

**MAY 2005**

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**ADMINISTRATIVE LAW JUDGE ORDERS**

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**MAY 2005**

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

Cumberland Coal Resources, LP v. Secretary of Labor, MSHA, Docket Nos. PENN 2004-73-R, etc. (Judge Zielinski, March 28, 2005)

Secretary of Labor, MSHA v. Oak Grove Resources, LLC, Docket Nos. SE 2005-27, SE 2005-35. (Unpublished Default Orders of Chief Judge Lesnick, April 13, 2005)

No cases were filed in which Review was denied during the month of May



**COMMISSION DECISIONS AND ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 4, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2005-177
v.	:	A.C. No. 15-17651-18928
	:	
SIDNEY COAL COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

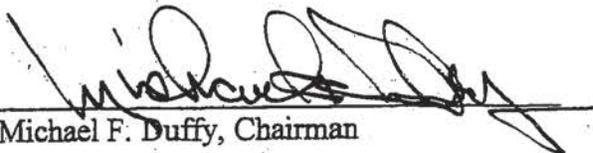
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On March 14, 2005, the Commission received from Sidney Coal Company, Inc. (“Sidney Coal”) a letter requesting that the Commission reopen a penalty assessment that had become a final order 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 13, 2004, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment (A.C. No. 15-17651-18928) to Sidney Coal’s Mine Number 1 in Pike, Kentucky, for several citations and orders, including Citation No. 7404726. In its letter, Sidney Coal states that it wished to contest Citation No. 7404726 and noted as much on the proposed assessment. Attached to its letter is a copy of the proposed assessment with a check mark appearing next to Citation No. 7404726 in the “Check for Contest” column. Sidney Coal asserts, however, that it now understands that its contest was never received by MSHA. The Secretary states that she does not oppose Sidney Coal’s request for relief.

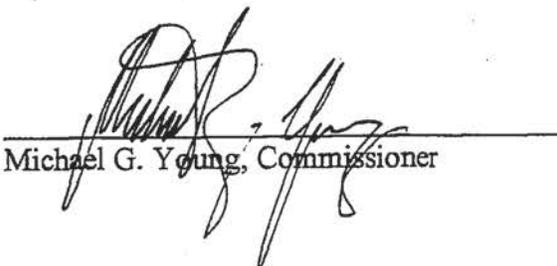
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the 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 Sidney Coal’s letter, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Sidney Coal’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.

  
Michael F. Duffy, Chairman

  
Mary Lu Jordan, Commissioner

  
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 4, 2005

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

v.

BARRICK GOLDSTRIKE MINES

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Docket No. WEST 2005-229-M  
A.C. No. 26-02246-45879

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On March 11, 2005, the Commission received from Barrick Goldstrike Mines ("Barrick") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

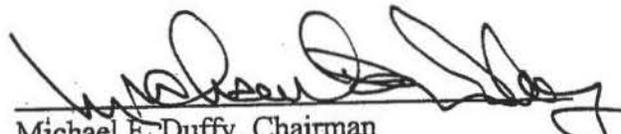
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On January 4, 2005, Barrick received from the Department of Labor's Mine Safety and Health Administration ("MSHA") the proposed penalty assessment that is at issue. Mot. at Ex. A. In its motion, Barrick states that the proposed assessment was subsequently misplaced, and that by the time the company's safety department received it, the period for contesting the proposed assessment had lapsed. Mot. at 1-2. Although Barrick subsequently attempted to contest the proposed assessment, MSHA informed the company that the contest was untimely. Mot. at Ex. A. The Secretary states that she does not oppose Barrick's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen

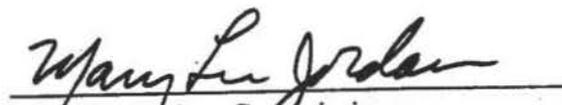
uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“JWR”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure 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 Barrick’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 Barrick’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.



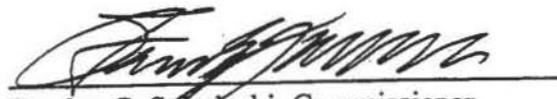
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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Stanley C. Saboleski, Commissioner



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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 4, 2005

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

v.

INDEPENDENCE COAL COMPANY  
d/b/a PROGRESS COAL COMPANY

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Docket No. WEVA 2005-96  
A.C. No. 46-08645-35881  
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BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On March 29, 2005, the Commission received from Independence Coal Company d/b/a Progress Coal Company ("Progress") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

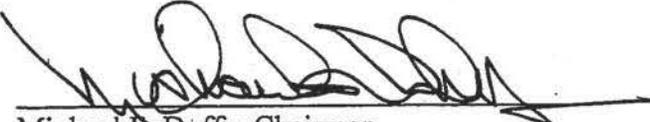
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In its motion, Progress states that on February 3, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the company five citations in connection with a fatal accident at Progress' Twilight MTR Surface Mine. Mot. at 1. Progress contested all five citations, which are the subject of Docket Nos. WEVA 2004-83-R through WEVA 2004-87-R and are currently stayed before Commission Administrative Law Judge Avram Weisberger. Mot. at 1-2. Progress states that, on February 18, 2005, it learned that it had failed to contest the proposed penalty assessments dated September 15, 2004 for two of the five citations that had been issued to Progress. *Id.* at 2. Upon an internal investigation, Progress

discovered that it had received the proposed assessment, that it had been subsequently misplaced, that the time to contest it had lapsed, and that it had never been paid. *Id.* at 2-3. In support of its motion, Progress has included an affidavit by Bryan J. Petrosky, the company's safety director. Mot. Tab A. The Secretary states that she does not oppose Progress' request for relief.

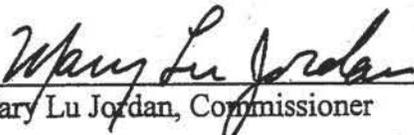
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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



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Mary Lu Jordan, Commissioner



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Stanley C. Saboleski, Commissioner



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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 16, 2005

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

v.

U.S. STEEL MINING COMPANY, L.L.C.

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Docket No. SE 2002-126

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

DECISION

BY: Duffy, Chairman; and Young, Commissioner

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”), Administrative Law Judge Gary Melick determined that U.S. Steel Mining Company (“U.S. Steel”) violated 30 C.F.R. § 77.404(a).<sup>1</sup> 25 FMSHRC 227 (Apr. 2003) (ALJ). U.S. Steel filed a petition for discretionary review, which the Commission granted. For the reasons that follow, we vacate and remand.

I.

Factual and Procedural Background

U.S. Steel operates the Concord coal preparation plant located in Jefferson County, Alabama. The plant utilizes a thermal dryer and a granular coal injection (“GCI”) system to process and transport coal. 25 FMSHRC at 228. Coal is dried in the preparation plant in the

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<sup>1</sup> Section 77.404(a) provides:

Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

thermal dryer. *Id.* The fine coal particles are then entrained<sup>2</sup> as air passes through the coal on the thermal dryer's fluidized bed. *Id.* These coal particles are then removed from the air by passing through several downstream cyclones and are discharged through rotary air locks into the GCI system. *Id.* Once in the GCI system, which consists of two independent and parallel conveying systems, the fine coal is conveyed to a sizing screen and then stored in a retention bin before it is loaded onto railcars. *Id.*; R. Exs. D, I. The atmosphere in the GCI system is enclosed and separated from the air in the rest of the facility. Tr. 87.

During this process, coal dust and methane are produced. 25 FMSHRC at 228. In order to prevent combustion, the oxygen content in the GCI system is reduced by injecting nitrogen into the system at various locations where air enters the system.<sup>3</sup> *Id.* at 228, 230. Oxygen levels are monitored by gas analyzers at three sampling points within the system. *Id.* at 228. When the oxygen level reaches 7%, the sensors trigger a "high alarm" warning on a computer screen in the computer control room. *Id.* at 228; R. Ex. A; Tr. 156. If 10% oxygen is detected, a "high-high alarm" is signaled and the screw conveyors feeding coal fines<sup>4</sup> into the GCI system are reversed, effectively shutting down the system. 25 FMSHRC at 228; R. Ex. A; Tr. 157-58. If a sensor detects oxygen at a level of 12%, an "extreme high" warning is displayed and the screw conveyors are reversed. R. Ex. A; Tr. 209. The GCI system is not operated if the sensors are disabled. R. Ex. C at 1; Tr. 206, 209.

On August 10, 1999, MSHA conducted an on-site evaluation of the GCI system. R. Ex. I at 1.<sup>5</sup> The evaluation was undertaken to address a series of concerns about the GCI system raised by the United Mine Workers of America ("UMWA"). *Id.* at 3-4. MSHA engineer and ventilation specialist Clete Stephan, accompanied by several other MSHA personnel, performed the study "to determine the conditions under which the GCI [system] can be safely operated." *Id.*

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<sup>2</sup> Entrainment is defined as "[t]he process of picking up and carrying along." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 188 (2d ed. 1997) ("DMMRT").

<sup>3</sup> The oxygen content of air is 20.9%. R. Ex. I at 2. A fire or explosion involving methane at an explosive concentration can result when the oxygen level is 12% or greater. *Id.* at 1-2. A fire or explosion involving coal dust can result when oxygen level is 13% or greater. *Id.*

<sup>4</sup> Fines are "[f]inely crushed or powdered material, e.g., of coal." *DMMRT* at 208.

<sup>5</sup> In this decision, "R. Ex. I" refers to a report prepared by the Department of Labor's Mine Safety and Health Administration ("MSHA") on the Concord plant's GCI system dated June 30, 2000, along with cover memoranda. We note that there appears to be some confusion in the official file and the transcript regarding the proper designation of this exhibit. The judge should clarify this confusion on remand. In the same vein, the transcript in this case contains numerous errors and is particularly difficult to follow. We remind both judges and parties to take the time to review transcripts of hearings and to correct any mistakes.

at 1. Some 10 months after his on-site visit, Stephan issued a report in the form of a memorandum, dated June 30, 2000, in which he summarized his findings regarding the GCI system (hereafter “the June 2000 Report”). *Id.* The report was sent to U.S. Steel by MSHA on July 26, 2000. *Id.*

Stephan’s report concluded that the operation of the gas analyzers is “a critical safety feature of the GCI” because the analyzers continuously monitor the air and automatically cause injection of nitrogen into the system. *Id.* at 2. The report noted “28 separate locations where leakage from the GCI was occurring” and stated that prudent engineering practice indicated that the leaks should be sealed because “[t]he nitrogen rich atmosphere and coal from inside the GCI was apparently leaking to the outside environment.” *Id.* at 5. In addressing the effect of the leaks on the atmosphere inside the GCI system, the report stated that “[t]he explosion hazards inside the GCI [are] negated when operating in an atmosphere with less than 12 percent oxygen. Maintaining dependable gas analyzers . . . will assure that the oxygen content remains insufficient for combustion.” *Id.*

On March 7, 2002, MSHA Inspector Larry Richardson observed that the monitors at the preparation plant showed high oxygen levels at two locations within the GCI, i.e., 7.2% oxygen at one conveyor and 7.5% oxygen at another. 25 FMSHRC at 228. Upon inspection of the GCI system, Richardson observed a half-inch-wide hole in the side of one of the conveyors located approximately 10 feet above the walkway. *Id.* The hole resulted from a bolt having been sheared. *Id.* The inspector testified that for approximately 10 minutes, he observed fine, dry coal coming out of the hole and then the coal would stop. *Id.*; Tr. 28-29. He assumed that, when the coal stopped coming out of the hole, air was entering the GCI system. Tr. 48-49. He estimated that coal was emitted from the hole for approximately 20 seconds at a time and then air entered for 1 to 2 minutes. 25 FMSHRC at 228; Tr. 29. Richardson did not conduct any testing to determine what amount of air, if any, was entering the hole. Tr. 48.

As a result of his observations, the inspector issued Citation No. 7672461, which alleged a violation of 30 C.F.R. § 77.404(a). Gov’t Ex. 2. The citation charged, in pertinent part, that the GCI system “was not being maintained in safe operating condition” because “[f]or this system to operate safely the atmosphere inside must remain inert and separated from the air in the outside atmosphere,” and the half-inch hole allowed seepage of outside air into the system. *Id.*; 25 FMSHRC at 227. A U.S. Steel foreman immediately arranged to have the hole plugged, and the cited condition was abated within 15 minutes. 25 FMSHRC at 228. The Secretary proposed a civil penalty for the violation, which U.S. Steel contested. The case proceeded to a hearing before Judge Melick.

