

JUNE 2000

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JUNE 2000

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

David Morales v. Asarco, Inc., Docket No. WEST 99-188-DM. (Judge Manning, May 8, 2000)

Reconsideration was denied in the following case during the month of June:

Secretary of Labor, MSHA v. San Benito Aggregates, Inc., Docket Nos. WEST 2000-155-M, etc. (Commission Order of May 11, 2000)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 21, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 2000-311-M
	:	through WEST 2000-314-M
CITY TRANSFER OF KENT,	:	
INCORPORATED	:	

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 21, 2000, the Commission received from City Transfer of Kent, Inc. ("City Transfer") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by City Transfer.

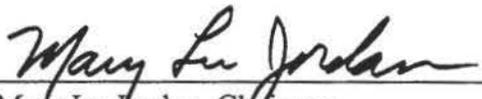
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

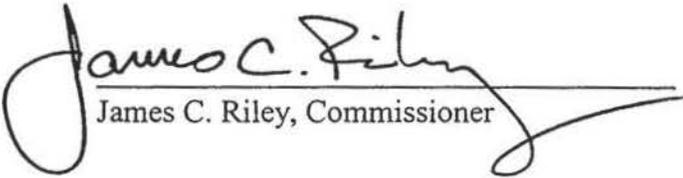
In its request, City Transfer, which is represented by Environmental Compliance & Remediation, Inc., states that when it received the citations, "there was no formal statement from MSHA on the appeals process," contrary to the past practice by the Department of Labor's Mine Safety and Health Administration ("MSHA") of including "a post card with citations that could be sent back to MSHA requesting an informal meeting." Letter dated April 12, 2000. It also contends that it previously mailed letters dated August 4 and 18, 1999 to MSHA contesting the citations in these cases because they were unjust and unsubstantiated, and requesting a hearing. *Id.* and attaches. It alleges that it never received a response to its letters. Letter dated April 12, 2000. City Transfer attached to its request copies of several letters, dated May 24, August 4, and August 18, 1999, which it allegedly sent to MSHA's regional office in Bellevue, Washington

contesting the citations; a return receipt for a mailing to MSHA's regional office delivered on November 7, 1999; and a letter dated October 29, 1999, which it allegedly sent to MSHA's Civil Penalty Compliance Office indicating that it sent the August 4 and 18 letters and inquiring into the status of its hearing request. Attachs. Accordingly, City Transfer requests a hearing on Citation Nos. "796948 — 796979." Letter dated April 12, 2000.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, eg., Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (Mar. 1998); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preservation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of City Transfer's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether City Transfer has met the criteria for relief under Rule 60(b). See *Bauman Landscape, Inc.*, 22 FMSHRC 289, 289-90 (Mar. 2000) (remanding to a judge where the operator claimed that it never received the proposed penalty assessment and owner did not sign the return receipt without submitting any supporting documentation); *Warrior Investment Co.*, 21 FMSHRC 971, 973 (Sept. 1999) (remanding where operator claimed that it did not receive proposed penalty assessment and record did not clearly indicate why service was unsuccessful). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose City Transfer's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of GRANT NOE, JR.	:	
	:	
v.	:	Docket No. KENT 99-248-D
	:	
J & C MINING, L.L.C., and	:	
MANALAPAN MINING COMPANY, INC.	:	

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

ORDER

BY THE COMMISSION:

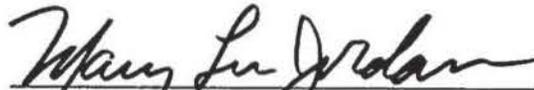
In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge Gary Melick issued a decision dismissing a complaint brought by the Secretary of Labor on behalf of Grant Noe, Jr., alleging discrimination in violation of section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1). 22 FMSHRC 404, 410-11 (Mar. 2000) (ALJ). In a related temporary reinstatement proceeding, Docket No. KENT 99-174-D, the judge had issued a decision approving a settlement agreement, providing for the temporary economic reinstatement of Noe by J & C Mining, LLC (“J&C”). Unpublished Order at 1-2 (May 17, 1999).

On June 20, 2000, the operators, J&C and Manalapan Mining Company, Inc. (“Manalapan”) filed a Motion to Expedite Review by Commission. In the motion, the operators state that, having prevailed before the judge, they “desire relief from the order requiring payment of temporary economic benefits” to Noe. Mot. at 1. In addition, they request that review before this Commission be expedited, and that the time for filing a reply brief by the Secretary be reduced from 20 days to 10 days. Mot. at 2.

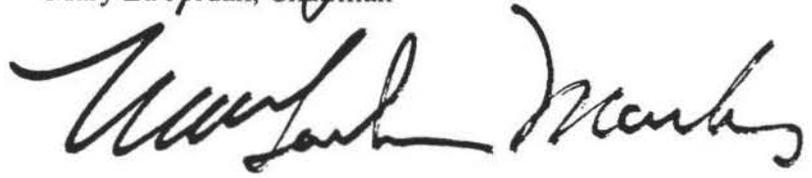
Upon consideration of the motion, the operators’ request for relief from the May 17, 1999 order providing for the economic reinstatement of Noe is denied.¹ See *Secretary of Labor on behalf*

¹ We note that, on June 19, 2000, the United States District Court for the Eastern District of Kentucky issued an order granting the Secretary’s motion for a preliminary injunction and temporary restraining order requiring J&C and Manalapan to reinstate Noe temporarily, pending

of *Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947, 949 (Sept. 1999) (“the language of the Mine Act requires that a temporary reinstatement order remain in effect while the Commission review the judge’s decision”). Furthermore, the Commission will be expediting these proceedings as it is statutorily required to do. See 30 U.S.C. § 815(c)(3) (“Proceedings under this section shall be expedited by the Secretary and the Commission.”); see also *Bernardyn*, 21 FMSHRC at 950 (recognizing the appropriateness of expediting cases involving parallel temporary reinstatement proceedings). Nonetheless, the operator’s request to reduce the period for filing the Secretary’s reply brief is denied because such a reduction would not materially advance the Commission’s expedited consideration of the case.



Mary Lu Jordan, Chairman



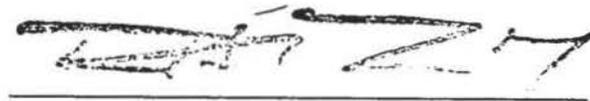
Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

resolution of this discrimination proceeding. *Secretary of Labor v. J & C Mining, L.L.C.*, No. 00-217 (E.D. Ky., June 19, 2000). In the order, the Court stated that after the issuance of Judge Melick’s March decision, the operators ceased economic reinstatement of Noe. *Id.* at 2.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 97-49
	:	WEST 97-172
BLACK MESA PIPELINE, INC.	:	

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In these civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Black Mesa Pipeline, Inc. (“Black Mesa”), seeks review of Administrative Law Judge Jacqueline Bulluck’s determinations that it violated 30 C.F.R. § 77.502, which requires that electrical equipment be frequently examined by a qualified person, and a related record-keeping provision, 30 C.F.R. § 77.800-2, and that the violation of section 77.502 was significant and substantial (“S&S”).¹ 20 FMSHRC 666, 672-77, 678-79 (June 1998) (ALJ). The Secretary of Labor seeks review of the judge’s determination that the violation of section 77.502 was not attributable to Black Mesa’s unwarrantable failure.² *Id.* at 677. For the reasons that follow, we reverse the judge’s findings of violations.

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

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

I.

Factual and Procedural Background

Black Mesa's Pipeline Preparation Plant ("prep plant"), located near Kayenta, Arizona, receives coal mined at the nearby Black Mesa Coal Mine, which it crushes into powder, mixes with water, and dispatches as coal slurry for transport by pipeline to an electric power plant 200 miles away. 20 FMSHRC at 667; Tr. 134. Prep plant equipment includes very large pump stations, crushing mills, belts, various motors using between 110 volts and 4160 volts, and other high-voltage equipment such as breakers, control circuits, disconnects, cables, and safety equipment. 20 FMSHRC at 667. Among 36 prep plant employees are seven electricians. *Id.* at 667, 668.

On June 25, 1996, Peter Saint, an electrical inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted his first electrical inspection of the prep plant. *Id.* at 668. Inspector Saint's review of the prep plant's record book of monthly examinations on high-voltage electrical equipment ("high-voltage book") revealed that examinations were being performed by electricians he considered only qualified to work with low and medium-voltage electrical equipment. *Id.*³ The inspector also observed an electrician working with a high-voltage motor and was told that prep plant electricians handled high-voltage switchgear units. *Id.*

Reviewing the qualifications of prep plant electricians, the inspector discovered that, while all held MSHA cards identifying them as surface low/medium-voltage qualified, none had a card showing qualification to work on high-voltage equipment. *Id.*; Tr. 37, 46-47. From subsequent conversations with electricians and prep plant officials, Saint further learned that, for approximately 18 years, the prep plant's electricians had been performing all electrical work on the property, including high-voltage work. 20 FMSHRC at 668. The electricians and officials also related to the inspector their belief that the electricians were qualified to perform high-voltage work because they had passed five tests given by MSHA and did not work on energized high-voltage circuits or lines. *Id.*

Inspector Saint told the Black Mesa personnel that only electricians MSHA recognized as qualified to work with high voltage are authorized to examine and maintain high-voltage equipment and sign the high-voltage book. *Id.* According to Saint, Black Mesa electricians

³ MSHA considers voltage of 660 volts and lower "low voltage," voltage between 661 volts and 1000 volts "medium voltage," and voltage above 1000 volts "high voltage." Tr. 29, 286.

lacked high-voltage qualification because MSHA considered them to have passed only four of the five tests administered to electricians seeking qualification by testing. Tr. 147-48.⁴

After two telephone discussions with Donald Gibson, the electrical supervisor for MSHA District 9, Inspector Saint advised Black Mesa that to comply with the agency's testing program, it could either use qualified outside contractors to perform high-voltage work at the prep plant, or qualify its electricians for high-voltage work through MSHA testing. 20 FMSHRC at 668; Tr. 281. The inspector informed Black Mesa officials of several upcoming test dates and said that he would not be returning to the prep plant for approximately 3 months, so as to give the electricians the opportunity to study for and pass the high-voltage test given each month as part of the series of five qualification tests. 20 FMSHRC at 668; Tr. 78-80. Consistent with this grace period, Inspector Saint cited Black Mesa only for violating the record-keeping provision, section 77.800-2, a citation Black Mesa did not contest. 20 FMSHRC at 668; Gov't Ex. 5.

When Saint returned to the prep plant, on September 12, 1996, he was told that none of its electricians were high-voltage qualified under the MSHA testing program. 20 FMSHRC at 668; Tr. 82. Consequently, Saint issued Black Mesa a section 104(a) citation alleging a violation of the regulation which sets forth the electrician qualification process, 30 C.F.R. § 77.103, on the ground that no electrician at the prep plant was certified to perform inspections, maintenance, or repairs on high-voltage equipment. 20 FMSHRC at 669; Gov't Ex. 1. In a meeting the following day with Black Mesa officials and a union representative, Inspector Saint learned that Black Mesa intended to seek adjudication of the issue of electrician qualification. 20 FMSHRC at 669.

On Inspector Saint's next visit to the prep plant, on January 9, 1997, he learned that all of the electricians still lacked MSHA high-voltage certification, and that one had been performing monthly high-voltage equipment examinations and signing entries in the record book. *Id.*; Tr. 119-20, 123-24. Consequently, Saint issued a section 104(d)(1) citation alleging an S&S violation of section 77.502 on the ground that monthly inspections and maintenance of high-voltage equipment required by that regulation were not being done by a person qualified to work on high-voltage equipment. 20 FMSHRC at 669-70; Gov't Ex. 2. He also cited Black Mesa again for violating the record-keeping regulation, section 77.800-2. 20 FMSHRC at 670; Gov't Ex. 3. On March 4, 1997, three prep plant electricians passed the MSHA high-voltage examination and became high-voltage qualified. 20 FMSHRC at 670.

When the matter came before Judge Bulluck for hearing, the Secretary argued that bifurcating the testing system between low/medium-voltage qualification and high-voltage

⁴ MSHA witnesses testified that while section 77.103(b)(5) requires the Secretary to test on the "[r]equirements of Subparts F through J and S of . . . Part 77[.]" the requirements of Subpart I - Surface High Voltage Distribution are tested separately. Testimony indicated they are the subject of the fifth test, which is taken by an electrician seeking high-voltage qualification and is only administered to him after he has passed the first four tests and obtained low/medium-voltage qualification. Tr. 140-41, 256-57, 316-17, 321-22.

qualification is a reasonable interpretation of her qualification-by-testing regulation. 20 FMSHRC at 672. The judge subsequently affirmed the January 1997 citations for alleged violations of sections 77.502 and 77.800-2, and in the process upheld the Secretary's interpretation of section 77.103 on which those citations were based. *Id.* at 673-75, 678-79.⁵ According to the judge, section 77.103 is ambiguous with respect to the question of whether the Secretary can differentiate between electricians "qualified" to work on low/medium-voltage equipment and those who can work on high-voltage equipment. *Id.* at 673. The judge noted the language of section 77.103 does not distinguish between levels of qualification and found the Secretary's "bifurcated" program of requiring applicants to become low/medium qualified before they can become qualified to do high-voltage work was a reasonable interpretation of the regulation. *Id.* at 673-74. Because she found that high-voltage motors and switchgears were being worked on at the prep plant by electricians not qualified to do so, she affirmed both the citation alleging a violation of section 77.502 (*id.* at 675), and the related record-keeping violation of section 77.800-2, finding that the required monthly inspections entered in the record book were not performed by a high-voltage qualified electrician. *Id.* at 679.

The judge agreed with the Secretary that the violation of section 77.502 was S&S, but rejected the Secretary's charge that the violation was due to Black Mesa's unwarrantable failure. *Id.* at 675-77. The judge decreased the Secretary's proposed penalty from \$2,500 to \$400 for the section 77.502 violation, on the ground that the Secretary, who had initially assessed the penalty at \$150, was impermissibly seeking to punish Black Mesa for not acceding to the Secretary's interpretation of 77.103. *Id.* at 677-78. The judge also assessed a \$100 penalty for the section 77.800-2 violation. *Id.* at 679. Black Mesa and the Secretary cross-petitioned for review before the Commission, which granted both petitions.

II.

Disposition

Black Mesa contends that the qualification-by-testing terms of section 77.103 cannot be lawfully interpreted to support the Secretary's bifurcated system of qualification. BM Br. at 11-13. According to Black Mesa, nothing in the relevant regulatory scheme indicates that qualification for high-voltage work is to be separate and apart from low and medium-voltage qualification. *Id.* at 12-13.

The Secretary responds that the judge properly upheld the Secretary's interpretation of section 77.103 as an ambiguous regulation to which deference is owed because the interpretation is a reasonable one. S. Resp. Br. at 5-22. The Secretary maintains that because the regulation does not explicitly designate how qualification for high-voltage work should be tested in relation to qualification for low voltage, the regulation is ambiguous with respect to whether the

⁵ In a ruling that has not been appealed, the judge vacated the September 1996 citation charging Black Mesa with a violation of section 77.103. 20 FMSHRC at 672.

Secretary can institute a bifurcated qualification system. *Id.* at 10. The Secretary contends she has adopted qualification levels based on different voltage levels because of the greater degree of danger posed by high-voltage equipment. *Id.* at 19-22.

The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary’s interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must “look to the administrative construction of the regulation if the meaning of the words used is in doubt”) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (“Deference . . . is not in order if the rule’s meaning is clear on its face.”) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

Section 77.502 states in pertinent part that “[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions[.]” Section 77.502-1 explains that “[a] qualified person within the meaning of § 77.502 is an individual who meets the requirements of § 77.103.” Qualification under section 77.103 can be accomplished in three different ways — by virtue of holding a state qualification, by completing an approved training program, or through testing. Section 77.103 specifies the method of qualification by testing as follows:

(a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of Subparts F, G, H, I, and J of this Part 77 to perform electrical work (other than work on energized surface high-voltage lines) if:

....

(3) He has at least 1 year of [mine industry] experience . . . and he attains a satisfactory grade on each of the series of five written tests approved by the Secretary as prescribed in paragraph (b) of this section.

(b) The series of five written tests approved by the Secretary shall include the following categories:

- (1) Direct current theory and application;
- (2) Alternating current theory and application;

- (3) Electric equipment and circuits;
- (4) Permissibility of electric equipment; and,
- (5) Requirements of Subparts F through J and S of this Part 77.

There is nothing in the language of section 77.103, or in the regulatory scheme of which it is a part, which even hints that the drafters of the regulation left open the question of whether there could be more than one level of electrician qualification. Under the plain language of the regulation, a person is either considered “qualified” for electrical work thereunder or is not.⁶ Consequently, we disagree with the judge and the Secretary and find absolutely no ambiguity in the language of the regulations.

The Secretary’s enforcement action here is based upon her interpretation of the regulation as permitting a distinction between high and low/medium-voltage qualification. It is undisputed that MSHA recognized Black Mesa prep plant electricians as qualified for electrical work under section 77.103, albeit for low/medium voltage. It is only because MSHA did not recognize them as high-voltage qualified that the Secretary cited Black Mesa. *See* Gov’t Ex. 2, at 2 (January 1997 citation issued because “no examinations were done by a person qualified to make High Voltage checks”), 3 (citation terminated the day following its issuance because required checks were “made by a certified person, qualified to make High voltage examination”).

We thus have before us an alleged violation of a policy that the Secretary has based entirely upon an ambiguity in section 77.103 that does not exist. Section 77.103 contains no language that distinguishes low/medium-voltage qualification from high-voltage qualification, and the Secretary’s bifurcated administration of section 77.103 has no basis in the regulation. Under these circumstances, we cannot affirm the citation and allow MSHA to prosecute an operator for supposedly violating a policy that is at odds with the regulation the policy attempts to implement. Because it is not grounded in the plain language of the pertinent regulations, the citation is invalid and the judge’s decision to the contrary must be reversed.

We recognize that the larger implication of our holding today is to invalidate that part of the Secretary’s present electrician qualification-by-testing program based upon two distinct levels of qualification. However, our holding is required by the plain meaning of the regulations, and we may not go beyond that plain meaning, regardless of the inconvenience it may work on the parties. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996); *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989).⁷

⁶ A separate regulation, 30 C.F.R. § 77.104, addresses qualification to work on energized high-voltage lines.

⁷ The dissent states that we “seem[] to believe” that “[r]ejection of the Secretary’s bifurcated testing program . . . nullif[ies] the effect of the existing electrician qualification regulations.” Slip op. at 12 n.1. We do not hold any such view. To the contrary, we are upholding the plain meaning of section 77.103(b). It is the Secretary’s *policy* implementing the

More importantly, we are not convinced that the Secretary's current practice of bestowing a lesser qualification status on electricians who have not passed the high-voltage qualification test is a reasonable interpretation of the regulation that promotes safety. The Secretary's approach instead appears to have the opposite effect and is entirely inconsistent with the language of the regulation. In fact, application of the Secretary's bifurcated testing system creates various anomalies that we believe have the potential to expose electricians in the mining industry and their fellow miners to extremely hazardous situations.

First, under the Secretary's bifurcated testing policy, those seeking low/medium certification, either underground or surface, are not tested on any regulations pertaining to high voltage, as set forth in Part 75 Subpart I (Underground High Voltage Distribution) or Part 77 Subpart I (Surface High Voltage Distribution). This means that individuals considered by the Secretary to be "qualified" can nevertheless work near high-voltage equipment without ever having to demonstrate any knowledge of the hazards associated with high voltage. A lack of knowledge regarding the hazards of high voltage could expose purportedly qualified "electricians" to extreme hazards of the type that only those conversant with the Secretary's high voltage regulations might appreciate. This is the case, for example, with respect to such an important function as determining whether a high-voltage line has been deenergized. *See* 30 C.F.R. § 77.704-1. It thus makes perfect sense that, contrary to the Secretary's policy, neither section 75.153 nor section 77.103 make any distinction between low/medium-voltage and high-voltage qualifications.

A second inconsistency in the Secretary's testing scheme involves the important area of permissibility. Section 77.103 requires an applicant to attain a satisfactory grade on a series of five written tests. Included in this series of required tests is permissibility of electrical equipment. 30 C.F.R. § 77.103(b)(4). In spite of the clear mandate of section 77.103(b)(4), under the Secretary's bifurcated scheme only individuals seeking *underground* low/medium certification are required to be tested on permissibility. As MSHA witnesses admitted at trial, surface low/medium-voltage qualification is obtained without testing on permissibility. Tr. 263-64, 320, 403, 409-10. In place of a permissibility test, the Secretary has unilaterally implemented testing on the National Electrical Code ("NEC") for individuals seeking the low/medium-voltage surface certification.

The Secretary argues that testing on the NEC is the equivalent of the permissibility testing required by section 77.103(b)(4), and that NEC provisions are better suited to surface electricians because they deal with things such as draw-off tunnels, silos, and preparation plants that are common to surface facilities. S. Resp. Br. at 22 n.11; Tr. 409. At first glance this appears to be a reasonable approach. However, a scheme that tests underground and surface low/medium-voltage applicants differently on the section 77.103(b)(4) requirement leads to troubling results when the Secretary then accords a *common* high-voltage qualification to members of both groups who pass the high-voltage test. According to MSHA, the only prerequisite for taking the

regulation that we find untenable.

common high-voltage qualification test is to be low/medium qualified either *underground or surface*. Tr. 427-36. Granting electricians a common underground and surface high-voltage qualification premised on low/medium voltage surface *or* low/medium voltage underground qualifications based on different criteria could compromise miner safety for the reasons that follow.

First, under the Secretary's testing scheme, a *surface* low/medium-voltage electrician who has passed the common high-voltage test can work as a high-voltage electrician *underground* without ever being tested on his understanding or knowledge of permissibility. This is particularly significant today because of the industry's trend towards utilizing high-voltage electric power in longwall mining operations. See 57 Fed. Reg. 39,036 (1992) (notice of proposed rulemaking on approval requirements for high-voltage electrical equipment operated in longwall face areas of underground mines); 64 Fed. Reg. 72,760 (1999) (limited reopening of record for submission of comments). We find it hard to conceive of a more serious threat to miner health and safety than an MSHA-sanctioned qualification process that allows an electrician to perform high-voltage electrical work on longwall equipment without first demonstrating his understanding of electrical permissibility with respect to either low/medium or high voltage. In addition, the Secretary's bifurcated testing scheme qualifies the underground low/medium-voltage electrician, who has passed the common high voltage test, to work as a high-voltage surface electrician without ever being tested on the NEC regulations. This scenario raises serious questions about the safety of the work performed by these individuals, particularly given MSHA's position that testing on the NEC is more appropriate for electricians working on the surface than is testing on permissibility.

Despite our dissenting colleagues' assertion that the "real-world ramifications" of the majority's approach are "alarming" (slip op. at 13), we are far more concerned about the real world consequences on the health and safety of miners in the industry resulting from the Secretary's bifurcated qualification scheme. In fact, the existing data confirms that the risk of death or injury to miners as the result of electrical problems is not merely a hypothetical concern. Accident data compiled by MSHA from 1980 to 1997 indicate that during that period, there were 106 accidents involving overhead electrical lines alone; 32 of these accidents resulted in fatalities. *Mark the Power Line*, Holmes Safety Ass'n Bull., Mar./Apr. 2000, at 3. Contrary to the suggestion of our dissenting colleagues (slip op. at 13), we do not believe that section 77.103(b) is itself tainted. Rather, it is the policy developed by the Secretary for implementing the testing requirements embodied in section 77.103(b) that in our view creates a situation where, although miners are "qualified" electricians under the Secretary's program, in reality, these miners have not met the plainly stated requirements of the regulation. The Secretary's bifurcated testing policy, which finds no support in the language of the regulation itself, is not entitled to any deference from this Commission. See *Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000) (Department of Labor opinion letter regarding employer's policy on use of compensatory time not entitled to deference).

