are "persons" within the meaning of the regulation. However, I have found that, absent MSHA's intervention no one would have entered the Affected Area on November 10, 2003. MSHA cannot be allowed to create a violation of a standard and saddle Respondent with the consequences, including the imposition of a civil penalty. I also reject the Secretary's argument that the history of travel through the Affected Area renders the regulation applicable, even though it was effectively dangered off on November 10. That travel occurred under markedly different circumstances.

works or travels, would not be. As the Secretary recognized, in commenting on that part of the current rule addressing air quality in bleeder entries, "The purpose of this standard is to protect miners, not to regulate air quality where persons are not exposed." 61 Fed. Reg. 9764, 9776 (1996).

The overriding purpose of the Act is to protect the health and safety of miners. *E.g., Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C.Cir. 1989). Finding the regulation inapplicable to the Affected Area on the date in question, when no miner or person would have worked or traveled in it, is consistent with the protective purpose of the Act. Under the Secretary's interpretation, which has been imposed by MSHA since the longwall began operating, a preshift examination must be conducted to assess, *inter alia*, the air quality in the Affected Area. If the air quality is found to satisfy the standard at the time of the examination, miners are free to enter the Affected Area during the subsequent shift, and it is clear that many have done so.[19] However, the air quality in the Affected Area is highly variable. Gibson testified that the air quality changes rapidly at times. The simple fact of a person stepping into the notch in the gob separation plate can reduce oxygen levels at points in the Affected Area. Tr. 63, 67, 76, 97. David Hales gave similar testimony, stating that a monitor held stationary in the Affected Area can go through a range of readings.[20] Tr. 344. During the period November 6 to 10, satisfactory oxygen levels were found during several preshift examinations. Tr. 111.

A finding of sufficient oxygen levels in the Affected Area during a preshift examination provides virtually no assurance that they will remain in compliance for the next hour, much less for an entire shift. Vetter testified that the fact that the air in the Affected Area was found to comply with the requirements of section 75.321(a)(1) during a preshift examination *did not mean that miners were free to enter the area on the subsequent shift.* "It may be okay at the conclusion of the pre-shift or the examination, but it doesn't necessarily mean it's going to remain that way." Tr. 140. While his position appears to be inconsistent with the preshift examination regulation, it does confirm the variability of air quality in the area. Categorizing the Affected Area as active workings, through which miners are free to pass once the preshift examination has been done, would pose a substantially greater risk of exposing them to sub-standard atmospheric conditions than if they were prevented from entering the area. The threat of roof falls in the Affected Area poses an additional danger that would be avoided if entry into the Affected Area were barred.

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[19] As noted above, the regulation addressing preshift examinations bars entry to areas that have not been successfully preshifted. See also the testimony of Gibson (Tr. 85) and David Hales (Tr. 298).

[20] The bottle samples taken by Vetter on November 10 produced different results than those shown only moments earlier on his hand-held monitor. Tr. 113. Gibson has vacated a citation he had issued for sub-standard air quality in the Affected Area when the air taken in a bottle sample was found to be in compliance with the standard, a result markedly different from that that had been shown a little earlier on his hand-held meter. Tr. 63.

Conclusion

I find that, on November 10, 2003, the Affected Area was not an "area where persons work or travel," within the meaning of section 75.321(a)(1). San Juan was not prohibited from dangering off the Affected Area. Having found a hazardous condition, it was compelled to do so.

ORDER

Citation No. 7605607 is hereby **VACATED**.