The judge, citing *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982), ruled that section 77.404(a) was not ambiguous and that U.S. Steel had adequate notice of the provision’s requirements. 25 FMSHRC at 229. The judge credited the testimony of MSHA’s expert witness Clete Stephan, who testified that, until the 20.9% level of oxygen from the surrounding air that was entering the cited hole was diluted to less than 12%, an explosion hazard

existed, and the GCI system was unsafe. *Id.* at 229-30. The judge then applied the “reasonably prudent person” test contained in *Alabama By-Products* to each of the elements of Stephan’s opinion testimony and concluded that the unintended half-inch hole created a danger by allowing air to enter the cited hole and that a reasonably prudent person would have recognized that this created a hazard warranting corrective action. *Id.* at 229-30. The judge assessed a \$55 penalty. *Id.* at 231.

## II.

### Disposition

U.S. Steel argues that the judge misapplied the “reasonably prudent person” standard. PDR at 1-2. It claims that a reasonably prudent person could not have recognized that a hole caused by a single missing bolt, out of thousands of bolts in the GCI system, would render the system unsafe. *Id.* at 2. U.S. Steel contends that the testimony of the Secretary’s expert, Clete Stephan, was unsubstantiated because neither he nor the inspector took any measurements or performed any tests as to the amount of oxygen entering the GCI. *Id.* at 3-4, 7-8; Reply Br. at 4. It argues that Stephan’s testimony contradicted the June 2000 Report that he prepared in assessing the GCI system. PDR at 7. In addition, U.S. Steel challenges the judge’s “inferences” that: (1) air containing 20.9% oxygen entered the hole; (2) such oxygen would not be diluted immediately, and (3) there would be greater than a 13% oxygen concentration and an area large enough to support a fire or explosion inside the hole. PDR at 3. U.S. Steel also asserts that the judge erred by not discussing the testimony of its expert witness, John Hedrick, and comparing it to that of Stephan. PDR at 8-9.

The Secretary responds that the judge correctly applied the reasonably prudent person test. S. Br. at 7-10. In addition, she asserts that the judge’s finding of a violation of section 77.404(a) is supported by substantial evidence. *Id.* at 10-17. The Secretary submits that the judge did not abuse his discretion in crediting the testimony of MSHA’s expert witness over the conflicting testimony of U.S. Steel’s expert. *Id.* at 17-35. Thus, she urges that the judge’s decision be affirmed. *Id.* at 35.

Section 77.404(a) provides that machinery and equipment shall be maintained in a “safe operating condition.” The Commission has construed the language of the regulation as imposing two requirements: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. *See Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (Oct. 1979) (interpreting identical language in the predecessor regulation to section 77.404(a)). In this case, the MSHA inspector cited U.S. Steel as a result of the half-inch-wide hole in the conveyor caused by the loss of a single bolt. MSHA believed that, for the GCI system to operate safely, the atmosphere inside the system must be entirely separate from the air outside the system. *See Gov’t Ex. 2*. The judge concluded that, in order to prevail, the Secretary must prove that a reasonably prudent person familiar with the GCI system and the facts surrounding the cited condition would have recognized that the half-inch hole was a hazard warranting corrective

action. 25 FMSHRC 229-30. The primary issues before the Commission are whether the judge properly applied the reasonably prudent person test and whether substantial evidence supports the judge's decision.

In order to avoid due process problems stemming from an operator's asserted lack of notice, the Commission has adopted an objective measure (the "reasonably prudent person" test) to determine if a condition is violative of a broadly worded standard. That test provides:

[T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

*Alabama By-Products*, 4 FMSHRC at 2129; *See also Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an "objective standard." *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983). The Commission has recognized that the various factors, bearing upon what a reasonably prudent person would know and conclude, include accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP Minerals Int'l, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996).

Based on our review of the record, we agree that the reasonably prudent person test was not properly applied in this case and that the case should be remanded to the judge. First, as discussed below, the judge did not apply the reasonably prudent person test as an objective test based on the existing factual circumstances. Second, the judge did not consider all the factors bearing on the reasonably prudent person test. In particular, he did not consider or even mention the June 2000 Report on the Concord plant's GCI system (R. Ex. I) prepared by MSHA's expert witness, Clete Stephan. In addition, the judge did not discuss or reconcile the testimony of U.S. Steel's expert witness, John Hedrick, in crediting Stephan's testimony.

The Commission has explained that the reasonably prudent person test must be based on conclusions drawn by an objective observer with knowledge of the relevant facts. *U.S. Steel Corp.*, 5 FMSHRC at 4-5. It follows that the facts to be considered must be those which were reasonably ascertainable prior to the alleged violation. Moreover, the test must be applied based on the totality of the factual circumstances involved, not just those which tend to favor one party or the other. *Asarco*, 14 FMSHRC at 949.

In this case, the judge erred in the way he applied the reasonably prudent person test. The judge separately considered in turn specific opinions of MSHA's expert witness, Clete Stephan, as set forth in the trial testimony and determined whether it was reasonable to credit each of those opinions. The judge then credited each of those opinions and further determined that the reasonably prudent person would have also "inferred" that each of those opinions was reasonable. 25 FMSHRC at 230.<sup>6</sup> Thus, instead of considering all the factual circumstances concerning the hole in the GCI system from the perspective of an objective observer, the judge limited his analysis to the opinions of MSHA's expert and determined whether those opinions were reasonable. Under the approach used by the judge in attempting to apply the reasonably prudent person test, the judge essentially treated the MSHA expert as the reasonably prudent person, rather than viewing the facts from the perspective of an objective observer.

In *Alan Lee Good d/b/a Good Construction*, 23 FMSRHC 995 (Sep. 2001), the Commission addressed a similar situation involving application of the reasonably prudent person test, and that language applies in this case as well:

The judge "inferred" that the inspector was a reasonably prudent person familiar with the mining industry and the protective purposes of this standard, and that consequently his testimony sufficed to prove that adequate notice existed, pursuant to the criteria in *Ideal Cement*. 22 FMSHRC at 1082. The "reasonably prudent person" test, however, is an objective standard. *BHP*, [18 FMSHRC at 1342.] Relying solely on the testimony of the inspector to determine whether an operator had fair notice of a regulation's requirements (as the judge did in this case) transforms this analysis into a subjective inquiry based on the views of an MSHA inspector. Although an inspector's views are generally relevant to the notice inquiry, they do not automatically equate to what the prototypical "reasonable person" would conclude about the scope of the guarding requirements at issue here. . . .

*Id.* at 1004-05 (separate opinion of Commissioners Jordan and Beatty). The same concerns apply to the manner in which the judge in the instant case treated the testimony of the Secretary's expert witness, Stephan, upon which the judge based his finding of a violation. Because the judge failed to apply the reasonably prudent person test from the perspective of an objective observer, the case must be remanded for proper application of the test.

The judge also erred in his analysis by failing to consider countervailing opinion testimony by U.S. Steel's expert witness, John Hedrick, a mining engineer who participated in

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<sup>6</sup> For example, the judge's opinion states at one point: "I further credit [Mr. Stephan's] expert testimony, and it is reasonable for the objective reasonably prudent person to infer, that the half-inch hole permitted a sufficient amount of air to enter the GCI system to create an area with greater than 13% oxygen concentration and an area large enough to support a fire or explosion." 25 FMSHRC at 230.

designing the GCI system. For example, Mr. Hedrick testified that any oxygen that entered the system through the hole in question would not be a safety concern because sensors would shut down the system if the oxygen level ever reached 10%. Tr. 185-88. He also testified that, although the GCI system is an enclosed system, it was never designed to be “airtight.” Tr. 177-80. Although Stephan’s opinion testimony conflicted with Hedrick’s opinion testimony in several key respects, the judge never explained why he credited Stephan’s testimony rather than Hedrick’s testimony. Indeed, he did not even mention Hedrick’s testimony in his decision. The Commission has made clear that, when the reasonably prudent person test is being applied and “the opinions of expert witnesses conflict in a proceeding, the judge must determine which opinion to credit, based on such factors as the credentials of the expert and the scientific bases for the expert’s opinion. In such cases, the judge should set forth in the decision the reasons for crediting one expert’s opinion over that of another.” *Asarco*, 14 FMSHRC at 949. As discussed below, Hedrick’s testimony should be discussed and evaluated on remand.

Furthermore, on remand, the judge should exercise caution in attributing opinions set forth in trial testimony to the reasonably prudent person. The reasonably prudent person test is an objective one. Although an expert’s opinion will presumably be based on certain facts, the opinion itself will be subjective in part by its very nature. Experts can reasonably reach different opinions based on identical facts and frequently do so. Accordingly, unless only one opinion can be drawn from a given set of facts, opinion testimony should ordinarily be given somewhat limited weight in determining what a reasonably prudent person would conclude in a particular situation. For example, in the instant case, it was undisputed that neither Stephan nor MSHA Inspector Richardson had conducted any actual testing, simulation, or computational analysis of the GCI system to verify their opinions regarding the extent to which air would enter the hole in question, what volume of oxygen would be released into the system, and how far the oxygen would travel before being diluted. Tr. 47, 115-17, 120, 123; 25 FMSHRC at 230. In applying the reasonably prudent person test on remand, the judge should consider and expressly address the lack of objective test data in determining what weight to give such opinion testimony in the context of all the other factors concerning the safety of the GCI system.<sup>7</sup>

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<sup>7</sup> “[A] trial judge must ensure that . . . scientific testimony or evidence admitted is not only relevant, but reliable.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995), *aff’d sub nom., Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (“*Dust Cases*”), quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993). A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994) (remanding to the judge where he “failed to address adequately the evidentiary record . . .”). Ultimately, the question still remains whether a reasonably prudent person with knowledge of the facts and circumstances would conclude that a half-inch hole in the GCI system, which may have permitted air to enter the system, created a danger or hazardous condition rendering the system unsafe.

In addition to failing to apply the reasonably prudent person test from the perspective of an objective observer and thereby giving undue weight to Stephan's opinion testimony, the judge erred by failing to consider important factors of which a reasonably prudent person would have been aware. As explained above, the Commission has indicated that the factors of which a reasonably prudent person would be aware include, among other things, accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP*, 18 FMSHRC at 1345. Those factors would also certainly include any MSHA announcements or policy memoranda relevant to the alleged hazard that were made publicly available or brought to the attention of the operator. *Good*, 23 FMSHRC at 1005. In this case, some of the factors that are relevant to the inquiry include the operating procedures for the GCI system (R. Ex. C) and MSHA's June 2000 Report on the safety of the GCI system (R. Ex. D). However, the judge's opinion does not address either of those documents, let alone evaluate their impact on what a reasonably prudent person would conclude concerning a possible hazard from the half-inch-wide hole in the GCI system.

In particular, the June 2000 Report (R. Ex. D), which was prepared by Cleve Stephan, the Secretary's expert witness, specifically addresses the safety of the Concord plant's GCI system and therefore is a key document bearing upon what a reasonably prudent person would conclude regarding the effect of the hole in the system. The report contains Stephan's conclusions and recommendations based on his visit to the plant to evaluate the GCI system in August 1999.<sup>8</sup> The June 2000 Report notes that, at the time of the evaluation, there were 28 holes in the GCI system. *Id.* at 5. At least one of the 28 holes was similar to the hole in question. Tr. 125. The report states that the 28 openings should be sealed. However, the report recommends sealing the holes in the portion of the report that deals with preventing coal dust and nitrogen from escaping from the system and posing hazards outside the system, rather than as a means of preventing combustion hazards inside the system. R. Ex. I at 5. With regard to possible explosion hazards inside the system, the report notes that "[t]he explosion hazards inside the GCI [are] negated when operating in an atmosphere with less than 12 percent oxygen. Maintaining dependable gas analyzers, or other no less effective means to determine oxygen content, will assure that the oxygen content remains insufficient for combustion." *Id.* The report does not appear to conclude that the 28 holes pose a significant risk of a combustion hazard occurring inside the system. Despite the fact that the report addresses safety concerns at the GCI system, the judge failed to discuss the report or relevant trial testimony addressing the report in his opinion.<sup>9</sup>

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<sup>8</sup> Stephan testified at the trial that he believed that the system had not changed since his earlier visit. Tr. 118, 128.