Our dissenting colleagues state that we are “mistaken in believing that we are limited to resolving whether the Secretary is correct in her theory of the violation.” Slip op. at 12 n.1. We hold no such belief. In fact, we agree in principle with the dissent that there are cases where it would be appropriate to find a violation based on the plain meaning of a standard even if such a rationale was not a part of the Secretary’s theory of the violation. In *Bluestone Coal Corp.*, for example, the Commission found a violation based on the plain meaning of a cited standard even though the Secretary argued that the standard was ambiguous and her interpretation of it was due deference. 19 FMSHRC 1025, 1028-29 (June 1997). But in *Bluestone*, a violation of a standard was at issue, not a violation of an interpretive policy as is the case here. In this case, we find that we must nullify the policy on which the Secretary based her enforcement action because the Secretary’s administration of the qualification-by-testing terms of section 77.103 is simply untenable. She must replace it with a program that ensures miner safety by comporting with the requirements of the regulation.

Given our reversal of the judge’s determination that Black Mesa violated section 77.502, we also reverse her determination that Black Mesa violated the related record-keeping regulation, section 77.800-2.⁸ We do not reach the questions whether substantial evidence supports the judge’s determinations that the section 77.502 violation was S&S but not unwarrantable. Because our reversal also nullifies the penalty assessed for the violation, there is no need to take up Black Mesa’s request that we “address” the judge’s finding that the Secretary, by increasing the penalty she assessed for the violation of section 77.103, sought to punish the operator for seeking a Commission interpretation of that regulation. BM Br. at 26-29; BM Reply Br. at 9-11.⁹

⁸ Section 77.800-2 provides that “[t]he operator shall maintain a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary.” Although Black Mesa may not have directly contested the section 77.800-2 violation in its PDR, we are not precluded from reversing the judge’s finding of a violation of this record-keeping requirement since it is a direct and logical outgrowth of our reversal of the finding of a violation of section 77.502.

⁹ We simply note that the Commission has already spoken on this question. In *Thunder Basin*, the Commission observed that “litigant[s] should not be exposed to greater punishment for forcefully exercising due process rights.” 19 FMSHRC 1495, 1505 (Sept. 1997).

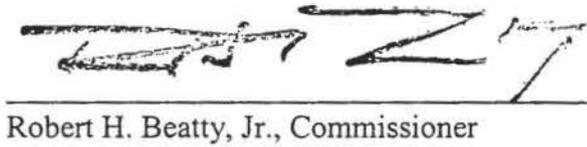
III.

Conclusion

For the foregoing reasons, we reverse the judge's determinations that Black Mesa violated sections 77.502 and 77.800-2.


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

Like our colleagues in the majority, we believe the language of the regulations at issue is plain. We also agree with them that the miners in this case “have not met the plainly stated requirements of the regulation.” Slip op. at 8. However, unlike our colleagues, we believe that since Black Mesa failed to comply with the plain language of the standards, the citation charging a violation of section 77.502 should be upheld. Accordingly, we would affirm the judge’s finding that this violation occurred (though on different grounds than those on which the judge relied). We would also affirm the judge’s finding that the violation was significant and substantial, and reverse her determination that it was not the result of an unwarrantable failure.

We begin with the language of the regulation, which of course is the starting point for its interpretation. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993).

Section 77.502 requires that “[e]lectric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions.” Thus, we must decide whether the electrician who performed the monthly inspections of high-voltage equipment at Black Mesa in late 1996 can be considered a “qualified person” under this standard.

To do so, we look to section 77.103, as section 77.502-1 states that “[a] qualified person within the meaning of § 77.502 is an individual who meets the requirements of § 77.103.” Section 77.103 provides three methods of qualifying. The one Black Mesa relies on is a testing program, set forth in section 77.103(b). Thus, for us to answer the question of whether the Black Mesa electrician was a “qualified person,” we must ascertain whether he received a satisfactory grade on the tests described in section 77.103(b).

That section provides, in no uncertain terms, that there must be five written tests which “shall include the following categories:

- (1) Direct current theory and application;
- (2) Alternating current theory and application;
- (3) Electric equipment and circuits
- (4) Permissibility of electric equipment; and,
- (5) Requirements of Subparts F through J and S of this Part 77.”

If the electrician did not satisfactorily pass all five of these written tests, which must have included all of the above subjects, he cannot be considered qualified under the regulations. The language could not be clearer. Under the plain terms of this regulation, *all* qualified individuals must pass *all* five written tests. The regulations provide no leeway here — a scheme to

differentiate among types of electricians by permitting some of them to be qualified by passing less than all five of the mandated written tests is simply not contemplated by the wording of this standard.

In this regard, we agree with our colleagues in the majority, who recognize that “[u]nder the plain language of the regulation, a person is either considered ‘qualified’ for electrical work thereunder or is not.” Slip op. at 6. Consequently, we also agree with them that the Secretary’s bifurcated testing program is not consistent with the standard, and that the judge erred in finding the regulation to be ambiguous. We part ways with our colleagues, however, when they conclude that the citations in this case should not be affirmed. Slip op. at 6. With all due respect to our colleagues, we find it somewhat difficult to declare the regulation that underlies the Secretary’s enforcement action in this case to be unambiguous, acknowledge that the operator did not meet the regulation’s requirements, and then refuse to uphold the violation. Our task, after all, is to ascertain whether the citation should be upheld by determining whether, under the plain meaning of the standard, a qualified person performed the inspections at issue.¹

We answer this question by simply ascertaining whether any Black Mesa electrician passed all five of the tests. The testimony is uncontraverted that at the time the citation issued, none of the prep plant electricians had even taken the fifth and final test, which contains material on the high voltage aspects of Subparts H and I of section 77. Tr. 140-41, 256, 321-22, 412.²

¹ The majority is mistaken in believing that we are limited to resolving whether the Secretary is correct in her theory of the violation. See *BethEnergy Mines, Inc.*, 15 FMSHRC 981, 985 (June 1993) (appellee can urge affirmance (and by implication, Commission can therefore affirm) judge’s determination on any ground that does not attack that determination or enlarge rights under that judgment). Rejection of the Secretary’s bifurcated testing program does not, as the majority seems to believe, nullify the effect of the existing electrician qualification regulations.

² The citation describes the “condition or practice” at issue, as

[e]lectric equipment was not being frequently examined, tested, and properly maintained by a qualified person to assure safe operation at the Black Mesa pipeline preparation plant. High Voltage (4160 volts) motors and circuit breakers are located within the coal preparation plant. Management has failed to provide a qualified person as defined in part 77.103 subpart I to conduct the required examination.

Gov’t Ex. 2, at 1. This clearly tracks the requirement of section 77.103(b)(5) that a “qualified person” pass a test on “[r]equirements of subparts F through J . . . of this Part 77.”

Consequently, we would affirm the judge's determination that Black Mesa violated section 77.502.³

We are troubled by the practical implications of the majority's decision, which acknowledges that it invalidates the Secretary's current electrician qualification-by-testing program but refuses to uphold a citation based on an operator's failure to meet the requirements set forth in the plain language of section 77.103(b). Slip op. at 6. The real-world ramifications of this approach are alarming. Apparently, the majority will refuse to affirm any citation issued by the Secretary based on a violation of section 77.103(b), because that regulation is tainted by the Secretary's bifurcated qualification-by-testing program. Conceivably, electricians who are deficient not only in the area of permissibility (a concern expressed by the majority) but in all of the subjects currently being tested, could be utilized by operators, as it is now futile for the Secretary to cite operators with unqualified electricians. We do not believe that a moratorium on citations in this area is the most effective way of remedying the situation while still protecting miner safety.

We turn now to the question of whether that violation was significant and substantial. The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. See *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming

³ Our colleagues in the majority reverse the judge's determination that Black Mesa violated section 77.800-2, the record-keeping regulation. Slip op. at 9. Black Mesa failed to raise this issue in its PDR. BM PDR at 9. Accordingly, it is not properly before us. 29 C.F.R. § 2700.70(d).

continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).⁴

We would affirm the judge's finding that Black Mesa's violation of section 77.502 was S&S, finding its arguments (which focus on the second and third prong of the *Mathies* test) unpersuasive. Substantial evidence in the record supports the judge's determination that

[b]ased on the cumulative testimony regarding the bridging capabilities and destructive, unforgiving peculiarities of high-voltage electricity, and the potential danger of even the slightest mistake or unclean work-habit, I find that the violation created a discrete safety hazard. Based on the lack of training specific to the intricacies of work on high-voltage equipment, I find that there was a reasonable likelihood of serious injury, including death, to an unqualified electrician serving high-voltage electrical equipment, or to others working around or coming into contact with the equipment.

20 FMSHRC at 676-677.

The inspectors provided forceful testimony about the discrete safety hazard created when unqualified electricians work on high-voltage equipment, with descriptions of hazards caused by electrical shock, Tr. 89, burns, Tr. 108-09, and fire and toxic fumes, Tr. 109. Inspector Saint testified that the possibility of surviving a contact with high voltage "is near none," Tr. 89, noting that "[y]ou don't get a second chance in high voltage." Tr. 96.

Black Mesa contends that the failure of its electricians to be high-voltage qualified under the regulations was not shown to contribute to a discrete safety hazard, because their failure to qualify under MSHA's regulations was not tantamount to being unqualified to work on high-voltage equipment, and their actual work on that equipment was not shown to present a hazard. BM Br. at 23. However, the judge did not merely assume that the prep plant electricians were unqualified based on their failure to complete the high-voltage qualification process. Rather, she found that they lacked "training specific to the intricacies of work on high-voltage electrical

⁴ Black Mesa alleges the S&S allegation to be defective because it was reinstated by Inspector Saint, at the direction of the Secretary's counsel, after having been deleted as the result of a Health and Safety Conference between Black Mesa and a representative of the MSHA District Manager. BM Br. at 25. Regardless of how the S&S allegation was handled internally by the Secretary and MSHA prior to trial, the Secretary, through her representatives, tried the allegation below, and we can see nothing that prevents the Secretary from proceeding with the allegation.

equipment” as well as “current training in high voltage electricity” (20 FMSHRC at 676-77), and substantial evidence supports those conclusions.⁵

First, even qualified electricians must take an annual retraining program, in order to keep current with technological changes. Tr. 100; *see* 30 C.F.R. § 77.103(g).⁶ Not being high-voltage qualified, the prep plant electricians did not receive the annual high-voltage retraining. Gov’t Ex. 16 (report of prep plant electricians’ qualification history).

Moreover, the experience of the prep plant electricians in trying to become high-voltage qualified after the section 77.502 citation was issued provides further evidence that they were in fact unqualified to work on high-voltage equipment at the time of the citation. Only three of the seven prep plant electricians took the high-voltage test, and all three needed to take it twice before receiving a passing grade. Tr. 370-72. Most significantly, one of the three was Castillo, whose checks on the high-voltage equipment led to the citation at issue. Tr. 543-44. In these circumstances we feel that the judge’s finding that the electricians’ lack of high-voltage qualification contributed to a discrete safety hazard is supported by substantial evidence.

Substantial evidence also supports the judge’s finding that there was a reasonable likelihood that the hazard contributed to would result in an injury. Inspectors Saint and Gibson testified that a high-voltage accident could kill or permanently disable an individual. Tr. 130, Tr. 380-81; *see also* Gov’t Ex. 8 (accident investigation report of a fatal high-voltage accident).

Black Mesa argues that the lack of a high-voltage equipment accident during the 15 or more years in which the prep plant electricians worked on such equipment without high-voltage qualification under the regulations demonstrated there was no reasonable likelihood that an injury-producing event would result. BM Br. at 24. However, simply because a condition or practice has yet to result in injury does not preclude a finding that the condition or practice

⁵ When reviewing an administrative law judge’s factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support [the judge’s] conclusion.” *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

⁶ “An individual qualified in accordance with this section shall, in order to retain qualification, certify annually to the District Manager, that he has satisfactorily completed a coal mine electrical retraining program approved by the Secretary.” In fact, electrical supervisor Castillo, who was initially high-voltage qualified by virtue of “grandfathering in” under the regulations, failed to take high-voltage refresher training and thus lost his high-voltage qualification in 1982. Tr. 350-52; Gov’t Ex. 16.

constitutes a violation that is S&S. *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996); *Buffalo Crushed Stone, Inc.*, 16 FMSHRC 2043, 2046 (Oct. 1994).

We next address the question of whether the violation was the result of unwarrantable failure. On this question, we would reverse the judge and remand for reassessment of the penalty, as the record compels the finding that the citation was the result of the operator's unwarrantable failure.

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

The record evidence in this case compels only one conclusion — that Black Mesa engaged in intentional misconduct. The operator deliberately refused to comply with the qualification standard after repeated warnings by MSHA. In fact, plant manager Andrew Mikesell testified that management "made a conscious decision that we were not going to pursue a high voltage qualification." Tr. 504. *See also* Tr. 583 (the decision not to comply was agreed to by management). Although it used an electrician who was high-voltage qualified to perform work that was necessary to abate citations, Black Mesa returned to using a low/medium-voltage qualified electrician on the ground that it would not accede to MSHA's interpretation of the regulations while it challenged that interpretation.⁷ 20 FMSHRC at 669; Tr.127, 129-30, 507.

⁷ We are fully aware that Black Mesa disagreed with the Secretary's interpretation of what constituted a "qualified person" as defined by the regulations. 20 FMSHRC at 668. In fact, after receiving the September citation, Black Mesa made clear that it intended to seek adjudication of the electrical qualifications issue. *Id.* at 669. Instead of doing so, however, it simply proceeded to continue to utilize unqualified individuals.

We recognize an operator's right to come to the Commission for a ruling about the proper interpretation of an MSHA standard. *See, e.g., Akzo Nobel Salt, Inc.*, 21 FMSHRC 846 (Aug. 1999), *vacated and remanded on other grounds*, No. 99-1370 (D.C. Cir. May 26, 2000). We also recognize that to obtain a Commission ruling, the operator must violate MSHA's view of the regulation so as to receive a citation the Commission can review. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). However, the mere fact that an operator is proceeding with a legal test case cannot insulate it from a finding of unwarrantable failure if the operator fails to proceed in good faith and in a reasonable manner. *See New Warwick Mining Co.*, 18 FMSHRC 1365 (Aug. 1996) (affirming unwarrantable failure determination when the operator asserted that it

The judge based her finding of no unwarrantable failure on her view that Black Mesa held a reasonable belief that it was not violating the regulation. The judge relied on Black Mesa's argument that it was in compliance with the regulations as long as its electricians did not work on *energized* high-voltage equipment. 20 FMSHRC at 677.⁸ In accepting Black Mesa's belief as reasonable, the judge apparently relied solely on evidence that previous MSHA inspectors had failed to cite Black Mesa when presented with its belief regarding the regulations. *See id.*⁹ However, the judge failed to consider the fact that the unwarrantability allegation is contained in a citation that was issued only after Inspector's Saint's third visit to the prep plant. On each previous inspection he had explained to Black Mesa that he, as MSHA's representative, did not agree with Black Mesa's reading of the regulations, and that its electricians were performing work in violation of those regulations. *See* 20 FMSHRC at 668-69, 669-70. Moreover, on his first visit to the prep plant Saint confirmed with his supervisor that this was MSHA's view as well (*id.* at 668), and on his second visit Black Mesa was a party to a telephone conference with MSHA electrical supervisors in two different locations during which that point was reiterated. *Id.* at 669; Tr. 366-70. Consequently, this is not just a case of one MSHA inspector taking a different position than previous inspectors.

Black Mesa deliberately thwarted the clear instructions of MSHA officials regarding compliance with this standard. Its intentional refusal to comply with the regulatory requirements which had been painstakingly communicated by MSHA constitutes unwarrantable failure.

Finally, we address the penalty issue raised by Black Mesa. It asks the Commission to address the ALJ's finding that the Secretary, in increasing the penalty she assessed for the violation of section 77.502 from the initial \$150 to \$2,500, sought to punish the operator for seeking an interpretation at the Commission of section 77.103. BM Br. at 26-29; BM Reply Br. at 9-11.¹⁰ Black Mesa maintains that review is called for because the issue "presents a substantial question of law, policy or discretion which should be addressed by the Commission[.]" and that the conduct of the Secretary "warrants more than a mere passing observation by the [ALJ]." BM Br. at 26, 29.

was attempting a good faith challenge of MSHA's interpretation of a regulation and wished to have the issue clarified by receiving a citation, but the operator's actions were not reasonable).

⁸ While Black Mesa urged this interpretation of the regulations to the judge in its defense of the citation (*see* 20 FMSHRC at 674-75), it repeats the defense on appeal only to the extent it is relevant to the issue of unwarrantability.

⁹ The judge states that her finding on the reasonableness of Black Mesa's belief is based "in part" on this evidence, but discusses no other evidence. *See* 20 FMSHRC at 667.

¹⁰ The judge also noted that the \$1,500 penalty the Secretary ultimately assessed for the section 77.103 citation the judge vacated was initially assessed at \$50. 20 FMSHRC at 678.

While Black Mesa's first contention accurately states the grounds on which the Commission may grant review under Mine Act section 113(d)(2)(A)(ii) (*see* 30 U.S.C. § 823(d)(2)(A)(ii)), Mine Act section 113(d)(2)(A)(i) clearly specifies that petitions for review on such grounds may only be filed by a "person adversely affected or aggrieved by a decision of the [ALJ]." 30 U.S.C. § 823(d)(2)(A)(i). It is equally clear that the judge's finding to which Black Mesa refers worked to Black Mesa's benefit. The judge not only concluded that an operator's "[f]ailure to cooperate is not a valid basis to conclude that a violation is more hazardous or that its occurrence is attributable to a higher degree of negligence, warranting an elevation in penalty[,]" (20 FMSHRC at 678), but she also determined that a penalty of \$400, not \$2,500, was appropriate. *Id.*

Because Black Mesa does not contend that the judge should have reduced the penalty even further, we do not believe that, with respect to the penalty issue it raises, it can be considered "adversely affected or aggrieved" under the Mine Act. *See Asarco, Inc.*, 20 FMSHRC 1001 (Sept. 1998) (vacating grant of review of adverse determination requested by party that nevertheless prevailed below), *aff'd*, 206 F.3d 720 (6th Cir. 2000).¹¹



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner

¹¹ In one respect Black Mesa's grounds for review are even weaker than the case presented by the petition for review in *Asarco*, because below Black Mesa was the prevailing party on the issue on which it seeks review.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 5, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-17
Petitioner	:	A.C. No. 42-00171-03759
	:	
v.	:	
	:	Star Point No. 2
PLATEAU MINING CORP.,	:	
(formerly CYPRUS PLATEAU MINING	:	
CORPORATION)	:	
Respondent	:	

DECISION

Appearances: Ann M. Noble, Esq., U.S. Department of Labor, Denver, Colorado,
for Petitioner,
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charged Plateau Mining Corp. (Plateau) in Citation No. 7611140 with the violation of the mandatory preshift examination safety standard 30 C.F.R. § 75.360(b)(3). At the hearing the Secretary, over the objection by Plateau, was permitted to amend the citation to allege, in the alternative, a violation of 30 C.F.R. § 75.360(f) concerning record keeping of the results of the preshift examination. No change was made in the description of the alleged violation.

The Citation

Citation No. 7611140 the only citation at issue in this case reads as follows:

An inadequate preshift was conducted for the afternoon shift for Unit #1 working section due to the following conditions: Loose and fine coal was allowed to accumulate in the following areas: (1)

No. 6 entry which measured 5-15 inches in depth, 1-4 feet in width and extended for approximately 40 feet in length, (2) In the No. 5 entry which measured 2-4 feet in depth, 7-8 feet wide and approximately 20 feet in length. (3) In the No. 4 entry, the accumulations measured 2-4 ½ feet in depth, 7-8 feet wide and approximately 30 feet in length. (Refer to citation No. 7611138) and the Approved Roof Control Plan was not being complied with in the following locations (1) A rib had blown out which left an area of approximately 15 feet in length and up to 6-8 feet in width between the roof bolts and the rib, (2) In the No. 3 entry the ribs had sloughed which left an area of approximately 9-10 feet in length and up to 7 feet in width between bolts and rib, (3) In the No. 4 entry the ribs had sloughed out which left an area of approximately 10 feet in length and up to 7 feet in width between the roof bolts and the rib, (4) In the No. 5 entry the ribs had sloughed out which left an area of approximately 15 feet in length and 7 feet in width between the roof bolts and the rib. (Refer to citation No. 7611139). None of the above hazardous conditions had been entered in the preshift record book.

The citation alleged that an injury or illness was “reasonably likely,” that it could be expected to be “permanently disabling,” and that negligence was “high.” It also alleged that the condition resulted from an “unwarrantable failure” and that it was significant and substantial.

Stipulations

At the hearing the parties agreed on stipulations as follows:

1. Plateau Mining Corp. is engaged in mining and selling of coal in the United States and its mining operations affect interstate commerce.
2. Plateau Mining Corp. is the owner and operator of Star Point Number 2 Mine, MSHA ID Number 42-00171.
3. Plateau Mining Corp. is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 USC Sections 801, et seq.
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject Citation 7611140 was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein and may be admitted into evidence for the purpose of establishing its issuance and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits to be offered by Respondent and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. Payment of the proposed penalty will not affect Respondent's ability to continue in business.

8. The Respondent demonstrated good faith in abating the violation.

9. Plateau is a coal-mine operator with 1,391,173 tons of production at this mine and 70,986,776 tons of production for the company in 1997. The certified copy of the MSHA assessed violations history accurately reflects the history of this mine for the two years prior to date of the citation and order.

10. Although Citation Number 7611140 indicates that it was issued at 0915, it was actually issued at 2115.

Issues

At the hearing the issues were stated as follows:

1. Whether a violation of 30 C.F.R. § 75.360(b)(3) and/or 30 C.F.R. § 360(f) occurred when a preshift examination of Unit 1 failed to note the accumulation of loose and fine coal-dust accumulation.

2. If a violation of a mandatory standard existed under one of the Secretary's theories of liability, whether it significantly and substantially contributed to the cause and effect of a mine safety or health hazard.

3. If a violation of a mandatory standard existed under one of the Secretary's theories of liability, whether it resulted from an unwarrantable failure to comply with the cited standard.

4. If a violation of a mandatory standard existed under one of the Secretary's theories of liability, what penalty is appropriate.

Finding of Facts

On April 28, 1998, the day-shift section face boss Miles David Frandsen was supervising a crew of miners in the Unit No. 1 production section of the Star Point No. 2 mine. A continuous miner was used in the section to mine the coal.

