

JULY AND AUGUST 2007

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JULY AND AUGUST 2007

Review was granted in the following cases during the months of July and August:

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Secretary of Labor, MSHA v. Emerald Coal Resources, LP, et al., Docket No. PENN 2007-251-E, etc. (Judge Zielinski, June 27, 2007)

Phelps Dodge Tyrone, Inc., v. Secretary of Labor, MSHA, Docket No. CENT 2006-212-RM. (Judge Manning, July 24, 2007)

No cases were filed in which Review was denied during the months of July and August

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 12, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 2007-228-M
	:	A.C. No. 29-01899-114181
	:	Docket No. CENT 2007-229-M
	:	A.C. No. 29-01899-99835
	:	Docket No. CENT 2007-230-M
v.	:	A.C. No. 29-01899-102372
	:	Docket No. CENT 2007-231-M
	:	A.C. No. 29-01968-112533
	:	Docket No. CENT 2007-232-M
JAMES HAMILTON CONSTRUCTION	:	A.C. No. 29-00708-99064 AB8

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act").¹ On May 29, 2007, the Commission received from James Hamilton Construction ("Hamilton") a motion by counsel seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

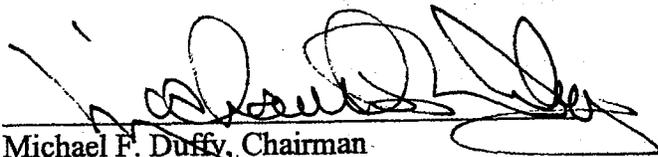
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2007-228-M, CENT 2007-229-M, CENT 2007-230-M, CENT 2007-231-M, and CENT 232-M, all captioned *James Hamilton Construction*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

During 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued numerous citations to Hamilton. In Hamilton's motion to reopen, counsel states that "due to clerical error, mistake and excusable neglect, the citations were misplaced and not timely responded to." In addition, counsel states that Hamilton wishes "to contest the citations and/or the proposed assessments at this time." In response, the Secretary states that she does not oppose reopening the dockets included in this proceeding but clarifies her understanding as to a citation that was not included. She also states that penalties in two of the dockets have been paid.

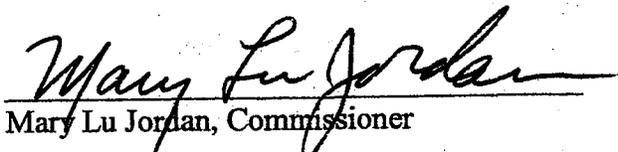
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

Having reviewed Hamilton's motions to reopen, we deny without prejudice Hamilton's request. Hamilton has failed to provide any specific explanation to justify its failure to timely contest the proposed penalty assessments. *See Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006). Moreover, rather than including a precise listing of the citations associated with the individual penalty assessments from which it seeks relief, Hamilton has included an extensive list of citations, many of which are apparently not within the scope of relief sought by its motion. The list of citations is, at best, confusing, and there is *no* identification of the corresponding penalty assessments from which relief is sought.

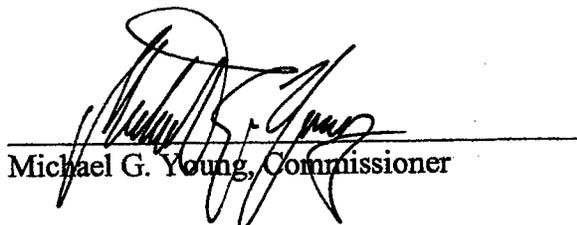
In the event that Hamilton chooses to refile this motion, it should disclose with specificity the grounds for relief from the final orders of the Commission and what citations and associated penalties are included in the request for relief.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

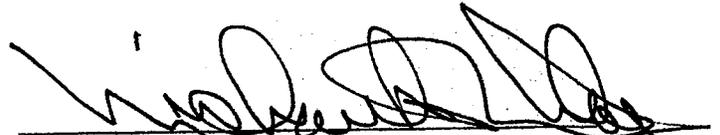
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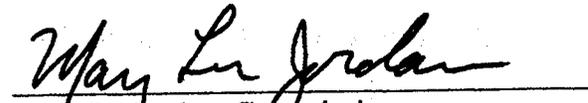
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Here, where the request to reopen the penalty assessment has resulted in vacature of the citation underlying the assessment, there is no longer an outstanding penalty owed by Major. Because the lack of a penalty renders the penalty proceeding moot, we hereby dismiss the proceeding.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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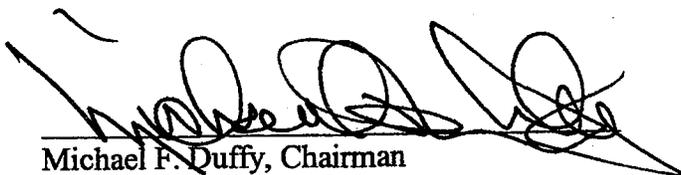
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According to Performance, internal delays in the distribution of mail and the attendance of company officials at meetings out of their offices prevented Performance from requesting a hearing in a timely manner. The Secretary of Labor, in her response to the motion to reopen, requests that Performance explain in detail why it took almost three months for the operator to contest the proposed penalty assessments.

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

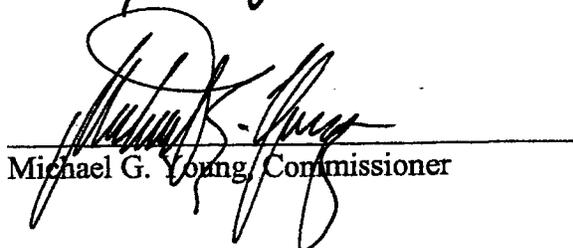
Having reviewed Performance’s request and the Secretary’s response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Performance’s failure to timely contest the penalty proposals and whether relief from the final order should be granted. The issues raised by the Secretary involve fact-finding that is the province of an administrative law judge in the first instance. Consequently, the judge to whom this case is assigned should consider the Secretary’s response and any reply by Performance. If the judge eventually determines that reopening is warranted, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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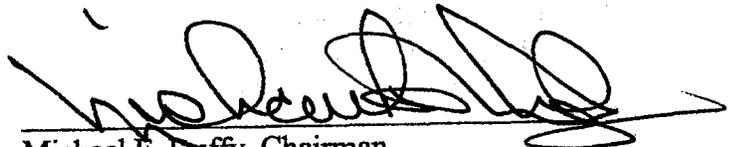
The two penalties subsequently were listed as “closed” on MSHA’s website, prompting counsel for the Secretary of Labor in the contest proceedings to write a letter to the assigned judge in the case requesting that she dismiss the proceedings on the ground that the penalties had been paid by Performance. The judge granted the Secretary’s request on March 20, 2007.¹

Performance is now requesting that the penalty assessment be reopened so that it can challenge the two penalties that it intended to challenge originally. The Secretary of Labor, in her response to the motion to reopen, requests that Performance explain why the contest proceedings should be reopened, why it did not respond to the Secretary’s letter in the contest proceedings, and why it did not appeal the judge’s order dismissing those proceedings.

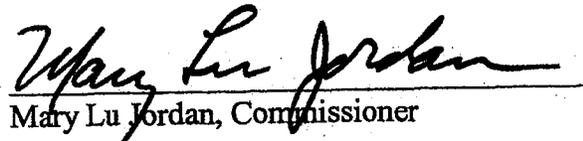
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¹ Neither Performance in its motion nor the Secretary in response to the motion states whether the penalties were actually paid.

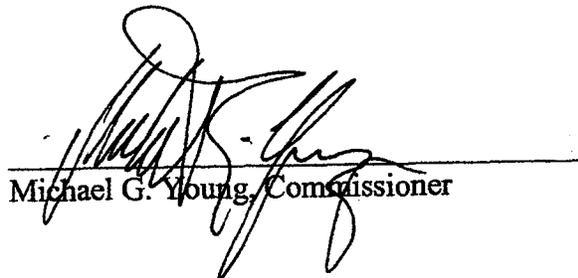
Having reviewed Performance's request and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Performance's failure to timely contest the penalty proposals and whether relief from the final order should be granted. If the judge eventually determines that reopening is warranted, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

July 13, 2007

UNITED MINE WORKERS OF
AMERICA, on behalf of LOCAL 1248,
DISTRICT 2

v.

MAPLE CREEK MINING, INC.

Docket No. PENN 2002-23-C

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”). The United Mine Workers of America (“the UMWA”), pursuant to section 111 of the Act, 30 U.S.C. § 821, seeks compensation for miners of Maple Creek Mining, Inc. (“Maple Creek”) idled by a withdrawal order issued by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”). Administrative Law Judge Michael Zielinski twice denied Maple Creek’s motion for summary decision on the question of whether the miners were owed up to one week’s compensation. 28 FMSHRC 407 (May 2006) (ALJ); 28 FMSHRC 904 (Oct. 2006) (ALJ). Maple Creek requested that the judge certify for interlocutory review the issue addressed in the judge’s decisions, and he did so. 28 FMSHRC 1120 (Dec. 2006) (ALJ). The Commission thereafter granted interlocutory review. 29 FMSHRC 1 (Jan. 2007). For the reasons that follow, we vacate the judge’s decisions denying Maple Creek’s motions.

I.

Factual and Procedural Background

On the morning of July 30, 2001, while inspecting the Maple Creek Mine, an underground coal mine then operating in Washington County, Pennsylvania, an MSHA inspector

issued Citation No. 7082157 to Maple Creek, alleging an ineffective bleeder system in violation of 30 C.F.R. § 75-334(b)(1).¹ 28 FMSHRC at 408-09 & n.4; MCM Reply Mem. on Mot. for Summ. Dec., Ex. 2 (“Citation”). In addition to the citation, issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), the inspector issued Order No. 7082156, an “imminent danger” withdrawal order under section 107(a) of the Act, 30 U.S.C. § 817(a).² 28 FMSHRC at 408 & n.3; MCM Reply Mem., Ex. 1. Following a ventilation survey conducted by MSHA, that order was terminated by a different inspector at 1 p.m. the following day, July 31. 28 FMSHRC at 409.³

Although the “Condition or Practice” section of Citation No. 7082157 stated that because of the imminent danger order, no abatement time was set, the citation included a notation that termination was due by 11:30 p.m., July 31. *Id.*; Citation at 2. The issuing inspector returned to

¹ 30 C.F.R. § 75.334(b)(1) provides:

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

² Section 107(a) provides in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

³ Both the imminent danger withdrawal order and the citation were ultimately modified to eliminate language stating that the alleged violation was a contributing factor to the condition prompting the imminent danger order. 28 FMSHRC at 409.

the mine before then and, pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b),⁴ again ordered miners withdrawn from that area of the mine, based upon his conclusion that Maple Creek had expended "little or no effort" to correct the condition he had cited the day before. 28 FMSHRC at 409; Compl.'s Opposition to Mot. for Summ. Dec., Ex. C. According to the parties, as a result of the section 104(b) order, Order No. 7060223, MSHA did not permit mining operations to resume there until August 7, 2001. 28 FMSHRC at 409; MCM Br. at 2. Maple Creek did not file notices of contest with respect to either of the withdrawal orders or with respect to the citation. 28 FMSHRC at 413.

On October 26, 2001, pursuant to section 111 of the Mine Act, the UMWA filed a Complaint for Compensation initiating this proceeding.⁵ The claim is based on the third sentence

⁴ Section 104(b) provides that:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

⁵ Section 111 provides that:

[1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 for a failure of the operator to

of section 111, which provides that, if a mine is closed by an order issued under section 104 or section 107, all miners who are idled by the order shall receive up to one week's pay after there is an opportunity for a public hearing and "after such order is final." 30 U.S.C. § 821. Accordingly, the UMWA seeks up to a week's pay for each Maple Creek miner idled as a result of the section 104(b) withdrawal order. 28 FMSHRC at 407 & n.1, 411.