<sup>9</sup> Our dissenting colleague argues that we have misconstrued the June 2000 Report authored by Stephan and that the report is not a factor that a reasonably prudent person would have considered in determining whether a single hole in the GCI system constituted a hazard. Slip op. at 17. According to the dissent, this is because there is no evidence that Stephan observed any leaks at the locations where the UMWA complained that 28 leaks existed. *Id.* First of all, it is irrelevant whether Stephan actually observed the leaks: his report is unquestionably

In addition to the contents of the report itself, the judge should have considered the circumstances involving MSHA's handling of the June 2000 Report, which was not sent to U.S. Steel until July 2000, nearly a year after Stephan's visit to the Concord plant in August 1999. This delay appears to belie the purportedly hazardous nature of a single hole in the system. If there had been such an "obvious" combustion danger resulting from a single hole in the system, as the judge found (25 FMSHRC at 230), MSHA presumably would not have waited a year to inform U.S. Steel of such a hazard when 28 holes in the system had existed at the time Stephan visited in 1999. The judge should have considered MSHA's lack of urgency in addressing leaks in the GCI system occurring on a far larger scale than the single hole at issue here under the reasonably prudent person test because it was one of the relevant circumstances at the operator's mine. *See BHP*, 18 FMSHRC at 1345. On remand, the judge must address the significance of MSHA's delay in issuing the report.

There is at least one other record issue that needs to be addressed further by the judge on remand. Stephan testified that "hypothetically . . . the injection of nitrogen would most likely be able to take care of any increased oxygen in the system within about ten or fifteen feet of conveyance [sic], at the most." Tr. 152. Stephan also opined that the hole was 50 or 60 feet away from the nearest nitrogen injector. *Id.* However, U.S. Steel's expert Hedrick, who participated in the design of the GCI system, testified that the nearest nitrogen injector was 12 to 20 feet away from the cited hole. Tr. 189, 205 (testifying that one injector was 15 to 20 feet from the hole and another injector was 12 to 13 feet from the hole). The judge never discussed this testimony nor how far the nitrogen injector was from the hole. This testimony is probative as to whether oxygen entering the cited hole was sufficiently diluted by nitrogen and should be weighed by the judge in determining the existence of a violation in the first instance.<sup>10</sup> *See*

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based on the existence of 28 leaks in the GCI system and addresses the extent to which they might pose hazards. R. Ex. I at 5. Second, Stephan's June 2000 Report clearly indicates that he observed the 28 leaks during his August 1999 evaluation of the GCI system. For example, he states in the report that "[t]he accumulations of float coal dust, *that were observed during the evaluation*, occurred outside the GCI in the immediate vicinity of each particular leak." *Id.* (emphasis added). The dissent actually highlights the inconsistencies both within the report and between Stephan's trial testimony and the contents and nature of his prior report, which are significant for purposes of applying the reasonably prudent person standard. At the very least, because the June 2000 Report discusses leaks in the GCI system at the Concord plant, the judge, on remand, must consider and discuss the report as an important factor that a reasonably prudent person would consider in determining whether a single hole in the GCI system constituted a hazard.

<sup>10</sup> Furthermore, the June 2000 Report appears to be inconsistent with Stephan's testimony that the sensors would not have adequately assured against excess oxygen entering from the cited hole. Tr. 105-10. The judge did not discuss the June 2000 Report in relation to this apparent inconsistency. *Mid-Continent*, 16 FMSHRC at 1222 (remanding for further analysis where judge failed to adequately address evidentiary record).

*Vermont Unfading Green Slate Co.*, 24 FMSHRC 439, 441-42 (May 2002) (remanding for the analysis of all probative evidence). It appears that Stephan's own testimony would not support a finding that the system was, in fact, unsafe if the nitrogen injectors would "most likely be able to take care of any increased oxygen" entering within the range of the nitrogen injectors.<sup>11</sup> Tr. 152. Nevertheless, the judge who heard the testimony is in the best position to interpret the facts of record and to determine whether the Secretary has carried her burden of proof. *Mid-Continent*, 16 FMSHRC at 1222 (providing that substantial evidence standard of review requires that a fact finder weigh all probative evidence) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-89 (1951)).

In sum, on remand, the judge must apply the reasonably prudent person test from the perspective of an objective observer who considers the totality of factual circumstances relevant to the alleged hazard resulting from the hole in the GCI system.<sup>12</sup> In doing so, he must discuss and evaluate all conflicting testimony and evidence that is relevant to this inquiry.

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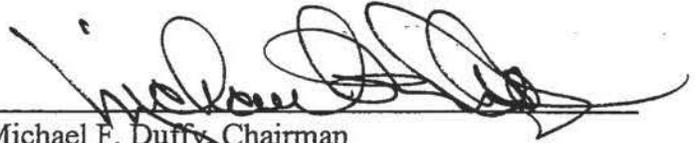
<sup>11</sup> Commissioner Young believes that this failure to establish that the machinery in question was actually not in safe operating condition would be a fatal defect in the Secretary's case under the language of the standard.

<sup>12</sup> The dissent's suggestion, slip op. at 17-18 & n.5, that, under our analysis, MSHA cannot issue a citation until explosive levels of oxygen are verified or until the violation is considered "significant and substantial" misconstrues our opinion. Nothing in our decision that addresses either the presence of a violation *or* the question of notice mandates such an occurrence before MSHA can issue a citation. Rather, as in many Commission cases, we address whether the Secretary carried her burden of proof on the issues before us in light of conflicting opinion testimony and the June 2000 Report. *See, e.g., Asarco*, 14 FMSHRC at 949. The issue of testing (or any objective basis for gauging the volume of air entering the hole) is pertinent because the absence of objective data undercuts Stephan's opinion that a single hole made the GCI unsafe. Finally, the dissent's reliance on the low penalty amount (\$55), slip op. at 16 n.3 & 17, to reflect a lower hazard level from a single hole does not result in a diminished burden of proof for the Secretary.

III.

Conclusion

For the foregoing reasons, we vacate and remand the judge's finding of violation of section 77.404(a), consistent with the instructions contained in this decision.

A handwritten signature in black ink, appearing to read "Michael F. Duffy", written over a horizontal line.

Michael F. Duffy, Chairman

A handwritten signature in black ink, appearing to read "Michael G. Young", written over a horizontal line.

Michael G. Young, Commissioner

Commissioner Suboleski, concurring:

While I join with my colleagues in remanding this case to the judge, I also believe there are sufficient grounds for reversal based on the contradiction between Clete Stephan's trial testimony and his earlier written report, and the actions that he took at that time.

Because there were no measurements taken, or any factual estimations made, the Secretary is faced with two burdens. First, she must establish that a safety hazard actually existed, and then she must show that a reasonably prudent person familiar with the situation would recognize such a danger. Stephan opined that such a danger existed and the judge credited his testimony. The judge then concluded that a reasonably prudent person would "easily" have identified that an unplanned (1/2 inch) hole would make the system unsafe.<sup>1</sup>

Stephan, as the judge affirmed, is one of the leading experts in mining-related fires and explosions. As such, with regard to fire and explosion hazards, if he cannot recognize a danger, then a reasonably prudent person familiar with mining certainly could not be expected to do so. Stephan earlier examined this facility with the express purpose of determining dangerous conditions.<sup>2</sup> He found 28 points of leakage, at least one of which was similar to the bolt hole in the current case (Tr. 125), yet waited approximately 10 months to issue a report. I have no doubt that, if he had recognized that an unsafe condition existed, Stephan would have taken action immediately.<sup>3</sup> If he did not recognize a danger with 28 holes, then a reasonably prudent person could not be expected to do so with a single hole.

Further, the conclusion reached by Stephan in his previous written report renders inapposite his statements and conclusions during the trial. In this report, Stephan states: "The explosion hazards inside the GCI is [sic] negated when operating in an atmosphere with less than 12 percent oxygen. Maintaining dependable gas analyzers . . . will assure that the oxygen content remains insufficient for combustion." R. Ex. I at 5. If dependable analyzers and a system with no leaks were both necessary for safe operation, it is reasonable to assume that Stephan would

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<sup>1</sup> The judge actually made a two-part conclusion from this. First, that a reasonably prudent person would identify that an unplanned hole warranted corrective action. Second, that the GCI system was not maintained in a safe operating condition. 25 FMSHRC 227, 230 (Apr. 2003) (ALJ). However, simply because the first conclusion is true, it does not follow that the second is also true. That is, an unplanned hole might also be recognized as needing corrective action as part of normal maintenance but not necessarily because it is by itself a hazard.

<sup>2</sup> Stephan testified that he did not revisit the facility before the trial because the system had not changed since this earlier visit. Tr. 114-15, 128.

<sup>3</sup> The report did not determine that the 28 holes were an explosion or fire hazard. It recommended sealing the holes, but did so in the section dealing with escaping coal dust and nitrogen, evidencing a concern with the atmosphere outside, rather than inside, the GCI. R. Ex. I at 5.

have said so in his report. Instead he discusses the leakage only in connection with leakages *from* the system, not leakages into the system.

Although Stephan attempted to explain the difference in the report conclusion and his trial opinion at three different points during the trial, contradictions such as this must detract from the weight given to an expert's opinion. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843-44 (Nov. 1995), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). In this instance, there is a direct contradiction between the conclusions reached in Stephan's pre-litigation written report and his trial testimony.

Finally, the judge credits Stephan's testimony that the half-inch hole permitted "an area [of oxygen] large enough to support a fire or explosion." 25 FMSHRC at 230. Yet, I find no testimony by Stephan regarding the creation of an area (more correctly, a volume) of oxygen sufficient to support a fire or explosion. Because such a volume is a requirement for a fire or explosion, perhaps the judge inferred this conclusion from Stephan's testimony that a hazard existed. However, Stephan did not testify directly on this critical point, and it is not apparent to me that such an inference could be drawn from any record evidence. *See Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The absence of direct testimony by Stephan on this crucial factor is not a trivial omission.

  
Stanley C. Suboleski, Commissioner

Commissioner Jordan, dissenting:

I believe that substantial evidence supports the judge's finding that U.S. Steel violated 30 C.F.R. § 77.404(a), which required it to maintain the granular coal injection ("GCI") system in safe operating condition. Accordingly, I disagree with the majority's opinion vacating and remanding this case and would affirm the judge's decision.

The judge based his conclusion on two salient facts: first, that it was "undisputed that the GCI system . . . was intended and designed to safely operate only as an enclosed system with an inert atmosphere," and second, that "an unintended half-inch hole was created in the GCI system." 25 FMSHRC 227, 230 (Apr. 2003) (ALJ). He relied on the Secretary's expert witness, Clete Stephan, who explained that the GCI enclosure contains coal dust and methane, and that an ignition source could arise from metal to metal contact exceeding combustion temperatures. *Id.* at 229. Since, as Stephan noted, a fire or explosion may result when the right mixture of fuel, heat, and oxygen exists, the oxygen concentration within the GCI system must be kept below 12% in order to prevent that dangerous combination from occurring. *Id.* Stephan explained that the system was enclosed to prevent the 20.9% oxygen content of the surrounding air from entering the system. *Id.* In his view, the cited hole made the system unsafe because until such time as the oxygen entering the system was diluted, an explosion hazard existed. *Id.*<sup>1</sup>

U.S. Steel contends that it could not have been expected to recognize that a hole caused by a single missing bolt out of thousands of bolts in the GCI system would render the system unsafe. PDR at 2. In considering whether an operator had sufficient notice of its obligations under a broadly worded standard such as the one at issue here, the Commission determines "whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982).

I disagree with my colleagues' determination that the judge misapplied our "reasonably prudent person" standard. I believe he properly applied the test, which is to say that he applied it in an objective manner, based on the existing factual circumstances. The judge likened the instant situation to the cited condition in *Alabama By-Products*, noting that in both cases defects in the operating equipment increased the possibility that a friction source, coal dust, and oxygen might combine in sufficient quantities to create a dangerous situation. 25 FMSHRC at 230. In *Alabama By-Products*, 13 frozen rollers on the bottom of the No.1 belt conveyor provided a friction source that could lead to a heat buildup. 4 FMSHRC at 2128, 2131. The risk was that

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<sup>1</sup> The judge found the testimony of MSHA's expert credible. 25 FMSHRC at 230. The Commission does not overturn such a determination unless we find an abuse of discretion. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843-44 (Nov. 1995), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, my colleagues take the extraordinary step of declining to affirm the judge's credibility finding. Slip op. at 5-10.

coal falling off the belt could accumulate near the frozen rollers, and be ignited by the heat produced by those rollers. *Id.* at 2131. The Commission observed that the danger posed by a friction source in an area where coal accumulations could occur is “obvious,” and concluded that a reasonably prudent person would recognize that the cited equipment was in an unsafe condition. *Id.*

As in *Alabama By-Products*, the hazard in this case involves the danger posed when the three ingredients needed to sustain a fire or an explosion – sufficient oxygen, fuel, and an ignition source – come into close proximity. 25 FMSHRC at 229-30. In the instant case, the oxygen level within the enclosure is the only factor the operator can control, as the other two elements are always present within the GCI system. Tr. 84-87. The judge relied on Stephan’s testimony that “the safe operation of the system is only based on the fact that no leaks would exist in the system. No unplanned openings or . . . holes into the system.” Tr. 146; 25 FMSHRC at 230. Stephan explained that the unplanned half-inch hole permitted air containing 20.9% oxygen to enter the system although “there’s no way of knowing how much oxygen is actually getting in there . . . .” Tr. 109-10. The judge found that “the inferences made by MSHA’s expert, Clete Stephan, were rational and were sufficient to prove that unsafe levels of oxygen were in fact entering the GCI system, *and that the same inferences would be made by any objective reasonably prudent person.*” 25 FMSHRC at 230 (emphasis added).