Michael E. Zielinski
Administrative Law Judge

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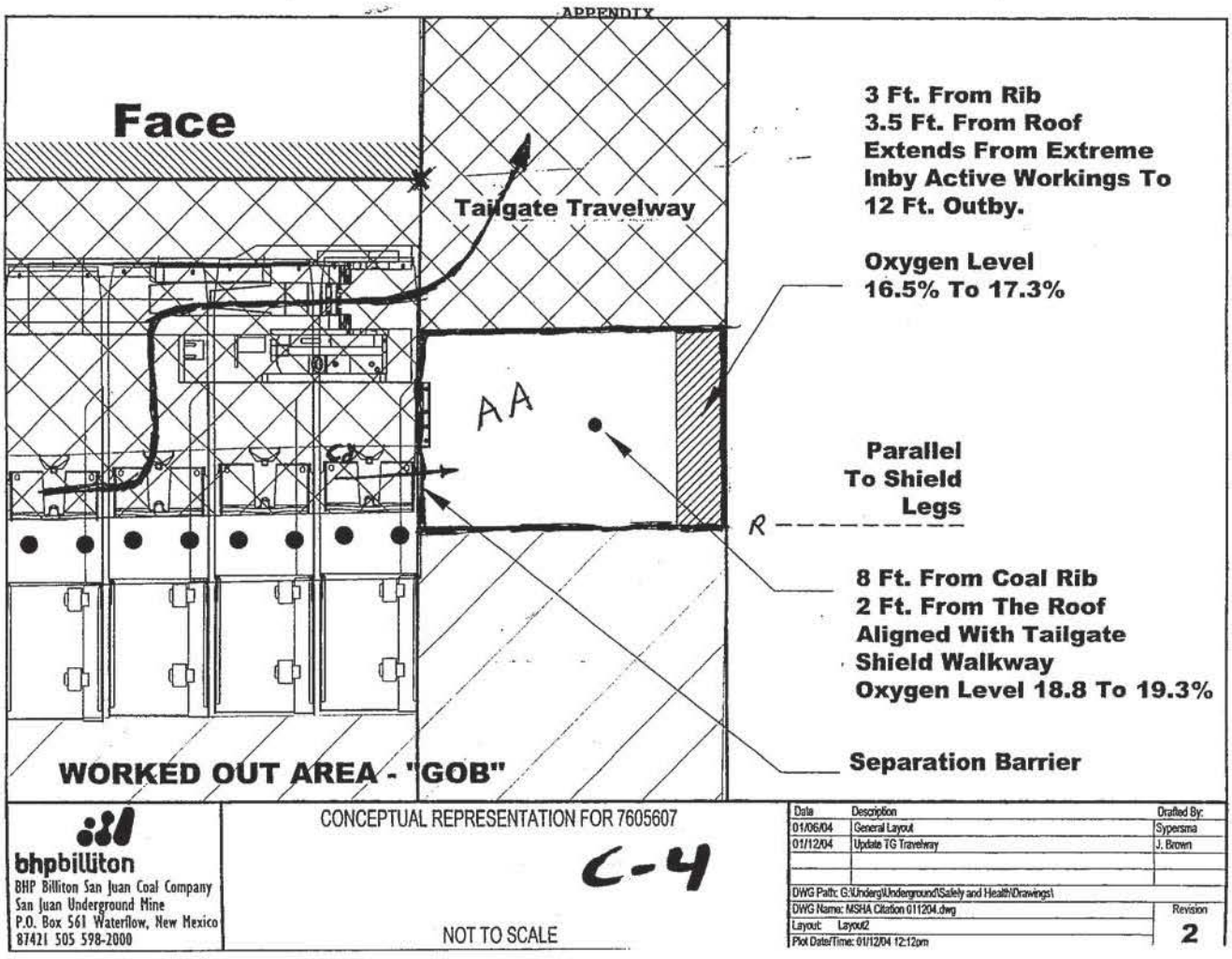
/mh

appendix: Exhibit C-4 (see footnote 5)



ADMINISTRATIVE LAW JUDGE ORDERS

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

May 13, 2004

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA),	:	
on behalf of ROBERT H. KINNAMAN,	:	Docket No. WEST 2003-402-DM
Complainant	:	MSHA No. WE MD 03-10
	:	
v.	:	3M Corona Plant
	:	
3M CORP.,	:	Mine I.D. 04-00191
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO AMEND TEMPORARY REINSTATEMENT ORDER

On or about August 25, 2003, the Secretary of Labor filed an application for temporary reinstatement on behalf of Robert H. Kinnaman against 3M Corp. under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2) (the "Act"). On September 18, 2003, I approved the settlement reached by the parties. In the settlement, Respondent agreed to economically reinstate Kinnaman at his regular rate of pay for 40 hours a week, to pay him for his average overtime hours, and to continue his benefits.

On April 16, 2004, Respondent filed a motion asking me to reopen this case on the basis of changed circumstances, as described below. Respondent also requests that I expedite my consideration of the motion. Although I approved the parties' proposed settlement, I retain jurisdiction over this proceeding to consider Respondent's motion. *See Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (April 2001). On May 5, 2004, the Secretary filed an opposition to the motion. For the reasons set forth below, the motion is denied.