On February 25, 2002, MSHA issued proposed civil penalty assessments for a number of citations and orders that had been previously issued to Maple Creek. 28 FMSHRC at 409. Among the proposed penalties was a proposed penalty of \$9,000 for Citation Number 7082157. *Id.* It was categorized under the "Type of Action" column on the assessment form as "104A-104B." *Id.* at 413. Maple Creek contested that and some of the other proposed penalties on March 18, 2002. *Id.* at 409-10.

On May 3, 2002, the Secretary filed with the Commission a Petition for Assessment of Civil Penalties in Docket No. PENN 2002-116. *Id.* at 410. In that proceeding, the Secretary sought to assess civil penalties in the total amount of \$36,853.00 for 12 alleged violations, including the aforementioned \$9,000 penalty. *Id.* The petition was served on both Maple Creek and UMWA Local Union 1248. *Id.* By letter dated June 19, 2002, the UMWA sought party status in the case — a request that was granted by the assigned judge, Judge Bulluck. *Id.*

comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

30 U.S.C. § 821.

On July 29, 2003, the Secretary filed with Judge Bulluck a Motion for Decision and Order Approving Partial Settlement, by which the Secretary and Maple Creek sought approval of a settlement of all but one of the violations at issue in the civil penalty proceeding. *Id.*; MCM Mot. for Summ. Dec., Ex. 2 (“Settlement Mot.”). Among the violations included in the motion was Citation No. 7082157. 28 FMSHRC at 410; Settlement Mot. at 2-3. In addressing the citation, the Secretary “recommend[ed] that . . . Order No. 706223 be vacated” and stated that a reduction in the \$9,000 proposed penalty to \$2,000 was warranted. 28 FMSHRC at 410; Settlement Mot. at 2-3.

The UMWA was served with a copy of the settlement motion but filed no response. 28 FMSHRC at 410. On August 11, 2003, a Decision Approving Partial Settlement was entered. Judge Bulluck granted the Secretary’s motion and approved the proposed reduction of the civil penalty assessed for Citation No. 7082157. *Id.*; MCM Mot. for Summ. Dec., Ex. 3.⁶

Subsequently, in the separate compensation proceeding, Maple Creek moved for summary decision before Judge Zielinski, who by then had been assigned the proceeding. Maple Creek contended that a week’s compensation for miners is not permissible in this instance under the terms of section 111 because Order No. 706223 had been vacated as part of the approved settlement in the civil penalty proceeding. 28 FMSHRC at 408. According to Maple Creek, because the order had been properly challenged and vacated, it did not constitute a “final order” entitling the miners to up to a week’s compensation under the pertinent provisions of section 111.

Judge Zielinski denied Maple Creek’s motion for summary decision on May 4, 2006. *Id.* at 413. The judge concluded that because the section 104(b) withdrawal order did not allege a new violation and since there was no separate civil penalty assessed with respect to the order, the order was not properly part of the civil penalty proceeding. *Id.* The judge held that Maple Creek’s sole avenue for challenging a section 104(b) withdrawal order was to file a notice of contest pursuant to section 105(d), which it did not do. *Id.* at 411-13. Consequently, the judge concluded that 30 days after its issuance the section 104(b) withdrawal order had become final for purposes of section 111. *Id.* at 413.

Upon Maple Creek’s motion for reconsideration, the judge requested that the Secretary appear as *amicus curiae* in the case because he believed that her views would aid his resolution of the ultimate issue raised by Maple Creek’s renewed motion. Order (ALJ) (June 13, 2006). In her *amicus* brief to the judge, the Secretary explained that because Maple Creek had indicated it was contesting a penalty that had “104A - 104B” in the “Type of Action” column on the penalty proposal form, the Secretary had subsequently treated the civil penalty proceeding as including Maple Creek’s contest of the section 104(b) withdrawal order. 28 FMSHRC at 906.

⁶ The UMWA was not served with a copy of the decision approving settlement. Dec. Approving Settlement (Aug. 11, 2003) (ALJ).

The judge nevertheless upheld his original decision on the same grounds as before. *Id.* at 906-08. He further held that “a belated agreement by the Secretary to vacate a section 104(b) [order], which had little or no continuing legal significance and was not at issue in the contest proceeding before the Commission, would not render the order invalid for purposes of section 111.” *Id.* at 908.

II.

Disposition

Maple Creek contends that the judge erred in holding that the withdrawal order could not have been appropriately included in the civil penalty proceeding. MCM Br. at 5-6. According to Maple Creek, the order was vacated pursuant to the terms of the settlement that was approved by the judge in the proceeding. *Id.* at 6-9. Maple Creek submits that the Secretary has unreviewable discretion to vacate a withdrawal order, as she did in settling the civil penalty proceeding. *Id.* at 9-10.

The UMWA urges the Commission to affirm the judge’s decisions that Maple Creek’s failure to contest the withdrawal order pursuant to section 105(d) rendered the order final for purposes of section 111. UMWA Br. at 3-4. According to the UMWA, any language in the settlement agreement vacating the withdrawal order is irrelevant because, pursuant to the same agreement, Maple Creek agreed to pay a penalty for the underlying violation. *Id.* at 4-8.

In her *amicus* brief before this Commission, the Secretary changes the position she took before Judge Zielinski. She now agrees with the judge’s holding that in order to contest the withdrawal order, Maple Creek was required to file a section 105(d) notice of contest. S. Br. at 12-18. The Secretary now states that the language in the settlement agreement regarding the withdrawal order is ineffective because the order was not timely contested. *Id.* at 18-20.

Maple Creek moved for summary decision below, pursuant to Commission Procedural Rule 67(b),⁷ on the ground that, as a matter of law, the miners are not entitled to a week’s

⁷ Rule 67(b) provides that:

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

- (1) That there is no genuine issue as to any material fact;
- and

compensation under section 111. The Commission's review of decisions granting or denying motions for summary decision is de novo. See *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

Section 111 plainly states that up to a week's compensation is only available if and when the order withdrawing miners has become "final." Section 111 states in pertinent part that:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled by such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and *after such order is final*, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (emphasis added). Thus, up to a week's compensation will be ordered by the Commission only in those instances in which the withdrawal order was ultimately upheld and will not be ordered if the order was later vacated. See *Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975) (upholding interpretation by Commission's predecessor agency of a substantially similar predecessor provision to section 111, section 110(a) of the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. § 820(a) (1970)).

In this instance, the Secretary's settlement motion in the civil penalty proceeding addressed the withdrawal order and recommended that it be vacated. Judge Bulluck granted the Secretary's unopposed motion, and therefore the order was vacated. See *Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 509 (Apr. 1988) ("The judge's order approving the settlement and dismissing the proceeding obviously and inherently directs compliance with the settlement agreement."). The relevant language of section 111 requires a final order before compensation may be awarded. 30 U.S.C. § 821. Because a vacated order cannot serve as the "final order" required by the statute, compensation must be denied in this case.

However, the UMWA and, on interlocutory review at least, the Secretary contend that the withdrawal order was never properly a part of the civil penalty proceeding and thus could not have been lawfully vacated by the judge's decision approving settlement in that proceeding. According to the UMWA and the Secretary, Maple Creek's sole opportunity to contest the withdrawal order was to file a notice of contest pursuant to section 105(d) of the Act within 30

(2) That the moving party is entitled to summary decision as a matter of law.

29 U.S.C. § 2700.67(b).

days of the order's issuance.⁸ Because Maple Creek did not do so, the UMWA argues that the order became a final order at the end of the 30 days. UMWA Reply Br. at 1-2.

The issue of whether a section 104(b) withdrawal order can only be contested pursuant to section 105(d), and not later in a section 105(a) civil penalty proceeding, has not been directly decided by the Commission.⁹ Although the parties do not refer to the terms of the Mine Act to support their competing positions, we must start there to determine whether Congress spoke directly to the question presented.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Moreover, "in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

⁸ Section 105(d) states in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing

30 U.S.C. § 815(d).

⁹ The issue was specifically noted but not decided by the Commission some time ago in *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 508 n.5 (Apr. 1989). The issue has since been addressed by Commission judges in the context of civil penalty proceedings, but they have reached different conclusions. *Compare Webster County Coal, LLC*, 29 FMSHRC 90, 91 (Jan. 2007) (ALJ) (Commission does not have jurisdiction under section 105(a) to entertain a challenge to a section 104(b) withdrawal order), *with Nelson Bros. Quarries*, 24 FMSHRC 980, 982-84 (Nov. 2002) (ALJ) (section 104(b) orders can be contested pursuant to the section 105(a) civil penalty proceeding provisions).

If, however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844).

The Commission is clearly charged with administering the provisions of sections 105(a) and 105(d) of the Mine Act, which address the challenge of enforcement actions of the Secretary, the initiation of cases before the Commission, and the Commission's administration of hearings concerning the validity of those enforcement actions. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53, 56-59 (D.C. Cir. 1988) (where language of Mine Act was indecisive, court deferred to Commission's interpretation of section 104(d) regarding the issuance of withdrawal orders). As the Supreme Court stated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), the Commission was established as an independent review body to "develop a uniform and comprehensive interpretation" of the Mine Act (citing Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n before the Senate Comm. on Human Res., 95th Cong. 1 (1978)). Moreover, the question of how the procedures set forth in sections 105(a) and 105(d) are to mesh and how the Commission will conduct hearings involves a major policy component, which the Commission is uniquely qualified to establish. Section 111 is also one of the provisions of the Mine Act the Commission is "charged with administering." 30 U.S.C. § 821 ("The Commission shall have the authority to order compensation due under this section . . ."); *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 775-80 (D.C. Cir. 1990). Consequently, we need not defer to another agency's interpretation of the statutory language at issue here.¹⁰

Based on our analysis of the statutory language and relevant legislative history, we conclude that a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d). As discussed below, such an interpretation is compatible with the Mine Act as a whole. Moreover, this interpretation is also consistent with the Commission's Procedural Rules and with the policies established by prior Commission decisions addressing contest rights.

Section 105(a) states in pertinent part that:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the

¹⁰ In any event, the Secretary has not requested that we accord deference to her interpretation in this case.

operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

30 U.S.C. § 815(a) (emphases added). Consequently, under the plain terms of section 105(a), penalty assessments are authorized not only for violations alleged in citations, but also for violations alleged in orders issued pursuant to section 104. Moreover, penalties are routinely assessed by the Secretary for orders issued under section 104, and those orders are challenged in civil penalty proceedings. *See, e.g., Mettiki Coal Corp.*, 13 FMSHRC 3 (Jan. 1991) (civil penalty proceeding involving challenge of orders issued pursuant to section 104(d)(2)).

In addition, the Commission's procedural rules governing civil penalty proceedings, which are consistent with the language of section 105(a), do not distinguish between review of citations and review of orders in such proceedings. The Commission procedural rule which was in effect when the withdrawal order was issued stated that:

An operator's failure to file a notice of contest of a citation *or order* issued under section 104 of the Act, 30 U.S.C. 814, shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in a citation *or order* including the assertion in the citation *or order* that the violation was of a significant and substantial nature or was caused by the operator's unwarrantable failure to comply with the standard.

29 C.F.R. § 2700.21 (2001) (emphases added).¹¹ We read our regulation to plainly permit a challenge to a section 104(b) withdrawal order in the civil penalty proceeding that includes the citation underlying the withdrawal order.

Despite the reference to section 104 "orders" in both section 105(a) and the Commission's applicable procedural rule, the Secretary and the UMWA would have the Commission interpret "order" in section 105 to exclude an order issued pursuant to section 104(b). In their view, section 104(b) orders are not contestable pursuant to section 105(a) because such orders do not allege a second, separate violation of the Mine Act, but rather a continuation of the original violation for which the operator was cited. UMWA Br. at 4; S. Br. at 14-16. Consequently, according to the Secretary, under section 105(a), she does not assess a second, separate penalty for the order, but rather only assesses a penalty for the original violation. S. Br. at 16. We are not persuaded by these arguments.