My colleagues complain that the judge essentially treated the MSHA expert as the reasonably prudent person, rather than viewing the facts from the perspective of an objective observer. Slip op. at 5-6. However, the judge did not simply equate the expert’s testimony with that of a reasonably prudent person. He considered the fact that a reasonably prudent person would recognize the danger inherent when the elements of an ignition or explosion exist in close proximity. That danger, as the judge noted is “obvious.” 25 FMSHRC at 230. *See also Alabama By-Products*, 4 FMSHRC at 2131. The hole increased the possibility that the elements might combine in the right mixture. 25 FMSHRC at 230. The judge found Stephan’s testimony credible on this point but he also specifically noted that the same conclusion would have been drawn by a reasonably prudent person. *Id.*

My colleagues also state that the testimony of an expert witness should ordinarily be accorded only limited weight in applying the “reasonably prudent person” test. Slip op. at 7. This is not consistent with our past precedent. For example, in applying that same test in *Asarco, Inc.*, 14 FMSHRC 941 (June 1992), we ruled that the judge erred in finding that the operator violated a regulation requiring the examination and testing of ground conditions. We took into account the testimony of the operator’s expert witnesses who testified that using a jumbo drill to test was common, safe, and accepted throughout the mining industry. *Id.* at 948.

My colleagues also conclude that the judge’s reasonably prudent person analysis is deficient because he failed to adequately discuss the existence of the gas analyzers. Slip op. at 8. They point out that Stephan’s report states that “[m]aintaining dependable gas analyzers . . . will

assure that the oxygen content remains insufficient for combustion.” *Id.*, citing R. Ex. I at 5.<sup>2</sup> However, the judge’s failure to rely on the existence of a backup safety feature does not impair his analysis as to whether a leak rendered the system unsafe. The Commission has often pointed out the prophylactic nature of the Mine Act regulations. In *Alabama By-Products*, for example, we emphasized that “Congress intended the Mine Act to both remedy existing dangerous conditions and prevent dangerous situations from developing.” 4 FMSHRC at 2131 (citation omitted). In that case, there were only 13 frozen rollers, *id.* at 2128, and at the time of the citation, the belt was “wet and fire-resistant,” the area was “adequately rock-dusted and ventilated,” and “coal accumulations were not then present.” *Id.* at 2131. The Commission pointed out that these factors, relied upon by the operator, were “not controlling as to whether an unsafe condition existed.” *Id.* Rather, “these factors were appropriately considered in determining the ‘gravity’ of the violation when a penalty is assessed.” *Id.*<sup>3</sup> We cautioned, furthermore, that “it was not necessary for the inspector to wait until the feared hazard fully materialized before directing remedial action.” *Id.*

The limited significance of backup safety features in reducing liability was also addressed in *BHP Minerals Int’l, Inc.*, 18 FMSHRC 1342 (Aug. 1996). In that case, the Commission concluded that the operator violated a regulation requiring that circuit-breaking devices or fuses be installed to protect against short circuits and overloads. *Id.* at 1347. Although overcurrent protection was also provided by a thermal breaker, we rejected the argument that this “functioning backup system” precluded liability. *Id.* at 1346. Similarly, the existence of gas analyzers in the GCI system does not transform a defective system (that is, a system designed to be enclosed, but which has a hole), into one maintained “in safe operating condition.”<sup>4</sup>

The majority points out that neither the MSHA inspector nor the MSHA expert “conducted any actual testing, simulation, or computational analysis of the GCI system” and

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<sup>2</sup> The gas analyzers consist of sensors at three locations which monitor the levels of oxygen, carbon monoxide, and methane and make some temperature readings. Tr. 95.

<sup>3</sup> The penalty in this case is only \$55 (the minimum penalty at the time of the citation). 25 FMSHRC at 231. In assessing the penalty, the judge obviously took into account the fact that the hole resulted from one sheared bolt. Moreover, the Secretary acknowledged that the violation was of low gravity. *Id.*

<sup>4</sup> The limitations of the gas analyzers were pointedly illustrated in the Stephan report which explained that the GCI operates without this safety feature “when maintenance problems occur.” R. Ex. I at 2-3. When the analyzers are disabled, “a handheld device is used to read oxygen levels intermittently and only at specific points within the system.” *Id.* at 3. The report describes an incident in which the gas analyzer was disabled “from 1:30 p.m. until 2:21 p.m.” and after resuming operation “the reading for oxygen rose to 17.35 percent, indicating that air had been leaking into the system.” *Id.* Because “the computers maintain the last correct oxygen reading” while an analyzer is disabled, “there were no alarms or automatic remedial measures taken as the oxygen concentration increased.” *Id.* at 2-3.

instructs the judge to consider this lack of objective test data on remand to determine what weight to give the opinion testimony. Slip op. at 7. However, the judge already addressed this issue in his decision. He explained that “[w]hile it is true that no actual tests were taken inside the one-half inch hole to determine the oxygen levels inside the GCI system, I find that the inferences made by MSHA’s expert, Clete Stephan, were rational and were sufficient to prove that unsafe levels of oxygen were in fact entering the GCI system, and that the same inferences would be made by any objective reasonably prudent person.” 25 FMSHRC at 230.<sup>5</sup>

My colleagues also fault the judge’s analysis for its failure to reference Stephan’s report of June 2000. Slip op. at 8. They consider the report to be an important factor which a reasonably prudent person at this mine would have considered. *Id.* Unfortunately, my colleagues rely on certain unfounded assumptions regarding the report. For instance, they assume that 28 holes were present in the GCI system at the time Stephan examined it. *Id.* at 8. They conclude, moreover, that because Stephan did not issue his report until 10 months later, he could not have considered the 28 holes to be much of a hazard. *Id.* at 8-9. That being the case, they question whether a reasonably prudent person would conclude that a single hole rendered the system unsafe. *Id.*

My colleagues misconstrue the Stephan report. Although a complaint of 28 leaks by the UMWA (among other problems) prompted Stephan’s visit to the mine, there is no evidence he observed any leaks at those locations. Indeed, at the hearing, Stephan testified that “[a]t the time of this particular evaluation, I don’t recall seeing any of those twenty-eight locations continuing to leak. It was my belief at that time that they had all been sealed.” Tr. 145-46. In addressing the UMWA’s concerns, the report states that “[p]rudent engineering practice is for these 28 locations to be sealed. This action would allow for the GCI atmosphere to remain separate from the outside air, as intended.” R. Ex. I at 5.

Finally, I return to the central facts regarding this violation: it is undisputed that the safety of the GCI system depends upon its ability to maintain the oxygen level below a certain level (12%, according to Stephan, Tr. 86, 91; 10% according to the operator’s expert. Tr. 156). It accomplishes this by creating an enclosed system, which is designed to prevent oxygen from entering except at certain planned locations. Tr. 86, 112, 146. Stephan maintained that any unplanned hole created a hazard and justified MSHA’s determination that the system was not “maintained in safe operating condition.” Tr. 146.

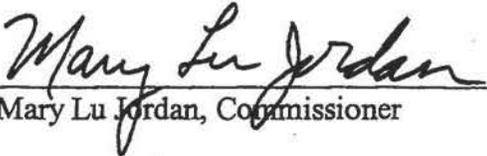
My colleagues point out that this citation involves only one hole or leak. Slip op. at 9. Admittedly, the likelihood of an explosion resulting from a single leak is small. (The \$55 penalty reflects that fact.) But do we really want to require an MSHA inspector to wait until the feared hazard has a reasonable likelihood of occurring? Are we not thereby effectively preventing MSHA from enforcing this standard until the violation is considered “significant and

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<sup>5</sup> Surely my colleagues do not mean to imply that MSHA cannot issue a citation until it has verified that the oxygen inside the hole has reached the level necessary to support an explosion.

substantial?”<sup>6</sup>

As the Commission has stated in discussing a similar regulation, 30 C.F.R. § 56.9002 (1987)<sup>7</sup> requiring that “[e]quipment defects affecting safety shall be corrected before the equipment is used,” “the language ‘affecting safety’ has a wide reach,” *Ideal Cement Co.*, 12 FMSHRC 2409, 2415 (Nov. 1990), and the effect on safety “need not be major or immediate” to come within the regulation’s reach. *Id.* Being mindful of that admonition, I respectfully dissent.

  
Mary Lu Jordan, Commissioner

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<sup>6</sup> A violation is significant and substantial when there is a “reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), quoting *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

<sup>7</sup> 30 C.F.R. § 56.9002 (1987) was revised as of July 1, 1988, and transferred along with 30 C.F.R. §§ 57.9002, 56/57.9001, and 56/57.9073 to 30 C.F.R. §§ 56.14100 and 57.14100. 53 Fed. Reg. 32,497, 32,504 (Aug. 1988).

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 18, 2005

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

v.

PRAIRIE MATERIAL SALES, INC.

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Docket No. LAKE 2004-94-M  
A.C. No. 11-02972-21590

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On April 7, 2005, the Commission received from Prairie Material Sales, Inc. ("Prairie Materials") a letter seeking review of an order of Chief Administrative Law Judge Robert J. Lesnick entering a default judgment for the Secretary of Labor in this matter.

On July 21, 2004, Chief Judge Lesnick issued a show cause order to Prairie Materials stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on May 13, 2004, and that Prairie Materials would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On September 2, 2004, Chief Judge Lesnick issued an order finding that Prairie Materials had failed to respond to the show cause order and entering a judgment by default for the Secretary. On September 27, 2004, the Commission received a letter from Dave Mashek, the Safety Director of Prairie Materials, seeking review of the Chief Judge's default order.

The Commission construed Mashek's September 27 letter to be a timely filed petition for discretionary review, but did not grant review, noting the "the petition . . . does not address the validity of the Chief Judge's default order [or] provide any reasons why the default order should

be vacated.” 26 FMSHRC 800, 801 (Oct. 2004).<sup>1</sup> In a footnote, however, the Commission stated: “If Prairie Materials can justify its failure to answer the petition for penalty assessment and to respond to the show cause order, it may submit a request to the Commission, with supporting documentation, asking it to reopen this case.” *Id.* Review not having been granted, the judge’s order became a final order of the Commission on October 12, 2004.

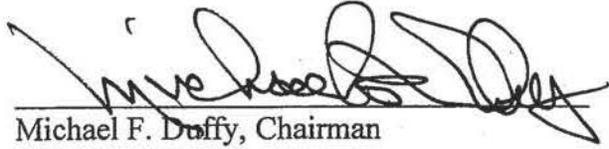
The April 7, 2005 letter from Prairie Materials, also from Mashek, supplements the September 27 letter and renews the operator’s request to reopen this matter. In its request to reopen, Prairie Materials states: “I (David Mashek) personally suffered a loss of my son due to a tragic accident. During the time frame of the dispute of the citation I failed to properly respond to the Order of Default.” Attached to the letter is a funeral home announcement of the May 26, 2004 death of Mashek’s son. The letter provides few other details, and none as to why this event prevented the operator from complying with the judge’s July 21, 2004 Show Cause Order.

In evaluating requests to reopen final 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”); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 787 (May 1993). 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).

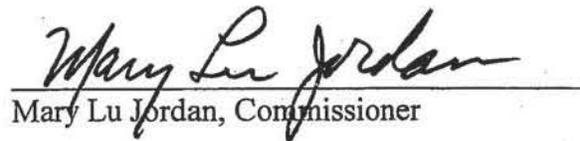
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<sup>1</sup> The Chief Judge’s jurisdiction in this matter terminated when his default order was issued on September 2, 2004. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, relief from a judge’s decision may be sought by filing a petition for review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a).

Having reviewed Prairie Materials' request, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists to excuse Prairie Materials' failure to respond to the show cause order and for further proceedings as appropriate.