I. RESPONDENT'S MOTION AND THE SECRETARY'S OPPOSITION

In its motion, Respondent stated that it recently learned that Kinnaman has been pursuing permanent disability benefits under the California Workers' Compensation law based on an injury he suffered in July 2002. It appears that Kinnaman's right hand was injured in July 2002 when he and another worker were moving a piece of heavy equipment with a crane. Apparently, when they set the equipment down in the work area, part of Kinnaman's right hand was injured. (Motion, Ex. 3, p. 2). Surgery was performed on his little finger and he was off work for a few months. He subsequently returned to his regular duties at the Corona Plant. On January 15, 2004, a workers' compensation medical examiner, who is a physician, found Kinnaman's condition to be "permanent and stationary" and he placed Kinnaman under work restrictions.

Among other conditions, the examination revealed that "there was very little movement in the proximal interphalangeal joint" and Kinnaman could not "make a full grip with his right hand." *Id.* at p. 7. The medical examiner precluded Kinnaman from "repetitive gripping, grasping and repetitive manipulation" with his right hand. *Id.* at p. 8. The examiner further stated that, if the employer is unable to accommodate the work restriction, then Kinnaman would be eligible for vocational rehabilitation. *Id.*

By letter dated February 18, 2004, Kinnaman was notified by his workers' compensation provider that he was eligible for permanent disability benefits as a result of this injury effective November 20, 2003, the date he was examined by the medical examiner. (Motion, Ex. 4). It appears that Kinnaman is entitled to workers' compensation payments of $160 per week until a total amount of $6,500 has been reached. *Id.*

Respondent contends that the examiner's restrictions cannot be accommodated. It states that the job of Maintenance Mechanic requires the ability to use both hands repetitively while lifting or working on heavy objects. As a consequence, Respondent argues that Kinnaman is physically unable to perform the duties of his position of Maintenance Mechanic. Respondent maintains that, by receiving workers' compensation benefits in addition to his pay under the economic reinstatement settlement, Kinnaman is earning more money than he would if he were still working at the plant, thereby unjustly enriching him. It states that if Kinnaman were working at the plant, he would have been placed on a medical leave of absence without pay effective January 15, 2004, as a result of the permanent disability determination.

Respondent asks that my decision approving settlement dated September 18, 2003, be modified to eliminate all pay and benefits for Kinnaman, effective January 15, 2004, except those benefits he would have been entitled to if placed on a medical leave of absence on that date. Respondent also asks that Kinnaman be required to reimburse Respondent for all monies it paid him since that date because of his failure to inform Respondent of the medical examiner's findings and the status of his workers' compensation claim.

The Secretary maintains that there is no authority to support Respondent's assertion that Kinnaman is not entitled to receive $6,500 from workers' compensation while receiving his earnings under my order approving temporary reinstatement. She also contends that there is no support for Respondent's claim that Kinnaman could not return to his regular duties at the plant with work restrictions. The record shows that he worked for Respondent as a Maintenance Mechanic from October 12, 2002, after returning from his surgery, until June 30, 2003, when he was separated from his employment. The Secretary states that, because the work restrictions are so minimal, there is no basis for Respondent's assertion that they could not be accommodated. She observes that if the motion is granted, Kinnaman would only have the $6,500 workers' compensation benefits to live on during the pendency of the underlying discrimination case.[1]

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[1] The underlying discrimination case was filed by the Secretary with the Commission in April 2004 and was assigned to me on May 3, 2004. *Sec'y of Labor on behalf of Kinnaman et al.*

The Secretary maintains that, if a doctor determines that an employee's injury is permanent and that it will not improve with additional care (*i.e.*, stationary), he is entitled to benefits. These benefits are not an income substitute but are "to compensate the injured worker for the permanent damage suffered as a result of the industrial injury." (S. Opposition, 3). Thus, the Secretary argues that permanent disability benefits are analogous to a personal injury award in a tort claim. Under California law, an injured employee does not have to be out of work to receive permanent disability benefits. Once an injured employee returns to work, he is entitled to his disability benefits as well as the wages he earns.

The Secretary also argues that there is no evidence that Respondent could not accommodate Kinnaman's work restrictions. The work restrictions are rather moderate. Kinnaman is left handed and he worked at his regular job for over eight months before he was separated from his employment at the plant.

Finally, the Secretary contends that granting Respondent's motion would defeat the underlying purpose of temporary reinstatement because Kinnaman's income would be significantly reduced. A miner should not be forced to endure a reduction of income while his discrimination complaint is being litigated.