First of all, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that

¹¹ Language identical to that of former Commission Procedural Rule 21 now appears in Commission Procedural Rule 21(b). *See* Fed. Reg. 44,190, 44,196, 44,207 (Aug. 4, 2006).

the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase "order under section 104" in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary's notification of the proposed assessment of penalty. . . .

30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA's regulations authorize the Secretary to assess steep daily penalties. See 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) ("Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$6,500 for each day during which such failure or violation continues.").

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and miners' representatives when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)].* The notice of proposed penalty to operators in such cases shall state that a [104(b)] order has been issued and the penalty provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.*

S. Rep. No. 95-181, at 34-35 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978) (emphases added).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As

Judge Zielinski recognized in his first decision, "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty." 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. See *NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) ("Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.").

While operators have the right under section 105(d) to contest citations and orders earlier instead of waiting for a penalty assessment, that right does not diminish their options under section 105(a). Recognizing the interrelationship between the violation alleged in a citation or order and the penalty ultimately proposed for the violation, the Commission has attempted to harmonize the various contest provisions of section 105 in interpreting that provision, stating that:

The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. See, e.g., *Energy Fuels Corp.*, 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator *immediately* contest a citation or order within 30 days of receipt thereof, 30 U.S.C. § 815(d), but he also may initiate a contest following the Secretary's subsequent proposed assessment of a civil penalty within 30 days of the Secretary's notification of the penalty proposal. 30 U.S.C. § 815(a).⁹

⁹ The procedures followed by the Secretary in proposing penalties for violations usually result in an operator's receipt of the Secretary's notice of proposed penalty at a time substantially after the expiration of the 30-day period within which the operator may contest a citation or order.

Quinland Coals, Inc., 9 FMSHRC 1614, 1620-21 & n.9 (Sept. 1987).

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), which was cited in *Quinland Coals*, the Secretary argued against interpreting section 105(d) to permit operators to immediately contest citations, on the ground that such an interpretation would encourage piecemeal litigation.

1 FMSHRC at 300, 306-07. The Commission rejected the Secretary's position, but indicated its preference for resolution of all issues in the later civil penalty proceeding:

If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308-09 (footnote omitted).

Adhering to *Quinland Coals* so as to permit an operator to contest a withdrawal order as part of the civil penalty proceeding is particularly appropriate in cases such as this one. The penalty proposed by the Secretary and contested by Maple Creek was for the "104A-104B" action reflected not only by Citation No. 7082157, which was listed on the proposed assessment (the "104A" component), but also by Order No. 706223 (the "104B" component). Furthermore, the settlement motion in the resulting civil penalty proceeding stated that:

[The section] 104(b) Order Number 7060223 was issued . . . for the Respondent's failure to correct the condition cited in Citation Number 7082157. A penalty of \$9,[000]^[12] was specially assessed based on the high negligence rating and the § 104(b) Order.

After further discussions with the operator, the Secretary recommends that the citation should remain classified as high negligence but Order Number 706223 should be vacated. While the negligence is still high, the parties submit that it is somewhat less than initially determined. Respondent was unsuccessfully attempting to correct the condition listed in Citation No. 7082157 at the time the 104(b) Order No. 7060223 was issued. Therefore, a reduction in the assessed penalty to \$2,000 is warranted.

Settlement Mot. at 2-3. In short, the removal of the failure to abate allegation that prompted the withdrawal order decreased the penalty by \$7,000. Stated differently, it appears that the failure to

¹² The motion mistakenly stated that the original penalty assessment was for \$9,500, not \$9,000. Settlement Mot. at 2.

abate allegation that led to the issuance of the withdrawal order increased the penalty proposed by 350 percent as compared to the amount the Secretary presumably would have proposed for the citation alone. Given the significance of the failure to abate allegation in the context of the civil penalty proceeding, we remain convinced that permitting operators to challenge section 104(b) withdrawal orders in such proceedings is consistent with the terms of the Mine Act.

The alternate approach, suggested by the Secretary and the UMWA, *i.e.*, requiring an operator to file a notice of contest under section 105(d) within 30 days of the issuance of the section 104(b) order or lose the right to contest it, is unreasonable. Such an order would become final if not contested within 30 days, even though the underlying citation giving rise to the order could still be challenged later in the civil penalty proceeding. If the underlying citation were subsequently vacated in connection with the civil penalty proceeding for any number of reasons, including the Secretary's failure to establish the violation, the UMWA and the Secretary would have the operator nevertheless obligated to compensate the miners idled due to the section 104(b) order for up to a week's compensation. The Commission, as the agency charged with administering section 111, cannot agree with interpreting the "final order" language of section 111 and the language of section 105(d) in a way that such an absurd result could occur. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)).¹³

We are aware that vacating the judge's denial of the operator's motion for summary decision may have an adverse impact upon miners who might otherwise have been eligible for up to a week's compensation for the time they were not permitted to work due to the withdrawal order. We are sympathetic to their position. However, the Secretary has broad authority to

¹³ While Chairman Duffy and Commissioner Young believe that the plain meaning of section 105 and other provisions of the Mine Act resolves the question presented by this case, if they were to instead find the Mine Act ambiguous on the issue, they would still interpret section 105(a) to permit operators to wait and challenge withdrawal orders during the civil penalty proceeding involving the citation underlying the order. As discussed, such an interpretation is more compatible with the Mine Act as a whole, especially in comparison with the approach of the UMWA and the Secretary, who would have the Commission adopt an unreasonable and Byzantine procedure in cases in which a section 104(b) withdrawal order has been issued.

Commissioner Jordan disagrees that the plain meaning of section 105 and other sections of the Act clearly resolves the question presented in this case. In *Energy Fuels* the Commission decided a related issue under section 105(d), and stated: "[w]e find the section ambiguous." *Energy Fuels*, 1 FMSHRC at 300. She finds that assessment appropriate in resolving the matter at hand. Nonetheless, although she disagrees with her colleagues on this point, she is in accord with their conclusion that permitting operators to challenge withdrawal orders during the civil penalty proceeding is a reasonable interpretation that is harmonious with the Mine Act as a whole. She also agrees with their assertion that the approach asserted by the UMWA and the Secretary is unreasonable and needlessly complicated.

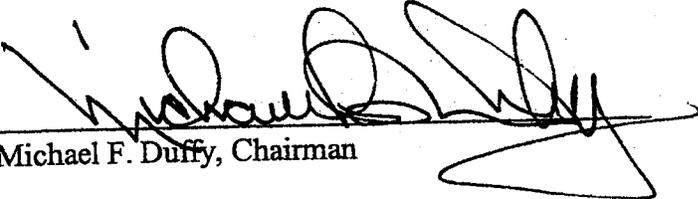
vacate orders she has issued. See *RBK Constr., Inc.*, 15 FMSHRC 2099, 2100-01 (Oct. 1993) (relying on *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985), in holding that the Secretary had the authority to vacate the citation at issue).

Consequently, for the foregoing reasons, we vacate the judge's decisions denying Maple Creek's motions for summary decision. Because it is unclear from the record whether there is any other valid claim for compensation under the other provisions of section 111, we remand the case to the judge for further proceedings consistent with this decision.

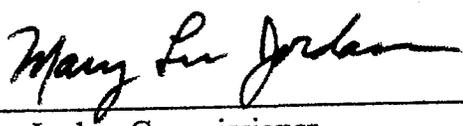
III.

Conclusion

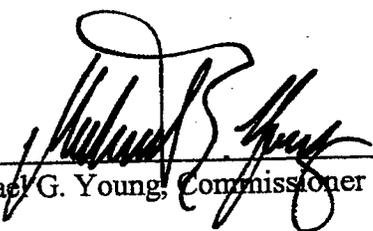
For the foregoing reasons, we vacate the judge's decisions denying Maple Creek's motion for summary decision and remand the case to him for further proceedings consistent with this decision.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2007

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

v.

THE AMERICAN COAL COMPANY

Docket No. LAKE 2007-139
A.C. No. 000113419

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 25, 2007,¹ the Commission received from The American Coal Company ("American Coal") a motion by counsel seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

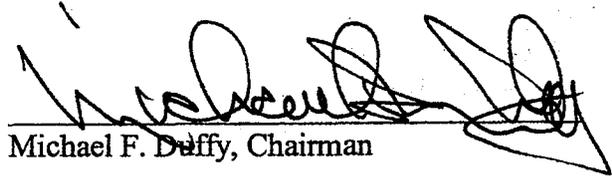
As a result of citations issued during 2006 and 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a Proposed Assessment sheet dated March 14, 2007, to American Coal. In American Coal's motion to reopen, counsel states that the company was going through a change in personnel in its inhouse legal department and that it

¹ On July 3, 2007, American Coal supplemented its original filing by submitting an amended Exhibit A. The significance of any differences in the original Exhibit A and the amended Exhibit A is not apparent from the supplemental filing, and counsel provides no explanation.

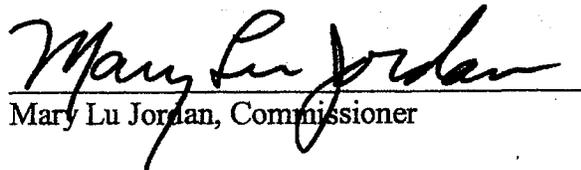
intended to contest certain proposed assessments but erroneously failed to do so. In response, the Secretary states that she does not oppose reopening the proposed penalty assessments but clarifies that three of the proposed penalties on the assessment sheet had been paid.

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

Having reviewed American Coal's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for American Coal's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.²



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

² In its motion, American Coal has not identified the relevant penalty assessments and associated citations that are included on the Proposed Assessment sheet, which contained 149 proposed penalties that had become final orders. Thus, the specific assessments from which it seeks relief are not apparent from the motion and amended exhibit. On remand, American Coal must identify for the judge the proposed assessments on the Proposed Assessment sheet from which American Coal seeks relief.

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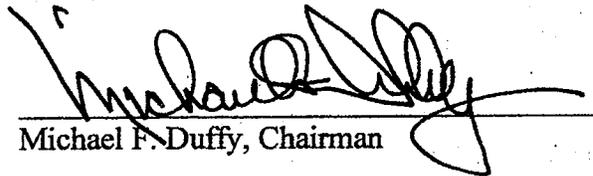
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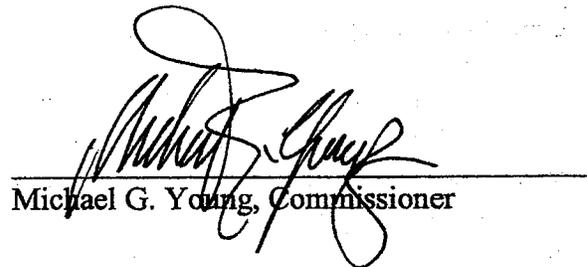
attached to Oak Grove's motion is an affidavit from Oak Grove's safety director, the official responsible for filing contests, who stated that he intended to check the box for Citation No. 7687956 on the assessment form but he inadvertently failed to do so.

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

Having reviewed Oak Grove's motion to reopen and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Oak Grove's failure to timely contest the penalty proposal and whether relief from the final order should be granted. See *Mosaic Phosphates Co.*, 28 FMSHRC 925, 925-26 (Nov. 2006). If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would deny Oak Grove's request for relief from the final order. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, here the operator has merely proffered the generalized explanation that its failure to timely contest the penalty assessment was due to "[m]istake and excusable neglect." Mot. at 2. The Secretary correctly states that this conclusory excuse does not suffice to warrant a reopening.¹

Because Oak Grove has failed to provide any meaningful explanation to justify its failure to timely contest the proposed penalty assessment, I find no grounds upon which relief could be granted in this case, and would deny the company's request and dismiss these proceedings without prejudice. See *Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief); *Eastern Associated Coal, LLC*, 28 FMSHRC 999, 1000 (Dec. 2006) (same).