Michael F. Doffy, Chairman



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

WASHINGTON, DC 20001

May 18, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2005-27
ADMINISTRATION (MSHA)	:	A.C. No. 01-00851-39186
	:	
v.	:	Docket No. SE 2005-35
	:	A.C. No. 01-00851-41158
OAK GROVE RESOURCES, LLC	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).<sup>1</sup> On February 23, 2005, Chief Administrative Law Judge Robert Lesnick issued to Oak Grove Resources, LLC (“Oak Grove”) two Orders to Show Cause for failure to answer the Secretary of Labor’s petitions for assessment of penalty in both civil penalty proceedings. On April 13, 2005, Chief Judge Lesnick issued two Orders of Default dismissing these proceedings for failure to respond to the show cause orders.

On April 25, 2005, the Commission received from Oak Grove a letter signed by Michael E. Blevins, Oak Grove’s Safety Director. Letter. In the letter, Blevins states that Pinn Oak Resources was founded on July 1, 2003 and employs persons who are unfamiliar with the assessment process. *Id.* He further states that the employee who signed for the certified mail did not understand the urgency in responding, and thus failed to forward the letters in a timely manner to the proper parties. *Id.* Blevins also states that he is not always in the office because he travels between two mines and requests that all future correspondence be addressed to him at his

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<sup>1</sup> Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2005-27 and SE 2005-35, both captioned *Oak Grove Resources, LLC* and both involving issues similar to those addressed in this order. 29 C.F.R. § 2700.12.

home address. *Id.* Oak Grove asks the Commission to grant its motion to reopen. *Id.* The Secretary has not taken a position on Oak Grove's request to reopen.

The judge's jurisdiction in this matter terminated when his orders were issued on April 13, 2005. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). We construe Oak Grove's motion to be a timely filed petition, which we grant.

In evaluating requests to reopen final 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"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). 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 Oak Grove's request, in the interest of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Oak Grove's failure to timely respond to the judge's show cause order, and for further proceedings as appropriate.



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Michael F. Duffy, Chairman



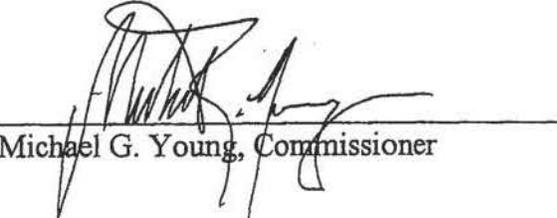
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Mary Lu Jordan, Commissioner



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Stanley C. Suboleski, Commissioner



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Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

May 18, 2005

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

v.

SUBURBAN SAND & GRAVEL

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Docket No. WEST 2005-245-M  
A.C. No. 05-04428-42795

BEFORE: Duffy, Chairman; 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. (2000) ("Mine Act"). On March 25, 2005, the Commission received from Suburban Sand & Gravel ("Suburban") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

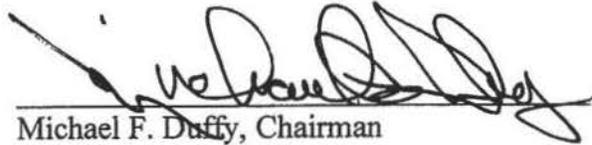
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

In its motion, Suburban states that on July 15, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the company several citations, including Citation No. 6311776. Mot. at 2. Through counsel, Suburban timely contested Citation No. 6311776, *id.*, docketed as WEST 2004-461-RM and currently on stay before Commission Administrative Law Judge Richard Manning. Counsel for Suburban explicitly requested that any proposed penalty assessments made in connection with Citation No. 6311776 be served on counsel. Mot. at 2-3. On November 12, 2004, when MSHA issued a proposed penalty assessment for Citation No. 6311776, it was sent to Suburban's business address rather than the operator's counsel of record in WEST 2004-461-RM. Mot. at 3. Suburban's counsel did not receive information regarding the proposed assessment until after the time to contest it had run. *Id.* at 3-4. While the Secretary states that she does not oppose Suburban's request for relief, she

also maintains that service of the November 12, 2004 proposed penalty assessment was properly made on the operator at its address of record.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of 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 Suburban’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 Suburban’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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Michael F. Duffy, Chairman



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Mary Lu Jordan, Commissioner



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Stanley C. Suboleski, Commissioner



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Michael G. Young, Commissioner

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**ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

May 4, 2005

SCOTT L. CROSBY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2004-105-DM
	:	RM MD 04-01
v.	:	
	:	Mine I.D. 42-00149
	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP.,	:	
Respondent	:	

**DECISION**

Appearances: David K. Smith, Esq., Midvale, Utah, for Complainant;  
James M. Elegante, Esq., and Martha J. Amundsen, Esq.,  
Kennecott Utah Copper Corporation, Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Scott L. Crosby against Kennecott Utah Copper Corporation (“Kennecott”), 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. Crosby contends that he was demoted and laid off because he complained about safety issues at the mine. An evidentiary hearing was held in Salt Lake City, Utah, and the parties filed post-hearing briefs.

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

Kennecott is the operator of the Bingham Canyon Mine, a large open pit copper mine in Salt Lake County, Utah. On or about September 30, 2003, Mr. Crosby filed a discrimination complaint with the local office of the Department of Labor’s Mine Safety and Health Administration (“MSHA”). On November 21, 2003, the Secretary determined that the facts disclosed during her investigation into Crosby’s discrimination complaint do not constitute a violation of section 105(c) of the Mine Act.

On December 19, 2003, Crosby filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. The complaint of discrimination states as follows:

Allegedly laid off because of cable truck accident on Feb. 26, 03. The brakes were reported to management timeless times. The drivers were forced to drive a cable truck even if the brakes were questionable.

Mr. Crosby started working at Kennecott in October 1980. He worked at the smelter for 15 years and then transferred to the mine in 1995. (Tr. 135). His primary job at the mine was to drive haul trucks. He also operated cable trucks, salt trucks, water trucks, and other trucks.

On February 26, 2003, Crosby was operating Cable Truck No. 969 (the "cable truck"). He had been operating the cable truck for about 6 months. (Tr. 158). Because the shovels in the pit were electric, they had trailing cables to provide power. As a cable truck operator, Crosby was responsible for tending the trailing cables and pulling slack in the cables. (Tr. 163). On February 26, Crosby did his normal pre-operational check of the cable truck and he checked the brakes. The brakes, including the parking brake, appeared to be in good operating order. (Tr. 165). Crosby was asked to put some slack in the cable for the No. 52 shovel so that a bridge could be installed.<sup>1</sup> With the help of his assistant, Richard Chavez, he used a cable hook to perform this task. Crosby, who was in the cab of the cable truck, testified that he had light pressure on the service brake as he was backing the truck. (Tr. 166). He testified that when he got close to the bridge, he pushed the service brake to stop the truck but it would not stop. (Tr. 166-67).

Because the trailing cable going over the bridge is live and the metal cable hook was extended, he did not want to hit the bridge. He put the cable truck in drive and tried to go forward. He testified that by the time he moved forward, he was very close to the rover truck behind him and worried that he had hit it. Crosby pulled the cable truck forward 30 to 40 feet and got out of the vehicle. (Tr. 167). He testified that before he got out of the cable truck, he engaged the parking brake. This brake releases all of the air in the system and is supposed to engage all of the brakes. (Tr. 168). Crosby testified that as he was approaching the rear of the cable truck to place a chock under the wheels, the cable truck "took off." *Id.* There were several pedestrians in the area, so Crosby and Chavez began yelling. Crosby testified that he tried to get back into the truck to get it into gear, but he did not make it. Everyone in the area was able to jump out of the way before the cable truck hit the rover truck behind him. If the miners in the area had not jumped away, they would have been crushed between the two vehicles. (Tr. 169). The cable truck did not make contact with the bridge but it came within nine inches. By this time, Crosby was able to get in the cable truck and he pulled it away. Several miners put chocks under the wheels and Crosby applied the parking brake.

Crosby called Andy Hoffman, who was the shovel foreman and Crosby's supervisor at that time. Hoffman and Ben Stacy, the operations superintendent, arrived at the scene shortly

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<sup>1</sup> A bridge is a large metal frame that raises the cable above the ground so that a haulage truck can travel to either side of the shovel to be loaded without running over the cable. (Tr. 89-90).

thereafter. Casey Kalipetsis, Crosby's union representative, also arrived. Crosby told the men what had happened. According to Crosby, Stacy called him a liar. (Tr. 172). Stacy denies that he ever made this statement. (Tr. 293-94; 317-19). Crosby testified that he asked that the brakes on the cable truck be tested at that time and that Stacy said "no." (Tr. 173). Crosby was taken for a urine analysis and the cable truck was driven to the Dry Fork Shop.

After Crosby prepared his written statement of the accident, Hoffman told him that he was suspended pending the investigation of the accident. Crosby testified that he asked Hoffman if he could participate in the testing of the truck and the request was denied. (Tr. 174). According to Crosby, Hoffman called him a few days later and told him that the brakes on the truck failed during the test and that he should come back to work. (Tr. 175). Because Crosby was in southern Utah at the time and was scheduled to start a two week vacation, he declined to come to the mine "just to punch out." *Id.* According to Crosby, Hoffman told him that everything was fine and that he should enjoy himself during his vacation. *Id.*

When Crosby returned to work he was assigned a haul truck. Crosby testified that when his union representative reminded Hoffman that Crosby should be paid for the time he was suspended, Hoffman's attitude completely changed. (Tr. 176). Hoffman told Crosby that he would not be driving cable trucks anymore. (Tr. 181). Haul truck drivers and cable truck drivers receive the same pay, but Crosby preferred working with cable trucks. Crosby did not drive any cable trucks after February 26, 2003. It is Crosby's understanding that, after his accident, the brakes on the cable truck were repaired. (Tr. 183).

Crosby contends that the brakes on the cable truck worked intermittently. He testified that the brakes often worked well for a few days and then "all of a sudden, bingo, they were gone." (Tr. 158). He further testified that he would call Hoffman or David Lanham about the problem but, before they could respond, the brakes would start working again. (Tr. 159). If the brakes did not come back, the cable truck was taken to the Dry Fork shop to be adjusted or repaired. When he reported the truck as being defective, his supervisor would offer him another truck to operate. By that time, his cable truck was usually working again, so he would not trade it out. (Tr. 161). Crosby stated that if there were no other cable trucks available, management would make him continue to operate his cable truck. (Tr. 163). Mike Sparks, another cable truck operator, testified that the brakes did not work as well after Kennecott removed the automatic brake adjusters. (Tr. 116).

Blaine Withers, a truck shop supervisor, testified that it is highly unlikely that brakes on a cable truck will work, then not work at all, and then function properly again. (Tr. 254). The braking systems on cable trucks are air brakes, so if there is a leak they may stop working but they would not come back again. If there were a sudden loss of air, the brakes would engage because of the springs in the braking system. *Id.* Withers also testified that there are no such things as automatic brake adjusters on cable trucks. Mechanical devices on the trucks must be manually adjusted to take up the slack as the brakes wear down. (Tr. 247-48). He stated that the brakes on cable trucks have always been manually adjusted as the pads wear out. (Tr. 253).

Withers was asked to test the brakes on the cable truck after the accident on February 26. As a result of his testing, he concluded that the accident was not caused by any mechanical failure. (Tr. 247). He tested the brakes on the cable truck with Shawn Williams, another cable truck operator. He performed the tests on a grade of about six to eight percent with about 1000 feet of cable on the reel. He determined that the service brake was weak and the stopping distance was excessive. The parking brake would hold the truck if the vehicle were stopped and in neutral. The parking brake would not hold the truck if the vehicle were left in gear after it was stopped. (Tr. 246-48; Ex. R-1). The brakes were adjusted after the testing, but no repairs were made before the truck was placed back into service.

Hoffman testified that, at the accident scene on February 26, Crosby told him that he lost his brakes as he was backing the cable truck down the hill. (Tr. 529). Hoffman testified that Crosby told him that he pulled the truck up the hill a short distance and engaged the parking brake before it rolled down into the rover truck. Hoffman stated that, if Crosby believed that the brakes were not working, he should not have left it on the hill where it could potentially roll down to the area where miners were working but he should have left it where it was and called for help or he should have driven it to a flat area. (Tr. 530; Ex. R-7). Hoffman completed the company's accident report and concluded that Crosby failed to follow company procedures. (Ex. R-6). Because the parking brake was found to be operating properly, Hoffman concluded that Crosby's description of what happened after he moved the truck forward was inconsistent with the results of the company's investigation. (Tr. 534). Hoffman also characterized Crosby's accident/injury history as "extensive." (Ex. R-7). He stated that Crosby had been counseled about his accident rate in 2002. Based on these factors, Hoffman testified that the company determined that Crosby should be suspended for two days and disqualified from operating cable trucks.