II. ANALYSIS

I agree with the arguments presented by the Secretary. Congress enacted the temporary reinstatement provision of section 105(c) because "complaining miners may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of their discrimination complaint." (S. Rep. 95-181, at 37, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978)). It would be unfair to Kinnaman to suffer a reduction in income because he has a permanent partial disability. Indeed, if the motion were granted, Respondent would receive a windfall because it would no longer be required to pay Kinnaman his wages as Respondent committed to in the parties' "Settlement Agreement and Motion for Temporary Reinstatement."

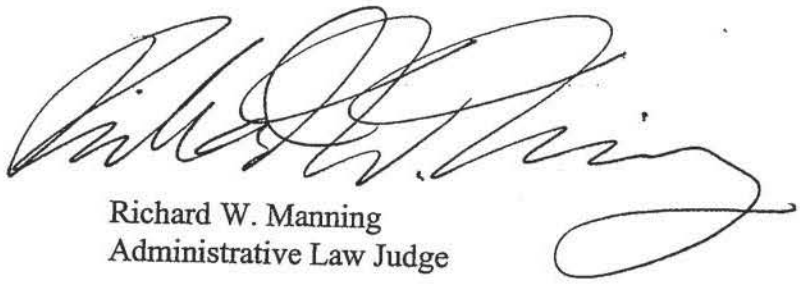
The workers' compensation payments are to compensate him for his disability, which appears to be a loss of 30% of the use of his right hand. (S. Opposition, 3). "Temporary" disability benefits serve as a wage replacement when an employee is injured and cannot return to work. These benefits terminate when an employee is able to return to work, with or without restrictions. "Permanent" disability benefits are available only after a physician has certified that an employee's injury is permanent and stationary. These benefits are not an earnings substitute; rather they compensate the individual for the impairment of function after maximum recovery from the industrial accident. *See, Calif. Dept. of Rehab. v. Workers' Comp. Appeals Bd.*, 70 P.3d 1076, 1081-83 (2003). In this instance, the physician determined that Kinnaman could continue

working with certain restrictions. Respondent should not enjoy a windfall as a result of Kinnaman's partial disability and Kinnaman should not be required to suffer a loss of income.

It is also important to consider the fact that Respondent voluntarily agreed to economically reinstate Kinnaman. Although I have the authority to reopen this case and modify my decision approving the parties' settlement, I believe that such modifications should be made only in exigent circumstances. Respondent has not demonstrated a compelling need to modify the parties' settlement. Respondent argues that, if Kinnaman were working at the plant, it would not be able to accommodate his work restrictions. Respondent's argument is simply a bald assertion without any evidence to support it. More importantly, even if Respondent's assertion is true, it is largely irrelevant. Kinnaman was not working at the plant because he was receiving economic reinstatement as agreed to by the Respondent and his income should not be reduced while the underlying discrimination claim is adjudicated. Reducing his income would defeat the purpose of the temporary reinstatement provisions of section 105(c).

Although unemployment benefits are not entirely analogous, it is interesting to note that the Commission has held that an employer is not entitled to offset unemployment benefits that an employee has received from a backpay award in a discrimination case. The Commission originally held that unemployment benefits should be deducted from backpay awards. *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (April 1993). Commissioner Backley dissented from that part of the decision. 15 FMSHRC 621-26. In *Sec'y of Labor on behalf of Poddy v. Tanglewood Energy, Inc.*, a majority of the Commission reversed itself and adopted the reasoning of Commissioner Backley in *Essroc*. 18 FMSHRC 1315, 1325 (Aug. 1996).

For the reasons set forth above, the motion of Respondent to reopen this temporary reinstatement proceeding to modify my decision approving settlement is **DENIED**. I expect the parties to proceed expeditiously in the underlying discrimination case. Discovery shall be initiated and completed as quickly as possible and settlement discussions shall be initiated. As I stated in my prehearing order, the parties shall initiate a conference call in that case on or before June 3, 2004.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 18, 2004

BECON CONSTRUCTION, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2001-204-RM
v.	:	Citation No. 7994802; 01/02/2001
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Lebec Cement Plant
Respondent	:	Mine ID 04-00213 AF6
	:	
MORTON ENGINEERING AND	:	CONTEST PROCEEDING
CONTRACTING, INC.,	:	
Contestant	:	Docket No. WEST 2001-226-RM
	:	Citation No. 7994802; 01/02/2001
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Lebec Cement Plant
Respondent	:	Mine ID 04-00213 8FQ
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Docket No. WEST 2002-147-M
Petitioner	:	A.C. No. 04-00213-05502 AF6
	:	
v.	:	
	:	
BECON CONSTRUCTION COMPANY,	:	Lebec Cement Plant
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH,	:	
ADMINISTRATION, MSHA	:	Docket No. WEST 2002-164-M
	:	A.C. No. 04-00213-05504 8FQ
v.	:	
	:	
MORTON ENGINEERING &	:	Lebec Cement Plant
CONSTRUCTION, INC.,	:	
Respondent	:	