Mary Lu Jordan, Commissioner

¹ The Secretary also argues that the operator should be required to identify facts that, if proven on reopening, would establish a meritorious defense. I need not reach that issue, however, as I would deny Oak Grove's motion on the ground that it failed to provide an adequate explanation for its failure to timely contest.

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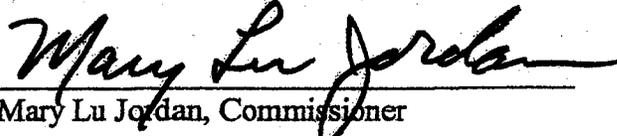
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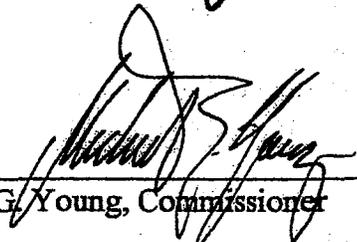
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We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating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

Having reviewed ICG’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for ICG’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700.¹


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

¹ Both the motion and the Secretary’s response were filed prior to the Commission’s decision in *Maple Creek Mining, Inc.*, 29 FMSHRC __, No. PENN 2002-23-C (July 13, 2007), which addressed the issue of when certain orders can be contested in a civil penalty proceeding. It is not discernible from ICG’s Motion to Reopen and the proposed assessment (Exhibit 1) whether, if the proposed penalty for Citation No. 7516790 is reopened, ICG can contest Order No. 7516794. Compare *Maple Creek*, slip op. at 11-14. On remand, in order to contest the order as well as the citation underlying the penalty assessment, ICG must present sufficient facts to the judge to determine that the order is reviewable under the rationale of *Maple Creek*.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 10, 2007

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

v.

COPPERSTATE COMPANIES, INC.

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Docket No. SE 2007-308-M
A.C. No. 01-00003-114104 VAU

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 5, 2007, the Commission received from Copperstate Companies, Inc. ("Copperstate") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On March 22, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Copperstate covering Citation No. 7765264, which involved its Shelby, Alabama facility. In its letter, Copperstate alleges that it intended to appeal the proposed penalty assessment but that the assessment was sent to its Mesa, Arizona office, where it was not expected. Copperstate further asserts that it realized its inadvertence in not contesting the penalty assessment when it received a demand to pay the civil penalty. In response, the Secretary states that she does not oppose reopening the proposed penalty assessment.

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

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

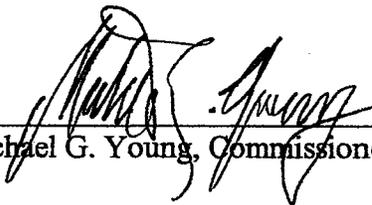
Having reviewed Copperstate’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Copperstate’s failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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August 10, 2007

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

v.

ELK RUN COAL COMPANY

Docket No. WEVA 2007-547

A.C. No. 46-08553-103552

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

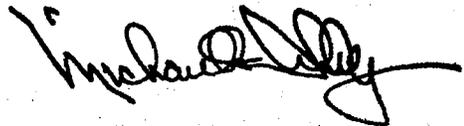
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On July 2, 2007, the Commission received from Elk Run Coal Company ("Elk Run") a motion by counsel seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

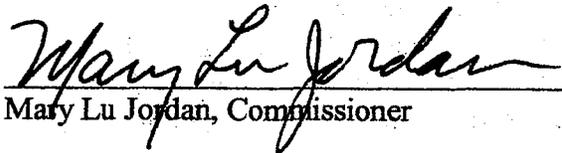
On June 7, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 72550820 and Order No. 7250821 to Elk Run. Elk Run filed a notice of contest with respect to these two violations on July 6, 2006. WEVA 2006-794-R and WEVA 2006-795-R. MSHA then issued a proposed assessment covering the two violations on November 16, 2006. In its motion to reopen, Elk Run asserts that it failed to timely respond to the proposed assessment because the assessment was inadvertently lost in the office of its safety director. As soon as the proposed assessment was discovered, counsel for Elk Run attempted to file a response to it with MSHA. In response, the Secretary states that she does not oppose reopening the proposed penalty assessment.

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

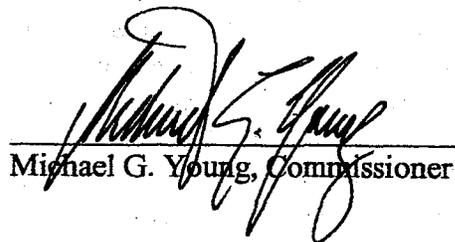
Having reviewed Elk Run’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Elk Run’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 15, 2007

VURNUN EDWURD JAXUN

v.

ASARCO, LLC

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:
:
:
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:

Docket No. WEST 2006-416-DM

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Duffy, Chairman; and Young, Commissioner

This discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (the "Mine Act"), raises the question of whether Commission Administrative Law Judge Jacqueline Bulluck erred in requiring Vurnun Edwurd Jaxun, a miner pursuing a discrimination claim under section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3),¹ to obtain representation or to risk dismissal of his complaint. After a series of orders, the Judge dismissed without prejudice Jaxun's discrimination complaint, noting that

¹ Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides in pertinent part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

Section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), provides in part:

If the Secretary [of Labor], upon investigation, determines that the provisions of [section 105(c)(1)] have not been violated, the [C]omplainant shall have the right within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission.

the Complainant had failed to respond to a show cause order directing him to provide contact information for his representative or to show good reason for his failure to do so. Unpublished Order dated Nov. 28, 2006 (ALJ). The Commission granted Jaxun's petition for discretionary review challenging the Judge's dismissal. For the reasons that follow, the Judge's order dismissing Jaxun's complaint without prejudice stands as if affirmed.

I.

Factual and Procedural Background

On March 15, 2006, Jaxun filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA investigated the complaint and issued a letter to Jaxun on May 3, 2006, stating that the facts disclosed during the investigation did not reveal discrimination in violation of section 105(c)(1) of the Mine Act. The letter also informed Jaxun of the procedure for filing a complaint on his own behalf with the Commission under section 105(c)(3) of the Mine Act.

On May 24, 2006, Jaxun filed a complaint with the Commission. In the complaint, Jaxun stated that he had been hired as a heavy truck driver for Asarco, LLC ("Asarco") and received training on February 14 through 16, 2006. Complaint at 2. Jaxun further stated that on February 18, 2006, he had mailed to Asarco a safety-related suggestion regarding loading heavy haul trucks. *Id.* at 5. Jaxun asserted that, on February 22, 2006, he was assigned to clean up a spill of "concentrate," which he believed was hazardous, without proper equipment or training and without supervision. *Id.* at 4, 5. Jaxun submitted that he expressed safety concerns to management and was removed from the mine property on February 23. *Id.* at 8 (MSHA Form 2000-124).

Asarco answered Jaxun's complaint. The case was assigned to Judge Bulluck, and Asarco initiated discovery.

In August 2006, the parties filed pleadings and correspondence with the Judge that revealed difficulties in communication. On August 10, 2006, Asarco sent correspondence to the Judge requesting a teleconference with Jaxun and Judge Bulluck because Jaxun had failed to meet a discovery deadline. It appears that the teleconference occurred on August 15, 2006. Mot. for Summ. Dec. at 2. During that call, the Judge allegedly advised Jaxun to seek to retain counsel. *Id.* In addition, Jaxun allegedly replied that he was having trouble finding an attorney because this case did not involve a "whistleblower" action. *Id.* Jaxun further stated that MSHA mistakenly believed that he was suing Asarco for discrimination rather than for a training violation of 30 C.F.R. § 48.7. *Id.* On August 16, 2006, Jaxun faxed a letter to the Judge noting his reservations about considering his action a claim alleging discrimination rather than an action for a training violation under 30 C.F.R. § 48.7.

On August 18, 2006, Asarco filed a Motion for Summary Decision seeking dismissal of Jaxun's discrimination action with prejudice. Mot. at 3. Asarco argued that, given Jaxun's statements, Jaxun did not intend to assert a claim under section 105(c) of the Mine Act. *Id.* at 2-3. It further stated that no private right of action exists to enforce MSHA's regulations and that, even if Jaxun had a private right of action against Asarco with regard to section 48.7, the Judge would lack jurisdiction over the action. *Id.*

On August 21, 2006, Jaxun sent a letter to the Judge stating in part that he had no intention of withdrawing his section 105(c) complaint. Jaxun further stated that he had recently been "assigned" an attorney but that the attorney required a retainer which Jaxun could not afford. Jaxun stated that he would seek another attorney, but if there were no means for legal aid or a court-appointed attorney, he would be proceeding pro se. On that same day, Jaxun sent a second letter to the Judge setting forth a chronology of events that had occurred on February 22 and 23, 2006.

Rather than ruling on Asarco's Motion for Summary Decision, on August 24, 2006, the Judge issued an order, staying the case. The Judge ordered the parties to complete discovery, engage in settlement negotiations, and report on the status of the case by October 2, 2006.

On August 31, 2006, Asarco sent a letter to the Judge requesting assistance in obtaining responsive answers to discovery from Jaxun. Asarco explained that it was making the request in lieu of filing a motion to compel. Jaxun replied by a letter to Asarco dated September 12, 2006, and challenged the assertion that his discovery answers had been non-responsive on the basis that, according to the dictionary's meaning of "responsive," he had, in fact, responded.

The Judge issued three orders, ultimately leading to the dismissal of Jaxun's discrimination complaint. First, on September 27, 2006, the Judge issued an order requiring Jaxun to obtain representation within 30 days of the order. The Judge explained that she believed Jaxun's written and verbal communications had been confusing and sometimes incomprehensible, and that Jaxun was either unable or unwilling to engage in meaningful discovery and settlement negotiations, and that, as a result, he could not receive the full and fair hearing that he was entitled to by law. The Judge noted that, during a teleconference on September 21, she had informed Jaxun of her decision that he obtain a representative and that the failure to do so might result in the dismissal of his discrimination complaint.

On November 2, 2006, the Judge issued a second order directing Jaxun to provide in writing the contact information for his representative within 14 days of the order or to show good reason for his failure to do so. The Judge stated that, otherwise, Jaxun's discrimination complaint would be dismissed.

Finally, on November 28, 2006, the Judge issued an order dismissing Jaxun's discrimination complaint without prejudice. The Judge reasoned that the purpose of the November 2 show cause order had not been punitive but had been to afford Jaxun a fair hearing.

She noted that because Jaxun had failed to coherently address the elements of his case and was non-responsive during discovery, Asarco had been deprived of its right to due process of law.

Jaxun filed a petition for discretionary review with the Commission, which Asarco opposed. On January 5, 2007, the Commission granted the petition and stayed briefing pending further order by the Commission.

On January 17, 2007, the Commission issued an order directing the parties to address three specific issues in their briefs. Those issues included whether the Judge was authorized to require Jaxun to obtain representation or risk having his complaint dismissed; whether the Judge properly dismissed the complaint because Jaxun failed to respond to a show cause order; and whether the record supports the Judge's determination that Jaxun failed to address the elements of his case and thereby deprived Asarco of its due process rights. On February 12, 2007, Jaxun filed a motion requesting an extension of time until March 7 to file his brief. In the motion, Jaxun also requested a copy of a compact disk which he had previously provided in response to a discovery request and mailed to the Commission. The Commission provided a copy of the disk to Jaxun and granted the request for an extension of time.

Jaxun did not file a brief addressing the issues set forth in the Commission's briefing order. Rather, on March 2, Jaxun filed a motion requesting that he be provided with transcriptions of all the telephone conferences involving the Judge, Asarco and Jaxun that had taken place. The Commission issued an order, denying Jaxun's motion and stating that the Commission does not record or transcribe telephone conferences. On March 7, Jaxun filed a motion requesting that the Commission's January 17 order be set aside, that the case identification "remain the same," and that the Chief Administrative Law Judge assign the case to another Judge for further proceedings, or preside over the case himself. Mot. to Set Aside at 3.