At 12:16 p.m. Mr. Frandsen performed an "onshift" examination of the section pursuant to 30 C.F.R. § 75.362. During his examination of the section, he observed no hazards in the

eight faces that were being mined in any part of the section. He completed the examination at 12:46 p.m. He called out the results of his preshift examination of the section at 2:26 p.m. Later on that same shift, after completion of his preshift examination of the section, a bounce occurred approximately 240 feet, outby the working faces. Frandsen immediately had his crew stop mining and move needed equipment to the area of the bounce. He had his crew take the necessary action to start correcting the conditions created by the bounce. He stayed late at the end of his shift in order to report the bounce and conditions it caused to the oncoming foreman, Carl Martinez. He showed Martinez what had been done and what still needed to be done to complete the correction of the condition caused by the bounce. This included the accumulations and other hazardous conditions that later that evening were observed by Inspector Passarella and described by her in the citation at issue and as well in Citation Nos. 7611138 and 7611139 which were received into evidence as Petitioner's Exhibits 7 and 8. The latter two citations are not at issue but describe the hazardous conditions caused by the coal burst or bounce that occurred after completion of the preshift examination. The accumulations were approximately two crosscuts outby the working face and thus were not in locations which would indicate that they resulted from the mining process. They were in locations which indicate they had been caused by coal coming off the ribs as a result of the bounce.

It was later that same day, April 28th, at approximately 8 p.m. that Inspector Lana Passarella accompanied by Clifford Snow first entered the area of the mine where the bounce occurred. Upon observing the accumulations and other conditions caused by the bounce which she believed at the time constituted the hazardous conditions that should have been observed and noted in the preshift examination, she issued Citation No. 7611140 at 2115. (Stipulation No. 10).

Discussion

The citation alleges a violation of 30 C.F.R. § 75.360(b)(3) which provides in relevant part as follows:

- (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the flowing locations.

* * *

- (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work in the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls in these sections and in these areas, and the examination

shall include tests of the roof, face and rib conditions on those sections and in these areas.

The only time requirement for preshift examination is set forth in 30 C.F.R. § 75.360(a) which specifies that the preshift examination is to be performed during some part of the three hour period before the beginning of the next shift. The next shift in this case started at 3 p.m. The preshift examination was performed between 12:16 and 12:46 p.m. Thus the preshift examination was clearly performed within the three hour period before the next shift began.

Since the hazardous conditions described in the citation in question did not exist at the time the preshift examination was performed and were caused by the later bounce some 240 feet from the face, there was no violation of the cited standard 30 C.F.R. § 75.360(b)(3), *New Warwick Mining Co.*, 18 FMSHRC 1568; 1575 (Rev. Comm. Sept. 1996); *Enlow Fork Mining Co.*, 19 FMSHRC 5; (Rev. Comm. January 1997).

The Secretary under the alternative theory of liability charges Plateau with the violation of 30 C.F.R. § 75.360(f) which in relevant part provides:

A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination and of the results and locations of an end methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. A record shall also be made by a certified person of the action taken to correct hazardous condition found during the preshift examination. (Emphasis added).

Clearly, the only record of the preshift examination is of the conditions found or corrected during the preshift examination. No record of conditions found at other times is required under 30 C.F.R. § 75.360(f). Since the hazardous conditions observed by the inspector did not exist at the time of the preshift inspection, no violation of the recording requirement occurred. The citation should be vacated.

Conclusion

Plateau Mining Corporation did not violate 30 C.F.R. § 75.360(b)(3) nor 30 C.F.R. § 75.360(f). Citation No. 7611140 and its corresponding proposed penalty are **VACATED**.


August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

June 19, 2000

IN THE MATTER OF: : DISCIPLINARY PROCEEDING
CONNIE PRATER, :
: Docket No. D 99-1

DECISION

Before: Judge Hodgdon

This disciplinary proceeding is before me on referral from the Commission pursuant to Rule 80, 29 C.F.R. § 2700.80. *DISCIPLINARY PROCEEDING*, Docket No. D 99-1 (June 9, 1999). The Commission directed the Chief Administrative Law Judge to assign the case to a judge to determine, after a hearing, “whether discipline is warranted in this case and, if so, what the appropriate sanction should be.” *Id.* For the reasons set forth below, I conclude that discipline is warranted in this case and order that the Respondent be disbarred from practicing before the Commission.

Background

This matter was referred to the Commission by the Secretary of Labor, in accordance with Rule 80(c)(1), 29 C.F.R. § 2700.80(c)(1).¹ The referral stated that since Ms. Prater “has been convicted of a criminal violation of the Mine Act, and the company for which she was President and sole shareholder has been convicted of violations of 18 U.S.C. § 1001 and 18 U.S.C. § 2 for submitting fraudulent respirable dust samples to MSHA, she has engaged in unethical and unprofessional conduct.” However, after the Commission referred the matter to a judge for consideration, the Secretary, in response to a Prehearing Order, stated that she was not a party to the proceedings and did not expect to participate in the hearing.

Left without anyone to prosecute the case, application was made to the Commission to appoint a prosecutor. This they did on August 18, 1999. *DISCIPLINARY PROCEEDING*, 21 FMSHRC 880 (August 1999).

¹ Rule 80(c)(1) provides that “a Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral.”

The matter was proceeding toward hearing when, on December 20, 1999, Respondent's counsel filed a letter which stated: "I am writing to inform the Court that Ms. Connie Prater will be unable to proceed in this matter due to unexpected health reasons. Therefore, please withdraw my appearance for Ms. Prater. Further, please be advised that Ms. Prater will not make any further appearances before the Court." As the Prosecutor noted in his response to this letter, it was not clear whether the Respondent was seeking a continuance in the case until her health permitted her to participate in the proceedings, whether she was no longer contesting the charges or whether she expected the matter to be dropped because she was not going to make any further appearances in the case.

The response of the Prosecutor, prompted a second letter from counsel for the Respondent, which was filed on January 24, 2000. It stated, among other things:

Quite frankly, given that Ms. Prater is currently fighting for her life against what I understand is a recurring cancer, I do not intend to even forward the [prosecutor's] letter to her unless so ordered by the Court. . . . I do not intend to disturb Ms. Prater during her illness to obtain "sworn affidavits" from her or her medical doctors.

As to [the prosecutor's] suggestion that Ms. Prater "consent to an order determining her culpability for ethical misconduct," I can represent to the Court without discussing it with Ms. Prater that she would never do so. Ms. Prater was completely prepared to litigate this matter up until the time that she was diagnosed with her current illness. I respectfully submit that I believe Ms. Prater would not consent to some order proposed by [the prosecutor] simply to make this matter go away.

. . . . At the same time, please do not misunderstand Ms. Prater's position — she was quite clear with me that she has not chosen to withdraw from the case to win the Court's sympathy. Rather, her decision is borne out of the reality that her attention must be devoted to holding her life together. This proceeding, and the extreme infrequency with which she even participated in Commission proceedings in the past, is simply too remote to the core activities in her life to permit her to focus on this matter as she originally intended.

Despite the peremptory tone of the letter, it still did not state exactly what the Respondent's position was with regard to the case. While the letter clearly stated that Ms. Prater would not request a continuance based on affidavits from her doctors and she would not consent

to an order disposing of the case, it did not state how the case was supposed to be resolved. The implication, however, is that if she “withdrew” the case would be dropped. Manifestly, that is not an option available to one facing disciplinary proceedings.

Accordingly, on February 29, 2000, an Order to Show Cause was issued to the Respondent ordering her to show cause why she should not be held in default in this matter.² The order pointed out that:

[I]f Ms. Prater desires that this proceeding be continued until such time as her illness permits her to participate, she must accompany her request with an affidavit from her treating physician setting forth the nature of her illness, how long she has been ill, the reason the illness renders her incapable of participating in the proceedings, and the probable length of time she will be unavailable before the proceeding can resume. Such an affidavit may not be conclusory, but must set forth the medical history and prognosis of Ms. Prater’s condition, substantiate the medical basis for concluding that her health conditions preclude her from participating in the proceedings at this time and identify any medical restrictions that should be placed on her participation in pretrial examination or at trial.

The order also informed her that if she

is not seeking a continuance, but does not intend to participate in the proceedings at all, she should be aware that failure to participate will result in her being found in default and the issuance of a disciplinary order, “which may include reprimand, suspension, or disbarment from practice before the Commission.” 30 C.F.R. § 2700.80(c)(3).

The Respondent was given 21 days to respond to the order, which provided that:

The Respondent shall comply with this order by filing a statement that she is ready to proceed, by requesting a continuance in the manner set out above, or by filing a statement acknowledging that she is aware of the possible penalties facing her and stating that she does not desire to participate in the proceedings. **Failure to comply with this order will result in the issuance of a disciplinary order adjudging a reprimand, suspension or disbarment from practice before the Commission.**

² The order also granted her counsel’s renewed request to withdraw from the case.

On March 21, 2000, a response to the order was received from the Respondent. On May 1, 2000, the prosecutor filed his Proposed Findings, Conclusions and Recommendations. On May 15, 2000, a reply to the prosecutor's filing was received from Ms. Prater.

Findings of Fact and Conclusions of Law

The Respondent's response to the Order to Show Cause consisted of a copy of a statement signed by "John Furcolow, M.D." and addressed "TO WHOM IT MAY CONCERN." It stated, "[t]his is to document that I follow Ms. Prater for a host of medical problems" It was not accompanied by any other document. The statement, which consisted of two paragraphs of two sentences each, was not made under oath and is conclusory in nature. Although it lists some conditions for which Ms. Prater is being treated, it does not set forth the nature of those conditions, how long the Respondent has been ill, the reasons that she is incapable of participating in a hearing or the probable length of time she will be unavailable. Further, the statement does not set forth a medical history and prognosis of Ms. Prater's condition or substantiate the medical basis for concluding that her medical condition prevents her from participating in a hearing. Indeed, nowhere in the statement does it claim that the Respondent is not able to participate in these proceedings.

Since the statement requests that its contents "be held under strictest confidence," her "medical problems" will not be discussed in detail. However, it does not appear that any of them, either individually or in combination, would preclude her from taking part in a disciplinary hearing. Significantly, there is not mention in the statement of a "recurrent cancer" or any other life threatening disease of that nature. It is unclear for what purpose the statement was submitted, since it was not accompanied by a request for a continuance or with any explanation.

Accordingly, I conclude that the Respondent is in default in this matter because she failed to comply with the Order to Show Cause. She did not state that she was ready to proceed, she did not request a continuance³ and she did not state that she did not want to participate in the proceedings. In fact, in her reply to the prosecutor's Proposed Findings, Conclusions and Recommendations she concludes by stating: "I am respectfully asking to withdraw from this case. My priorities have changed and I prefer my energy to be spent on what I consider to be a more important issue - my health. I do not foresee proceeding with this case now, or anytime in the near future." As previously noted, withdrawal is not an option available to her. Inasmuch as Ms. Prater has defaulted in this proceeding, I will proceed to adjudging an appropriate sanction.

Disciplinary Sanction

³ If the doctor's statement was intended to be a request for continuance, it did not comply with the instructions provided for making such a request, nor does it, on its face, indicate that a continuance is necessary or justified.

On July 24, 1994, a 13 count indictment was returned against, among others, Pra-Mac Enterprises and Connie McKinney (a.k.a. Connie Prater) in the United States District Court for the Eastern District of Kentucky. The first count of the indictment alleged a conspiracy

to thwart and defeat MSHA's program for testing and controlling levels of concentration of respirable coal dust present in the active workings of coal mines by submitting fraudulent respirable coal dust samples to MSHA in violation of Title 18, United States Code, Sections 1001 and 1341.⁴

The alleged conspirators were Pra-Mac Enterprises, a Kentucky corporation of which Connie Prater is the sole owner, director and officer, Connie Prater, and three of her relatives who worked part time for Pra-Mac.

The next 11 counts alleged violations of 18 U.S.C. §§ 2 and 1001 in that Pra-Mac Enterprises, Connie Prater and various others submitted false dust samples and dust data cards for at least eight mines to MSHA.⁵ The final count alleged a violation of 18 U.S.C. § 1341 by mailing the false dust samples and dust data cards to MSHA.

The presentation of the government's case lasted several days. At the close of the government's case the parties entered into a plea agreement. Pra-Mac pleaded guilty to Count 2 of the indictment, which alleged that the corporation

submitted and caused to be submitted to MSHA respirable coal dust samples which were represented as having been taken in

⁴ When the case occurred, 18 U.S.C. § 1001 stated:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined under this title or imprisoned not more than five years, or both.

The section was completely revised in 1996, Pub. L. 104-292, § 2, 110 Stat. 3459 (Oct. 11, 1996), but prohibits the same things. 18 U.S.C. § 1341 prohibits use of the U.S. Postal Service to carry out frauds and swindles.

⁵ 18 U.S.C. § 2 makes "aiders and abettors" liable as principals in the commission of a crime.

accordance with the requirements of the Mine Safety Act at the coal mines of the defendants' customers, including but not limited to those coal mines mentioned in this Indictment, but which in truth and in fact, as defendants then and there well knew, were not taken at such coal mines and were not taken in accordance with the requirements of the Mine Safety Act; the defendants thereby concealing and covering up from MSHA material facts, the material facts being the level of the concentration of respirable coal dust actually present in the active workings of the mines on those dates for which the fraudulent respirable dust samples were submitted to MSHA

Connie Prater pleaded guilty to an Information which alleged:

that CONNIE PRATER failed to take the required valid respirable coal dust samples for the following mines: the Todco, Incorporated No. 1 Mine; the Dukane Energy, Incorporated No. 1 Mine; the White Cloud Mining Company, Incorporated No. 1 Mine; the V & M Mining Company of Paintsville, Incorporated No. 6 Mine; and the Lynx Coal Company, Incorporated No. 3 Mine. The respirable coal dust samples submitted to the Mine Safety and Health Administration were fabricated outside the mines or were otherwise not taken in accordance with the requirements of the Mine Safety Act. In violation of Title 30, United States Code, Section 820(d), and Title 30, Code of Federal Regulations, Sections 70.201, 70.207 and 70.208.

All of these crimes, the ones alleged and the ones to which Ms. Prater pleaded guilty, involve "moral turpitude," that is, "[c]onduct that is contrary to justice, honesty, or morality." *Black's Law Dictionary* 1026 (7th ed. 1999). While the transcript of the government's case against the Respondent indicates that the government had a strong case, it is only necessary to consider her guilty pleas to arrive at an appropriate sanction in this case. As *Black's* points out, and the prosecutor has well demonstrated in his extensive brief, "[i]n the area of legal ethics, offenses involving moral turpitude — such as fraud or breach of trust — traditionally make a person unfit to practice law." *Id.* Although Ms. Prater is not a lawyer, the principle is the same, and on this basis alone disbarment from practice before the Commission would be an appropriate sanction.

However, not only do the offenses that Ms. Prater admitted committing involve moral turpitude, they also were an attempt to undermine one of the main purposes of the Mine Act. In section 201(b) of the Act, 30 U.S.C. § 841(b), Congress stated, in setting out interim mandatory health standards, that:

Among other things, it is the purpose of this title to provide, to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free from respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period.

Sections 70.201, 70.207 and 70.208, the sections Ms. Prater pleaded guilty to violating, are the Secretary's rules for conducting dust sampling to fulfil Congress' intention in the Act. By her actions, and the actions of her employees, the Respondent was not only dishonest, but she also placed miners lives in jeopardy. *See Consolidation Coal Co.*, 8 FMSHRC 890, 898-99 (June 1986) (overexposure to respirable dust raises a presumption that pneumoconiosis or chronic bronchitis will result).- Consequently, while crimes of moral turpitude would prohibit Ms. Prater from practicing law any place, if she were a lawyer, submitting fraudulent dust samples makes such a sanction that much more appropriate before the commission whose sole purpose is adjudicating matters arising under the Mine Act.

Accordingly, I conclude that Connie Prater has engaged in conduct that warrants discipline and that the appropriate sanction is disbarment from practice before the Commission.

Order

It is **ORDERED** that Connie Prater is **DISBARRED** from appearing before the Commission.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 20, 2000

REINTJES OF THE SOUTH, INC.	:	CONTEST PROCEEDINGS
- Contestant	:	
	:	Docket No. CENT 99-152-RM
v.	:	Citation No. 7867324; 01/21/99
	:	
SECRETARY OF LABOR,	:	Docket No. CENT 99-154-RM
MINE SAFETY AND HEALTH	:	Citation No. 7867336; 02/02/99
ADMINISTRATION (MSHA),	:	
- Petitioner	:	Ornet Corporation
	:	Mine ID No. 16-00354 FDP
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-195-M
Petitioner	:	A.C. No. 16-00354-05501 FDP
	:	
v.	:	Docket No. CENT 99-335-M
	:	A.C. No. 16-00354-05505 FDP
REINTJES OF THE SOUTH, INC.,	:	
Respondent	:	Ornet Corporation

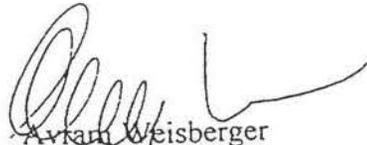
DECISION APPROVING SETTLEMENT

Before: Judge Weisberger

The Stay Order previously issued in this case on January 6, 2000, is hereby lifted.

These cases are before me upon a petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), and notices of contest filed by the operator. Petitioner has filed a motion to approve a settlement agreement and to dismiss these cases. Respondent has agreed to pay the full penalty of \$55,131.00. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$55,131.00 within 30 days of this order. It is further **ORDERED** that the parties shall abide by all the terms of the settlement.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 21, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-132
Petitioner	:	A. C. No. 36-00970-04131
v.	:	
	:	Maple Creek
MAPLE CREEK MINING INC.,	:	
Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Michael O. McKown, General Counsel, Maple Creek Mining, Inc., Bentleyville, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary) against the respondent, Maple Creek Mining, Inc. (Maple Creek). The petition sought to impose a \$6,000 civil penalty for each of three 104(d)(2) Orders, constituting a total civil penalty of \$18,000. 104(d)(2) Order No. 3657936 concerns Maple Creek's alleged failure to maintain a belt structure in safe operating condition in violation of the mandatory safety standard in 30 C.F.R. § 75.1725(a). 104(d)(2) Order No. 3657937 cited Maple Creek for its alleged failure to post a pertinent danger sign, as required by 30 C.F.R. § 75.363(a), for the purpose of alerting miners to the hazardous conditions cited in Order No. 3657936. Finally, 104(d)(2) Order No. 3658016 cited Maple Creek for numerous areas of combustible coal dust accumulations allegedly prohibited by the mandatory safety standard in 30 C.F.R. § 75.400.¹

¹ Section 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

This matter was heard on April 4, 2000, in Morgantown, West Virginia, at which time Maple Creek stipulated that it is a mine operator subject to the jurisdiction of the Act.² At the hearing, the parties proposed a settlement agreement wherein Maple Creek agreed to pay the \$6,000 civil penalty proposed by the Secretary for 104(d)(2) Order No. 3657936, and to pay a reduced civil penalty, from \$6,000 to \$5,000, in satisfaction of 104(d)(2) Order No. 3657937. The terms of the settlement agreement, including Maple Creek's agreement to pay a total civil penalty of \$11,000 for the subject two Orders, was approved on the record. (Tr. 4-6).

Consequently, the remaining Order for disposition is 104(d)(2) Order No. 3658016 issued on October 29, 1998, for impermissible combustible coal dust accumulations at the New Eagle section of the Maple Creek Mine. At the hearing counsel for Maple Creek stipulated that the cited accumulations constituted a violation of 30 C.F.R. § 75.400. However, Maple Creek challenges both the significant and substantial (S&S) designation of the violation, and the Secretary's assertion that the violation was attributable to its unwarrantable failure.

I. The Secretary's Case

The Maple Creek Mine is a large, underground coal mine located in western Pennsylvania. (Tr. 199). The New Eagle Mine is a single unit mine that is directly adjacent, although not physically connected, to the Maple Creek Mine. The New Eagle Mine produces a low sulfur blend coal for the Maple Creek Mine. (Tr. 196). The subject section of the New Eagle Mine is a ten entry section. (Tr. 203).

On September 15, 1998, Mine Safety and Health Administration (MSHA) Inspector George Rantovich inspected the Maple Creek Mine. Rantovich was accompanied by MSHA Supervisory Inspector Robert W. Newhouse of the Ruff Creek Field Office. (Tr. 146). Newhouse has 33 years of experience in the mining industry and he has been employed by MSHA for almost 24 years. (Tr. 145). During the course of his inspection, Rantovich observed loose coal, fine coal and float coal dust accumulations on the mine floor, belt structure and crosscuts in the No. 2 Mains. The accumulations included fine coal measuring 2 inches to 24 inches in depth that was in close proximity and contacting the moving tailrollers of the 1 East Mains conveyor belt. Based on his observations, Rantovich issued 104(d)(1) Order No. 3657357, not in issue in this proceeding, alleging a violation of 30 C.F.R. § 75.400. (Gov. Ex. 3; Joint Stip. No. 11; Tr. 147).

² On May 31, 2000, the Secretary filed an unopposed request to correct 12 errors in the hearing transcript. The Secretary's request is granted and the transcript is hereby amended to reflect the subject corrections.

Order No. 3657357 was issued to John Parker, Maple Creek's assistant mine foreman and belt foreman, at 11:05 a.m. on September 15, 1998. At that time, Rantovich and Newhouse spoke to Parker about the importance of preventing accumulations, particularly around the moving beltline. (Tr. 149, 165-166; Gov. Ex. 3).

Upon completing the September 15, 1998, underground inspection, Rantovich and Newhouse proceeded to the surface to meet with Maple Creek officials. Newhouse testified that he told Mine Foreman Tony Bertovich and Safety Director Richard Marcavitch that "the cleanup in the [belt] area . . . was just terrible. . . . It was just unacceptable. You can't have accumulations of coal like that in the mine. With all the ignition sources we have in there, it's just unheard of." (Tr. 150, 166).

Although Newhouse could not recall the exact date, he testified that, several days after the September 15, 1998, inspection, he also had a conversation with Jerry Taylor, Maple Creek's Corporate Safety Director, "about the lack of cleanup and lack of attention paid . . ." to the beltline areas. (Tr. 151, 166)

On a Saturday, approximately one to two weeks after Newhouse's September 15, 1998, aboveground meeting with Bertovich and Marcavitch, at the request of Maple Creek's President, Robert Murry, a meeting was held at the Maple Creek Mine between MSHA officials and Maple Creek officials. Participants at the meeting included Newhouse, the MSHA District Manager and Assistant District Manager, and Murry, as well as all of Maple Creek's department heads and supervisory employees. (Tr. 152, 166-167).

MSHA's Assessed Violation History Report reflects 50 citations were issued the previous year, from October 6, 1997, through September 15, 1998, at the Maple Creek Mine for impermissible coal dust accumulations. (Gov. Ex. 7). At the meeting, Newhouse talked about the large number of violations of 30 C.F.R. § 75.400 at the mine and the need for the operator to improve cleanup around the beltlines and in the sections. (Tr. 153-154). The discussion of the need for compliance with 30 C.F.R. § 75.400 was a major part of the meeting. (Tr. 154).

On October 29, 1998, MSHA Inspector Victor Patterson conducted an inspection of the New Eagle section of the Maple Creek Mine. Patterson has been employed in the mining industry for more than 30 years, and he has been a coal mine inspector for more than eight years. As a mine inspector, Patterson has a variety of training, including specialized training regarding the hazards associated with coal dust accumulations. (Tr. 34-38).

Patterson's inspection was in response to an employee complaint alleging accumulations of coal, and a lack of cleanup and rock dusting at the New Eagle section of the mine. The complaint was sent by facsimile to the Ruff Creek Field Office at 10:14 a.m. on October 28, 2000, the day before Patterson's inspection. The complaint was filed pursuant to Section 103(g) of the Act, 30 U.S.C. § 813(g). (Tr. 39, 161). Patterson was aware of Rantovich's 104(d) order that had been issued the previous month for violative coal dust accumulations. (Tr. 49).