Hoffman testified that he never heard Crosby complain about his brakes on the mine radio on the day of the accident. (Tr. 539, 563). Crosby did not ask that a mobile repair crew check the brakes that day or ask that he be given a different truck that day. (Tr. 540). The pre-shift inspection report for the cable truck for that shift could not be located. (Tr. 541). Hoffman denied that either Kalipetsis or Crosby was prohibited from observing the brakes being tested by Withers. (Tr. 532). He also denied that he told Crosby that he was not going to be disciplined for the accident when Crosby was suspended pending the investigation. (Tr. 536).

On June 26, 2003, Crosby was advised that he was being laid off from Kennecott effective July 5. (Tr. 185). Crosby testified that when he asked Stacy and others why he was laid off, he was given evasive answers. Stacy does not recall discussing the layoff with Crosby. (Tr. 298). Crosby stated that when he called Stan Heal, the manager of employee relations, he was told he was laid off because he was only qualified to drive haul trucks and the company wanted employees who are multi-tasked. (Tr. 187). When Crosby told Heal that he was task-trained on many pieces of equipment, Heal suggested that he talk to his supervisor to see if there had been a mistake. Heal testified that he could not recall any conversation with Crosby, but when

employees called about the layoff he told them that the layoff was based on the Qualifications Assessment worksheets, described below. (Tr. 451).

Kennecott laid off about 119 employees effective July 5, 2005. These employees were laid off, not on the basis of seniority, but based on the average rating each employee received on Qualifications Assessment worksheets filled out by supervisors. After the scores were tabulated, Crosby was ranked 399 out of 410 in the mine department. (Tr. 375-77; Ex. R-18). When Kennecott determined that it needed only 371 employees at the mine, every employee ranked 372 and below was laid off effective July 5, 2003. Thus, 39 employees out of 410 were laid off at the mine based on the ranking they achieved following the tabulation of the scores from the Qualifications Assessment worksheets.

Kennecott used the Qualifications Assessment worksheets as the basis for determining who would be laid off based on a study performed by a consultant and changes in the collective bargaining agreement. A committee of Kennecott's upper-level supervisors and managers developed a method of ranking employee qualifications to meet the requirements of the organization. (Tr. 304-06, 351-580; Ex. R-12). Although seniority was considered in the rankings, it was only used to break a tie in the event two employees received the same score. After the committee determined what factors are important to Kennecott, the committee developed the Qualifications Assessment worksheet to be used when ranking employees. (Tr. 361-71; Exs. R-13 through 15). This worksheet has seven qualification categories, as follows: (1) Safety-Personal Safety Plan and Participation; (2) Safety-Incident Rate; (3) Work Output-Effectiveness; (4) Performance Effectiveness-Working with Others (Team Skills); (5) Performance Effectiveness-Adaptability; (6) Work Experience-Number of and Quality of Industrial Experiences; and (7) Technical Skills-Demonstration of Skills Needed to Complete Job Assignments. *Id.* Within each category there are five short statements, each with a box next to it that can be checked.

These worksheets were given to front line supervisors with instructions to rate employees. They rated each employee by checking the box next to the statement in each category which most closely matched the employee being rated. These front line supervisors did not participate in the development of the worksheets; they were not told that the information provided would be used in future layoffs, and they were not told that the worksheets would be scored. In addition, these supervisors were told not to discuss the ratings or employees with other supervisors but that they were to complete the worksheets independently. Kennecott now requires supervisors to rate employees using these worksheets on a regular basis but this was the first time the worksheets had been used. Each employee was rated by at least three supervisors who were familiar with the employee's work.<sup>2</sup> An average score for each employee was calculated using a computer spreadsheet. Each laid-off employee has recall rights under the collective bargaining agreement. When market conditions improved in late 2003 and early 2004, all 39 employees who had been

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<sup>2</sup> Crosby was rated by Hoffman, David Lanham (an operations supervisor), and Allen Pearson (the dispatch supervisor).

were laid off at the mine were recalled and offered employment at Kennecott. As stated above, Crosby was recalled by Kennecott effective January 20, 2004, and continues to be employed at Kennecott.

Crosby testified that in September 2003, while he was on layoff status, Rob Black, a miner's representative, called him to tell him that he was mailing him the three qualifications assessment worksheets pertaining to him. (Tr. 190; Exs. C-10, C-11, and C-12). Crosby became very angry when he reviewed the assessment worksheets, especially because he was ranked poorly for his "incident rate." (Tr. 197-98). Mr. Black also mailed Crosby a copy of his accident/incident history at Kennecott which had been downloaded from a company database. (Tr. 204; Exs. C-15, R-19). Crosby testified that the collective bargaining agreement provides that any accidents or incidents that occurred more than five years ago should not to be considered. Crosby believes that incidents from the years before 1995 when he worked at the smelter had to have been considered to give him such a poor rating. The history shows incidents back to April 1981. In addition, Crosby testified that his accident/incident report included incidents for which he was not responsible or negligent. (Tr. 199- 209).

As stated above, Crosby was rehired by Kennecott effective January 20, 2004. (Tr. 217). Crosby complains that since his accident on February 26, 2003, Kennecott will not allow him to operate any equipment except haulage trucks. (Tr. 223). He also contends that he has not been scheduled for cross-training by the company but that other employees are receiving such training. (Tr. 225). Crosby believes that he is being singled out by the company because he complained about the brakes on the cable truck before the accident on February 26. He also states that his accident/incident history is replete with errors and that Kennecott managers manipulated the data to ensure his layoff.

## 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, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95<sup>th</sup> Cong., 2<sup>nd</sup> 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 (4<sup>th</sup> Cir. 1987).

### **A. Protected Activity**

Crosby contends that he complained about the condition of the brakes on the cable truck. He testified that he "constantly" complained about the brakes prior to the accident on February 26. (Tr. 154). Crosby also testified that he often made oral safety complaints about conditions at the mine and that, as a consequence, he is "not real popular with the bosses . . . ." (Tr. 155). He testified that the company has only allowed him to operate the haul trucks since the accident and will not train him on other pieces of equipment. *Id.*

Kennecott denies that Crosby complained about the condition of the brakes on the cable truck. It contends that Crosby presented only vague, unsupported allegations that he complained about the brakes. Stacy, Lanham and Hoffman denied that Crosby complained about the brakes on the cable truck on the day of the accident. (Tr. 311-12, 502, 539). As stated above, Crosby testified that the brakes on the cable truck would fail intermittently and, if the truck was needed for production, he was told to get it to work. Withers testified that it is unlikely that the brakes on a cable truck would fail and then work again on an intermittent basis.

Although Kennecott denies that it was aware that Crosby was concerned about the safety of the brakes on the cable truck, for purposes of this decision, I find that Crosby raised legitimate safety issues concerning the brakes. I am giving Crosby the benefit of the doubt that management was aware that he complained about the brakes on the cable truck in the days preceding the accident. As a consequence, I find that he engaged in protected activity.

### **B. Adverse Action**

Crosby contends that he suffered adverse action as a result of his protected activities. The adverse actions consist of (1) his two day suspension and disqualification from operating cable trucks following the February accident; (2) his inclusion in the layoff from July 5, 2003, through his re-employment at the mine on January 20, 2004, and (3) the company's failure to cross-train him for other positions at the mine. 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.

### **1. Suspension and Disqualification**

Kennecott disciplined Crosby for backing into the rover truck and for his conduct after the initial impact. It appears that Kennecott was especially concerned that Crosby moved the cable truck a short distance up the hill to park the truck after the initial impact. As Crosby got out of the cable truck it started moving down hill toward miners who were in the area. This part of the accident is described in the accident investigation report as follows:

Scott then pulled the cable truck 969 forward so he could get out of the truck and see if damage happened to the rover truck or the bridge. Scott got out of the cable truck and was walking toward the rover truck and bridge when the cable truck began to move backwards down the grade, through the bridge, and toward the rover truck positioned in front of the shovel dipper. The operators changing the shovel teeth started yelling “Get out of the way!” They made it in the clear and the 969 cable truck smashed in the front of rover truck 883 for a second impact. Scott then pulled cable truck 969 forward again in the same place (approximately 50-60 ft) and got out of the cable truck placing wheel chock behind the tires.

(Ex. R-6). The accident report states that the first impact was caused by Crosby’s failure to “follow TRACK and conduct proper risk assessment.”<sup>3</sup> *Id.* The report states that the second impact was caused by “improper usage of parking brake.” *Id.* In the comments section, the report states that “Scott’s story about the incident is inconsistent with the facts that came out of the investigation.” *Id.* When the truck was tested by Withers, he determined that the parking brake would hold the cable truck on a grade as long as the truck was not in gear.

In his suspension and disqualification letter to Crosby, Hoffman states that the “proper actions that you should have taken were to stop the equipment you were operating immediately and call your supervisor when you thought you may have had an accident, not keep operating the cable truck.” (Ex. R-7).

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<sup>3</sup> TRACK stands for “Think through the task, Recognize the hazards, Assess the risks, Control the hazards, and Keep safety first at all times.” (Tr. 445).

Crosby complains that company management did not initially blame him for the accident but then disciplined him after he returned from his vacation. He faults the company for holding equipment operators responsible for all accidents, whether there is any showing of negligence. He contends that the accident would not have occurred if the brakes were in better working condition and that he was a scapegoat for Kennecott's poor maintenance practices which values production over safety.

Kennecott uses a progressive discipline system. Crosby has what Kennecott considered to be an extensive incident history. On February 8, 2003, he was assisting another driver move cable with a different cable truck. The truck backed over the cable pothead and damaged a brake canister on the truck. (Ex. R-19). Crosby contends that this accident was not his fault because he was not operating the cable truck. Crosby and the cable truck operator were held accountable for the incident for failure to check the area before starting the work. *Id.* Between 1999 and 2003, Crosby was involved in three other incidents where he received some form of discipline including a verbal warning and a written warning. (Ex. R-20). Although not considered to be discipline, Crosby received counseling twice in 2001 for unsafe acts and for using abusive language.<sup>4</sup>

Crosby contends that his cable truck had been in and out of the shop in early 2003 for faulty brakes. He testified that the cable truck operators complained about the conditions of the brakes, but the brakes were never repaired. (Tr. 576). He believes that Kennecott disciplined him for the accident to cover up the fact that the brakes were not properly maintained. *Id.* Mike Sparks, another cable truck operator, testified that he drove the subject cable truck on a regular basis. (Tr. 116). He testified that the cable truck was in the shop for adjustment or maintenance on a weekly basis in the month or so before Crosby's accident. (Tr. 117). Sparks testified that, after February 26, he went to the shop on Crosby's behalf to get a copy of the maintenance records for the cable truck, but was told that Stacy had taken them all. (Tr. 118). Apparently, the notebook kept inside the cable truck which drivers use to record the results of their preshift examinations and to record any safety problems could not be located. Crosby believes that the missing preshift book would have revealed the brake problems that had been reported.

Kennecott produced what it represented to be the maintenance file for the cable truck. (Exs. R-2, R-28 through R-31). Withers testified that the record does not indicate that the brakes on the cable truck were repaired or rebuilt in the weeks before Crosby's accident. (Tr. 250, 457-

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<sup>4</sup> While Crosby worked at the smelter in the early 1990s, he was suspended once and he was also terminated from his employment for violating a probationary agreement regarding alcohol abuse. Crosby testified that any incidents or discipline he received prior to 1998 should not be considered because they occurred more than five years before the accident. In addition, he testified that he suffered severe post traumatic stress syndrome during that period because he witnessed a close friend commit suicide. (Tr. 579). Crosby also made threatening calls to Kennecott supervisors. (Tr. 391-92, Ex. R-21).

67). The records show that the brakes were adjusted after Crosby's accident. (Tr. 250, 461; Exs. R-2, R-31).

I find that Crosby did not establish that he was disciplined as a result of any complaints he had made about the brakes on the cable truck or as a result of any other safety complaints he had lodged. As stated above, a mine operator's motivation in disciplining a miner is not always clear with the result that circumstantial evidence must be considered. There was certainly a coincidence in time between the protected activity and the discipline. Kennecott contends that its supervisors were unaware that Crosby complained about the brakes on the cable truck. When he conducted his preshift examination, the brakes were working. Management was aware that Crosby, along with other employees, reported brake problems on mobile equipment from time to time and, as stated above, I assume for purposes of this decision that management was aware that Crosby had complained about the brakes on the cable truck in the days before the accident.