Asarco filed a brief requesting that the Commission affirm the Judge's dismissal order. A. Br. at 8. Asarco addressed the three issues identified by the Commission in the briefing order, asserting, in essence, that Jaxun had failed to coherently address the elements of his case, and that the Judge properly exercised her discretion by dismissing the case in order to preserve the due process rights of Jaxun and Asarco. *Id.* at 3-8.

II.

Disposition

Jaxun's March 7, 2007 motion requested that we set aside our January 17 order, allow the case identification to "remain the same," and return the case to the Chief Administrative Law Judge to reassign the case to another Judge or to preside over the matter himself. In short, Jaxun's March 7 motion appears to be a request that we terminate our appellate review. Jaxun filed no brief and made no attempt to correlate the facts in the record to legal authority or to advance any cognizable legal argument on the issues before us. Thus, Jaxun provided no basis

for the Commission to continue its review of this proceeding. *Cf.* 29 C.F.R. § 2700.75(e) (“If a petitioner fails to timely file a brief or to designate the petition as his brief, the direction for review may be vacated.”); *Turner Bros., Inc.*, 6 FMSHRC 805, 806 (April 1984) (dismissing operator’s challenge for lack of prosecution).

Accordingly, we construe Jaxun’s March 7 motion as a motion to vacate the Commission’s direction for review dated January 5, 2007. We hereby grant Jaxun’s motion and vacate our direction for review. This proceeding returns to the posture that it had on January 4, 2007.²

Although we are vacating the direction for review in this case, we believe that it is appropriate to provide guidance regarding a miner’s ability to represent himself or herself in Commission proceedings. For approximately 30 years, the Commission has facilitated the participation of parties appearing pro se, or not represented by counsel, in Commission proceedings. Such facilitation is apparent in Commission practice and in the Commission’s procedural rules. *See, e.g., Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (noting special considerations for pro se litigants); 29 C.F.R. §§ 2700.3(b), 2700.4 (permitting participation in Commission proceedings without counsel).

The Mine Act, the Administrative Procedure Act (“APA”), and the Commission’s Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation. More specifically, section 105(c)(3) of the Mine Act provides that if the Secretary of Labor determines that a violation of section 105(c)(1) has not occurred, “the [C]omplainant shall have the right . . . to file an action in his own behalf before the

² On January 4, the posture of this proceeding was that it had been dismissed without prejudice. When a case has been dismissed without prejudice, the Complainant retains the right to re-file the initiating pleading with the Commission. The opportunity to re-file is afforded under some circumstances in order to allow the Complainant the opportunity to remedy the procedural defects that led to the dismissal. Thus, although we have vacated our order granting appellate review, Jaxun retains the opportunity to “continue [the] case litigation” before the Commission’s administrative law judges by re-filing his complaint. If Jaxun were to refile his complaint, he would have the opportunity to cure the procedural defects (the filing of incomprehensible and non-responsive documents) that ultimately led to the dismissal of his complaint. Unlike our dissenting colleague (slip op. at 8 n.2), we see no obstacle based on timeliness grounds to Jaxun refile his complaint. Congress clearly indicated, as acknowledged in Commission precedent, that the time-frames in section 105(c) of the Mine Act are not jurisdictional and may be waived under “justifiable circumstances.” *See* S. Rep. No. 95-181 at 37, 38 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625, 626 (1978); *Sec’y of Labor on behalf of Hale v. 4-A Coal Co., Inc.*, 8 FMSHRC 905, 907-08 (June 1986); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-14 (Jan. 1984). Such justifiable circumstances would clearly appear to exist in this case.

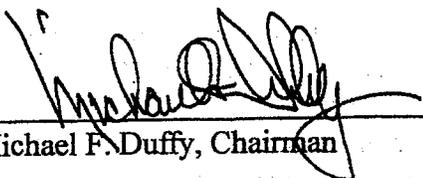
Commission, charging discrimination.” 30 U.S.C. § 815(c)(3). The APA, which in part governs the requirements for the opportunity for a hearing under section 105(c)(3) (*see* 30 U.S.C. 815(c)(3)), provides that a party may appear at a hearing without representation, although the party is entitled to obtain representation. 5 U.S.C. § 555(b) (“A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.”). Finally, under the Commission’s procedural rules, a miner who has filed a complaint with the Commission under section 105(c)(3) is accorded party status and, as such, may represent himself. *See* 29 C.F.R. §§ 2700.3(b)(1), 2700.4(a).

Although the Judge was not authorized to require Jaxun to secure representation, we can appreciate her frustration with the lack of coherence in the Complainant’s presentation of his claim of discrimination. We also agree with the Judge that Jaxun’s claim would have been best served had Jaxun sought outside counsel. Legal counsel or a non-legal representative could have assisted Jaxun in articulating his position in timely and responsive pleadings. Nonetheless, in proceedings such as this in which a pro se litigant has filed unintelligible or non-responsive pleadings, the Commission’s Procedural Rules provide appropriate avenues for Judges to protect the integrity of the Commission’s hearing process and parties’ due process rights.³

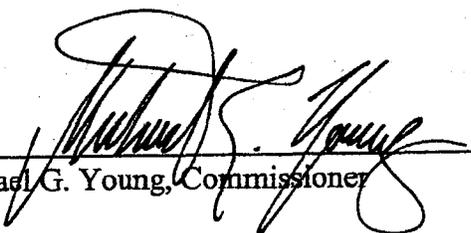
III.

Conclusion

For the foregoing reasons, we grant Jaxun’s March 7 motion and vacate the Commission’s direction for review.



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

³ For instance, if a pro se litigant were being evasive in providing answers to requests for admissions, the opposing party could file a motion to compel in accordance with 29 C.F.R. § 2700.59. Thereafter, if the pro se litigant failed to comply with an order compelling discovery, a Judge would have wide discretion to regulate proceedings, including “deeming as established the matters sought to be discovered.” 29 C.F.R. § 2700.59. Moreover, if the opposing party believed that a litigant failed to allege or establish the elements of a prima facie case, that party could file a motion for summary decision under 29 C.F.R. § 2700.67 making such an argument.

Commissioner Jordan, dissenting:

For the reasons cogently stated by my colleagues, I agree with their conclusion that the judge in this case was not authorized to require Vurnun Jaxun to secure legal representation in his discrimination case before the Commission. However, I disagree with their ultimate decision to vacate the direction for review and, in effect, dismiss this proceeding.

The majority's vacature of the direction of review is based in large part on the following language in Jaxun's March 7, 2007 motion:

I hereby request that the January 17th order [the Commission's briefing order] be set aside, the case identification WEST 2006-416-DM remain the same, Chief Administrative Law Judge Lesnick assign WEST 2006-416-DM to another administrative law judge or preside over the case himself.

Mot. to Set Aside at 3.

Noting, in addition, that Jaxun failed to file a brief, the majority "construe[s] Jaxun's March 7 motion as a motion to vacate the Commission's direction for review" and proceeds to "grant" it. Slip op. at 4-5. Although my colleagues know full well that terminating appellate review results in a dismissal of Jaxun's discrimination case, *id.* at 5 & n.2, they suggest that they are simply granting Jaxun's request. However, nowhere in his motion does Jaxun ask that his appeal be withdrawn. Indeed, Jaxun entitled his submission "Motion to Set Aside the FMSHRC Order Dated January 17, 2007 and Continue Case Litigation" (emphasis added). To treat Jaxun's request that a different judge hear his case as a "voluntary" dismissal "exalt[s] artifice above reality." See *Upton v. SEC*, 75 F.3d 92, 97 (2nd Cir. 1996).¹

The Commission "has generally held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys." *Tony M. Stanley, emp. by Mgt. Consultants, Inc.*, 24 FMSHRC 144, 145 n.1 (Feb. 2002); see also *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (pro se litigant's complaint held to less stringent standard than formal pleadings drafted by lawyers). In *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992), cited by the majority, slip op. at 5, the Commission also noted that "[i]n general, courts take into account the 'special

¹ To its credit, Asarco's characterization of Jaxun's motion is a much more accurate reading of Jaxun's submission. See Asarco Br. at 3 ("In his motion, Jaxun does not address the issues outlined by the Commission, but asked for the Commission to set aside Judge Bulluck's order dismissing the case because the phone communications between the undersigned [counsel for Asarco], Jaxun, and Judge Bulluck were not recorded.").

circumstances of litigants who are untutored in the law.” By construing Jaxun’s motion as a request for dismissal of his appeal, the majority turns its back on this concept.²

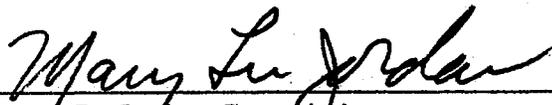
The majority’s dismissal is also based in part on Jaxun’s failure to file a brief, slip op. at 4-5. Jaxun’s brief was due on March 7; indeed, on that date, he submitted a pleading to the Commission. He entitled it a “motion,” rather than a brief. Ironically, had he simply called this document a “brief,” instead of a motion, this rationale for the dismissal of his appeal might no longer exist.

In any event, the Commission’s rules (Commission Procedural Rule 75(a)(1), 29 C.F.R. § 2700.75(a)(1)) provide that a party who files a petition for discretionary review (“PDR”) may choose not to file an opening brief. Instead, the party must notify the Commission that its petition is to constitute its brief. Thus, our rules contemplate that we may decide an appeal without the benefit of any additional substantive information from an appellant beyond its PDR. Granted, Jaxun did not send the requisite notice designating his PDR as his brief. Nonetheless, his failure to submit such a notice does not warrant the draconian sanction of dismissing his appeal. The Commission could have issued a show cause order asking Jaxun to explain why he did not file a brief or designate a PDR as his brief. See *Broken Hill Mining*, 18 FMSHRC 291 (Mar. 1996); *Faith Coal Co.*, 18 FMSHRC 294 (Mar. 1996).

² The majority insists that Jaxun has the right to continue his case before the judge, although it acknowledges that he would need to re-file his discrimination complaint with the Commission and “remedy the procedural defects that led to the dismissal.” Slip op. at 5, n.2. In Jaxun’s case, the “procedural defect” leading to the dismissal was his failure to provide the judge contact information for his legal representative. Slip op. at 1-2. The Commission has now held that the judge was not authorized to require Jaxun to secure such representation. Slip op. at 6. Thus, if he were to successfully re-file his discrimination complaint, he should be able to proceed by representing himself in the litigation.

However, I believe that if Jaxun refiles his complaint, he may face a challenge that his filing is untimely. The majority’s ruling returns his case to the posture that it was in on January 4, 2007, the day before he filed his petition for discretionary review. At that time his case had been dismissed without prejudice. Slip op. at 5 & n.2. A dismissal without prejudice leaves a party in the same legal position as if no suit had been filed, and consequently, the statute of limitations is not tolled by the filing of the original suit. 8 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 41.50[7][b] ((3d ed. 2002); see also *Local Union 1889, District 17, United Mine Workers of America v. Westmoreland Coal Co.*, 5 FMSHRC 1406, 1410-11 (Aug. 1983) (dismissal without prejudice could cause possible time limitation problems in compensation case).

I would decide this case on the merits of the issue before us and hold that the judge erred in dismissing Jaxun's case because he failed to retain an attorney. I would vacate the judge's decision and remand for further proceedings.³ Thus, because I cannot accede to the majority's ruling in this matter, I respectfully dissent.


Mary Lu Jordan, Commissioner

³ I concur with my colleagues' acknowledgment of the difficulties the judge faced in understanding Jaxun's claims, slip op. at 5-6, and agree with them that she has procedural mechanisms at her disposal to alleviate this problem. *Id.* at 6 n.3.

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inadequate insulation of cables. MSHA also issued Order No. 7257575 under Mine Act section 104(d)(1), charging Marfork with an S&S violation of 30 C.F.R. § 75.360(b)(9) for an inadequate preshift examination of the power center.