Patterson arrived at the mine at approximately 8:00 a.m. on October 29, 1998. (Tr. 40). Patterson proceeded to the 043 portal of the New Eagle section, arriving on the section at 9:15 a.m. (Tr. 41). Patterson was accompanied by mine foreman Bertovich and union representative Larry Harper. (Tr. 41). Upon arriving at the section, Patterson went to the belt tailpiece in the No. 3 entry and observed accumulations of coal consisting of fine, loose dry coal and float coal dust, black in color, beside the belt tail on both sides. The accumulations were under the belt tail rollers and immediately outby the belt tailpiece. (Tr. 42). With Harper's assistance, Patterson measured the accumulations with a tape measure and determined them to be approximately 4 feet wide by 4 feet long and up to one foot in depth. (Tr. 45). The first tail roller outby on the bottom (return) of the belt was in contact with the accumulations. (Tr. 43). Patterson testified that he did not recall the presence of a feeder in line with the tailpiece. (Tr. 126). However, his contemporaneous notes reflect accumulations in contact with the belt tail roller as well as along both sides of the feeder.³ (Tr. 43; Gov. Ex. 5, pp. 3-4).

The belt at the tailpiece appeared to be out of alignment because it was rubbing against the belt structure. (Tr. 52). As a result, Patterson noted the belt structure was too hot when touched. (Tr. 42-43, 55, 127; Gov. Ex. 5, p. 3). Patterson testified he instructed Bertovich to shut the belt down immediately after discovering the heat produced from the belt structure. (Tr. 51). Given the combustible accumulations in proximity to the roller, Patterson considered the misaligned belt as an ignition source. (Tr. 42). Patterson did not issue a separate citation for the defective belt condition because he believed the 30 C.F.R. § 75.400 violation cited in Order No. 3658016 was sufficient to encompass all of the hazards presented at the belt. (Tr. 59-60).

In addition to the 4 feet by 4 feet accumulations in the immediate vicinity of the return tail roller, there was an accumulation of fine, loose coal and float coal dust 15 feet in length, up to four feet in height, and four feet wide on both sides of the belt feeder. (Tr. 43; Gov. Ex. 5, p. 4).⁴

³ Maple Creek safety director Richard Marcavitch's testimony reflects Patterson's failure to recall if a feeder was present is not a matter of evidentiary significance. (Tr. 218-221). Moreover, Maple Creek has stipulated to the cited accumulations in proximity to the tail roller in the No. 3 entry. (Joint Stip. 12(b)).

⁴ The accumulations along the belt line in the vicinity of the feeder are identified as Location No. 2 in the parties' Joint Stipulation No. 12(b), as well as on the mine maps admitted as Gov. Ex. 6 and Resp. Ex. 3.

The accumulations observed by Mr. Patterson at the belt line were dry, and they had not been rock dusted.⁵ Based on the extent of the accumulations in the vicinity of the tailpiece, Patterson concluded the accumulations existed during the prior midnight shift of October 29, 1998. (Tr. 50). At the time of Patterson's arrival on the section, no cleanup was taking place. (Tr. 129).

After observing the accumulations at the belt line, Patterson proceeded to ascertain whether there were other accumulations as the complaint received by MSHA suggested the presence of accumulations throughout the section. (Tr. 53). In addition to the beltline accumulations, Patterson proceeded to find eleven other areas of accumulations. Ten of these eleven other areas of accumulations were cited in 104(d) Order No. 3658016.⁶ The nature and extent of these twelve areas of accumulations are not in dispute and have been stipulated to by Maple Creek. (Joint Stip. Nos. 12(a) through 12(l)).

The next accumulation observed by Patterson (Identified as Location No. 1 on Gov. Ex. 6) was in the 0 entry at survey spad 2600 about 300 feet from the face. (Joint Stip. No. 12(a); Tr. 55; Gov. Ex. 1, Gov. Ex. 6). The accumulation consisted of fine, loose coal and float coal dust up to 24 inches deep, three feet wide, and 54 feet in length. The accumulated coal was mostly dry, black in color, and it had not been rock dusted. If there were an ignition in the mine, the material in this accumulation would help propagate a fire. (Tr. 57).

Patterson opined that there had been no mining in the area for a "few days". It appeared that the accumulation had simply been left behind when the area was mined. (Tr. 55, 58; Gov. 5, p. 5). In fact, Marcavitch, Maple Creek's safety director, testified that mining in the vicinity of spad 2600 had been completed a few weeks earlier. (Tr. 215).

The next accumulation Patterson observed was in the Number 1 entry at the intersection with the Number 77 crosscut, 100 feet outby the face (identified as Location No. 3A on Gov. Ex. 6). The accumulation measured 18 feet by 18 feet and up to 18 inches deep. (Tr. 64-66). The accumulation did not result from recent mining as the continuous mining machine was located at the other side of the section in the Number 8 entry, and the face area had already been cleaned. (Tr. 64-65). The accumulation consisted of loose, fine coal, ground up coal, and coal dust. It was dry, black in color, and had not been rock dusted. (Tr. 67). The subject area was one where mining equipment would travel during normal mining operations, including the mining machine, shuttle cars, bolting machines, and scoops. (Tr. 66). Ignition sources were present such as electrical cables and the mining equipment itself. (Tr. 67).

⁵ The operator had not rock dusted any of the 12 accumulations cited by the Secretary in this proceeding. (Tr. 81, 101).

⁶ Order No. 3658016 was amended at the hearing to include an area of accumulations in the No. 77 crosscut between the No. 2 and 3 entries. See fn. 6, *infra*.

Patterson next noted an accumulation in the last open crosscut from the No. 1 to the No. 2 entry, 18 inches by 18 inches along both ribs and 36 feet in length (identified as Location No. 3B on Gov. Ex. 6). Mr. Patterson estimated this area had been mined two to three shifts earlier. (Tr. 68). The accumulation consisted of fine, loose coal and float coal dust. It was dry, black in color, and it was not rock dusted. The subject area was one where the continuous mining machine, shuttle cars, bolting machines, and scoops would travel during normal mining operations. Ignition sources were present such as electrical cables and the mining equipment itself. (Tr. 72).

Patterson also found an accumulation in crosscut 77 (the last open crosscut) between the Number 2 and 3 entries, 68 feet outby the face (identified as Location No. 3C in Gov. Ex. 6). (Tr. 75).⁷ The accumulation measured 36 feet in length, 18 inches deep, and approximately 18 feet wide, along both ribs and occupying nearly the entire crosscut. (Tr. 73). In addition, there was an additional accumulation, located along the right rib from crosscut 77 to the face, of fine, loose dry coal and float coal dust. The material was dry, black in color, up to 18 inches deep, 18 inches wide, and 68 feet in length. (Gov Ex. 5, p. 7, Gov. Ex. 6; Tr. 76-77.) Both of the accumulations described in this paragraph are included within Location No. 3C. The dry nature of the material in accumulation 3C is representative of all 12 of the accumulations cited by Patterson with the exception of Location Nos. 4 and 6 that were wet. (Tr. 77-78).

Patterson next encountered a lengthy accumulation in the Number 3 entry, which had not been cleaned or scooped for a distance of about 100 feet (identified as Location No. 4 on Gov. Ex. 6). The accumulation extended up to 20 feet outby crosscut 77, the last open crosscut, and consisted of loose, fine coal, up to 18 inches deep from rib to rib. (Gov Ex. 1, Gov. Ex. 5, p. 8; Tr. 78). Patterson approximated the length of this accumulation by counting roof bolts which were put in on four foot centers. (Tr. 79; Gov Ex. 5, p.8). The subject area was one where mining equipment would travel during normal mining operations. Ignition sources were present such as electrical cables and the mining equipment itself. (Tr. 72, 79).

Patterson also noted accumulations in the Number 4 entry up to 160 feet in length, 18 feet wide, and up to 12 inches in depth (identified as Location No. 5 on Gov. Ex. 6). This accumulation was similar to the others cited by Patterson, except for the unusually long length. (Tr. 83-84, 86). In this entry Maple Creek had scooped out the last 40 feet down the middle of the entry (leaving material along the ribs), but had left a 160 feet long area behind the partially cleaned area that had not been cleaned at all. (Tr. 86-89; Gov. Ex. 5, p. 9).

⁷ Location 3C was described in Patterson's notes and appears on the mine map in Gov. Ex. 6. However, it was not included in the original order. The order was amended without objection at the beginning of the hearing to include this accumulation. (Tr. 20).

Patterson next observed an accumulation in crosscut 77 between the No. 3 and No. 4 entries (identified as Location No. 6 on Gov. Ex. 6).⁸ The accumulation consisted of fine, loose coal and float coal dust, black in color, up to 18 feet wide and 12 inches deep. (Gov. Ex 1, Gov. Ex. 5, p. 9). Compared to the other eleven accumulations cited by Patterson, this accumulation was unusually deep, up to three feet in depth along the ribs. According to Patterson, the area “was never cleaned up whatsoever. It was just left, otherwise there wouldn’t have been that much accumulation there.” (Tr. 91-92).

There was also an accumulation located in the No. 5 entry (identified as Location No. 7 on Gov. Ex. 6). The accumulation consisted of fine loose coal and float coal dust, black in color, along both ribs. It was 18 inches deep, 18 inches wide, and up to 70 feet in length. (Gov. Ex. 1, Gov. Ex. 5 at p. 10, Gov. Ex. 6). There was a roof bolting machine and trailing cable in this area that provided a potential ignition source. (Tr. 92-93). Although Patterson observed that cleaning in this entry at survey spad 2950 had begun, the cleaning efforts were occurring approximately two hours after Patterson’s arrival at the mine, and about forty-five minutes after his arrival at the section. (Tr. 93-94).

Patterson proceeded to observe an accumulation in crosscut 77 between entries 5 and 6 (identified as Location No. 8 on Gov. Ex 6). The accumulation consisted of fine, loose coal and float coal dust, black in color. The material was along both ribs and was up to 18 inches deep, 18 inches wide, and 36 feet in length. (Gov. Ex. 1, Gov. Ex. 5, p. 10, Gov. Ex. 6).

The next accumulation was in the Number 6 entry, inby the 77 crosscut all the way to the face, a distance of about 100 feet (identified as Location No. 9 on Gov. Ex. 6). The accumulation was 12 inches deep along the ribs, and consisted of loose, fine coal, and float coal dust, black in color. (Tr. 96-97; Gov. Ex 1, Gov. Ex. 5, p. 11, Gov. Ex. 6). There was an accumulation of coal and coal dust up to four feet in depth along the right rib, which was the deepest accumulation Mr. Patterson observed. (Tr. 99). An accumulation of this depth presents a health hazard from dust inhalation as well as a fire and an explosion hazard. (Tr. 100). Patterson also noted an accumulation along the left rib of the 7 entry (identified as Location No. 10 on Gov. Ex. 6). The accumulation consisted of fine, loose coal and float coal dust up to 18 inches deep and 40 feet in length. (Tr. 97; Gov. Ex. 1, Gov. Ex. 5, p. 12, Gov. Ex. 6).

The next accumulation observed by Patterson was in the No. 77 crosscut between the number 7 and 8 entries (identified as Location No. 11 on Gov. Ex. 6). The accumulation consisted of fine, loose coal and float coal dust, 12 inches deep along both ribs and up to 18 inches wide. (Tr. 98; Gov. Ex. 1, Gov. Ex. 5, p. 12, Gov. Ex. 6).

As with many of the other accumulations, accumulations identified as Nos. 9, 10, and 11 occurred in areas where mining equipment would be used during normal mining operations.

⁸ Although Maple Creek does not challenge the nature and extent of the accumulation, it contends the accumulation was in crosscut 77 between the No. 4 and No. 5 entries. (Tr. 89).

(Tr. 101). These accumulations had the same characteristics as nearly all the other accumulations -- black in color; fine, loose coal, and float coal dust.

Although Maple Creek apparently did not have a written cleanup plan, as a general proposition, under a normal mining cycle, mine operators clean to within the last 40 feet of the last cut at the face, rock dust, and maintain the area. (Tr. 109). Although Patterson previously had observed Maple Creek clean each entry as the face was advanced, based on his observations on the morning of October 29, 1998, Patterson concluded Maple Creek was driving all ten entries before coming back to perform an adequate cleanup. Patterson opined such a practice is hazardous and unacceptable. (Tr. 137-138, 141).

Patterson determined there were a total of 13 miners working on the section at the time of the inspection who were exposed to the violative coal dust accumulations cited in 104(d) Order No. 3658016. (Gov. Ex. 1; Tr. 101).

Patterson testified that he made a gravity finding of "significant and substantial" based on the following factors: the amount and extent of the accumulations, the locations, the heat source presented at the conveyor belt, and the presence of mining equipment which would move through the accumulation areas. In particular, Patterson considered the bit of the roofbolter drilling into the roof as a potential source of sparking. Furthermore, Patterson concluded the large amount of coal dust itself posed a health hazard. (Tr. 101-103, 130).

With respect to the unwarrantable failure issue, Patterson testified that he considered the violation attributable to an unwarrantable failure for many reasons. As a threshold matter, Patterson concluded the cited accumulations had existed "for a considerable period of time" based on their locations extending a considerable distance from the face.⁹ (Tr. 107). Patterson believed the No. 2 through No. 7 entries had been cut during the previous three shifts during which time travel over the accumulations occurred as the faces in each entry advanced. (Tr. 66, 69, 107).

In addition, face boss Greg Miller's initials were marked on the date board in the 0 entry between the 75 and 76 crosscuts at 9:00 a.m., on October 29, 1998. There was also a date board at the tailpiece feeder of the conveyor belt. Despite the evidence of onshift examiners in the vicinity of prohibited examinations, no efforts were made to clean the accumulations until after Patterson arrived on the section. (Tr. 106, 222-223). Based on Maple Creek's admission that some of the accumulations existed since at least the midnight shift, the accumulations should have been noted and ordered to be cleaned by the preshift examiner. (Tr. 104-106, 130).

Patterson considered Maple Creek's violation history, Rantovich's order citing a

⁹ The Commission has determined the duration of accumulations may be established through circumstantial evidence, and that an inspector need not possess actual knowledge of the length of time the accumulations existed. *Windsor Coal Company*, 21 FMSHRC 997, 1002-1003 (September 1999).

30 C. F.R. § 75.400 only six weeks before citing similar accumulations in the vicinity of the tailpiece, and repeated meetings with company officials that placed Maple Creek on notice that greater cleanup efforts were required, as additional evidence that Maple Creek's conduct was unwarrantable. (Tr. 69, 106-107).

As a final matter, Patterson testified, notwithstanding the eleven additional areas of accumulations, he would have issued an unwarrantable failure order based solely on the first accumulation observed at the tail of the conveyor belt due to the extent of the accumulation and its proximity to the belt roller and the hot belt structure. (Tr.108).

Clete R. Stephan was called by the Secretary as an expert witness. (Tr. 173-174). Stephan has been employed as a mine engineer by MSHA for 23 years. (Tr. 173; Gov. Ex. 8). Stephan is one of only two certified mine fire and explosion investigators in the United States. (Tr. 173). He has conducted 52 investigations of mine fires and explosions. (Tr. 173; Gov. Ex. 8). He also has written 29 reports on fires and explosions, and he has conducted extensive training classes on fire and explosion hazards before government and industry groups. (Gov. Ex. 8).

Stephan testified there are three prerequisites for a fire -- fuel, heat, and oxygen. These three elements are known as the "fire triangle." (Tr. 175-176). Stephan testified that the oxygen required for a fire or explosion is always present in a mine. (Tr. 177-178). Fuel is also an ever present hazard in the form of coal accumulations. (Tr. 178, 180). Ignition sources in an underground mine include heat from hot belt rollers and arcing from electrical cables on mining equipment. (Tr. 178, 185-186).

Stephan opined there was an enhanced danger of fire in the cited areas because of the accumulations which increased the exposure of fuel to potential ignition sources. (Tr. 179). Where there is an accumulation of coal, air can flow through the loose material more easily, thereby bringing additional oxygen to a fire and feeding a flame. (Tr. 186). In a fire, any size particle of coal can become involved. (Tr. 185). A hot roller on a beltline, and movement of equipment through a mining section, present ignition sources that accentuate the hazard. (Tr. 185-186).

In addition to the three elements for a fire, Stephan testified two additional elements are necessary for an explosion -- suspension of the fuel and confinement. These five elements - - fuel, heat, oxygen, suspension and confinement - - are known as the "explosion pentagon". (Tr. 175-176). Stephan explained that, by its very nature, the underground mine environment provided the containment necessary for an underground explosion. (Tr. 187).

With respect to the remaining element of suspension, Stephan stated that the "relatively extensive" cited accumulations "would make explosion propagation so much easier because the fuel is readily available and can easily be suspended and ignited." (Tr. 189). In this regard, Stephan calculated that it would take approximately ten cubic feet of coal dust to engulf the entire New Eagle section in by the last open crosscut in the flame of an explosion. Stephan

calculated that, by considering only the top half-inch of the accumulations cited by Patterson as material capable of suspension, there was a potential for 350 cubic feet of coal dust that could be put in suspension. (Tr. 181-184).

Finally, Stephan testified, in the event of a fire or explosion at the mine, fatal injuries would result to people in the explosion zone. He stated that anywhere the explosion flame would travel, fatalities would likely result because the explosion consumes all available oxygen. Even if people did not succumb to the heat of the flame or the force of the explosion, they would die from lack of oxygen and inhalation of the toxic products of combustion. (Tr. 189). In Stephan's expert opinion, the three elements necessary for a fire, and the five elements necessary for an explosion, were present under the conditions described in Patterson's 104(d) order. (Tr. 175-178, 190).

II. Maple Creek's Case

As previously noted, Maple Creek has stipulated that the subject twelve areas of accumulations constitute a violation of the mandatory safety standard in 30 C.F.R. § 75.400. However, Maple Creek contests the "significant and substantial" designation, as well as the Secretary's assertion that the violation is attributable to its unwarrantable failure. (Tr. 194).

Maple Creek called safety director Richard Marcavitch and section foreman (face boss) Gregg Miller to testify on its behalf. Marcavitch did not arrive at the New Eagle section until approximately 10:00 a.m. on October 29, 1998, about one hour after Patterson's inspection began. (Tr. 201). Marcavitch arrived on the section after Patterson had instructed mine foreman Tony Bertovich to de-energize the tailpiece because it was in close proximity to coal dust accumulations around the tail roller. (Tr. 202).

Marcavitch also did not have direct knowledge about when cleanup of the cited accumulations would have occurred if Patterson had not inspected the section. (Tr. 235). The priority given to removing accumulations was determined by Bertovich or Miller. Bertovich did not testify, and Miller did not testify concerning any cleanup activities other than at the conveyor belt. (Tr. 237, 279).

Upon arriving on the section Marcavitch did travel to the tailpiece because cleanup had already begun in that area. (Tr. 202, 214). Rather, Marcavitch proceeded to observe accumulations already seen by Patterson in the zero entry, in the No. 1 entry, in the two to one cut-through, and in the No. 2 entry. After observing the No. 2 entry, Marcavitch joined Patterson and Bertovich who were walking through the section together. (Tr. 202).

The New Eagle section is a ten entry section. Equipment on the section consists of a Joy scrubber remote continuous miner, two Fletcher twin boom roofbolters, three shuttle cars, and three scoop tractors. One scoop is dedicated to hauling supplies from the surface to the mine. The remaining two scoops are kept on the section for cleanup, with one in use and one on charge. (Tr. 204).

The mine cutting sequence is from the zero entry to the No. 9 entry. The length of cuts in each entry varies from zero to as long as 40 feet. (Tr. 205). Marcavitch testified that the New Eagle section has a 25 feet long Stamler feeder attached to the tailpiece. (Tr. 208). Marcavitch approximated the last inby set of rollers was four to five feet from the end of the tailpiece structure. (Tr. 212). Marcavitch stated that coal accumulations typically occur at the end of the tailpiece where spillage occurs when coal is transferred from the feeder to the somewhat lower conveyor belt. (Tr.210, 212-213). Marcavitch stated “. . . based on my experience . . . when you have a problem with a feeder being on [the tailpiece] your accumulations will show up first directly underneath the tailpiece in contact with the tailroller.” (Tr. 220). Marcavitch conceded a malfunctioning roller could be a source of heat. (Tr. 220). However, he stated that his “. . . understanding was, what was warm was what Mr. Patterson was saying was the structure [of the tailpiece]” rather than the rollers. (Tr. 213).

Marcavitch , referring to the numerical designations on the mine map admitted into evidence as Gov. Ex. 6, testified about when each area where cited accumulations were located was mined. Marcavitch stated Location No. 1 was mined “a couple of weeks before;” Location Nos. 3, 3c, 4, 7, 9, and 10 on the midnight shift; Location No. 5 half-mined on the midnight shift and half-mined on the previous afternoon shift. (215-217).

Marcavitch did not dispute that the accumulations cited by Patterson existed at the time Miller performed his onshift examination at 9:00 a.m. on October 29, 1998. (Tr. 222-223). Miller also performed the preshift examination earlier that morning at 5:00 a.m. (Tr. 215). It is apparent that at least some of the accumulations noted by Patterson existed at the time of Miller’s preshift examination. There is no evidence of any preshift or onshift examination notations alerting personnel that cleanup efforts were required on the section.

Maple Creek’s description of its mining-cleanup cycle was equivocal. Counsel for Maple Creek stated its cleanup cycle began after all the entries inby the last open crosscut had been mined and roof bolted. (Tr. 228). Marcavitch indicated that when areas of the section were cleaned was “kind of a floating thing.” (Tr. 235). He testified, “[we clean up] as soon as [we] could get to it. It may be two or three entries . . . Depending on what was going on with the section.” (Tr. 235).

Marcavitch stated the section would have been cleaned sooner if Maple Creek’s scoops had not broken down. One scoop reportedly developed electrical problems on the afternoon shift of October 28, 1998. The second scoop reportedly was taken out of service during the midnight shift due to a broken bucket. The remaining scoop normally used to haul materials into the mine was reportedly taken out of service during the day shift of October 29, 1998, because of a battery problem. (Tr. 237-243). However, the thrust of Marcavitch’s testimony was that at all times during the several shifts preceding Patterson’s inspection at least one scoop (the haulage scoop) was available for cleanup.

In fact, Marcavitch conceded the reported scoop problems were not the main reason for the lack of cleanup. Marcavitch testified:

The Court: Okay. So what I'm trying to distinguish is whether or not the [cited accumulations] weren't cleaned up . . . because scoops weren't available, assuming that's a defense, or whether or not they weren't cleaned up because Maple Creek hadn't gotten to it yet? It seems to me you're saying essentially they hadn't been cleaned up because Maple Creek just hadn't gotten to it yet; is that correct?.

Marcavitch: I would say that would probably be a correct statement.

(Tr. 244).

Marcavitch went on to explain that Maple Creek does not place any priority on cleaning an entry once it has been mined and roof bolted and the equipment has been removed from the face in that entry until equipment returns to take an additional cut. (Tr. 257-260).