I find that Crosby did not establish hostility or animus toward his protected activities, however. The preponderance of the evidence establishes that if the operator of mobile equipment reports that the brakes on his vehicle are not working properly, Kennecott attempts to address the problem. (Tr. 101, 254, 333-36). Equipment operators are not required to drive trucks with defective brakes. (Tr. 563-64). There is simply no credible evidence that Kennecott is hostile to an employee who reports that the brakes on a vehicle are not working.

I also find that Crosby did not establish disparate treatment. Kennecott management believed that Crosby had a significant history of accidents and discipline. (Tr. 383-84, 389-90). He had received a verbal warning and a written warning in the five years prior to his accident. (Ex. R-20). I find that Crosby's conduct following the first impact with the rover truck played a significant role in the decision to suspend him and disqualify him from operating cable trucks. Whether his suspension and disqualification were fair and just discipline for his actions is not within my jurisdiction. I find that there is no credible evidence to support Crosby's argument that he was disciplined to cover up the fact that the brakes were not properly maintained. There has been no showing that other equipment operators, with similar incident and discipline histories, have been treated differently by Kennecott.

Much of the argument and evidence presented by Crosby concerns the company's alleged policy of placing blame for accidents on employees without regard for their negligence. Crosby paints a picture of an employer who always disciplines equipment operators for accidents that are not their fault. Crosby genuinely believes that his discipline was unfair. In a discrimination case, a judge may conclude that the justification offered by the employer for taking an adverse action "is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516. The Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on "good" business practice or on whether a particular adverse action was "just or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

*Chacon*, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

[T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgment or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

*Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

I find that Kennecott's alleged business justification for suspending and disqualifying Crosby from operating cable trucks is credible. His past history of accidents and discipline was the key factor in the level of discipline. The letter of suspension and disqualification states that his "personal incident rate exceeds the Kennecott Utah Copper average significantly . . ." (Ex. R-7). The reasons set forth by Kennecott for suspending and disqualifying Crosby were "enough to have legitimately moved that operator to have disciplined the miner." *Haro* at 1938.

## 2. Layoff Effective July 5, 2003

Crosby also argues that he was chosen for layoff because he complained about the brakes on the cable truck. This argument is closely tied to his other claims because he believes that he would have received a higher rating following the qualifications assessment process if he had not been disciplined for the February 26, 2003 accident.

Kennecott presented evidence concerning the system it used to rate employees. The evidence was quite similar to the evidence it presented in *Ondreako v. Kennecott Utah Copper Corp.*, 27 FMSHRC 334 (March 2005). The front line supervisors who rated employees using the Qualifications Assessment worksheet did not know that the worksheet would be scored or what it would be used for. Because all previous layoffs at the mine had been based on seniority, supervisors did not know that scores derived from these worksheets would be used to rank employees in future layoffs. (Tr. 472, 546-47).

Kennecott contends that its qualifications assessment review process is both fair and objective. Many of Crosby's arguments concern the fairness of the review process. He points to the fact that the supervisors who rated him considered his accident and discipline history since the beginning of his employment with Kennecott in 1981. It was Stacy's intention that supervisors would look only at an employee's work history for the previous five years. Apparently, this instruction was not communicated to all of the supervisors because Pearson and Lanham considered Crosby's entire accident/discipline history with Kennecott. (Tr. 473, 512). The supervisors reviewed each employee's incident history and discipline history kept on a computer database when filling out the Qualifications Assessment worksheet. Crosby has worked at Kennecott for over 20 years and he had a rather extensive incident and discipline history. This history had a significant impact on his rating. Hoffman only considered Crosby's work history over the previous five years. (Tr. 551). Crosby also complains that many of the incidents on the accident/incident history should not be considered because he was not at fault. For example, one incident involved first aid that he received.

All of these arguments go to the fairness of the system developed by Kennecott. The Qualifications Assessment worksheets were developed in the spring of 2003 so supervisors had never been asked to fill them out before. It is clear that the implementation of this new system was not perfect because clear instructions were not given to supervisors. The supervisors spent about ten minutes independently rating each miner. The supervisors relied on their observations of the miners they were assigned to assess as well as the incident and discipline information obtained from the company's database. Because it appears that many supervisors did not limit their review to the previous five years, an employee with a short work history could well have an advantage over a long-term employee. Nevertheless, I find that there is no credible evidence to show that Crosby was treated differently in this regard. Supervisors who reviewed Crosby's entire work history followed the same procedure when rating other Kennecott employees. Any unfairness in his ratings is not related to his protected activities. There is no credible evidence that any complaints Crosby made about the brakes on his cable truck influenced the ratings given

by Hoffman, Pearson, or Lanham. Both Lanham and Hoffman testified that they were not aware that Crosby complained about the condition of the brakes on the cable truck before his accident. (Tr. 502, 539). Crosby received his highest rating from Pearson. (Ex. R-26).

Kennecott rated employees in the past using a different method from the Qualifications Assessment worksheets. These ratings concerned quantitative production and they were not used for purposes of layoff. Crosby points out that he was one of the highest rated haul truck drivers in 2000, 2001, and 2002, based on production. (Tr. 142-44; Exs. C-4, C-5, C-6 and C-7). In 2000, Stacy took Crosby into his office to congratulate him for being the "top dog" in terms of production for a haul truck driver that year. (Tr. 146-47; Ex. C-4). Crosby offered this evidence to show that Kennecott turned against him in early 2003 and he argues that the only explanation for this turnaround is Crosby's safety complaints. Although this argument has some appeal, I reject it. Clearly, Crosby is to be congratulated for his work. Nevertheless, the work for which he was commended was as a haul truck driver. He was permitted to continue operating haulage trucks at the same rate of pay after the February 2003 accident. More importantly, the Qualifications Assessment worksheet does not stress quantitative production in the categories used to rate employees. Crosby scored somewhat higher in categories entitled "work output," "work experience," and "technical skills," but his scores were still in the midrange or below. To get high scores in these areas, an employee must, for example, demonstrate that he is a "highly motivated employee," a "team player," and that he "adapts quickly to changes in the business." (Ex. C-10). I have no way of knowing whether the ratings that Pearson, Hoffman, and Lanham gave Crosby in these areas accurately reflect his abilities, but there has been no showing that these ratings were tainted in any way by Crosby's concerns about the maintenance of brakes on the cable truck.

In conclusion, I find that Crosby was included in the 2003 layoff for reasons that are not protected under the Mine Act. He was selected based on the ratings he received as a result of the Qualifications Assessment worksheets.

### **3. Lack of Training Opportunities**

Crosby is also concerned that Kennecott has not given him the opportunity to cross-train on other pieces of equipment since his February 2003 accident. (Tr. 155-56). It is clear that it is to an employee's advantage to be qualified to operate many pieces of equipment. Crosby contends that he has been denied the chance to attend training classes. Crosby testified that whenever he raises the training issue with his supervisor, he is told that he was hired as a truck driver and that is all he will ever be. (Tr. 223). The current training schedule for dozer/motor graders, for example, shows that he is not scheduled for training on that equipment through early 2006. (Tr. 223-25; Ex. C-17). Crosby believes he has been denied training opportunities because he raised safety issues.

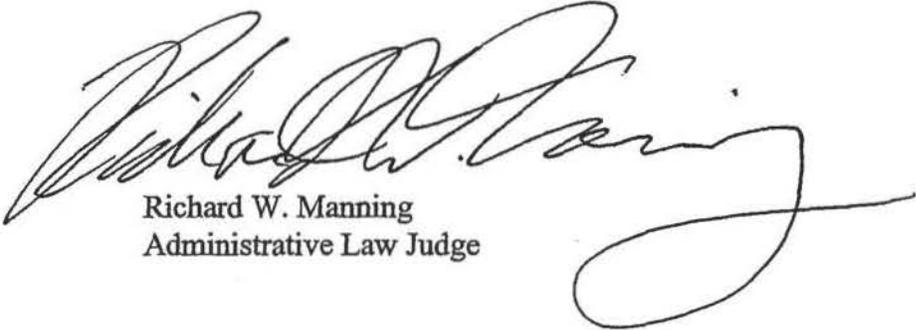
Kim Moulton, who is now the director of organizational development, testified that under the new collective bargaining agreement, miners can be transferred anywhere in the mine without

regard to union affiliation. (Tr. 409-10). As a consequence, the company has developed a training plan with a goal of cross-training as many miners as possible so that they can work at other positions in the mine. He testified that it will take years to complete this training because there are 410 employees in mine operations. (Tr. 410). Those employees who receive the highest qualifications assessment ratings are cross-trained first. (Tr. 411). Stacy testified that "the odds of [Crosby] being able to cross-train after a serious accident were probably slim" because the company would offer such training to those who did better on the qualifications assessment. (Tr. 310). As a consequence, Crosby has not yet been given the opportunity to cross-train because he received a relatively low rating. Neither Crosby nor his union filed a grievance on this issue.

The training issue is closely tied to the qualifications assessment issue, discussed above. I credit the company's evidence that Crosby has not been cross-trained because of his score on the qualifications assessment. His prior incidents and discipline had a negative effect on his rating. Each employee is rated on a regular basis, so an employee's rating is not static and can improve. I find that Crosby did not establish that he has been denied training opportunities because he complained about safety issues at the mine or complained about the condition of the brakes on his cable truck.

### III. ORDER

For the reasons set forth above the discrimination complaint filed by Scott L. Crosby against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Ave., N.W., Suite 9500  
Washington, DC 20001-2021

May 11, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-185-M
Petitioner	:	A.C. No. 31-02071-26994
v.	:	
	:	
WAKE STONE CORP.,	:	
Respondent.	:	Nash County Quarry

**DECISION**

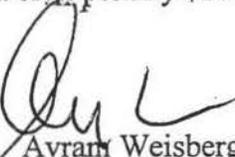
Before: Judge Weisberger

Pursuant to the Commission's Decision in this matter issued March 23, 2005, the parties were directed to confer and attempt to reach an agreement with regard to the factors set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

In compliance with this directive, on April 21, 2005, the parties filed an Amended Joint Stipulation setting forth their agreement as follows: (1) The character of the history of previous violations is normal or below for a company of this size. (2) The \$60 penalty is appropriate to the size, which is large, of the business of the operator charged. (3) Under 110(i), the operator was negligent to a moderate degree. (4) The effect on the operator's ability to continue in business is not affected. (5) The gravity of the violation is of a moderate and non-serious level. (6) The operator demonstrated good faith in achieving rapid compliance after notification of the violation.

Based on the parties stipulations regarding the factors set forth in Section 110(i) of the Act, and considering the record in this case, including the facts asserted in the citation that are not disputed, I find that a penalty of \$60 is appropriate for the violation of 30 C.F.R. § 56.171.32(a).

It is **Ordered** that Respondent pay a civil penalty \$60 within 30 days of this Decision.

  
Avram Weisberger  
Administrative Law Judge

Distribution:

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W. Suite 9500  
Washington, DC 20001-2021

May 17, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. KENT 2004-190
	:	A.C. No. 15-02085-24601
	:	
PERRY COUNTY COAL CORP., Respondent.	:	
	:	HZ4-1

**DECISION**

Appearances: MaryBeth Zamer Bernui, Esq., U.S. Department of Labor, Nashville, TN, for the Secretary;  
LaToi Mayo, Esq., Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, KY, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor alleging violations of various mandatory safety standards by Perry County Coal Company (Perry County), and seeking the imposition of civil penalties for these violations. The case was heard in Johnson City, Tennessee, on February 1, 2005. Subsequent to the hearing, the parties each filed Proposed Findings of Fact and a Brief.

Citation No. 7517685

Findings of Fact

MSHA Inspector Patrick Stanfield, who is an electrical specialist, was at Perry County's HZ4-1 mine on June 24, 2003. While on the surface of the mine, Inspector Stanfield was informed that the day shift electrician, Don Moore, had received electrical burns while attempting to energize a pump.<sup>1</sup> Inspector Stanfield went underground to the 017 Section to investigate the accident.

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<sup>1</sup>There were not any witnesses to the accident, and no one had observed Moore's actions. Stanfield subsequently determined, based on his investigation, that Moore was burned while attempting to energize a return pump by plugging the cathead of a 10/5 cable attached to the pump into the receptacle located below the No. 2 breaker. Stanfield explained that an arc was created when Moore plugged the cable into the receptacle because the contacts inside the breaker had become fused together which energized the breaker.

Stanfield examined the power center in the 017 Section which contained 14 circuit breakers. In normal operations, the cathead (plug) of the cable connected to a piece of equipment would be inserted into a receptacle located below a breaker. Each breaker had a dial with a limited range of amperage settings, which controlled the amperage level at which the breaker would trip, shutting off power to the equipment it serviced. The amperage range setting on the dial was not uniform for all the breakers.