On July 10, 2006, Marfork filed a notice of contest for the three violations. 28 FMSHRC 745 (Aug. 2006) (ALJ). On July 27, 2006, the Secretary filed an answer and motion for continuance until a civil penalty assessment was proposed. *Id.* In her cover letter to Chief Administrative Law Judge Lesnick, the Secretary requested that “given the inordinate number of contest cases being filed by this operator,” the operator, not the Secretary, file periodic reports to the judge concerning the status of the civil penalty, as is customary. Marfork did not oppose the continuance but did oppose the requirement of providing periodic status reports to the judge. On August 7, 2006, the case was assigned to Judge Feldman.

On August 11, 2006, the judge issued Marfork an order to show cause why the contest proceeding should not be dismissed because it constituted a needless and duplicative consumption of Commission resources and contravenes Commission Procedural Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii). 28 FMSHRC at 747. On September 1, 2006, Marfork filed a response to the order to show cause contending that its contest should not be dismissed. 28 FMSHRC 890 (Sept. 2006) (ALJ). The Secretary responded, submitting that although she was “unaware of any statutory provision, any procedural rule, or any case law that requires dismissal of the operator’s contest,” filing notices of contest without a specific or urgent need for a hearing was not an appropriate use of the litigation process. S. Letter (Sept. 11, 2006).

On September 27, 2006, the judge dismissed the contest proceeding. 28 FMSHRC at 847. He stated that the purpose of a section 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary’s proposed civil penalty. *Id.* at 842. The judge reasoned that, by filing a contest “only to agree shortly thereafter to stay its contest pending the civil penalty case, Marfork apparently does not want a disposition on the merits *before* the civil penalty is proposed.” *Id.* at 843 (emphasis in original). He found that Marfork’s response to the show cause order did not seek an “early” adjudication on the merits, but was instead based on a desire to contest all S&S violations for the purpose of initiating discovery and informal negotiations with the Secretary. *Id.* at 844. The judge concluded that these were insufficient reasons to initiate a contest because there was no need for an immediate hearing, which the judge perceived to be a critical element. *Id.* at 844-45. He also determined that permitting discovery would be counterproductive because many of the violations would not be litigated after the Secretary proposes her penalty. *Id.* at 845. The judge added that a notice of contest effectively cuts off the opportunity for settlement through informal conferences. *Id.* He concluded that because Marfork lacked the intent to seek an “early” hearing, its contest served no purpose. *Id.* at 846. The judge believed that the “unprecedented” filing of voluminous contests results in needless expense and wasted effort and preparation for no legitimate reason. *Id.* at 845.

Marfork filed a petition for discretionary review with the Commission, which was granted. After Marfork filed its opening brief, the Secretary moved to dismiss for mootness and

to stay briefing. On December 21, 2006, the Commission stayed the proceeding pending a response from Marfork. Marfork filed a response to the motion to dismiss for mootness and, on January 12, 2007, the Commission lifted the stay of briefing and took the motion to dismiss under advisement.

II.

Disposition

A. Mootness

Before turning to the merits of the petition, we first address whether the proceeding should be dismissed on the basis of mootness. The Secretary claims that the contest proceeding has now been mooted because the Secretary has proposed, and Marfork has contested, penalties with respect to the violations at issue.² S. Mot. at 4-6. She alleges that every issue raised in Marfork's appeal was predicated on the judge's dismissal of its contest proceedings pending issuance of the Secretary's penalty proposals. *Id.* The Secretary asserts that Marfork is now in the position that it would be in if it were to prevail on the merits of its appeal and Marfork now is free to engage in any discovery or settlement negotiations. *Id.* Marfork opposes the motion on the basis that this issue will likely arise again every time an operator contests a citation or order and does not seek some type of immediate review. M. Reply to Mot. at 7.

The Commission has stated that "an agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the Article III 'case or controversy' requirement." *Mid-Continent Res., Inc.*, 12 FMSHRC 949, 956 (May 1990) (quoting *Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983)). Although it is true that penalty proceedings have been instituted and Marfork is free to pursue its case despite the dismissal, this case fits within an exception to the mootness doctrine entitled "capable of repetition, yet evading review." 13A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3533.8 (2d ed. 1984). The exception applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, R., dissenting) (alteration in original). For example, election issues are "among those most frequently saved from mootness by this exception." *National Right to Life Political Action Comm. v. Connor*, 323 F.2d 684, 691 (8th Cir. 2003). Similarly, the Commission has stated that "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable." *Mid-Continent*, 12 FMSHRC at 955.

² On August 2, 2006, the Secretary proposed a penalty for Citation No. 7257568. On December 7, 2006, the Secretary proposed penalties for Citation No. 7257574 and Order No. 7257575. S. Mot. at 3. Marfork has contested the associated penalties, and the proceedings have been stayed before Judge Feldman. See Docket Nos. WEVA 2006-934 and WEVA 2007-232.

Based on the Commission's experience of the past few months, there is a substantial likelihood that this scenario will be repeated. Judge Feldman has already dismissed another one of Marfork's contest proceedings relating to its River Fork Powellton Mine. See WEVA 2006-755-R (Dec. 12, 2006) (ALJ) (Dismissal Order). Likewise, other judges have dismissed contest proceedings once penalty proceedings have been initiated. See, e.g., *Mammoth Coal Co.*, WEVA 2006-759-R (Dec. 29, 2006) (ALJ) (Dismissal Order), *vacated & remanded*, 29 FMSHRC 46 (Jan. 2007); *Pinacle Mining Co.*, WEVA 2006-123-R (Dec. 21, 2006) (ALJ) (Dismissal Order). In the past year, some operators have filed numerous notices of contests and then immediately agreed to stay them rather than proceeding to a hearing before penalties were issued. See *Aracoma Coal Co.*, WEVA 2006-801-R (Nov. 16, 2006) (ALJ) (Dismissal Order); 28 FMSHRC at 844 n.1 (noting that the operator filed 375 contests).

In addition, this case fulfills the other requirement for the exception to the mootness doctrine: the time frame between the notice of contest and the penalty assessment in most cases will not be of sufficient duration to permit review of the issue. Accordingly, we conclude that the exception to mootness applies and that the question should be reviewed.

B. Whether An Operator May Maintain A Section 105(d) Contest Proceeding When It Does Not Seek An Immediate Hearing

Marfork argues that operators have an absolute right under section 105(d) of the Mine Act to contest citations and orders. M. Br. at 9. It asserts that the language of the Mine Act is plain and unambiguous in granting this right and therefore the judge erred by interpreting section 105(d) to require that the operator request an immediate hearing.³ *Id.* at 14. Marfork also contends that the operator's procedural due process rights under section 105(d) outweigh the concern of alleged waste of Commission resources. *Id.* at 27. It also asserts that Marfork's interest is best served by filing notices of contest so that it may begin discovery before memories fade or witnesses re-locate. *Id.* at 17. Marfork submits that the judge erred in concluding that its contest served no purpose because it was actively engaged in discovery and in moving the proceedings forward and that it was the Secretary who sought a continuance. M. Reply Br. at 4.

The Secretary responds that review of the judge's management of cases lies within the discretion of the Commission. S. Br. at 2. The Secretary takes no position as to whether the judge abused his discretion in this case. *Id.* However, she states her belief that management of cases before judges should be entrusted to the discretion of judges and should be disturbed only for an abuse of that discretion. *Id.* The Secretary asserts that effective administration of justice requires that trial courts possess the capability to manage their own affairs and be able to dismiss a

³ In this decision, we use the term "immediate hearing" to refer to a section 105(d) hearing that is intended to take place before a hearing on any subsequent contest of the proposed penalty assessment for the citation or order involved. See *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). We interpret this term to mean the equivalent of the judge's reference in his decision to an "early hearing." 28 FMSHRC at 842, 844.

case “[f]or failure of the plaintiff to prosecute.” *Id.* at 3-4 (citing Fed R. Civ. P. 41(b)). The Secretary maintains that “pre-penalty” notices of contest are not a reasonable use of the litigation process unless the contestant has an urgent or specific need for a hearing on the underlying violation and that they constitute a burdensome use of litigation resources. *Id.* at 5-9.

The Commission has not directly addressed the statutory interpretation question posed by this case — whether an operator’s contest of a citation or order pursuant to section 105(d) may subsequently be dismissed if the operator does not seek an immediate hearing with regard to its contest. We now employ traditional principles of statutory interpretation to resolve that issue.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).⁴ If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a “*Chevron II*” analysis, is required to determine whether an agency’s interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to “an agency’s interpretation of the statute it is charged with administering when that interpretation is reasonable.” *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency’s interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec’y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997).

Turning to the first inquiry, “in ascertaining the plain meaning of the statute, the court must look at the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute’s text and legislative history, may be employed to determine whether “Congress had an intention on the precise question at issue,” which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

Section 105, subsections (a) and (d), sets forth the procedures for contesting citations, orders, and penalties under the Act. The Commission has historically considered these provisions together. *Energy Fuels Corp.*, 1 FMSHRC 299, 301 (May 1979) (analyzing section 105(a) and 105(d) together rather than in isolated fashion); *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620 (Sept. 1987) (stating that “the contest provisions of section 105 are an interrelated whole”).

⁴ The examination to determine whether there is such a clear Congressional intent is commonly referred to as a “*Chevron I*” analysis. *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (January 1994).

Subsection (a) lays out the framework for contesting violations after the penalty has been proposed. It provides in relevant part:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a).

Subsection (d) provides for contesting orders and citations prior to the proposed penalty assessment. It provides in relevant part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. . . . The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

30 U.S.C. § 815(d).

Based on our analysis of the statutory language and legislative history, we agree with the judge's conclusion that Congress did not directly speak to the precise issue involved here. 28 FMSHRC at 846. Nowhere in section 105(d) did Congress include language that, on the one hand, requires that an operator seek an immediate hearing or, on the other hand, states that a contest may be filed and maintained regardless of whether an immediate hearing is sought. While, as the Commission concluded in *Energy Fuels*, 1 FMSHRC 299, Congress gave operators the right to file a contest of any citation or order within 30 days, it was silent on whether the operator must subsequently seek an immediate hearing or at least oppose any effort by the Secretary to delay the hearing.⁵ Likewise, the legislative history of the Mine Act is not clear as to whether a section 105(d) proceeding is exclusively an immediate remedy for operators who wish to go forward before the penalty is proposed. S. Rep. No. 95-181, at 69 (1977); S. Conf. Rep. No. 95-461, at 15, 18 (1977), both reprinted in Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 657; 1293, 1296 (1978).

Where Congress has not spoken on an issue, the reviewing body is to determine whether the interpretation of the agency charged with administering the statute is a reasonable one. *Chevron*, 467 U.S. at 843-44. The Commission is clearly charged with administering the provisions of section 105(a) and 105(d), which set forth the procedures for contesting, before the Commission, the enforcement actions of the Secretary and the manner in which hearings shall be conducted before the Commission. Commission administrative law judges are responsible for presiding over proceedings initiated under section 105(a) or section 105(d) and making procedural or substantive rulings which resolve those proceedings. 30 U.S.C. § 823(d)(1). Moreover, the Commission itself is authorized to review the judges' final decisions to determine, inter alia, whether the decisions are "contrary to law or to the duly promulgated rules or decisions of the Commission." 30 U.S.C. § 823(d)(2)(A)(ii). Similarly, the Supreme Court, in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), stated that the Commission "was established as an independent review body to develop 'a uniform and comprehensive interpretation of the Mine Act'" (quoting Hearing on the Nomination of Members of the Federal Mine Safety and Health

⁵ Although the last sentence of section 105(d) mentions expedited proceedings being carried out in some situations, it does not directly address the question posed here. That sentence states: "The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104." 30 U.S.C. § 815(d). In other words, while the Commission is to take "whatever action is necessary" to expedite proceedings involving section 104 orders, the language does not state that all such proceedings must necessarily be expedited or that a particular proceeding must be expedited even though an operator may not desire such expedition. In addition, it is significant that the language in question applies only to "orders issued under section 104." Even if the language could be read to require that all section 105(d) contests of section 104 orders must be expedited, the language is silent as to contests of section 104 citations. Thus, the last sentence cannot be read to state directly that expedited proceedings must be held for all section 105(d) contests.