Greg Miller testified that the spillage at the tailpiece occurred after the feeder had been knocked off the tailpiece by a shuttle car during the midnight shift. (Tr. 265). Miller testified that, prior to Patterson's arrival on the section, the belt had been turned on and off to remove the spillage. Miller testified he could not recall Patterson instructing Bertovich to shut the belt down. (Tr. 279). Miller also testified he did not see Patterson touch the belt structure to determine if it was hot. (Tr. 276). As previously noted, Maple Creek did not call upon Bertovich to testify.

III. Further Findings and Conclusions

Maple Creek has stipulated to the fact of occurrence of the violation of 30 C.F.R. § 75.400 cited in 104(d)(1) Order No. 3657357. The remaining issues of whether the violation was properly characterized as S&S, and whether it was unwarrantable will be discussed in turn.

A. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory safety standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986).

With regard to the first element of *Mathies*, Maple Creek has stipulated that the numerous and extensive accumulations that are cited in 104(d)(1) Order No. 3657357 constitute impermissible combustible accumulations prohibited by the mandatory safety standard in 30 C.F.R. § 75.400. Because coal dust accumulations are combustible, if combustion were to occur, *i.e.*, fire or explosion, there is a reasonable likelihood that miners would sustain serious injury. Moreover, Stephan's testimony concerning the propagation effects of widespread accumulations clearly satisfies the second and fourth elements of the *Mathies* test regarding a discrete safety hazard and the potential for serious injury.

The remaining criterion, a reasonable likelihood that the combustion hazard caused by the violation will result in serious injury, requires examining whether there was a "confluence of factors" present based on the particular facts surrounding the violation that would make a fire, ignition or explosion reasonably likely. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Some of these factors include the extent of the accumulations, possible ignition sources, the presence of methane, and the type of equipment in the area. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (January 1997) *citing Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990); *Texasgulf Inc.*, 10 FMSHRC at 500-03.

Stephan's testimony, as well as common sense, supports the conclusion that there is a positive correlation between the likelihood of injury resulting from the presence of combustible accumulations in an underground mine and the extensiveness of the accumulations. In this regard, Stephan's professional opinion that the "relatively extensive" cited accumulations "would make explosion propagation so much easier because the fuel is readily available and can easily be suspended and ignited" is compelling. (Tr. 189). Likewise, Stephan's calculations that the top half-inch of the accumulations cited by Patterson provided a potential for 350 cubic feet of coal dust that could be put in suspension, while only ten cubic feet of coal dust was necessary to engulf the entire New Eagle section in by the last open crosscut in the flame of an explosion, illustrates the magnitude of the danger posed by the cited extensive accumulations. (Tr. 181-184). Although there was no evidence of significant levels of methane in the New Eagle section, the extensive accumulations provided the fuel for fire, or, for propagation of an explosion that had originated in another area of the mine.

Ignition sources in the form of malfunctioning electrical mobile equipment, defective electrical cables, misaligned belts and defective rollers, and heat generated by the continuous miner bits during mining, are ever present hazards in an underground mine. While these sources of ignition are frequently unforeseen, safety dictates that reasonable efforts must be made to minimize sources of fuel. Disregarding, for the moment, the accumulations around the hot belt structure, Maple Creek's failure to minimize fuel sources by leaving accumulations in six entries and several crosscuts exponentially added to the likelihood of injury in this case.

With regard to the tailpiece area in the No. 3 entry, I credit Patterson's testimony, supported by his contemporaneous notes, that the belt structure at the tailpiece was hot, and that this structure and its rollers were in close proximity to combustible accumulations. Moreover, as previously noted, Maple Creek has stipulated to the cited accumulations in the vicinity of the tailpiece. Patterson's inability at trial to recall whether there was a feeder in front of the tailpiece has no material impact on his credibility, or, on the considerable weight that should be accorded to his testimony.

In sum, when viewed in the context of continuing mining operations, especially in view of Maple Creek's demonstrated lack of commitment to promptly remove accumulations, the evidence amply reflects that there was a reasonable likelihood that the fire and propagation hazard contributed to by the extensive accumulations in this case will result in an event (a fire and/or explosion) causing serious or fatal injury. *AMAX Coal Company*, 19 FMSHRC 846, 449 (May 1997) (a belt running in coal is a "dangerous condition that poses the threat of fire). Consequently, the S&S nature of the subject section 75.400 violation shall be affirmed.

B. Unwarrantable Failure

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

The Commission has identified various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Windsor Coal Company*, 21 FMSHRC at 1000; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596 1603 (July 1984). The Commission also considers whether "the violative condition is obvious, or poses a high degree of danger." *Windsor Coal Company*, 21 FMSHRC at 1000; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992).

Repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody*, 14 FMSHRC at 1263-64. Finally, warnings and directives given at prior meetings between MSHA and mine management also place the operator on notice that greater efforts at compliance are necessary. *Amax Coal Co.*, 19 FMSHRC at 851; *Jim Walter Resources*, 19 FMSHRC 480, 485-486 March 1997); *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1232 (June 1994); *Enlow Fork Mining*, 19 FMSHRC 9, 16, (January 1997); *Doss Fork Coal Co*, 18 FMSHRC 122, 125 (February 1996).

At the outset, I note that Maple Creek had a frequent history of similar section 75.400 violations. Moreover, Maple Creek's meetings with MSHA personnel, attended by assistant mine foreman and belt foreman John Parker, mine foreman Tony Bertovich, safety director Richard Marcavitch, corporate safety director Jerry Taylor, and Robert Murry, Maple Creek's President, should have been a stark reminder that greater efforts were required to fulfill Maple Creek's obligation under section 75.400 to not permit combustible accumulations to accumulate in working sections.

Despite being on notice, Maple Creek's has proffered unconvincing and contradictory explanations for the conditions observed by Patterson on October 29, 1998. Although Maple Creek has attempted to attribute the conditions observed by Patterson in its New Eagle section to an unavailability of scoops, Marcavitch's testimony reflects that at all times prior to Patterson's inspection at least one scoop (the haulage scoop), and sometimes two scoops, were available for cleaning. Moreover, the Commission has held that the unavailability of a scoop does not relieve an operator of its obligation to shovel impermissible combustible accumulations. *Mullins & Sons*, 16 FMSHRC at 195. In this regard, Newhouse testified that he previously had informed Bertovich that Maple Creek was responsible for shoveling accumulations in the event of inoperable scoops. (Tr. 165).

In addition, Maple Creek initially asserted that the accumulations had not been cleaned because the mining cycle had not been completed. This explanation is equally unavailing. Generally speaking, a mining cycle is completed after an entry has been driven approximately 40 feet by the continuous miner and roof bolted, at which time the equipment is withdrawn from the entry so that the entry can be cleaned by scoop and rock dusted. (Tr. 109, 137, 140-141, 216, 259). *See also Jim Walter Resources*, 11 FMSHRC 21, 26 (January 1989). However, when it became clear that the accumulations, ranging up to 160 feet in length, located in the full length of the No. 2 through No. 7 entries inby the last open crosscut, had existed for more than one shift, Maple Creek's definition of a mining cycle changed. Maple Creek's latest version of its cleanup cycle is that it does not clean an entry that has been mined and roof-bolted until equipment returns to that entry to take an additional cut. (Tr. 257-260). However, this assertion does not explain accumulations varying from 70 to 160 feet in the No. 3, No. 4, No. 5 and No. 6 entries. (Tr. 140-141; Gov. Exs. 1, 6). Rather, in the final analysis, Maple Creek's cleanup policy appears to be as safety director Marcavitch described it at trial - - that entries are left uncleaned until Maple Creek "can get to it," and that there is no time period "set in stone" for cleaning

accumulations. (Tr. 235, 257-258). Such a lack of discipline is indicative of an indifference that alone warrants a finding of an unwarrantable failure.

In short, Maple Creek's history of fifty section 75.400 violations in the year preceding the subject Order; Maple Creek management's awareness, through its meetings with MSHA officials, that greater compliance efforts were necessary; the extensive and obviousness nature of the accumulations; despite being on notice, the fact that the accumulations were not removed during the normal mining cycle but were allowed to exist for several shifts; and the danger posed by combustible accumulations in proximity to a hot belt structure; when viewed together, warrant the conclusion that Maple Creek's conduct evidenced an unwarrantable failure.

IV. Civil Penalty

Section 110(i) of the Mine Act provides the statutory criteria for determining the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

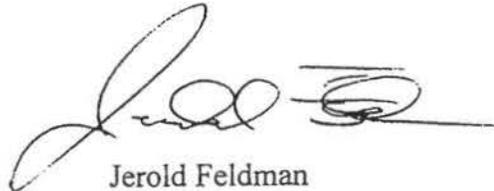
The parties have stipulated that Maple Creek is a large operator with annual production in excess of two million tons of coal at the time of the proposed assessment. (Joint Stip. No. 8; Tr. 12). The parties have also agreed that payment of the \$6,000 civil penalty proposed by the Secretary will not affect Maple Creek's ability to continue in business. (Joint Stip. No. 7). Maple Creek has provided no evidence of significant mitigating circumstances that would warrant a reduction in penalty. As discussed above, the violation is serious in gravity given the reasonable likelihood of serious injury. Moreover, Maple Creek's conduct was unwarrantable when viewed in the context of its history of similar violations, and prior notice that greater efforts to achieve compliance with section 75.400 were required. Maple Creek's efforts to achieve abatement by assigning ten employees to remove the cited accumulations for five hours, only after mining operations were halted as a consequence of the 104(d) order, does not provide a basis for a reduction in penalty. Accordingly, consistent with the statutory penalty criteria, the \$6,000 civil penalty initially proposed by the Secretary shall be assessed for 104(d)(2) Order No. 3658016.

ORDER

In view of the above, **IT IS ORDERED** that 104(d)(2) Order No. 3658016 **IS AFFIRMED**, and Maple Creek Mining, Inc., shall pay a \$6,000 civil penalty in satisfaction of said order.

IT IS FURTHER ORDERED, consistent with the parties' settlement agreement, that 104(d)(2) Order Nos. 3657936 and 3657937 **ARE AFFIRMED**, and Maple Creek Mining, Inc., shall pay a \$6,000 civil penalty in satisfaction of 104(d)(2) Order No. 3657936, and a \$5,000 civil penalty in satisfaction of 104(d)(2) Order No. 3657937.

ACCORDINGLY, IT IS FURTHER ORDERED that Maple Creek Mining, Inc., shall pay a total civil penalty of \$17,000 in satisfaction of the three 104(d)(2) orders that are the subjects of this proceeding. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the entire \$17,000 civil penalty, **IT IS ORDERED** that this matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 22, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEVA 99-156
	:	A. C. No. 46-08707-03507
v.	:	
	:	Hiope No. 8
HIOPE MINING, INC., Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner,
Daniel R. Bieger, Esq., Copeland, Molinary & Bieger, P.C., Abingdon, Virginia, for the Respondent.

Before Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Hiope Mining, Inc. pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815. The petition alleges a significant and substantial violation of the Secretary's mandatory health and safety standards attributable to Respondent's unwarrantable failure and proposes a civil penalty of \$1,500.00. A hearing was held in Abingdon, Virginia on March 13-14, 2000. Petitioner submitted a brief on April 27, 2000. Following receipt of the hearing transcript, Respondent submitted a reply brief on June 15, 2000. For the reasons set forth below, I affirm the citation and assess a penalty of \$1,500.00.

Findings of Fact

On May 17-19, 1999, John B. Sylvester, Jr., an inspector with the Secretary of Labor's Mine Safety and Health Administration (MSHA) conducted an inspection of the Hiope mine, an underground coal mine located in McDowell County, West Virginia. Over the course of the inspection he issued a total of 15 citations, four of which, he concluded were Significant and Substantial (S&S). Respondent did not contest 14 of the citations. The only citation at issue here was written on May 19, 1999, at 8:55 p.m., when Inspector Sylvester observed

accumulations of coal and float coal dust that he concluded violated 30 C.F.R. § 75.400.¹ He issued Citation numbered 7183561, which identified the condition or practice as:

On the 001-0 section coal and float coal dust is being allowed to accumulate on the mine floor and on the ribs. In the No. 2 face coal is being allowed to accumulate for a distance of 55 feet and the last line open cross-cuts from No. 4 heading to No. 9 heading hasn't been cleaned up at all for a distance of 250 feet. The accumulations range from 1 to 14 inches in depth. The section was producing coal at the time the citation was issued. No one was in the process of cleaning the section at this time. Citation No 7183548 was issued 5-17-99 for these same conditions.

The citation was issued pursuant to § 104 (d)(1) of the Act² because Inspector Sylvester determined that the violation was significant and substantial and the result of the operator's unwarrantable failure. As noted in the body of the citation, the inspector's assessment of the operator's negligence as "high" was based, in part, on the issuance of at least one prior citation for similar conditions only two days earlier in the same section of the mine. Upon issuance of the citation, the foreman, the continuous miner operator and the two shuttle car drivers directed their efforts to cleaning and the citation was terminated at 10:50 p.m., slightly less than two hours after it had been issued.

¹ 30 C.F.R. § 75.400, entitled Accumulation of Combustible Materials, provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

² Section 104(d)(1), 30 U.S.C. § 814(d)(1), provides in pertinent part:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. . . .

Subsurface coal extraction at the Hiope mine was conducted on three shifts. The first and second shifts actively mined coal. The third, midnight or "hoot owl," shift was devoted to maintenance activities, described by Hiope's President, Ronald Combs, as including cleaning, rock dusting and moving the conveyor belt. The crews for the first and second shifts consisted of six men, a foreman, a continuous miner operator, two shuttle car drivers and two roof bolters. According to the testimony of the mine (and #1 shift) foreman, Gerald Tatum the #1 and #2 shifts were operating "shorthanded" with a "skeleton crew" of six men. The #2 shift foreman at the time, Raymond Poszich,³ described a "normal" crew as consisting of at least two more men, an electrician and a scoop operator who would normally perform most of the cleaning and rock dusting duties.

Both Mr. Tatum and Mr. Poszich testified that the other five members of their crews were fully occupied operating equipment that was actively engaged in the production of coal and were available for cleaning only if their piece of equipment was inoperable. As a consequence, cleaning duties were generally the responsibility of the foreman, who had many other duties, including providing supplies to the roof bolter, making inspections of the mine every two hours and hanging centerlines and line curtains. While Mr. Tatum testified that he performed some of these duties while operating a scoop and doing cleaning and that he and his crew tried to clean as much as they could, Mr. Poszich testified that they simply didn't clean unless equipment broke down. I find that Mr. Poszich's testimony, based upon his lack of a current employment relationship with Respondent and the findings of Inspector Sylvester, more accurately described the cleaning effort during the production shifts. In actual practice, if mining operations were uninterrupted by equipment breakdowns, very little cleaning was performed on the first and second shifts.

At the time the citation was issued, the mine's posted cleanup program called for cleaning and rock dusting to be performed "after each work cycle." A work "cycle" consisted of the continuous miner making a cut 15-20 feet deep - the fresh cut was then to be roof bolted and cleaned, with loose coal being removed or "pushed up" to the face where it would be loaded out when the continuous miner returned to make another cut. After the citation was issued, Inspector Sylvester observed that Hiope was violating its own cleanup program. Within a month of the issuance of the citation, Hiope's president amended the program to specify that cleaning was required to be done after each 16 hour "producing period." It also provided that: "During the producing period a scoop will be utilized as much as possible to do cleaning." The change, in essence, brought the written cleanup program into conformance with the existing cleaning practice and was intended, in part, to assure that an inspector would not be able to refer to a failure to follow an established cleanup program in support of a citation.

³ Mr. Poszich no longer worked at the Hiope mine at the time of hearing.

Hiopo cannot strenuously dispute inspector Sylvester's description of the accumulations as noted in the citation. Mr. Poszich, the foreman on duty at the time, testified that he did not disagree with that description. The primary defense is that the citation was issued "prematurely" because, due to delays in roof bolting, cleaning could not have been done in the subject areas⁴ and that there is no reliable evidence that cleaning was not being done on cycle.

The mine was developed with nine entries, each 20 feet wide and spaced 50 feet apart on center. Cross cuts connecting the entries were made on centerlines spaced 80 feet apart. The mine was developed in the following sequence: cuts were made first in the #9 entry, followed by #8 and, in order, down to #5, where the conveyor belt was located. That process was repeated until those entries were mined up to where the next cross cut would be located. Cross cuts were then made, turning right, i.e. from #8 entry toward #9 entry. Each cross cut through 30 feet of coal had to be made with 2 cuts of the continuous miner. When the cross cuts from #5 to #9 had been completed, mining began on the left side and the #4 through #1 entries were cut and connected with cross cuts which became an extension of the #5 to #9 cross cut. When the second shift started work on May 19, 1999, the #4 through #9 entries had been mined up to the next cross cut and cross cuts had been made completely through from the #4 to the #9 entry. The Pre-shift report for the second shift, which was done between 2:00 and 3:00 p.m. on May 19, 1999, by Mr. Tatum, described the condition of the mine as, "needs bolted" for entries #1, #2, #3, #4, #6 and #8 and "needs cleaned" for entries #5, #7 and #9. "Needs bolted" means that the continuous miner had made a 15-20 foot cut and that it had not yet been roof bolted. Such areas are "dangered off", by hanging a reflector warning that no one can enter the area where the roof is unsupported. "Needs cleaned" means that the area had been roof bolted and could then be cleaned. No distinction was made between entries and cross cuts in the report because the cross cut was viewed as a continuation of the entry. For example, the cross cut from #6 to #7 was made by bringing the continuous miner up entry #6, where it would make a right turn toward entry #7. Two more cuts would be made, completing the cross cut between #6 and #7 — all of which would be referred to as mining in the #6 entry. Consequently, the pre-shift report entry that #6 "needs bolted" means that the final cut of the cross cut from #6 to #7 had been made and needed to be roof bolted.

There are factual disputes about the exact state of development of the mine on May 19, 1999, both at the beginning of the second shift and when the inspector arrived on section 1 at about 8:35 p.m. I find that at the time the inspector arrived the mine was developed as depicted in Government's Exhibit #18, a copy of which is attached as Appendix I, with the exception that the #5 through #9 entries were advanced no more than a few feet beyond the cross cut. I also find that at the beginning of the second shift the cross cuts from #4 to #9 had been cut through. There is no dispute that by the time Inspector Sylvester arrived the cross cuts from #4 through #9 had been cut through. Mr. Poszich testified that his shift did no mining on the right side (#5-#9) and mined only on the #3, #2 and #1 entries. The only witness that testified to the contrary was

⁴ Mandatory Safety Standards for underground coal mines provide that "[n]o person shall work or travel under unsupported roof * * * ." 30 C.F.R. § 75.202(b).

Walter McGlothlin, a shuttle car operator who stated that the continuous miner started in the #6-#7 cross cut. However, he was impeach with his deposition testimony that mining was done only in the #4 through #1 entries on the second shift.

I find, as Mr. Poszich testified, that mining on the second shift occurred only in the #3, #2 and #1 entries. Critically, when Inspector Sylvester arrived, the #2 entry had been driven in approximately 70 feet, the last cut of which had not been roof bolted. The first 55 feet of entry #2, however, had been bolted and should have been cleaned prior to the next cut being made. The inspector found excessive accumulations throughout the first 55 feet of the entry, accumulations that he was certain did not result from the last cut because of their extensiveness and location. There was a suggestion, in Mr. McGlothlin's testimony, that the accumulations may have been of recent origin because there may have been a cross cut started with a left hand turn from the #2 entry and that substantial spillage occurs when turns are made. I reject that suggestion because neither the #2 nor the #1 entry had been driven to the point where a cross cut would have been made and other testimony was uniformly to the effect that cross cuts were made by turning to the right.

There were also excessive accumulations throughout the length of the cross cuts from #4 entry to #9 entry. Respondent is correct in its contention that cleaning could not be done under unsupported roof and areas "in-by" unsupported roof. However, that would excuse the failure to clean only in the second cut that had not been roof bolted. At the start of the second shift the #4-#5 and #5-#6 cross cuts had been cut though and bolted, as indicated on the preshift report and the testimony of Scott Honaker, one of the roof bolters. I reject the contrary testimony of Steve Blackwell, the other roof bolter, that bolting was done in the #5-#6 cross cut on that shift. There is a dispute in the testimony as to the location of the roof bolter when the inspector arrived. He testified, consistent with his notes, that the bolter was at the last row of bolts in the #7-#8 cross cut. The roof bolters testified that they were working in the #6-#7 cross cut at the time. While I find that it is unlikely that the roof bolter was in the #7-#8 cross cut,⁵ its location when the inspector arrived is of little significance. Even if the roof bolter was in the second cut of the #6-#7 cross cut, such that cleaning could not have been done there or in the area of the second cuts of the #7-#8 and #8-#9 cross cuts, there were excessive accumulations that should have been cleaned previously in the entire cross cut from #4 through the first cut of the cross cut in #6-#7 and the first cuts of the cross cuts in #7-#8 and #8-#9.

With respect to possible ignition sources, Inspector Sylvester testified that there were several present, including sparks from the continuous miner, worn or damaged insulation on electrical cables and improperly maintained permissible equipment. In addition to the combustible accumulations, the mine liberated methane. While the Hiope mine was not a particularly gassy mine, mining operations were, at the time, occurring only 20-30 feet above an abandoned mine where serious methane problems and several ignitions had been experienced.

⁵ As noted above, the preshift report indicates that that cross cut had been bolted at the start of the second shift and no additional mining had been done on that side.

Test results in the record generally show zero or very low concentrations in areas where coal was not actually being cut. However, as Inspector Sylvester testified, methane concentrations are not predictable and he had been told by the continuous miner operator that concentrations at or above 2% had been encountered.⁶ Mr. Poszich testified that he had experienced methane concentration sufficient to shut down the continuous miner the same day that the subject citation was issued. Sparks are produced when the continuous miner's bits strike roof material and provide an efficient ignition source at the very location that methane is likely to be liberated. Other ignition sources include the equipment, which is powered by electricity. Wear and damage to trailing cables supplying 480 volts of electricity is not uncommon. In fact, Inspector Sylvester issued a citation on May 17, 1999, having found worn insulation in five locations on the trailing cables of the continuous miner. Sparks or flames in electrical controls also can provide an ignition source if the equipment is not maintained in "permissible" condition. Inspector Sylvester also issued a citation on May 17, 1999, for failure to maintain the continuous miner in permissible condition.

Conclusions of Law

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. (footnote omitted)

⁶ Methane is a highly combustible gas. Continuous mining machines are equipped with methane monitors that sound a warning when methane concentration reaches 1% and automatically shut the machine down at concentrations of 2%.

See also, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The Violation

The conditions found to exist, as described above, violated § 75.400. While they were the product of normal mining operations, the extensive accumulations existed at the time of the citation because Hiope failed to clean as part of the normal mining cycle. Any argument that the areas in question could not have been cleaned because they had not been roof bolted is unavailing because the great majority of the areas noted in the citation had been roof bolted. As the inspector noted, the #2 entry had not been cleaned for a distance of 55 feet to the last row of bolts. That distance would have been mined in three cycles, with a continuous miner making cuts of 15-20 feet. Those cuts had been roof bolted and should have been cleaned prior to the next cut being made. Similarly, there is no viable excuse for allowing accumulations to exist in the cross cuts from #4 to #6 and in the area of the first cuts in the other cross cuts from #6 to #9.