Stanfield observed that the amperage dial on the No. 2 bolter breaker had been set at 300 amps, its lowest setting.

Stanfield noted that the 10/5 cable at issue was required to have short circuit protection of no more than 150 amps. Since the amperage setting on the No. 2 breaker has been set at 300 amps, its lowest setting, he concluded that there was not adequate short circuit protection for the 10/5 cable, and cited Perry County for violating 30 C.F.R. § 518.

#### Further Findings and Discussion

Section 518, supra, provides, as pertinent, that “[a]utomatic circuit breaking devices or fuses of the correct type and capacity shall be installed so as to protect all electrical equipment and circuits against short circuit and overloads.”

The plain clear wording of Section 75.518, supra, requires: (1) the installation of automatic circuit breakers; (2) of the correct type and capacity to protect all electrical equipment against short circuits and overloads.

It appears to be the Secretary’s position that Perry County was in violation of Section 518, supra, because one the breakers did not have the proper setting to provide short circuit protection for the 10/5 cable and pump. This interpretation of the requirements of Section 518, supra, imposes an obligation that goes beyond the plain wording of Section 518, supra, which requires only that circuit-breaking devices (breakers) be installed to protect all equipment. The requirement that every breaker be capable of protecting all equipment would result in amending Section 518, supra, by adding words not found in the regulation. I thus reject the Secretary’s argument.

The Secretary has not adduced any evidence that the breakers installed on the power center could not protect all electrical equipment against short circuits and overloads. At least one of the breakers on the center was of the correct type and capacity to protect the 10/5 cable at issue, i.e., its dial had a law setting of 150 amps. (Tr. 40, 85). I thus conclude that the Secretary failed to prove that circuit breakers of the correct type and capacity were not installed to protect all electrical equipment against short circuits and overloads. Thus, I find that it has not been established that Respondent violated the requirements of Section 518, supra. Accordingly, Respondent’s Motion to Dismiss the citation at issue, made at the hearing, is presently granted.

Citation No. 7517686

### The Inspector's Testimony

According to Stanfield, during the course of his investigation of the accident relating to the No. 2 breaker, Bob Shell, Perry County's Chief Electrician, told him that the breaker to the left, the No. 8 breaker, was "burnt in" (Tr. 110, 115). Stanfield indicated that on June 24 he observed that this breaker had been locked out. According to Stanfield, once Perry County became aware that the No. 8 circuit breaker had malfunctioned, the other breakers, including the No. 2 breaker, at issue, should have been tested with a voltage meter. This test would have revealed that contacts inside this breaker had melted together resulting in the receptacle becoming energized, which could have led to arcing, and a resultant electrical burn injury. In addition, there was the possibility of the occurrence of a mine fire or ignition of combustible airborne accumulations.

Stanfield issued a citation alleging a violation of 30 C.F.R. Section 75.512, which, as pertinent, provides that "[A]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions."

### Discussion

Section 75.512, supra, requires the "frequent" examination of electrical equipment to assure safe operating conditions, but does not specify the frequency of the examinations. Section 75.512-2 provides that the examinations and tests required by Section 75.512, supra, "... shall be made at least weekly."

The parties agreed that Respondent did conduct its weekly examinations as required by Section 75.512-2, supra. The Secretary argues that Perry County was in violation of Section 75.512, supra, because it should have made a more frequent examination of the power center after the No. 8 circuit breaker malfunctioned, to ensure that all circuit breakers were being maintained in a safe operating condition. In this connection, I note the Inspector's testimony that Shell had told him that this breaker "was burnt in". (Tr. 110) However, Shell testified that when he made the statement he was not referring to the No. 8 breaker, but to the No. 2 breaker. I observed the demeanor of both witnesses testifying on this point and find Shell to have been the more credible witness.

The Secretary further argues that because the No. 8 circuit breaker had been locked out prior to the accident at issue, Perry County had been put on notice that further examination of the power center was required to ensure that all other circuit breakers were functioning safely.

Moreover, the record does not clearly establish when Respondent was given notice that the No. 8 circuit breaker had been locked out. According to Stanfield, Shell did not know who had placed the lock on the breaker, nor when it was done. There was not any evidence adduced by the Secretary as to when and why a padlock was placed on the No. 8 circuit breaker. Further, there was not any evidence adduced as to the specific nature of the condition of the breaker that led to it being padlocked.

Further, the regulations do not clearly specify under what conditions, if any, an operator is required to conduct an examination more frequently than weekly. Thus, to impose such a requirement herein would go beyond the terms of Section 75.512-2, supra, as it would require an examination of all breakers in a situation where one breaker had been locked out. In this connection, I note that on cross examination, Stanfield agreed that there was not any requirement to check all circuits when one is found to be operating properly. Also, on cross-examination, he agreed that the fact that one breaker may not have been operating properly does not indicate that other breakers were not functioning properly.

Further, for all the above reasons, I find that it has not been established that Respondent violated Section 75.512, supra.

Citation No. 7517687

Violation of 30 C.F.R. §75.607

According to Stanfield's testimony, during the investigation of the accident at issue it was determined that the victim had attempted to plug a cathead into the receptacle on the No. 2 breaker that had been energized. Perry County did not rebut or impeach this testimony.

Stanfield issued a citation alleging a violation of 30 C.F.R. § 75.607, which provides that trailing cable and power cable connections to junction boxes "... shall not be made or broken under load."

Based on the inspector's uncontradicted and unimpeached testimony, I find that Perry County did violate Section 75.607, supra.

Significant and Substantial

According to the inspector, placing a plug in a receptacle that was energized creates a hazard of a mine fire, electrical burn, or electrical shock. The uncontradicted evidence in the record indicates that the victim did receive burns and electric shock. Within this framework I conclude that all the elements set forth in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) have been met, and that it has been established that the violation was significant and substantial.

Penalty

Based on the parties' stipulations, I find that Perry County Coal is a large operator and a penalty will not affect its ability to remain in business. I have reviewed Perry County's history of violations and find that it is not a significant factor to cause either a significant increase or decrease in the amount of penalty to be assessed. There is no evidence that the operator did not exhibit good faith in abating this violation. Since the violative condition herein, as discussed above, contributed to the hazards associated with the injuries received by the victim, I find that the gravity of the

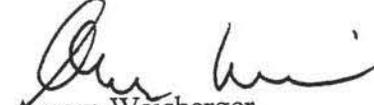
violation was high.

The inspector conceded that in his opinion the operator's negligence was only "moderate" because there were "mitigating circumstances leading up to the accident." (Tr. 198). In this connection, I note that the violative condition was created when the victim attempted to insert a plug into a receptacle that was energized. However, it had become energized as a result of the fusion of cables within the breaker, a condition that could not have been observed. Thus, although the victim was negligent to some degree in inserting the plug into an energized receptacle, and this negligence is imputed to the operator, the level of the operator's negligence is to be mitigated considerably because it did not know of this condition. Further, for essentially the same reasons discussed above<sup>2</sup>, I find that it has not been established that Perry County had notice of the conditions within the No. 2 breaker.

Taking into account all the above factors, and putting considerable weight on mitigating factors relating to the company's negligence, I find that a penalty of \$1,000 is appropriate for this violation.

Order

It is **Ordered** that Citation Numbers 7517685 and 7517686 be **Dismissed**. It is further **Ordered** that Respondent pay a civil penalty of **\$1,000.00** within 30 days of this decision.

  
Avram Weisberger  
Administrative Law Judge

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<sup>2</sup>Citation No. 7517686.



**ADMINISTRATIVE LAW JUDGE ORDERS**



**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 31, 2005

TAMKO ROOFING PRODUCTS, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. YORK 2004-72-RM
	:	Citation No. 6019683; 8/11/2004
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. YORK 2004-73-RM
ADMINISTRATION, MSHA,	:	Citation No. 6018684; 8/11/2004
Respondent	:	
	:	Docket No. YORK 2004-74-RM
	:	Citation No. 6018685; 8/11/2004
	:	
	:	Frederick Grinding Mill
	:	Mine ID 18-00750
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2005-11-M
Petitioner	:	A. C. No. 18-00750-37602
	:	
v.	:	Docket No. YORK 2005-79-M
	:	A. C. No. 18-00750-37602
	:	
TAMKO ROOFING PRODUCTS,	:	Frederick Grinding Plant
Respondent	:	

**PARTIAL SUMMARY DECISION**

Before: Judge Melick

On May 9, 2005, the Secretary filed a Motion for Summary Decision seeking (a) a determination that the Frederick Grinding Mill operated by Tamko Roofing Products Inc., (Tamko) is subject to the jurisdiction of the Department of Labor's Mine Safety and Health Administration (MSHA) under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.* "the Act", and, (b), to affirm the three citations at issue in this proceeding with a civil penalty of \$60.00 for each. For the reasons set forth below the motion is granted as to issue (a), above, the jurisdictional issue, but denied as to issue (b).

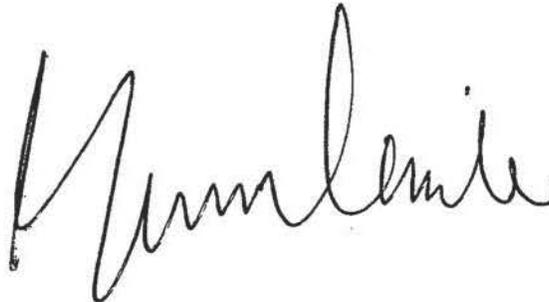
Under Commission Rule 67, 29 C.F.R. § 2700.67 a summary decision may be granted if the pleadings, depositions, answers to interrogatories, admissions, and declarations show there is no genuine issue as to any material fact and that the moving party is entitled to summary decision as a matter of law. As stated in her motion, the Secretary relies herein on the observations of MSHA Inspector Paul Pelesky, statements made to Inspector Pelesky by Tamko's supervisors and stipulations contained in Tamko's prehearing statement. According to Pelesky's affidavit, on August 2004, the date of the alleged violations herein, Pelesky observed that the subject mill was engaged in the process of sizing limestone by screening and then further milling the limestone to a dust-like size.

Tamko responds only by asserting that the cited milling operation, which it owns and operates, is no longer owned by the adjacent limestone quarry where limestone is extracted and, indeed, does not receive any mine product from that quarry. The Secretary counters by arguing that whether or not Tamko receives limestone from the adjacent mine is irrelevant in determining whether there is MSHA jurisdiction under the Act.

Section 4 of the Act states in relevant part, that "each coal or other mine, the product of which enters commerce, ... shall be subject to the provisions of this Act." Section 3(h)(1) of the Act defines a "coal or other mine" to include "facilities...used in... the milling of... minerals." Sections 3(h)(1) further provides that, in determining "what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." "Milling" is not defined in the Act but is defined in an agreement between the Mine Safety and Health Administration and the Occupational Safety and Health Administration which sets forth the areas of authority of the two agencies. 44 Fed. Reg. 22827 (April 17, 1979). The agreement defines milling as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is the separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." *Id* at 22829. The agreement further lists specific milling processes, and their definitions, over which MSHA has jurisdiction, which include grinding, pulverizing and sizing. *Id* at 22829-22830.

There is no dispute that limestone rocks were being sized and processed to a dust-like size at the cited mill. Within the above framework, these processes constitute milling, which is subject to MSHA jurisdiction under the Act. See *Secretary v. Watkins Engineers and Constructors*, 24 FMSHRC 669,673-675 (July 2002). Tamko cites no authority for its proposition that the milling facility must be part of the extraction facility in order to be within MSHA's jurisdiction and, indeed, the proposition is without legal support. Under the circumstances, I find that the MSHA has jurisdiction under the Act to cite the Tamko facility and the Secretary's Motion for Summary Decision is granted as to this jurisdictional issue.

With respect to the Secretary's motion Part (b), Tamko argues that several issues remain in dispute including, *inter alia*, whether Tamko's health and safety training plan under the Occupational Safety and Health Administration may be substituted to meet the training requirements under MSHA, whether the MSHA inspector issued the citation for an improper purpose, and whether the citations are redundant and, therefore, excessive. To the extent that these issues may reflect upon the civil penalty criteria set forth in Section 110(i) of the Act and therefore reflect upon the amount of appropriate civil penalty, if any, to be assessed, they are matters in dispute and the motion for Summary Decision with respect to the merits of the citations and the appropriate civil penalty must be denied. Hearings will accordingly be scheduled in the near future on these issues.



Gary Melick  
Administrative Law Judge  
202-434-9977

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