ORDER DENYING MOTION TO COMPEL

The stay in these consolidated contest and civil penalty proceedings was continued on February 26, 2004, pending the disposition of the civil litigation associated with the subject October 26, 2000, overhead trolley accident. During the course of a February 25, 2004, telephone conference, the parties advised that the wrongful death case was resolved. However, personal injury cases have not been completed. Since testimony in these administrative proceedings can have an impact on the civil litigation, the stay in these matters has remained in effect until all relevant civil litigation is complete.

Written discovery has proceeded during the stay. On April 9, 2004, Becon Construction Company, Inc. ("BECON"), filed a Motion To Compel Further Responses to Interrogatories.[1] On April 19, 2004, the Secretary, citing the departure of the formerly assigned counsel, filed a Motion for Extension of Time until April 29, 2004, to file an opposition to BECON's Motion to Compel. The Secretary's request was granted as BECON did not interpose an objection. The Secretary's Opposition to BECON's Motion to Compel was filed by facsimile on April 29, 2004.

As a threshold matter, citing the *Federal Rules Of Civil Procedure* Rule 33(b)(4), BECON asserts the Secretary waived all responsive objections and privileges to interrogatories because she did not serve her answers until July 5, 2002, although she was only granted an extension to respond until June 28, 2002. In response, the Secretary contends, on or about June 27, 2002, former Secretary's counsel Jason Vorderstrasse contacted the office of Kevin McNaughton, BECON's counsel, to request a brief extension of time. Vorderstrasse reportedly was advised by McNaughton's secretary that McNaughton was on vacation until July 8, 2002. Vorderstrasse mailed the Secretary's interrogatory response on July 5, 2002. In support of her opposition to BECON's waiver of privilege assertion, the Secretary has submitted an affidavit of Vorderstrasse .

BECON responded to the Secretary's Opposition on May 12, 2004. BECON asserts that Vorderstrasse's initial request for an extension of time was untimely because it occurred via a voice message left at McNaughton's office on July 1, 2002. BECON provided an affidavit of Jackie Betts, McNaughton's secretary, indicating that although she recalled speaking to Vorderstrasse on July 1, 2002, during which time Mcnaughton was on vacation, she did not grant Vorderstrasse an extension of time to respond to BECON's interrogatories.

Vorderstrasse's account of his inability to contact McNaughton during the July 4 holiday season is not contested. Moreover, I have consistently liberally granted extensions of time that were mutually agreeable to all parties. Surely, BECON was not prejudiced by the brief delay of Secretary's interrogatory response, particularly during a period when McNaughton was

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[1] It is not clear why BECON's waited until April 9, 2004, to file its Motion To Compel further responses to the Secretary's responses to interrogatories that were mailed on July 5, 2002.

vacationing. Moreover, BECON has waited approximately 1½ years to move for further responses from the Secretary. Civil Procedure Rule 33(b)(4) provides the Judge with the discretion to excuse untimely objections to interrogatories for good cause shown. Even if I were to conclude that the Secretary's objections to interrogatories were untimely, the brief delay does not warrant the extraordinary relief sought by BECON. Accordingly, BECON's request that I rule that the Secretary has waived objections to interrogatories based on privilege **IS DENIED**.

With respect to the Secretary's assertions of privileges, BECON poses a series of broad interrogatories that requests the Secretary to identify and/or provide each fact, witness or document that supports, in whole or in part, the statements in Citation No. 7994801 "that the trolley was not tracking properly on the rail system prior to the accident" and that it was known to BECON's site manager that the trolley was not tracking properly.

In response to BECON's interrogatories, the Secretary identifies Federal and State officials who are potential witnesses. With respect to other witnesses the Secretary asserts the miner witness privilege and the informant's privilege. BECON contends that the Secretary has waived these privileges because the Secretary has published the names of non-government employees, including miners, who have provided information during the course of her accident investigation.