Hiope argues that the only evidence that clean up was not being done on cycle was testimony from Raymond Poszich who was referring to a later time period when the mine was operating under the new cleanup plan. However, Mr. Poszich's testimony quite clearly was directed to the time frame of May 19, 1999, not a later period.⁷ The excessive accumulations

⁷ See, e.g., transcript pages 113 ("that was an accepted plan when we got there") and 155 (the cited accumulations would not have been cleaned up until the midnight shift, had the inspector not arrived). While he did refer to the amended cleanup plan, it appears to have been for

found by Inspector Sylvester are also ample proof that cleaning was not being done on cycle. Hiope also contends that Inspector Sylvester's testimony is unreliable for a number of reasons, including his lack of recollection of the exact status of roof bolting and the mining sequence. However, as noted previously, there is little dispute as to the accuracy of Inspector Sylvester's description of the excessive accumulations. Those accumulations existed in areas that clearly had been roof bolted and should have been cleaned.

The Commission's decisions long ago made clear that § 75.400 is directed at preventing accumulations — not to cleaning them up within a reasonable time. As stated in *Utah Power and Light Co.*, 12 FMSHRC 965, 968 (May 1990):

In defining a prohibited "accumulation" for section 75.400 purposes, the Commission explained [in *Old Ben Coal Co.*, 2 FMSHRC 2806 (October 1980)] that "some spillage of combustible materials may be inevitable in mining operations. However, it is clear that those masses of combustible materials which could cause or propagate a fire or explosion are what Congress intended to proscribe." *Old Ben II*, 2 FMSHRC at 2808. The Commission emphasized that the legislative history relevant to the statutory standard that section 75.400 repeats "demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." *Old Ben I*, 1 FMSHRC [1954 (December 1979)] at 1957.

Here, Hiope allowed loose coal, float coal dust and related combustible materials to remain in the active workings of the mine in numerous areas that had been roof bolted and should have been cleaned. These were clearly "accumulations" as defined in, and in violation of, § 75.400.

Likelihood of Injury

There can be little dispute that combustible accumulations contribute to the hazard of ignition or propagation of a fire and that any injury resulting from such a hazard could be serious and possibly fatal. The critical factor in the S&S determination, therefore, is whether there was a reasonable likelihood that the hazard would result in an injury. There were several ignition sources in the area and the mine was known to liberate methane. Sparks from the continuous miner, damaged trailing cables from the miner and other equipment and improperly maintained equipment were potential ignition sources. Inspector Sylvester had cited Hiope because insulation on the trailing cable of the continuous miner was worn in five places. Concentrations of methane sufficient to shut down the continuous miner had been encountered the same day that the citation was issued. The active workings in question were also located approximately 20-30

illustration purposes. No attempt was made on cross examination to establish that he was referring to a time frame other than when the citation was issued.

feet above an abandoned mine that had far more significant methane problems, including several ignitions. These factors give rise to a reasonable likelihood that the hazard contributed to by the accumulations would result in an injury. Accordingly, I find that the violation was significant and substantial.

Unwarrantable Failure

In *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999), the Commission reiterated the law applicable to determining whether a violation was the result of an unwarrantable failure.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission also considers whether the violative condition is obvious, or poses a high degree of danger. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous"); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

A consideration of the above factors compels a conclusion that the violation was the result of Hiope's unwarrantable failure. The accumulations were extensive and existed in several areas that should have been cleaned, had proper effort been devoted to cleaning in the normal mining cycle, i.e. after roof bolting had been completed. The record of prior violations by Hiope indicates that it had been cited for violations of § 75.400 seven times in the six months preceding the issuance of the instant citation. With one exception, the circumstances of those violations have not been explained and I do not consider that they should have put Hiope on a heightened alert for such violations. The § 75.400 violation cited in May 17, 1999, however, resulted from the same practice that prompted the violation at issue here, and clearly put Hiope on notice that delaying cleaning efforts and allowing accumulations to exist in the active workings was a violation of a mandatory health and safety standard. Nevertheless, Hiope did not change its ways. No cleaning had been done on the #2 shift and no cleaning was being done when the inspector arrived in the area despite the fact that the need for cleaning had been noted on the preshift inspection report and additional areas had been roof bolted and should have been cleaned. Cleaning was not initiated until the citation was issued, some five hours after the shift had begun. At that point, four miners worked two hours to abate the conditions cited. It is apparent that, had the inspection not taken place, substantial accumulations would have been allowed to remain in the active workings until the midnight shift began.

Hiope places significance on the fact that, on May 18, 1999, Inspector Sylvester found the mine clean and observed some cleaning being done during the #1 shift. However, Inspector Sylvester arrived at the mine virtually at the beginning of the #1 shift that day. Under the cleaning process actually followed by Hiope, the mine would normally have been clean by the end of the midnight shift. Attention to cleaning in the presence of an inspector who had issued a citation for excessive accumulations during the same shift the previous day is hardly indicative of a proper ongoing cleaning program. As the inspector testified; "If I was there [on the 18th], they were doing cleanup, I guarantee it."

The situation presented here is comparable to that in *Utah Power and Light Co., supra*, where an operator made a conscious decision to mine in a manner that allowed accumulations to exist. While the unwarrantable failure finding in that case was reversed, the reversal was predicated on the operator's good faith belief that its cleanup plan was consistent with applicable regulations and that its cleanup methods were safer than alternative procedures. In addition, the operator there had been cited in the past for deviating from its cleanup plan and was understandably reluctant to change its procedures. Those factors stand in sharp contrast to the situation presented in this case. Here, Hiope's conscious decision to mine in a manner that allowed unlawful accumulations to exist was a deviation from its cleanup program, a deviation for which it had been issued a citation only two days earlier. Hiope's response to the May 17 and May 19, 1999 citations was not to conform to its cleanup program and eliminate the accumulations. Rather, Hiope determined to change its cleanup program to formalize its deficient cleaning procedures. Under the Commission precedent discussed above, it was long ago made clear that deferring cleanup efforts and allowing accumulations to exist for even one shift, much less two shifts, was a violation of § 75.400.

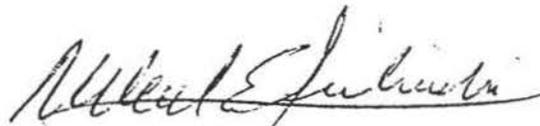
The citation is affirmed as significant and substantial and due to Hiope's unwarrantable failure to comply with a mandatory health and safety standard.

The Appropriate Penalty

Hiope Mining Inc. is a relatively small operator, with production of 56,060 tons of coal in 1998. It has a relatively good history of violations, having been cited for violations of the Act forty-five times, including the instant violation, during fifty-one inspection days in the two year period ending on May 19, 1999. Thirty-seven of the violations involved single penalty assessments and none of those finally adjudicated was specially assessed. The parties have stipulated that the proposed penalty of \$1,500.00 would not affect Hiope's ability to continue in business and that the violation cited was abated timely and in good faith. The gravity of the violation was serious in that six miners were exposed to a reasonable likelihood of serious injury. The operator's negligence was high. Although Hiope's subsequent amendment of its cleanup program raises concern about future compliance with the standard, it did promptly abate the violation in this case. Weighing these factors, which are required to be considered under § 110(i) of the Act, I find that the proposed penalty of \$1,500.00 would properly effectuate the deterrent purposes underlying the Act's penalty assessment scheme.

ORDER

Based upon the foregoing, citation number 7183561 is **Affirmed** and Hiope Mining Inc. is **Ordered** to pay a civil penalty of \$1,500.00 within 30 days.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 28, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-315-M
Petitioner	:	A.C. No. 05-01506-05526
	:	
v.	:	
	:	Golden Wonder
AU MINING INCORPORATED,	:	
Respondent	:	

DECISION

Appearance: Edward Falkowski, Esq., U.S. Department of Labor, Denver, Colorado,
for Petitioner;
Lance Barker, Pro Se,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act." The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charged Au Mining Incorporated (Au Mining) with the violation of the mandatory safety standards 30 C.F.R. § 57.14130(a) and § 57.14132(b) and proposed penalties of \$300.00 for the violations.

Au Mining filed a timely answer challenging the citation. A hearing on the merits was held in Grand Junction, Colorado. The parties presented testimony and documentary evidence and filed post-hearing statements of their position as to their interpretation and applicability of the cited standard to the facts of this case. The main issue in the case is the applicability of the ROPS standard to a wheel loader known as an LHD (which is the abbreviation for a load, haul and dump loader) when the loader is intermittently used on the surface area of an underground mine. See Pet.'s Exs. 12-A, B, C, D and F for photographs of the LHD. Apparently, the applicability of the ROPS standard to an LHD is a case of first impression.

Stipulations

1. Respondent Au Mining, Inc., is engaged in mining in the United States.
2. Respondent is owner and operator of a gold mine known as the Golden Wonder mine having MSHA ID number 05-01506.
3. The mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
4. The proposed penalties, if upheld, will not affect the Respondent's ability to continue in business.
5. The operator demonstrated good faith in abating the violations.
6. The Respondent is a small operator. Approximately 4,000 person hours are worked at the mine per year.

Facts

The evidence presented at the hearing demonstrates that there is no dispute as to the basic relevant facts. Au Mining owns and operates a small underground gold mine named the Golden Wonder Mine. The mine is essentially a two-man operation. The two owners do the mining work themselves. They enter the mine and do the drilling and blasting in the underground area being mined. They then retrieve the mined material using a Wagner model ST2, "load, haul, and dump loader" which is referred to by its initials LHD. The LHD was manufactured in 1975 and acquired by Au Mining in 1997. The LHD is driven bucket-first into the mine portal, travels bucket first through the mine, scoops up a load of mined material and then is backed out of the mine. (Tr. 47-48). The LHD operator sits sideways on the machine so that he can look either toward the front or the rear as he drives. (Tr. 42). There is no seat belt.

After backing the loader out of the mine portal onto the surface portion of the mine, the operator turns the LHD around and hauls the load, traveling approximately 100 feet, to a box lined with a large plastic bag and dumps the load of muck into the bag in much the same manner as any wheeled front-end loader would dump its load. See photographs in Pet.'s Ex. 12. The operator then again turns the loader around, so the bucket is facing toward the portal, and enters the portal to retrieve another load. If necessary, the loader is fueled while on the surface of the mine before reentering the underground portion of the mine.

Mr. Barker testified that the mine started using the LHD in 1997 and states it is still the original equipment which is used just as designed to be used. It was never equipped with ROPS or a seat belt. It appears from Mr. Barker's testimony that it was designed to be driven to the portal of the mine, enter into the mine one way, scoop muck in its bucket, back out of the

underground portion of the mine, turn around, haul the load in its bucket along the surface area to the dump box where the muck is dumped. He stated "obviously it was designed to go in and come out." It has been used exactly as it was designed to be used. Asked as to how often the LHD goes into the mine and comes out, Barker testified that it varies with production from "as high as 20 times a day to as low as twice a week."

Citation No. 7924004

On March 9, 1999, MSHA Inspector George Rendon issued Citation No. 7924004, alleging an S&S violation of 30 C.F.R. § 57.14130(a), because the loader was not equipped with a ROPS or a seat belt, and it was being used on the surface area of the mine each time it came out of the portal of the mine to haul and dump a load of mined material.

The citation, in pertinent part reads as follows:

The ST2 frontend loader that the miners use to tram the muck from under ground to the surface was not equipped with seat belts, backup alarm or ROPS. The travels a distance of approx. 100' when on the surface on level ground.

Shortly after receiving the citation charging the mine with the violation of the standard, Mr. Barker wrote to MSHA headquarters in Arlington, Virginia, to complain about the application of § 57.14130(a) to equipment that is used primarily underground. By letter dated July 1, 1999, Earnest C. Teaster, Jr., Administrator for Metal and Nonmetal Mine Safety and Health at MSHA, replied to Mr. Barker as follows:

Thank you for your letter of May 27 concerning the application of [section 57.14130(a)] to a piece of equipment that you use at the surface areas of your underground mine. The equipment is used in the underground section of your mine and also works at the surface

...

It is the Mine Safety and Health Administration's (MSHA) position that mobile equipment used at the surface areas of underground mines is surface equipment. MSHA promulgated these standards to address a number of serious hazards that can occur when miners operate a piece of mobile equipment on the surface. **Although the piece of equipment came from the underground mining area, it is still required to meet all applicable standards when used at surface areas of a mine.** (Emphasis supplied).

Mr. Teaster's letter was received in evidence as Pet.'s Ex. 8.

Discussion

30 C.F.R. § 57.14130 in pertinent part provides:

§ 57.14130 Roll-over protective structures (ROPS) and seat belts for surface equipment.

(a) Equipment included. Roll-over protective structures (ROPS) and seat belts shall be installed on--

- (1) Crawler tractors and crawler loaders;
- (2) Graders;
- (3) Wheel loaders and wheel tractors; (emphasis supplied)

The Secretary's interpretation of this safety standard is that the standard requires a ROPS and a seat belt be installed on any equipment listed in the standard even if used only intermittently for short periods of time on the surface area of an underground mine. The LHD is a "wheel loader" (See Pet.'s Ex. 12) which is listed in subsection (a)(3) of the cited standard as requiring ROPS and a seat belt when used on the surface of an underground mine. It is immaterial whether the amount of time the equipment is used on the surface is brief in comparison to the amount of time the equipment is regularly used underground.

The Secretary's counsel set forth the regulatory history of the standard stating that this history clearly shows that promulgators of the standard clearly intended by use of the term "surface equipment" to include any equipment listed in the cited standard such as "wheel loaders" (which is what the LHD is) that is used, however briefly, in a surface area of the mine.

The standard was first promulgated a mandatory ROPS standard for metal/non-metal mines in 1977 by MSHA's predecessor, the Mine Enforcement and Safety Administration (MESA) of the Department of the Interior. In adopting the standard, MESA stated:

Section 57.9, Loading, hauling, dumping, is amended as follows: New mandatory standard 57.9-88 which is **applicable to surface only** is added to read as follows:

§ 57.9 Loading, hauling, dumping

* * * * *

57.9-88 Mandatory. (A) Excluding equipment that is operated by remote control, all self-propelled track-type (crawler mounted) or wheeled (rubber-tired) scrapers; front-end loaders; dozers; tractors; including industrial and agricultural tractors . . .; all as used in metal and non-metal mining operations, with or without attachments, shall be used in such mining only when equipped with

(1) Roll-Over Protective Structures (ROPS) . . . , and (2) seat belts . . . (Emphasis supplied).

42 Fed. Reg. 7010 (Feb. 4, 1977).

After Congress enacted the Federal Mine Safety and Health Act in 1977, the duty to promulgate and enforce mine safety and health standards was transferred from MESA to the newly created MSHA. On January 29, 1985, MSHA recodified and renumbered the Part 57 standards, including MESA's ROPS standard, without changing the text of the standards, except to add descriptive headings. See 50 Fed. Reg. 4048, 4107-4108 (Jan. 20, 1985). The recodified standard reads as follows:

SURFACE ONLY

§ 57.9088 . Roll-Over protective structures (ROPS) and seat belts.

(A) Excluding equipment that is operated by remote control, all self-propelled track-type (crawler mounted) or wheeled (rubber-tired) scrapers; front-end loaders; dozers; tractors; including industrial and agricultural tractors . . . ; all as used in metal and non-metal mining operations, with or without attachments, shall be used in such mining only when equipped with (1) Roll-Over Protective Structures (ROPS) . . . , and (2) seat belts (Emphasis supplied).

Id.; see also Petitioner's Ex. 4 (30 C.F.R. § 57.9088 (July 1, 1987)).

The agency further explained that regulations appearing under the heading "surface only" as in the case of the ROPS standard, "apply . . . to the surface operations of underground mines." 30 C.F.R. § 57.1 (Jul. 1, 1985). The standard thus clearly required that whenever any listed equipment was used in a "surface operation" (such as the operation of hauling and dumping mined material into a surface bin), the equipment had to be equipped with a ROPS and a seat belt.

The standard was modified to its current form in August 1988. The 1988 revision: (a) updated the references to the documents that are incorporated by reference in the standard (which contain the performance criteria for the required ROPS and seat belts); (b) required that each ROPS must bear a permanent label, identifying among other things the ROPS manufacturer and model number; (c) required that each ROPS must be installed in accordance with manufacturer's recommendations; and (d) required that each ROPS must be maintained in a condition that meets the performance requirements of the standard. In modifying the standard, however, MSHA made it clear that it was not changing the scope of the standard, which would continue to apply to listed equipment that was used in a "surface" area. Thus the final standard retains the existing

standard's scope and applies to surface mines and surface areas of underground mines. 53 Fed. Reg. 32511 (Aug. 25, 1988) (Petitioner's Ex. 5). Accordingly, the standard, as revised in 1988 (and as it exists today), continues to require that ROPS and seat belts must be installed on any listed equipment which is used for any length of time in a surface area.

Courts defer to an agency interpretation of its regulations "so long as it is reasonable, that is so long as the interpretation sensibly conforms to the purpose and wording of the regulations" *Martin v. OSHRC* 499 U.S. 144, 150-51, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991).

I find the Secretary's interpretation of its regulation in question and its applicability to the LHD in this case is reasonable and sensibly conforms to the purpose and wording of the regulation. The LHD is a wheel loader which is a listed piece of equipment covered by the standard. Every time the LHD goes into the mine, it comes out to the surface and hauls over the surface of the mine its load to the point on the surface where it dumps the load and then is driven back over the surface of the mine until it enters the portal of the mine. It makes this trip back and forth along the surface of the mine, sometimes as often as 20 times a day.

The Secretary's interpretation of its standard and its applicability to the LHD in this case is consistent with the safety promoting purpose of the Mine Act. I find the evidence presented establishes a violation of the cited standard 30 C.F.R. § 57.14130(a).

Significant & Substantial

Citation No. 7924004 alleges that the failure to comply with the provision of the cited standard when the LHD is used on the surface of the mine was a significant and substantial violation. I disagree. Based on the evidence presented in this case and the Commission's interpretation of significant and substantial as set forth in *Texasgulf, Inc.*, 10 FMSHRC 498, 501-03 (April 1998). The significant and substantial designation of the violation should be deleted. The evidence presented does not establish the third *Mathies* element.

Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984) the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary . . . must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard — that is, a

measure of danger to safety — contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the *Mathies* formulation “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The Commission emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *Id.* In addition, the evaluation of reasonable likelihood should be made in terms of “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The Commission has held that the resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). Applying these principles to the instant case, I conclude that the cited violation was not of a significant and substantial nature.

In the course of continued normal operations at this mine, the LHD would be driven approximately 100 feet on a flat level surface, from the portal of the mine to a dump box, and then returns on a flat level surface to and through the portal of the mine. In fact, there was a level area just outside the portal of the mine of approximately 300 to 400 feet. (Tr. 50). I am aware that there is a possibility that the LHD without a roll-over protective system could turn over on level ground but that is not reasonably likely in this case based on the particular facts surrounding the violation. On evaluation of the evidence I find the preponderance of the evidence presented in this case fails to establish a reasonable likelihood that the hazard contributed to will result in an event in which there is a serious injury. I, therefore, find the violation of the cited standard in this case was not of a serious and substantial nature.

Citation No. 7924021

This citation was issued by mine inspector George Rendon on March 9, 1999, because the LHD while hauling muck as it was traveling on the surface of the mine did not have a back up alarm. At the hearing, Inspector Rendon testified that the LHD did not have any obstructive view to the rear. This also appears to be evident from the photograph of the LHD. (Pet.’s Ex. 12). Counsel for Petitioner moved to vacate the citation.

Citation No. 7924021 is vacated.

Appropriate Penalty

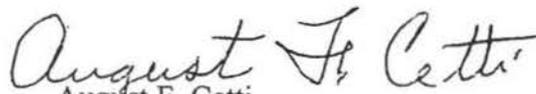
The parties stipulated that Respondent is a small operator. The mine is operated by the two owners who do the mining work themselves. It is stipulated that the operator demonstrated good faith in timely abating the violative conditions. Au Mining abated the violation by agreeing

in writing they will use the LHD only underground. The history of prior violations is not excessive. Petitioner states that it is moderate. The violation history for the 2 years prior to the citations was received as Petitioner's Ex. 2. I find the operator's negligence to be very low. The violation resulted from the operator's erroneous but understandable and in good faith belief that the ROPS regulation cited was not applicable to the LHD when it was used in the surface area of the underground mine. The LHD was used on the surface area of the mine for only brief periods and then only on the flat level surface. I find the gravity of the violation is low. Under the evidence presented, my deletion of the S&S designation and my findings above, I find the appropriate civil penalty in this case is \$55.00. Assessment of this penalty will not adversely affect Au Mining's ability to continue in business.

ORDER

Citation No. 7924021 is **VACATED** in accordance with MSHA's motion at the hearing to vacate that citation.

Citation No. 7924004 is modified by deleting the S&S designation, changing the negligence factor to "very low" and the injury likelihood to "unlikely." The citation as so modified is **AFFIRMED** and Au Mining is **ORDERED TO PAY** a civil penalty of \$55.00 for this affirmed violation within 40 days of the date of this decision and order.


August F. Cetti
Administrative Law Judge

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June 30, 2000

CENTRAL SAND AND GRAVEL COMPANY,	:	CONTEST PROCEEDING
	:	
Contestant	:	Docket No. CENT 98-230-RM
v.	:	Citation No. 7926022; 7/15/98
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Pit No. 77 Grand Island
Respondent	:	Mine ID 25-00686
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
	:	
MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. CENT 99-242-M
Petitioner	:	A. C. No. 25-00686-05515
v.	:	
CENTRAL SAND AND GRAVEL, COMPANY,	:	Mine: Pit No. 77 Grand Island
	:	
Respondent	:	

DECISION

Appearances:

Mark E. Novotny, Esq., Lamson, Dugan & Murray, LLP, Omaha, Nebraska, for Contestant;

Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Barbour

These are contest and civil penalty proceedings that arise under Section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815) (Mine Act or Act). They involve one citation issued to Central Sand and Gravel Company (Central Sand) at the company's Pit No. 77, a sand and gravel extraction and processing facility in Hall County, Nebraska. The citation was issued after a fatal accident that occurred at the mine on July 1, 1998.

The accident took the life of a 11-year-old boy. Personnel from the Hall County Sheriff's Department, the City of Grand Island Utility Department, and the Secretary of Labor's Mine Safety and Health Administration (MSHA) conducted investigations. As a result of its investigation, MSHA issued to the company the subject citation. It charges the company with a violation of 30 C.F.R. § 56.12045, a mandatory safety standard for surface metal and non metal mines requiring installation of overhead powerlines as specified by the National Electric Code (NEC). It also charges that the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Central Sand's unwarrantable failure to comply with Section 56.12045.¹ In contesting the validity of the citation the company argues that the cited conditions do not constitute a violation, or if they do, the violation is neither S&S nor unwarrantable. Finally, in her civil penalty petition the Secretary proposes the assessment of a penalty of \$25,000 for the violation. She asserts, among other things, the company's high negligence justifies the amount.

These cases were consolidated for hearing and decision. After extensive discovery, they were heard in Grand Island, Nebraska. Counsels have submitted helpful briefs.

THE ISSUES

The primary issues are whether the company violated either Section 56.12045 or Section 56.12030, and if so whether the violation is S&S and unwarrantable. If a violation is found, the amount of the civil penalty also is at issue.

THE STIPULATIONS

The parties stipulated as follows:

1. [Central Sand] is engaged in the mining and selling of sand and gravel . . . [a]nd its mining operations affect interstate commerce.
2. [Central Sand] is the owner and operator of Pit No. 77[,] Grand Island Mine.
3. [Central Sand] is subject to the jurisdiction of the . . . Mine Act.
4. [T]he Administrative Law Judge has jurisdiction in this matter.