Review Comm'n before the Senate Comm. on Human Res., 95th Cong., 1 (1978)). Certainly, the Commission is fully empowered to interpret the Mine Act with regard to the management of its own cases and the procedures to be followed by litigants before it.

Moreover, the question of how the procedures set forth in sections 105(a) and 105(d) are to mesh and how the Commission will conduct hearings involves a policy question. *Chevron*, 467 U.S. at 845, 865-66 (reasoning that deference is owed to the reasonable policy choices committed to an agency's care by statute). The Commission is uniquely qualified to establish that policy, and its policy choices are to receive deference. Congress recognized this policy-making role in section 113(d)(2)(B) of the Act, which provides, among other things, that the Commission may sua sponte grant review of cases where "the decision may be contrary to law or Commission policy or . . . a novel question of policy has been presented."⁶ 30 U.S.C. § 823(d)(2)(B).

Although the Commission has not addressed the precise issue of whether an operator may utilize section 105(d) when it is not seeking an immediate hearing on the merits, in *Energy Fuels*, 1 FMSHRC 299, the Commission addressed whether an operator could immediately contest a citation under section 105(d) of the Mine Act. Answering that question in the affirmative, the Commission in dicta stated that if an operator "lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed." *Id.* at 308. The Commission further stated that "[e]ven if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing." *Id.* Furthermore, in *Quinland Coals*, 9 FMSHRC at 1621, the Commission determined that failure to seek an immediate contest of an order containing an unwarrantable failure finding did not preclude an operator from challenging the special finding in a subsequent penalty proceeding. There, the Commission stated that the statutory scheme set forth in section 105 for review of citations, orders and proposed assessment of civil penalties "[g]enerally . . . affords the operator two avenues of review." *Id.* at 1620.

Consistent with the Commission's historical construction of section 105 to encourage substantive review rather than to foreclose it (*Quinland Coals*, 9 FMSHRC at 1620), we interpret section 105 to permit two avenues of review. This interpretation allows operators to file contests of citations and orders before related penalties are proposed even if there is no need for immediate review of the citations and orders. This interpretation also fully accords with the Commission's reasoning in *Energy Fuels* that even if an operator "lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply

⁶ We note that the Secretary has not argued in this case that her interpretation of sections 105(a) and 105(d) would be entitled to special deference. Additionally, she has not argued that she is to play a policy-making role under those provisions. In fact, the Secretary has acknowledged the Commission's role in this area by stating that "review of judges' case management decisions is committed to the discretion of the Commission." S. Br. at 2.

continued until the penalty is proposed.” 1 FMSHRC at 308. It is also consistent with the text of section 105(d) in that there is no language in that subsection requiring that an operator seek an immediate hearing on a citation or order in order to maintain a contest proceeding.

C. Whether The Judge Abused His Discretion By Dismissing The Notices Of Contest

Although the Mine Act does provide for two avenues of review under sections 105(a) and 105(d), we recognize that a judge possesses the power to manage and control matters pending before him, which includes the authority to dismiss a case under appropriate circumstances. See 29 C.F.R. § 2700.55 (Powers of Judges). It is a bedrock principle that effective administration of justice requires that judges possess the capability to manage their own affairs and that the authority to order dismissal is a necessary component of that capability. *Link v. Wabash R.R. Co*, 370 U.S. 626, 630-31 (1962); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). Similarly, Rule 41(b) of the Federal Rules of Civil Procedure authorizes a trial court to dismiss an action “[f]or failure of the plaintiff to prosecute”⁷ Although an operator has a presumptive right to bring and maintain a contest proceeding under section 105(d) of the Mine Act, a judge retains the authority to manage and control that contest proceeding consistent with the statutory scheme and the requirements of due process. Thus, there may be extreme circumstances where an action or inaction on the part of an operator will warrant a judge’s dismissal of a section 105(d) contest proceeding on non-substantive grounds.

The Commission has set forth its standard of review of pre-trial rulings, including the dismissal of cases, as follows:

[T]he Commission cannot merely substitute its judgment for that of the administrative law judge The Commission is required, however, to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings.

Black Butte Coal Co., 25 FMSHRC 457, 459-60 (Aug. 2003); *Asarco, Inc.*, 12 FMSHRC 2548, 2555 (Dec. 1990). Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial. *Medusa Cement Co.*, 20 FMSHRC

⁷ Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), provides:

On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . , the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure.

144, 147 (Feb. 1998). Additionally, any factual determinations made in arriving at the judge's conclusion are subject to substantial evidence review. *Black Butte*, 25 FMSHRC at 460.⁸

Applying this standard of review, we conclude that the judge abused his discretion in dismissing Marfork's contest proceeding. The judge's decision contains a number of statements that are not supported by the record. The judge termed the operator's filing of notices of contest as a "folly" and as "serv[ing] no purpose." 28 FMSHRC at 845. However, the record reveals that Marfork was moving forward in the case before the judge dismissed its notices of contest. M. Reply Br. Exs. A & B. By that time, Marfork had timely responded to the Secretary's discovery request and had submitted its own. It is also highly significant that the Secretary, not Marfork, sought the continuance. Dismissing an operator's case because the operator agreed to a continuance sought by the Secretary strikes us as unreasonable.

In addition, Marfork provided two reasons for going forward with the contest: initiating discovery and informal negotiations with the Secretary. 28 FMSHRC at 844. We conclude that initiating discovery and settlement negotiations are valid reasons to bring and maintain a section 105(d) contest proceeding. The judge's rationale for discounting Marfork's need for discovery before a penalty proceeding is circular and defective. The judge stated that he would prohibit discovery in the contest and then concluded, as a result, that Marfork's discovery and contest would serve no purpose. *Id.* at 845. With respect to settlement negotiations, he determined that contests hinder settlement opportunities based on his belief that the contest precludes the availability of informal MSHA safety settlement conferences. *Id.* While this may be true as to one settlement avenue, it does not mean that all settlement discussions will be prevented because of a contest filing. We can foresee that a contest proceeding and its consequent ongoing discovery could actually encourage more rapid settlements as additional facts become known in a case. In sum, we determine that the judge abused his discretion in dismissing the contest proceedings and, therefore, we reverse his decision.⁹

⁸ 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)).

⁹ The judge separately relied on Commission Procedural Rule 20(e), 29 C.F.R. § 2700.20(e), to support his position that Marfork's contests must be dismissed because it did not seek immediate relief. 28 FMSHRC at 845. Rule 20(e) sets forth the requirements for notices of contest and requires a "short and plain statement" of the party's position with respect to each pertinent issue of law and fact and the relief requested by the party. Although Marfork did not show a need for an immediate hearing, a need for an immediate hearing is not a specific requirement under Rule 20(e). Thus, we hold that Rule 20(e) does not provide an independent basis for dismissing the contests.

Nevertheless, we are cognizant of the concerns about administrative burdens that are raised by the judge in this case. The Commission must accommodate the operator's presumptive right to contest citations and orders under section 105(d) while not burdening the administrative hearing process with multiple cases that may never go to hearing once civil penalties are proposed. The Commission bears the sole responsibility for managing its caseload, 30 U.S.C. § 823(d)(2), and establishing internal procedures to ensure that cases are handled efficiently. Accordingly, the Commission takes the opportunity provided in this case to set forth a uniform policy for the handling of section 105(d) contests, which should alleviate most, if not all, of the concerns raised by this case.

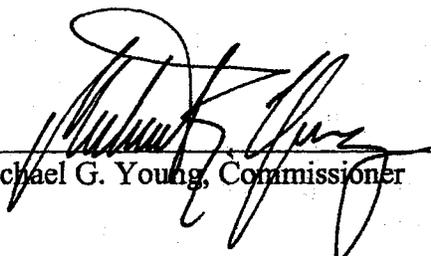
The Chief Administrative Law Judge will automatically stay all section 105(d) contests until their accompanying civil penalties are proposed by the Secretary. At that point, the initial contest and civil penalty proceedings will be consolidated and then assigned to a judge for appropriate disposition. This procedure is in line with the commonsense approach set forth in *Energy Fuels*, 1 FMSHRC at 308. If an operator desires an immediate hearing prior to a proposed assessment of penalty or believes other specific actions should be taken in the contest proceeding, the operator is free to move the Chief Administrative Law Judge to lift the automatic stay. If the operator provides a sufficient reason for lifting the stay, the case will be assigned to a judge and proceed to hearing.

III.

Conclusion

For the foregoing reasons, we deny the Secretary's motion to dismiss on mootness grounds. In addition, we reverse the judge's dismissal of the contest proceedings and reinstate the notices of contest. The contest proceedings will be consolidated with the associated proposed penalty proceedings and proceed pursuant to the Commission's Procedural Rules.


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

Chairman Duffy, concurring.

I agree with my colleagues that this proceeding should not be dismissed for mootness and that the question presented should be addressed, notwithstanding the fact that the Secretary had filed a petition for civil penalties subsequent to Marfork's filing of its petition for review of the judge's dismissal. This case presents issues fundamental to the Commission's administration of contest proceedings under section 105 of the Mine Act, issues that have arisen in other cases and that will undoubtedly continue to arise until the Commission decisively addresses them.

I further agree with my colleagues that the judge erred in dismissing Marfork's contests of the citations issued to the operator on June 27, 2006, and I, too, would reinstate them and consolidate them with the proposed civil penalty proceedings. I do so, however, on less qualified grounds: my reading of section 105 of the Mine Act leads me to conclude that mine operators have an unalloyed right to contest citations and orders issued under section 104 of the Mine Act without having to wait for the Secretary's proposed penalty, and that right cannot be subsequently infringed by the desire of the Commission or its judges to manage the Commission's docket.

Section 105 of the Mine Act is somewhat unwieldy inasmuch as it provides separately for the contesting of citations, orders, and proposed assessments of civil penalties under subsection (d), and the contesting of civil penalties assessed for citations and orders under subsection (a). In light of this seeming bifurcation and duplication of contest rights, the Commission has held that section 105 must be considered as "an interrelated whole." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620 (Sept. 1987). What is more, the Commission has gone on to conclude, correctly in my view, that the design of section 105 is such that operators are provided "two avenues of review." *Id.* An operator can immediately contest the Secretary's enforcement action by filing a notice of contest of the citation or order, or the operator can await the Secretary's proposed penalty and contest the penalty and the underlying enforcement action upon which it is based. *See UMWA v. Maple Creek Mining, Inc.*, 29 FMSHRC ___, slip op. at 9, No. PENN 2002-23-C (July 13, 2007) ("we conclude that a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d).").

Where I depart from my colleagues is that I find that the Act provides an operator the right to file contests under both subsections (a) and (d) without qualification and that the Commission and its judges may not abridge that right.