The Miner Informant and Witness Privileges

Protecting miners who participate in enforcement proceedings brought by the Secretary from retaliation is indispensable to the effective administration of the Mine Act as a safety statute. *Sec'y o/b/o Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520, 2524, 2526. In this regard, Commission Rule 61 provides that, absent extraordinary circumstances, a Judge shall not order the disclosure of the name of a miner who is an informant. 29 C.F.R. § 2700.61. Commission Rule 62 prohibits the disclosure of the identity of a miner witness until two days before a scheduled hearing. 29 C.F.R. § 2700.62.

BECON argues the Secretary has waived these privileges by publishing the names of miners who she has interviewed. This type of assertion was rejected in *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.,* 459 F.2d 303 (5th Cir. 1972), wherein the Court stated:

> Knowing the identity of persons who have given statements to the Secretary is not equivalent to knowledge of which of those persons were informants within the context of the privilege. Only when the content of the statement is disclosed will it be revealed whether the information was given reluctantly or voluntarily, whether the tone and manner in which it was given was friendly to the defendant or unfriendly, and whether it was accusatory or favorable. In short, if the employee is not known to the defendant as an informer but merely a statement giver, then disclosure of the statement might reveal him as an informer.

459 F.2d at 306.

To provide statements of miners simply because a mine operator is aware that a miner is a statement giver would eviscerate the miner protections provided in Commission Rules 61 and 62. The miner witness privilege is an unqualified privilege. However, the miner informant's privilege is a qualified privilege that can be overcome by a showing of substantial need. A desire to use informant statements for impeachment purposes is not an adequate basis for defeating the privilege. Significantly, BECON can depose any individual identified by the Secretary. BECON has failed to demonstrate the extraordinary circumstances that are necessary to defeat the privilege. Accordingly, BECON's Motion to Compel the disclosure of miners' statements **IS DENIED**.

The Informant's Privilege With Respect to Non-Miners

BECON has not specifically articulated the identity of non-miner statements, if any, that it seeks from the Secretary. Accordingly, leave is granted for BECON to request the production of statements obtained by the Secretary from non-miners. BECON should specifically state the basis for its knowledge that statements were taken, the basis for its interest in such statements, and, its understanding, if any, of the nature of the subject matter of such statements. If the Secretary asserts the informant's privilege, I may review the statements *in camera*.

The Work Product and Deliberative Process Privileges

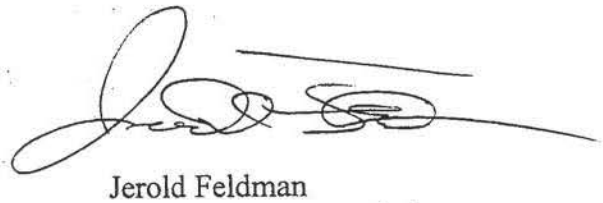
In her Opposition to BECON's Motion to Compel, the Secretary identified a variety of special investigator field notes, a special investigation report, notes from a health and safety conference and memoranda of interviews that she claims are protected, in whole or in part, by the work product and deliberative process privileges. As a general proposition, investigative field notes, case analysis, memorandum or summary of interviews prepared by or for a party in anticipation of litigation are protected by the work product privilege. *See, e.g., Consolidation Coal Company*, 19 FMSHRC 1239 (July 1997). Intra-agency memorandum or e-mail communications that are "consultative" in nature, in that they contain advisory opinions, recommendations and deliberations, are protected by the deliberative process privilege. *Id.*

BECON has not articulated why it objects to the Secretary's assertion of privilege with respect to each specific document. Nor has it shown an overriding need for any document. Accordingly, leave is granted for BECON to supplement its Motion to Compel by specifically identifying each document it seeks to compel the Secretary to provide, providing specific assertions why the claimed privilege should not apply to each document. If necessary, I will review documents *in camera* to resolve any privileges asserted by the Secretary. If BECON seeks to overcome privilege by a showing of substantial need and undue hardship, it should provide an individual showing for each document. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047 (2nd Cir. 1992).

ORDER

As discussed above, BECON's Motion to Compel the statements of miners **IS DENIED**. With respect to the production of specific non-miner witness statements, leave is granted for BECON to serve upon the Secretary such request within 21 days of this Order. The Secretary shall have 14 days to reply to BECON's request.

With respect to all other documents, leave is granted for BECON to file, within 21 days of this Order, a supplemental motion to compel that challenges the specific privileges asserted by the Secretary and/or demonstrates a compelling need that overcomes the asserted privilege.



Jerold Feldman
Administrative Law Judge

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/hs

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