¹ Subsequently, the Secretary amended her petition to charge in the alternative a violation of 30 C.F.R. § 56.12030, a mandatory standard requiring that "[w]hen a potentially dangerous condition is found it shall be corrected before . . . wiring is energized."

5. [Citation No. 7926022] was properly served by a duly authorized representative of the Secretary upon an agent of [Central Sand] on the date and placed stated there[on].

6. The exhibits offered by the parties are stipulated to be authentic but [the parties] make no stipulation as to the relevance or the truth of the matter[s] asserted therein.

7. [T]he proposed penalty [of \$25,000] will not affect the ability of [Central Sand] . . . to continue in business.

8. [Central Sand] is a mine operator with 12,638 hours of work at Pit No. 77 . . . in 1998 . . . [a]nd with 259,746 total hours of work . . . in 1998.

9. [A] copy of the MSHA Assessed Violation History Report accurately reflects the history [of previous violations] of this mine for . . . two years prior to the date of . . . [C]itation No. 7926022 (Tr. 9-10).

Based on the stipulations counsel for the Secretary characterized Central Sand as a large operator with a moderate to small history of previous violations (28).

THE FACTS

The Mine

No. 77 Pit is a sand and gravel mine that encompasses between forty and fifty acres (Tr. 315). A lake abuts the southern edge of the land portion of the mine. The company owns almost half of the lake. The company's dredge is on the lake. The dredge suctions sand and gravel from the lake bottom. A pipeline carries the sand and gravel across the lake to a screening plant. The plant is north of the lake shoreline. The material is processed at the plant, and a conveyor belt carries it to a radial stacker. The stacker deposits the sand and gravel in one of six stockpiles that are maintained north of the stacker. The maximum height of a stockpile made by the stacker is approximately 45 feet (Tr. 161-162, 292). A front end loader is used to transfer the processed material from the piles to customers' trucks (Tr. 331-332).

Official access to the mine is gained through an entrance gate on the western side of the property. A gravel access road runs along the northern side of the property. The road leads from the gate, to the mine office, the maintenance building, and the stockpiles. The road traverses the property in a generally west to east direction. High voltage powerlines run somewhat parallel to the road. They cross the road in at least two places before they make a turn to the south, cross the road again, and proceed to an electrical shed and transformer. Before arriving at the shed and

transformer, the lines pass over the western side of one of the stockpiles. The accident occurred at this stockpile. Although it is located where previous stockpiles existed, the particular stockpile was there for less than two weeks before the accident (Tr. 122).

The powerlines are carried on utility poles. At the point where they cross the stockpile they consist of two parallel high voltage lines and one static line. The static line runs above the high voltage lines (See Gov. Exh. 1; Tr. 69).

The northern side of the access road to the stockpiles is bermed with three to four feet sand berms (Tr. 226, Exh. C 15 at CSG 210, GSC 216). Immediately north of the berms is a zone of dense brush and other vegetation. Here the land falls to the southern bank of a river. Across the river is another zone of dense brush and vegetation, as well as a barbed wire fence. The fence marks the northern extremity of mine property. A trailer court of privately owned mobile homes is located adjacent to the property (Tr. 123-124, See generally Gov. Exh. G 1, Exh. C 3).

Entry to the mine is restricted. A vehicle coming into the mine must proceed through the gate, which is secured at the end of the business day, and must pass the mine office. The mine is posted with "no trespassing" signs, including signs located along the northern side of the road, between the river and the stockpiles (Tr. 221-222, 227, 229; Exh. C 11 at CSG 201, CSG 206, GSG 221, CSG 222, CSG 235, CSG 237, Exh. C 3). Although additional signs were added after the accident, several were in place before it occurred (Tr. 294).

Despite the gate, fence, and signs, unauthorized entry is possible. At points between the trailer court and the mine, the fence is down or otherwise in need of repair (Tr. 176-178). In addition, because the lake cannot be fenced, both the dredge and mine property that borders the lake can be visited by boaters (Tr. 214).

The Accident

On the evening of July 1, 2000, Deputy Frank Bergmark, an investigator of the Hall County Sheriff's Office was called at home and told there had been an accident at Pit No. 77. Bergmark immediately went to the pit, where he was met by an officer of the Grand Island Police Department.

Bergmark and the officer went to the accident site. Although the rescue squad already had removed the victim, Bergmark learned that the boy involved in the accident was a resident of the trailer court. After the close of work, the victim and a friend left home and crossed the fence onto mine property (Tr. 124). The boys traveled across the river and walked through the brush to the access road. They then began to "meander" about the pit. As the boys wandered they left footprints. By observing the footprints, Bergmark was able to determine that the victim and his friend ultimately arrived at the subject stockpile and ascended it. Looking at the stockpile Bergmark saw that the high voltage powerlines were "very close" to the pile (Tr. 41). Bergmark

was told that as the victim started to descend the western side of the pile, he contacted one of the powerlines (Tr. 42-43).

Bergmark's scenario of the boys' travels and of the events of July 1, generally agreed with that of Lloyd R. Caldwell, an MSHA inspector who was assigned to investigate the accident for the agency and who arrived at the mine on the morning of July 2.² However, Caldwell was able to provide some additional details concerning what happened.

Caldwell testified that reaching the river was not that difficult for the boys because the fence was pushed down in several places and paths ran through the dense vegetation between the fence and the river. He observed that after they crossed the river and walked up its south bank through the brush to the access road, the boys passed, but clearly did not heed, a "no trespassing" sign (Tr. 124, 220-221). He learned that the boys were playing a game of "007", which involved chasing one another, perhaps with water guns (Tr. 125).

John Brezina, Central Sand's mine manager, traveled with Caldwell during most of Caldwell's on-site investigation (Tr. 303-304, 306-307). Brezina testified that the footprints indicated the boys first attempted to climb a stockpile other than the one where the accident occurred, but gave up because they could not keep their footing (Tr. 307).

All agreed that when the boys came to the subject stockpile they were able to ascend to its top (Tr. 125-126). Once at the top, the victim started down its western side. The sand and gravel acted "like a pile of roller bearings" (Tr. 123) and the victim began to slide. Bergmark surmised that the victim, who was approximately 5 feet tall, must have seen the powerlines, which were about 10 feet below the summit of the stockpile (Tr. 57, 62). Realizing he was fast approaching the lines, the victim leaned backward, trying to go feet-first under them. Part of his body cleared, but one of his hands moved upward and touched the powerline closest to the stockpile (Tr. 30, 45, 123; See Gov. Exhs. 3F, 3G). The victim was electrocuted. Subsequently, his body slid down the pile, until he came to rest about 15 feet above ground level.

In the meantime, the victim's friend ran back to the trailer court and told the victim's mother to come quickly, that her son was hurt. She raced to the scene where she found the boy. A short time later rescue personnel arrived and attempted to revive him. The victim was rushed to the hospital where he was pronounced dead (Tr. 58).

The Powerlines and The Stockpile

Bergmark determined that during the time between the accident and his arrival no rescue personnel nor other persons had been to the top of the stockpile. Nor had anyone been on the pile at the point where the victim touched the powerline (Tr. 58). Therefore, when Bergmark

² Following the investigation, Caldwell retired. Therefore, when he testified Caldwell no longer worked for the agency.

measured the distance from the powerlines to the stockpile, he believed his results reflected conditions as they existed at the time of the accident. It was difficult for Bergmark to make the measurements because when he moved or walked near the points he was trying to measure, the sand and gravel shifted and slid down the pile (Tr. 44, 53-54, 57). Nevertheless, Bergmark found that the vertical distance (or clearance) from the nearest line to the surface was 29 inches and that the horizontal distance was 60 inches (Tr. 44, 56).³

The powerlines were installed in 1978, by the City of Grand Island Utility Department. They had not been altered or changed since (Tr. 31, 92, 93-94, 213, See also Tr. 294). The powerlines carried three-phase, 13,899 volts of electricity, which was described by Rober Smith, the assistant director of the department, as "standard primary voltage" (Tr. 67).

On the morning of July 2, Smith went to the mine with other utility department employees and with the Grand Island city attorney. The group wanted to determine the role played by the powerlines in the accident (Tr. 65). A bucket truck was brought to the scene. A utility department employee went up in the bucket and measured the height of the lines from the ground (Tr. 66). He determined that the powerlines were 25 feet, 5 inches from the ground and that the static wire above the lines was 29 feet, 10 inches from the ground. The employee also measured the height of the stockpile, which he found to be 35 feet, 7 inches high (Tr. 69, Gov. Exh. 4)).

Inspector Caldwell, The Investigation, and The Citation

In addition to being an inspector and accident investigator, Caldwell is a certified electrician. When he worked for MSHA, Caldwell's duties included the training of inspectors with regard to the meaning and application of MSHA's electrical regulations (Tr. 103-105).

Caldwell's July 2, investigation of the accident was interrupted by the July 4, weekend. Caldwell and another MSHA employee returned on July 7 and July 8 (Tr. 106-108). At the conclusion of the investigation the men submitted a written report to MSHA (Tr. 110; Gov. Exh. 8).

During the investigation Caldwell relied on Bergmark's measurements (See Tr. 116, 117-119, 170-171; See also n. 3 supra). In Caldwell's view, the clearances Bergmark measured did not meet those required by the NEC (Tr. 129-130, 137). Therefore, he issued Citation 7926022 to Central Sand, charging the company with a violation of Section 56.12045. In addition, although the regulation states compliance with the code is required when the powerlines are "installed", Caldwell testified he "looked at the installation not as the physical work to install . . . [the powerlines], but as the installation as a unit that was there at the time that [he] viewed the operation" (Tr. 127).

³ Caldwell also noted the instability of the pile. In fact, he found that it was so unstable he did not climb it to measure the vertical and horizontal clearances (Tr. 116).

Caldwell found that the violation was "S&S" because "the accident occurred and the accident was fatal" (Tr. 139). He further found that the company's negligence was "high" because "the company knew or had good reason to know that the violation existed and . . . would cause injury" (Tr. 142). As for the company's unwarrantable failure to comply with Section 56.12045, he stated "unwarrantable failure means there ain't no damn excuse for it happening . And that it just exactly the way I felt about it" (Tr. 141).

THE VIOLATION

In charging a violation of Section 56.12045, Citation No. 7926022 states:

On July 1, 1998 at approximately 8:45 p.m., an eleven-year-old boy was electrocuted when he contacted a bare power line. The victim was sliding down the road gravel stockpile when he made contact with one phase conductor of the 3-phase 13.8 KV power line which ran to the plant substation. The power line was originally installed in compliance with the national code by the local utility. Production personnel at the mine had allowed the road gravel stockpile to build under the radial stacker so that the pile was more than 10 feet higher than the power line and the west side of the pile was less than 2 feet from the line. Failure to maintain adequate clearance between this high power line and the stockpile constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard (Gov. Exh. G-9).

Section 56.12045, is worded in a straightforward manner. The powerlines must be "overhead", they must be "high-potential", and they must "be installed" according to the requirements of the NEC.

Here, the powerlines clearly were "overhead". Smith testified without dispute that the lines were 25 feet, 5 inches above the ground, which is "overhead" by any definition of the word (Tr. 69). Also, the lines were "high potential". Section 56.2 (30 C.F.R. §56.2) defines "high potential" powerlines as lines that carry more than 650 volts. Smith testified, again without dispute, that the lines in question carried electricity far in excess of 650 volts (Tr. 67).

Were the powerlines installed as required by the NEC? Both former inspector Caldwell and city utility department assistant director Smith agreed that the NEC incorporates by reference the National Electric Safety Code (NESC). They also agreed it is the NESC that mandates how high-potential powerlines must be installed, including requirements for the various clearances that must be maintained (Tr. 59, 63-64, 79, 131; Gov. Exh. 6 at 70-31, 70-57 FPN). I accept their undisputed testimony.

Turning to the NESC (Gov. Exh. 7), I find that although it does not specifically reference stockpiles as points of departure for determining required clearances, a reasonable operator parsing the code would conclude stockpiles come within its broader categories.

A purpose of the NESC is to institute "safety rules for the . . . maintenance of overhead electric supply . . . lines" (Gov. Exh. 7 at 59). Clearance requirements for such lines are among the code's specified safety rules. The requirements are found in Section 23 (Gov. Exh. 7 at 69), which is divided into various subsections containing tables specifying the clearance for conductors carrying various voltages when the conductors are located above and around various facilities and surfaces.

An operator attempting to comply with the code first would note that Section 23, "covers all clearances . . . involving overhead supply . . . lines" and would recognize the lines in question are overhead supply lines (Gov. Exh. 7 at 69). Next, the operator would note that Section 23, applies to "[p]ermanent and [t]emporary installations" (Id.) and would know that the stockpile is "temporary" in that it is built up in order to be depleted. Further, the stockpile is an "installation", in that it is "installed". To install is to set up for use (*Webster's Third New International Dictionary* (1986) at 1171)), and stockpiles, including the stockpile in question, are set up as repositories for material that later is sold, loaded, and usually is used elsewhere.

Having determined that Section 23, applies to the powerlines and to the stockpile, an operator attempting to comply with the NESC would review the subsections of Section 23, to determine which is applicable. In so doing, an operator would find that Subsection 231, the first subsection, applies to "[s]upporting structures, support arms and equipment attached thereto, and braces" (Gov. Exh. 7 at 71). The operator would know that the stockpile is not a "supporting structure" for the overhead conductor nor is it a "support arm" or a "brace" for the powerlines in question (Id.).

The operator would proceed to Subsection 232, which is titled, *Vertical Clearance of Wires, Conductors, Cables, and Equipment Above Ground, Roadway, Rail, or Water Surfaces*. The operator rightly would know that the stockpile in question is not a "roadway" (no vehicles travel over it). It is not a "[r]ail or [w]ater surface". Nor is it "ground" as the word usually is used, for although it is made up of earth, it is not a surface upon which persons normally stand nor upon which they move, dwell, nor upon which objects naturally rest (See Webster's at 1002). Rather, a stockpile is a purposefully constructed feature of the mine, a "heap of material formed to create a reserve for loading or other purposes" (American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* (1996) at 540)). Therefore, the operator would find that Subsection 232, is inapplicable.

The operator's finding would be confirmed when the operator examined the tables that set forth the precise requirements of Subsection 232. They specify areas for which clearances are required. In so doing they refer to areas that are subject to regular or restricted traffic by pedestrians, sailors, swimmers, or vehicles. Front-end loaders load material into trucks from the

base of the stockpile, and the witnesses agreed that neither loaders, other vehicles, miners, nor anyone else travel or work on the stockpile so that it is not subject to traffic of any kind.

The next subsection, Subsection 233, is titled, *Clearance Between Wires, Conductors, and Cables Carried on Different Supporting Structures* (Gov. Exh. 7 at 84). The operator would know that the question is not the proper clearance between the conductors but rather the proper clearance from the surface of the stockpile to the conductors. In addition, the operator would know that the conductors under consideration are carried on common (not on different) supporting structures.

It is at Subsection 234, that the operator would find the clearance requirements for the stockpile. The subsection is titled, *Clearance of Wires, Conductors, Cables and Equipment from Buildings, Bridges, Rail Cars, Swimming Pools, and Other Installations*. As I have noted, a stockpile is an installation. This being the case, the operator would use Table 234-1, to find the clearances prescribed (Gov. Exh. 7 at 101). The table is itself divided into two categories, the first is "[b]uildings" but the stockpile is not a building. The second is "[s]igns, chimneys, billboards, radio and television antennas, tanks, and other installations not classified as buildings or bridges" (*Id.*). Realizing that the stockpile can only be one of the "other installations" and therefore that the second category of Table 234 -1 applies, the operator would determine that for "supply conductors over 750 v[olts]" a vertical clearance of 8 feet and a horizontal clearance of 7 ½ feet is required. Then, noting that the horizontal clearance requirement bears a footnote that allows the requirement to be reduced by two feet when no maintenance is required on the installation (Gov. Exh. 7 n. 1 at 102), the operator further would determine that the actual horizontal clearance required is 5 ½ feet because no maintenance is required on the stockpile (Gov. Exh. 7 at 101 (Table 234-1 n. 1 at 102)).⁴

Does the evidence establish that on the July 1, 1998, Central Sand failed to maintain a vertical clearance of 8 feet and a horizontal clearance of 5 ½ feet? No one who witnessed the accident testified. Therefore, clearances at the time of the accident must be inferred from testimony regarding conditions both before and immediately after the event.

⁴ It should be obvious at this point that despite the straightforward wording of the standard, by incorporating the NEC and the NESC into the standard, the Secretary has adopted an approach to regulation that is not "user friendly" — to say the least. It takes diligence to sift through the many sections, subsections, and tables of the codes and find applicable requirements. Indeed, the difficulties inherent in the approach are evidenced in this case in that even those most familiar with the codes, Smith and Caldwell, seemed unsure at times as to which particular provision applied (*See* Tr. 74-75, 89-90, 132-133, 156-157, 159, 168-169, 188). This said, despite their complexity the codes are not impossible to understand and to apply. Although there may be a more direct and less difficult way to regulate required clearances, the Secretary's approach is not impermissible. Therefore, it is the duty of each operator to have a thorough, working knowledge of the codes' contents and applications.

Central Sand did not offer any reliable evidence regarding the clearances as they existed prior to the accident. The company's inspection reports do not reference the clearances (Tr. 268-269) and although the mine manager, Brezina claimed that the "rule of thumb" at the mine is to maintain clearances of at least 10 feet (Tr. 270-271, 339), the way he determined the distances — by eyeballing them, frequently from inside a moving vehicle (Tr. 339) — is not conducive to accurate measurement. As he stated, it is "just kind of guess judging" (Tr. 340).

On the other hand, sound inferences that the required clearances were not maintained can be drawn from the accident and the post-accident observations of the investigators. The most important fact is that the victim touched the wire. Obviously, a five-foot tall, eleven-year-old boy would not have done so had there been a vertical clearance of 8 feet. Second, when a vertical clearance of 29 inches and a horizontal clearance of 60 inches were measured by Bergmark on July 2, no one had been on the pile and disturbed the accident site between the time the accident occurred and the time Bergmark measured (Tr. 58). Further, Bergmark emphasized that in reaching the site to make the measurements he disturbed conditions as little as possible (Tr. 41).

Moreover, there is no dispute that on July 2, the stockpile was 35 feet, 7 inches high (Tr. 69). The company hypothesizes that on the previous day the stockpile had been 45 feet high (the maximum height of a stockpile built by the radial stacker) (Tr. 292-293); that the high voltage lines had adequate clearance on July 1; but that the victim pushed sand and gravel ahead of him as he slid down the slope toward the powerlines (Tr. 161-162, 299). Sand and gravel lost at the top reduced the height of the stockpile, built up under the powerlines, and altered the clearance to less than required.

Caldwell rejected this theory. In his view the top of the stockpile had not been disturbed after the stacker last added to the pile. Caldwell based his opinion on his observation of the stockpile, and he testified that photographs the government entered into evidence confirm what he had seen. He stated, "Very quickly you can look at the photographs and you can see that the top of the pile has not been disturbed" (Tr. 162).

I find Caldwell's testimony compelling, for as he pointed out, the photographs clearly depict undisturbed water streaks from the wet sand and gravel the stacker last put on the stockpile. Since the stockpile was not added to after the accident or before the photographs were taken, I agree with Caldwell that the top of the pile was not significantly reduced prior to the accident (Tr. 162-163; Gov. Exh. 3b, Gov. Exh. 3e). Further, although Caldwell agreed that there could have been movement of material on the side of the pile (Tr. 162), he did not believe movement occurred in the immediate accident area, and he testified that the photographs of the area did not reveal any signs of significant movement (Tr. 165). Again, I agree.

Given the testimony and the exhibits, I conclude that while some movement of sand and gravel may have been caused by the boys, the material was not moved to such an extent that otherwise permissible clearances went out of compliance. Rather, I find that the evidence and

testimony permit the inference that the clearances were out of compliance with the NESC prior to and at the time of the accident.

The final question is whether the powerlines were "installed" according to the code. Caldwell stated that the phrase "shall be installed" meant that the powerlines not only had to be fixed in position for use according to the code, they also had to be maintained in compliance (Tr. 126). Caldwell's construction is logical. To read the phrase as applicable only to the original positioning of the lines would negate much of regulation's protective intent. Powerlines, once installed, tend to be permanent, whereas conditions around and under them frequently are subject to change. For these reasons I conclude that because the subject powerlines were not maintained in compliance with the NESC, they were not "installed as specified". Therefore, Central Sand violated Section 56.12045 as cited.⁵

S&S and GRAVITY

A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

The Secretary met her burden. The violation existed as charged. The hazard contributed to by the failure of the company to maintain the required clearances is the danger that a person will touch the powerline and be shocked, burned or electrocuted. When, as here, clearances for an unguarded high voltage powerline are reduced to the point where a boy of eleven can not proceed upright past and under them without contacting the lines, there is a reasonable likelihood that the lines will be touched and serious injury or death will result.

The Commission recently has reemphasized that the focus of the gravity criterion is on "the effect of the hazard if it occurs" (Hubb Corp., 23 FMSHRC 606, 609 (May 2000) (quoting Consolidation Coal Co., 18 FMSHRC 1541, 1550 (September 1996)). In this case, the hazard occurred, and its effect was lethal. This is a very serious violation.

UNWARRANTABLE FAILURE and NEGLIGENCE

⁵ In view of this conclusion I need not reach the issue of whether the company violated Section 56.12030.

The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

Several factors must be considered in analyzing whether a violation results from unwarrantable failure, among these are: “the extensiveness of the violation, the length of time that the violative condition has existed, the operator’s efforts to eliminate the . . . condition, and whether [the] operator has been placed on notice that greater efforts are necessary for compliance” (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a “knew or should have known” test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 October 1993)).

In view of these and other factors, I conclude that Central Sand did not unwarrantably fail to comply with Section 56.12045. First, the violation was not easy to detect. To determine whether the company was in compliance, the mine examiner had to judge the horizontal and vertical distance between the lines and the slope of the stockpile from ground level, either while driving past the pile or while out of the vehicle and on the ground. In the case of the subject stockpile this meant making a judgement call from 29-feet or more below and at an angle to the lines (Tr. 44. 330, 340). This method of determining compliance, while difficult, was reasonable given the size of the mine and the location of the powerlines. There is nothing in the record to suggest that MSHA advised the company to measure the distance from another location (for example from the top or side of the stockpile) or always to estimate the distance while standing at the base of the stockpile.

Second, it is the nature of stockpiles that they are not necessarily built at one time. Material may be deposited on them over a series of shifts or even days. Although the subject stockpile had been in existence for up to nine days prior to the accident (Tr. 315, See also Tr. 122), the Secretary did not bring forward evidence to establish when the size of the pile reached the point where the vertical and horizontal clearances went out of compliance. Thus, it may well be that the violation existed for a very short time prior to the accident (Tr. 314-315).

It is clear from Caldwell’s testimony that MSHA was concerned about clearances for high voltage powerlines where the lines crossed mine roads or ran above areas where trucks were loaded or unloaded (Tr. 134-135, 161). It is also clear the agency’s concern extended to clearances above stockpiles. Stanley Benke, the company safety director, admitted that at joint MSHA/industry workshops it was Caldwell who warned company representatives about the hazards of powerlines and high voltage wires above stockpiles.

Benke testified that Caldwell “said . . . its a recommended practice -- safe practice to try

and keep stockpiles and materials away from powerlines [and that] [i]f you're not within the mandated requirements as far as clearances that it could result in a citation" (Tr. 252). However, Caldwell's warning was general in nature and was directed to all operators at the meetings. Central Sand was not singled out and told that it needed to exert greater efforts to ensure compliance with regard to clearances above stockpiles at its mines. In fact, other stockpiles had existed at the location of the cited stockpile, and the Secretary offered no evidence that the company was cited previously for a violation of the clearance requirements with respect to its stockpiles. The subject incident may represent the one and only time prior to July 1, that powerlines ran too close to a stockpile at the mine.

Based on the testimony and the lack of any evidence regarding previous violations of Section 56.12045, I conclude that although Central Sand was aware it was required to comply with the clearance requirements in situations where high voltage lines ran above its stockpiles, it was not on notice that greater efforts were needed to ensure compliance.

Finally, Central Sand had no reason to think a person would come near the lines. Miners never worked nor traveled on the stockpile. The only person the company might have anticipated would be endangered is a trespasser, and Central Sand posted and fenced its property to prevent unauthorized entry. While it is true that it might have posted a greater number of "no trespassing" signs and might have better maintained its fence (Tr. 176), the company's lack of care was not such as to be gross or reckless.

The testimony revealed the company experienced one prior instance of trespassing, one that involved vandalism to the dredge on the lake, but the company's safety director, who is likely to know, could think of no prior incident that involved the stockpile or that occurred anywhere near it (Tr. 215). Moreover, while the victim's mother testified the victim played on mine property prior to the accident and she had warned him not to go there again, there is no evidence she alerted the company to the fact (Tr. 38, See also Tr. 309).

Given all of these factors and the lengths to which the boys had to go to place themselves in harm's way — pass the fence, travel through dense brush, cross the river, walk past at least one "no trespassing" sign, and climb to the top of the stockpile — I cannot find that Central Sand's lack of care was aggravated or more than ordinary. Rather, the company failed to exhibit the ordinary care that was required by the circumstances, and in this way it was negligent.

CIVIL PENALTY CRITERIA

I have found that the violation was very serious and was the result of the company's failure to exercise the care required. In assessing a civil penalty, the Act mandates that I also consider Central Sand's history of previous violations, the size of its business, the effect of the penalty on the company's ability to continue in business, and its good faith in attempting to comply rapidly after being charged (30 U.S.C. §820(i)).

As noted above, Counsel for the Secretary characterized Central Sand's history of previous violations as moderate to small and the company's size as large (Tr. 28). The parties agreed that a penalty of up to \$25,000 would not affect the company's ability to continue in business (Stipulation 7). The company abated the violation in a timely fashion and with good faith by trimming the stockpile to obtain the clearances required (Gov. Exh. 9).

Considering all of these factors, and taking note especially that the company's negligence was not aggravated, I conclude that a civil penalty of \$6,000 is warranted. It is important to understand that while the assessment faithfully reflects the statutory civil penalty criteria, serves as an incentive for future compliance, and conforms in all respects to the law under which it is imposed, it is not a valuation of the life that was lost or of the great pain that was and will continue to be inflicted by this accident. Such things are beyond the Act.

ORDER

Within 30 days of the date of this Decision, Central Sand is **ORDERED** to pay a civil penalty of \$6,000. Upon payment of the penalty, these proceedings are **DISMISSED**.



David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified)

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/wd

⁶ Because trial counsel Mark W. Nelson since has left the Office of the Solicitor, the decision is being distributed to the Associate Regional Solicitor.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

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May 15, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-188-D
on behalf of LEVI BUSSANICH,	:	
Complainant	:	Centralia Coal Mine
	:	
v.	:	Mine I.D. 45-00416
	:	
CENTRALIA MINING COMPANY,	:	
Respondent	:	

ORDER GRANTING MOTION TO DISMISS COMPLAINT NO. DENV-CD-97-08

ORDER DENYING MOTION TO DISMISS COMPLAINT NO. DENV-CD-99-13

This proceeding was brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company ("Centralia") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Mine Act") and 29 C.F.R. § 2700.50 *et seq.* This case includes four discrimination complaints that Mr. Bussanich filed with the Department of Labor's Mine Safety and Health Administration ("MSHA"). In the first complaint, DENV-CD-97-08, filed on January 28, 1997, Mr. Bussanich alleges that his foreman prevented him from leaving the shop without a supervisor's escort because he had raised safety issues with MSHA. In the second complaint, DENV-CD-99-13, filed on February 16, 1999, Mr. Bussanich alleges that he was treated disparately because the company would not accept a work release from his physician when he was ready to return to work after a non-work related injury and he was also required to take a drug test before he could return. In the third complaint, DENV-CD-99-22, filed on August 23, 1999, Mr. Bussanich alleges that he was disparately subjected to a search of his vehicle at the mine. In the fourth complaint, DENV-CD-2000-06, filed December 18, 2000, Mr. Bussanich alleges that he was terminated from employment at the Centralia Mine in violation of section 105(c) of the Mine Act.

The Secretary determined that Centralia violated section 105(c) with respect to each complaint and notified Mr. Bussanich and Centralia of her determination on February 4, 2000. The Secretary filed this case with the Commission on or about February 22, 2000. Centralia filed a motion to dismiss the first two discrimination complaints that Mr. Bussanich filed with MSHA because they are untimely and Centralia was materially prejudiced by the delay. It also contends that Bussanich will not be materially prejudiced by the dismissal of the complaints. The Secretary opposes Centralia's motion. I consider the facts surrounding each complaint below.

I. Complaint of January 28, 1997, DENV-CD-97-08

Mr. Bussanich contends that he was prohibited from leaving the shop where he normally worked to get supplies because his foreman told him that Anil Puri, a Centralia supervisor, did not want him “out running around looking for more problems.” Mr. Bussanich states that he contacted MSHA and met with an MSHA inspector on January 14, 1997, about safety concerns he had at the mine. Bussanich maintains that Mr. Puri’s actions were in retaliation for his protected activity. The Secretary did not make her determination that Centralia violated the Mine Act with respect to this complaint until February 4, 2000.

Centralia contends that the Secretary’s lengthy delay with respect to this complaint is so extraordinary as to demonstrate prejudice *per se*. It also maintains that it was prejudiced, in fact, by the delay because of changes that occurred at Centralia since Bussanich filed his complaint with MSHA. In early 1998, Centralia’s parent company, PacifiCorp, was acquired by Scottish Power. Scottish Power then sold Centralia to TransAlta in May 1999. TransAlta terminated Centralia’s top managers including Mine Manager Bart Hyita and Human Resources Manager Charles Schultz. Centralia contends that, although it could subpoena these two individuals to testify at a hearing, it could not use them to prepare for trial. Centralia states that it is prejudiced as a result.

The Secretary states that the delay in processing this complaint “occurred primarily because of investigation and personnel difficulties with the field special investigator assigned to investigate this matter.” (S. Response at 2-3). She also cites the fact that Bussanich filed other complaints in 1999 that were interrelated to this complaint. Finally, she maintains that Centralia did not demonstrate that it was prejudiced by the delay. Centralia had a copy of the complaint and interacted with MSHA during the investigation. She states that part of the delay was caused by the fact that MSHA scheduled interviews of some Centralia employees to accommodate the schedule of Centralia’s counsel. She argues that the change in ownership of the company and the fact that some of the top managers no longer work for the company is insufficient to show prejudice.

It is clear that the Secretary violated section 105(c)(3) of the Mine Act by failing to notify Mr. Bussanich of her “determination whether a violation ... occurred” within 90 days of receipt of his complaint. It is also clear that this time-frame is not jurisdictional. The legislative history of the Mine Act states that the deadlines imposed on the Secretary in section 105(c) are not jurisdictional and that the failure of the Secretary to meet them “should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the Government to meet its time obligations.” S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 624 (1978).

In interpreting the deadlines imposed on the Secretary in section 105(c), the Commission concluded that the “fair hearing process envisioned by the Mine Act does not allow us to ignore

serious delay by the Secretary in filing a discrimination complaint if such delay prejudicially deprives a respondent of a meaningful opportunity to defend itself against the claim.” *Secretary of Labor for Donald R. Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 908 (June 1986). Accordingly, the Commission held that a discrimination complaint is subject to dismissal when the Secretary fails to meet the statutorily imposed deadlines “if the [mine] operator demonstrates material legal prejudice attributable to the delay.” *Id.* This test requires more than a mere allegation of prejudice.

The three-year delay with respect to this complaint was more than 12 times the length of time set forth in the Mine Act. This delay is truly extraordinary. A delay of this length is inherently prejudicial to a mine operator’s ability to defend itself against the allegations contained in a discrimination complaint. The Secretary does not offer any justification for such a lengthy delay. The affidavit attached to the Secretary’s response to the motion details the investigation process in this case, but offers only bureaucratic excuses for the delay. The discrimination complaint does not raise complicated issues. I find that the delay in this complaint was so significant as to constitute prejudice *per se*. The memories of management personnel as well as Mr. Bussanich will have faded over such a long period of time. Testimony about the events will be inherently unreliable and, as a consequence, subject to fabrication.

The Secretary alleges that Mr. Bussanich’s subsequent complaints complicated her review of this complaint. It must be understood that Bussanich’s second complaint was filed two years after his first complaint. Thus, MSHA had two full years to investigate his first complaint without any such complications. The Secretary also blames Centralia for some of the delay. Centralia denies this allegation. Even if I accept the Secretary’s contention that some interviews were delayed at the request of counsel for Centralia, it cannot justify a three-year delay.

It is important to recognize that Mr. Bussanich will not be significantly harmed by dismissing this complaint. Mr. Bussanich was off work for an extended absence shortly after he filed this complaint. He also transferred out of the shop in August 1997. It does not appear that he was under any restrictions concerning travel around the mine for a significant period of time. More importantly, he is no longer working at the mine. Even if Mr. Bussanich were to prevail on this complaint, there is no remedy that I can offer him unless he prevails on his fourth complaint, which would subsume any remedies available here. The only independent remedy that I would be able to impose with respect to this complaint is a civil penalty for a violation of section 105(c) of the Mine Act. The allegations contained in this complaint will still be admissible

For the reasons discussed above, Centralia’s motion to dismiss complaint No. DENV-CD-97-08, filed Bussanich on January 28, 1997, is **GRANTED** and the complaint is **DISMISSED**.

II. Complaint of February 16, 1999, DENV-CD-99-13

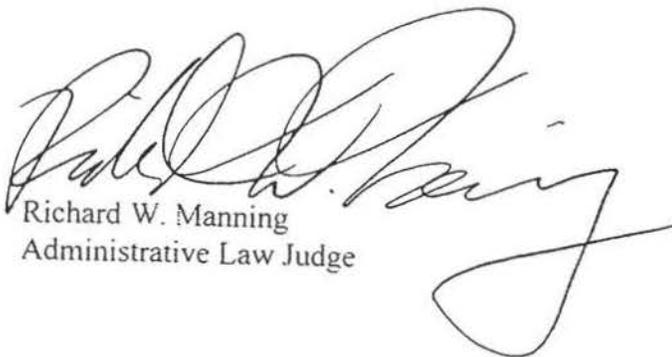
Mr. Bussanich maintains that when he was released to return to work by his physician following a non-work related injury, Dave Kendrick, his supervisor, told him to report to the

mine on February 5, 1999. Bussanich subsequently learned that Centralia wanted him to take a drug test and meet with the company doctor before returning to work. Mr. Bussanich alleges that after he took the drug test, the company doctor released him to return to work without restrictions. After Bussanich returned to work, he was sent home because, according to Bussanich, Mr. Puri was "not happy with ... the doctor's note." Mr. Bussanich maintains that he was treated differently than other similarly situated employees because he discussed safety matters with an MSHA inspector. He also filed a grievance over the matter.

Centralia argues that Charles Shultz was a principal decision maker and a witness to the relevant events in this complaint. Mr. Shultz was terminated from Centralia's employment when TransAlta became its parent corporation in May 1999. Centralia argues that although it knows where Messrs. Shultz and Hyita currently reside, these individuals are no longer available to help it prepare a defense to this complaint of discrimination and may indeed be uncooperative because they were terminated by TransAlta. Centralia states that without these two key managers on its "defense team, even [Centralia's] ability to respond to the Secretary's discovery, much less prepare [its] own defense, is badly compromised." (C. Reply at 5). Centralia argues that the Secretary's delay in prosecuting this complaint materially prejudiced its ability to defend itself against this complaint.

The delay in this complaint was a little less than one year. During this year, Bussanich filed two additional related discrimination complaints with MSHA. The events that Centralia relies upon to demonstrate that it was prejudiced by the delay occurred within the 90-day period set forth in the Mine Act. Thus, even if the Secretary had notified Bussanich within 90 days that she determined that a violation of section 105(c) occurred, Messrs. Shultz and Mr. Hyita would not have been available to help prepare Centralia's defense. They were apparently terminated in May 1999 and the 90-day period would have ended on or about May 17, 1999. By the time a complaint and answer were filed and the case set for hearing, Messrs. Shultz and Hyita would be no more available than they are at present. Accordingly, I find that Centralia has not demonstrated material legal prejudice.

For the reasons discussed above, Centralia's motion to dismiss complaint No. DENV-CD-99-13, filed by Mr. Bussanich on February 16, 1999, is **DENIED**.


Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 15, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-188-D
on behalf of LEVI BUSSANICH,	:	
Complainant	:	Centralia Coal Mine
	:	
v.	:	Mine I.D. 45-00416
	:	
CENTRALIA MINING COMPANY,	:	
Respondent	:	

ORDER DENYING RESPONDENT’S MOTION FOR PARTIAL SUMMARY DECISION

This discrimination proceeding was brought by the Secretary of Labor on behalf of Levi Bussanich against Centralia Mining Company (“Centralia”) under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.50 *et seq.* This case includes four discrimination complaints that Mr. Bussanich filed with the Department of Labor’s Mine Safety and Health Administration (“MSHA”). In the first complaint, DENV-CD-97-08, filed on January 28, 1997, Mr. Bussanich alleges that his foreman prevented him from leaving the shop without a supervisor’s escort because he had raised safety issues with MSHA. In the second complaint, DENV-CD-99-13, filed on February 16, 1999, Mr. Bussanich alleges that he was treated disparately because the company would not accept a work release from his physician when he was ready to return to work after a non-work related injury and he was also required to take a drug test before he could return. In the third complaint, DENV-CD-99-22, filed on August 23, 1999, Mr. Bussanich alleges that he was disparately subjected to a search of his vehicle at the mine. In the fourth complaint, DENV-CD-2000-06, filed December 18, 2000, Mr. Bussanich alleges that he was terminated from employment at the Centralia Mine in violation of section 105(c) of the Mine Act.

On or about December 28, 1999, the Secretary filed an application for temporary reinstatement on behalf of Mr. Bussanich in WEST 2000-99-D, under section 105(c)(2) and 29 C.F.R. § 2700.45. In a temporary reinstatement proceeding, the Secretary has the burden of proving that the miner’s complaint of discrimination was not frivolously brought. Centralia requested a hearing in the temporary reinstatement case. A hearing was held before me on January 21, 2000. In my decision issued January 27, 2000, I held that the Secretary did not meet her burden of proof because she failed to establish a colorable claim that Bussanich was terminated from his employment. *Secretary of Labor o/b/o Bussanich v. Centralia*, 22 FMSHRC 107. My decision was affirmed by the Commission, 22 FMSHRC 153 (Feb. 2000).

Centralia filed a motion for partial summary decision in the present proceeding. It contends that the issue of whether Bussanich was discharged on account of protected activity was adjudicated adversely to the Secretary in the temporary reinstatement case. As a consequence, it argues that Mr. Bussanich's fourth discrimination complaint, DENV-CD-2000-06, must be dismissed.

In support of its motion, Centralia argues that the Secretary is collaterally estopped from relitigating the same issue that was decided in WEST 2000-99-D. Centralia maintains that the doctrine of collateral estoppel precludes the Secretary's attempt to relitigate the issue of whether Bussanich was terminated from his employment and Centralia is not obligated to again rebut the Secretary's allegation. It argues that since the Secretary's burden of proof was lower in the temporary reinstatement case, collateral estoppel clearly bars a "second bite at the apple." (C. Motion at 7). Since the Secretary was unable to prove that Bussanich's discrimination complaint was not frivolous, collateral estoppel precludes her from trying to establish, by a preponderance of the evidence, that Bussanich was discharged by Centralia because of his protected activities.

Centralia further argues that, even though temporary reinstatement proceedings are expedited, the Secretary could have investigated Bussanich's fourth complaint more thoroughly, as recommended by Centralia, prior to bringing that action. The Secretary chose to bring the temporary reinstatement case before MSHA's investigators interviewed Centralia managers or reviewed the company's documents. Thus, it contends that the Secretary had the opportunity to more fully investigate the facts prior to the temporary reinstatement hearing but chose not to do so. Centralia argues that the Secretary's opportunity to litigate the merits of the discharge claim in the temporary reinstatement proceeding was the substantial equivalent of what is available in the present case so that principles of collateral estoppel should be applied.

The Secretary opposes Centralia's motion. She contends that MSHA's investigators discovered new evidence after the temporary reinstatement hearing. She also states that she has initiated discovery against Centralia which may also lead to new evidence that was not available for a temporary reinstatement hearing. Thus, the Secretary argues that, because there are genuine issues of fact in dispute in the present case, a motion for partial summary decision is not proper under 29 C.F.R. § 2700.67(b)(1).

The Secretary states that the Commission, in affirming my temporary reinstatement decision, held that its decision has "no bearing on the ultimate merits of the case." 22 FMSHRC at 159, n. 8 (citation omitted). The Secretary argues that she should not be bound by the evidence presented at a separate hearing having a different and narrower purpose. The hearing in a temporary reinstatement proceeding should not become the hearing on the merits of the underlying discrimination complaint because "full discovery and examination of the evidence" is not expected and "would be contrary to the legislative purpose for providing temporary reinstatement." (S. Response at 10). The Secretary maintains that if the Secretary were required to present a fully developed case at a temporary reinstatement proceeding in order to avoid the risk of being collaterally estopped in the discrimination case, the complainant would be put in a

difficult financial position. Rather than being reinstated on an expedited basis, the complainant would have to wait until MSHA's investigation is virtually complete before he could be reinstated. The mine operator would have a great incentive to delay the investigation by refusing to cooperate with MSHA investigators.

Finally, the Secretary focuses on the purpose for temporary reinstatement and the legislative history of section 105(c) of the Mine Act. She maintains that Congress intended that temporary reinstatement occur as soon as possible to the benefit of the complaining miner. The Secretary maintains that collateral estoppel should not be applied in these circumstances.

I agree with the arguments presented by the Secretary. This case presents rather unique facts that will infrequently arise. It is important to understand that, although a temporary reinstatement case is related to the underlying discrimination case, they are two separate cases with distinct functions. The same issue is not litigated in both cases. Although the Secretary's burden of proof is easier to meet in the temporary reinstatement case, the nature of that case is much narrower. The language of section 105(c)(2) of the Mine Act is instructive. That provision states that, upon receipt of a complaint of discrimination, the Secretary shall forward a copy of the complaint to the respondent and cause an investigation to be undertaken. This provision goes on to state:

Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission

This provision clearly contemplates that the Secretary seek reinstatement as quickly as possible before her investigation is completed. The legislative history supports my interpretation, as follows:

Upon determining that the complaint appears to have merit, the Secretary shall seek an order of the Commission temporarily reinstating the complaining miner pending final outcome of the investigation and complaint. The Committee feels that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint.

Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine*

Safety and Health Act of 1977 at 624-25 (1978).

Neither the Mine Act nor the legislative history speak of a right to a hearing in cases of temporary reinstatement. Initially, the Commission's procedural rules did not provide mine operators with a right to challenge an order of temporary reinstatement in a formal hearing. This right was added in response to a Sixth Circuit Court of Appeals decision. Subsequently, in *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987), the Supreme Court held that a temporary reinstatement provision in the Surface Transportation Assistance Act satisfied due process even though employers were not provided with the right to a hearing on the issue.¹

The Commission affords mine operators the right to challenge temporary reinstatement orders in a formal hearing. Nevertheless, the focus of the hearing is quite narrow: whether the Secretary presented sufficient evidence to show that the miner's discrimination complaint was not frivolously brought. The temporary reinstatement hearing is not a trial on the merits of the discrimination complaint and it cannot even be deemed a mini-trial on that issue. Temporary reinstatement is sought so that the complaining miner will not have "to suffer even a short period of unemployment or reduced income" pending the resolution of the discrimination complaint. The Secretary would be shirking her duty if she sought temporary reinstatement only after MSHA completed its investigation or only after she had sufficient information to present a *prima facie* case of discrimination.

Given this mandate, it is clear that the Secretary will not have sufficient facts at the time of a hearing in a temporary reinstatement case to be bound by the concept of collateral estoppel in the subsequent discrimination proceeding. MSHA's investigation will not be complete and there is insufficient time to develop the case through discovery. In most cases, of course, this issue will not arise because the Secretary's burden of proof is so low in temporary reinstatement proceedings. But in those few cases where the Secretary does not prevail in a temporary reinstatement case, issue preclusion should not apply because the issues in a discrimination case are not reached in a temporary reinstatement case.

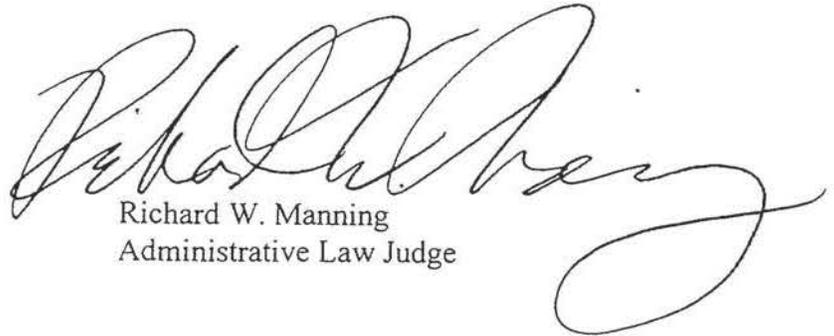
It is important to recognize that when the Secretary prevails in a temporary reinstatement proceeding, the holding of the administrative law judge in that case "has no bearing on the ultimate merits" on the underlying discrimination proceeding. 22 FMSHRC at 159, n. 8 (citation omitted). Likewise, when the Secretary does not present sufficient evidence to meet her burden of proof in a temporary reinstatement case, the judge's holding denying temporary reinstatement should not have any bearing on the ultimate merits of the discrimination case.² The

¹ A more detailed history of the Commission's Procedural Rule in temporary reinstatement proceedings is presented in the dissenting opinion of Commissioners Marks and Beatty in the temporary reinstatement proceeding. 22 FMSHRC at 162-63.

² The parties can use the transcript from the temporary reinstatement hearing in the discrimination case. For example, a party may attempt to demonstrate, on cross-examination, that

complaining miner should not have his discrimination complaint dismissed simply because the Secretary was not able to sufficiently marshal the facts in the temporary reinstatement hearing. Although the Secretary is a party in temporary reinstatement and discrimination proceedings, she is fundamentally representing the complaining miner so his interests are paramount.

For the reasons set forth above, Centralia's motion for partial summary decision is **DENIED**.



Richard W. Manning
Administrative Law Judge

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a witness made prior inconsistent statements while under oath.