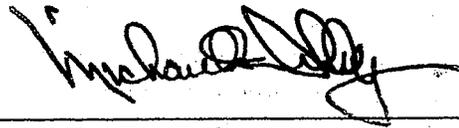
In addition to those circumstances set forth by my colleagues as justifying the filing of pre-penalty contests, *i.e.*, initiating discovery or fostering settlement negotiations, there are other circumstances where such contests may be appropriate. The operator may believe that doing so may speed the assessment process so that the matter can be resolved more promptly.¹ Likewise,

¹ Section 105(a) directs the Secretary to issue a proposed penalty "within a reasonable time" after a citation or order is issued. According to the D.C. Circuit Court of Appeals, it is essentially the Secretary, not the Commission, and certainly not the operator who determines

there may be a fundamental difference of opinion between the operator and the issuing inspector as to the interpretation or application of the mandatory standard giving rise to the citation or order at issue, and the operator may wish to resolve the dispute before the standard is cited again and potentially costly and unnecessary abatement is ordered. In any event, the operator's motivation is irrelevant since my reading of section 105 clearly grants the operator the right to contest a citation or order immediately, at the time the penalty is proposed, or at both times. While the filing of an initial contest prior to the proposed penalty may not always be necessary or even advisable, it is, by the unequivocal terms of the Mine Act, an operator's fully authorized right to do so. Accordingly, I would be most hesitant to suggest that the right can be abridged for any reason, let alone the one proffered below.

I agree with my colleagues that the Commission by its own internal mechanisms can address those concerns regarding case management raised by the judge in support of his order of dismissal, and I fully endorse the procedures set forth at page 11 of their opinion. Indeed, those very procedures preclude any need to leave open the possibility for dismissal of operator contests for other speculative, "non-substantive grounds" in the future.

In sum, the right of operators to bring contests of citations and orders prior to the Secretary's institution of civil penalty proceedings is absolute and cannot bend to the administrative prerogatives of the Commission and its judges.



Michael F. Duffy, Chairman

what time is "reasonable" for purposes of section 105(a). *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261-62 (D.C. Cir. 2005). Therefore, a contest of a citation may spur the proposal of a penalty if delays in the assessment process are anticipated.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 15, 2007

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

v.

INDEPENDENCE COAL COMPANY

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Docket No. WEVA 2007-582
A.C. No. 46-07273-93168

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 25, 2007, the Commission received from Independence Coal Company ("Independence") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On or about July 11, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Independence proposed penalty assessment No. 93168, which covered approximately 80 citations or orders. Independence paid the penalties for most of the citations and orders by a check dated July 27, 2006. In its motion, Independence alleges that it had intended to contest the proposed penalty assessments for Order/Citation Nos. 7233011, 7246280, 7246281 and 7245680, and that its safety director had faxed the assessment form to counsel who were handling civil penalty matters. Independence asserts that, due to problems with the fax transmission, the assessment form was not received by counsel and the contests of the four proposed penalty assessments were not submitted. Independence further alleges that it learned of this inadvertence in February 2007, when its safety director received an invoice from

MSHA indicating that an outstanding balance was due on the four violations. In response, the Secretary states that she does not oppose reopening the proposed penalty assessment.

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

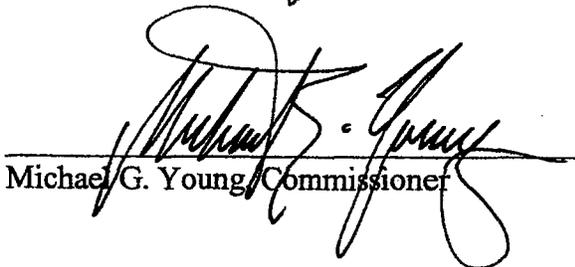
Having reviewed Independence’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Independence’s failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 5, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-17-M
Petitioner	:	A. C. No. 41-04184-96923
v.	:	
CSA MATERIALS, INC.,	:	Eagle #2
Respondent	:	

DECISION

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Tony Vinson, Safety Director, CSA Materials, Inc., San Angelo, Texas, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against CSA Materials, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$494.00. A hearing was held in San Angelo, Texas. For the reasons set forth below, I modify one citation, vacate the other, and assess a penalty of \$60.00.

Background

CSA Materials operates the Eagle #2 mine near Del Rio, Texas. The company mines crushed limestone which is sold for road construction or as aggregate for asphalt plants. The mine employed an average of ten employees in 2005.

MSHA Inspector Emilio Perales conducted a regular, semi-annual inspection of the mine beginning on June 20, 2006. He concluded the inspection the next day. During the inspection, he issued two citations, Nos. 6263615 and 6263616, under section 104(a) of the Act, 30 U.S.C. § 814(a), which were contested at trial.

Findings of Fact and Conclusions of Law

Citation No. 6263615

This citation alleges a violation of section 56.14211(b) of the Secretary's regulations, 30 C.F.R. § 56.14211(b), because:

A service man was observed standing under the boom of the 980G Caterpillar Front-End Loader[,] Serial # 2KR01365[,] while servicing the loader. The boom was in the raised position and was not blocked or secured from accidental lowering. The bucket was at full tilt with the teeth on the ground. The service man is exposed to accidental lowering of the boom. Also, the loader was not blocked or secured to prevent [it] from rolling.

(Pet. Ex. 1.) Section 56.14211(b) provides that: "Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering. The equipment must also be blocked or secured to prevent rolling."

Inspector Perales testified that he observed a miner working under the boom of the front-end loader, the arms of which were raised with the bucket resting on its teeth on the ground, and that there was nothing blocking or mechanically securing the boom to prevent it from accidentally lowering on the miner. (Tr. 24.) A picture that the inspector took of the situation corroborates his testimony. (Pet. Ex. 3.) The loader was on a level, paved surface. (Tr. 53.) Inspector Perales stated that "a failure of the hydraulic system could cause the boom to lower." (Tr. 25-26.) The violation was terminated by lowering the bucket and the boom to the ground. (Tr. 29.) The Secretary did not present any evidence as to whether the loader was blocked or secured to prevent rolling.

It is undisputed that the boom arms were not blocked or mechanically secured. Nonetheless, the Operator argued that because the loader was on level ground, with the motor off and the bucket resting on the ground, the bucket arms were mechanically secured against accidental lowering by the bucket. (Tr. 150-52.) Inspector Perales testified, however, that with the type of front-end loader in use, the bucket resting on the ground would not prevent the arms from accidentally lowering. (Tr. 79-80.) Accordingly, I conclude that the Respondent violated the regulation as alleged, except for the words: "Also, the loader was not blocked or secured to prevent rolling."

Significant and Substantial

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1),

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 (Apr. 1981)

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

In order to prove that a violation is S&S, the Secretary must establish: (1) a violation of a safety standard; (2) a distinct safety hazard contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4. In this case, a violation of a safety standard has already been established. With regard to the second factor, Inspector Perales testified that the accidental lowering of the boom could result in a fatal injury. (Tr. 25.) Consequently, I conclude that the first two criteria have been established.

As is frequently the case in determining whether a violation is S&S, it is the third criterion which is at issue. In a prior Commission case, *Holt Company of Texas*, 22 FMSHRC 196 (Feb. 2000) (ALJ), a miner died “when the bucket of a Caterpillar 990 front end loader collapsed pinning him between the lift arms and the main body of the loader.” In that case, the miner “had been working on the main hydraulic valve assembly of the loader but failed to block the lift arms prior to disengaging the hydraulic lines.” *Id.* Thus, it is clear that a failure of the hydraulic system could result in a fatal injury.

In this case, the miner under the boom was “either changing or adding oil to the front differential.” (Tr. 25.) He was not working on the hydraulic system or on anything that might affect the hydraulic system. It further appears, that absent a failure of the hydraulic system, lowering of the boom was prevented by the way the bucket was resting on the ground. I find that, in these circumstances, the chance of a spontaneous failure of the hydraulic system was unlikely and, therefore, that there was not a reasonable likelihood that the hazard contributed to would result in an injury. Accordingly, I conclude that the violation was not “significant and substantial” and the citation will be so modified.

Citation No. 6263616

This citation charges a violation of section 56.12001, 30 C.F.R. § 56.12001, in that:

The disconnect box for the #11 conveyor belt (2704) had a fuse that did not have the correct capacity. The box powers a 15 HP motor which should have 40 amp fuses and instead it had two (2) 50 amp fuses and one (1) 40 amp fuse. This condition exposes a person to possible electrical hazard.

(Pet. Ex. 2.) Section 56.12001 provides that: "Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity."

Inspector Perales testified that he observed some fuses next to the disconnect box for the number 11 conveyor belt, so he asked that the box be opened. (Tr. 31.) He saw three fuses in use in the box, two 50 amp fuses and one 40 amp fuse. (Tr. 32.) A 15 horsepower motor operated the conveyor belt. (Tr. 34.) The inspector said that in determining whether a violation existed, he called "our electrical supervisor or electrical inspector for the San Antonio field office and . . . discussed it with him." (Tr. 36.) He related that:

In conferring with our electrical inspector and using the 19.2 amperage reading off of the actual motor itself . . . times 125 percent of the NEC percentage that is used, it comes up with 24 volts. And in looking at any charts for this particular motor and at those amps, it is a 30 amp fuse that is used for that particular motor. And then if you take into account the full load capacity of 19.2 amperage, times 175 percent, which is your full load, it comes up to 33.6 amps. And that is the determination of the 40 amp fuse.

(Tr. 37.) He stated that: "The 125 percent represents the full load of the circuit, and the 175 percent represents the full current of the circuit." (Tr. 40.) Also introduced into evidence was a "Motor Circuit Protection" chart which indicates that the National Electrical Code (NEC) recommends a 40 amp fuse as the maximum for general application involving a 15 horsepower motor. (Pet. Ex. 6.) The inspector testified that he also used this chart in concluding that 40 amp fuses should have been in use in the disconnect box. (Tr. 41-42.)

Inspector Perales further testified that the 50 amp fuses were not appropriate because they would not "allow the system to ground itself or kick itself out due to the higher amp or fuse rating. Which . . . could lead to excessive heat in the wiring system. It could lead to a fire hazard, arcing hazard. Or because of the deterioration of the insulation to the wire, it could lead to shock hazard also." (Tr. 43.) Finally, the inspector related that the citation was terminated the next day when the company's electrical contractor came to the mine, reviewed the situation,

determined that 40 amp fuses were the correct type for the disconnect box, and installed them. (Tr. 44.)

Robert W. White testified for the Respondent. He was an MSHA Inspector and was Supervisory Inspector in the San Antonio, Texas, office at the time of his retirement in 1998. (Tr. 94.) He now operates Safety Assessment Services which works “with the mining community on training, electrical ground testing, first aid, CPR, safety audits.” (Tr. 94.) He stated that Jim Smiser, an MSHA certified electrical inspector, works part-time for his company. (Tr. 100.) He acknowledged that he did not know how to calculate the correct fuse size, but stated that he relied on Mr. Smiser’s calculations. (Tr. 126-28.)

Some pages from the “DeWalt Electrical Professional Reference” were introduced into evidence, which Mr. White testified indicated that a 52 amp fuse was the proper size fuse for the disconnect box. (Resp. Ex. 2 at 2; Tr. 112.) He did not know why there was a difference between the NEC chart and the DeWalt chart as to fuse size. (Tr. 132.)

To sum up the evidence on this citation, almost of all of it is hearsay. Inspector Perales issued the citation based on his discussions with the MSHA electrical inspector and testified based on what the electrical inspector told him. He seemed to have little electrical knowledge himself. For instance, he could not explain the difference between “general application” and “heavy start” on the Motor Circuit Protection chart he testified concerning. (Tr. 80, Pet. Ex. 6.) The MSHA electrical inspector did not testify. Similarly, Mr. White relied on Mr. Smiser, his electrical expert, but Mr. Smiser did not testify. Finally, the inspector testified that the operator’s electrical contractor determined that 40 amp fuses were the appropriate size for the disconnect box, but the contractor did not testify.

This citation demanded expert testimony. None was offered.¹ The gravamen of this violation is protecting the circuit against *excessive* overload. No evidence was presented on what constituted an excessive overload. No evidence was presented whether a 10 amp difference between a 40 amp fuse and a 50 amp fuse permitted an excessive overload on the circuit. Indeed, the chart relied on by the Secretary indicated that a 45 amp fuse was appropriate for “heavy start,” so the difference may only be five amps. (Pet. Ex. 6.) On the other hand, the Respondent’s evidence seemed to show that there was no overload at all. Unfortunately, no one could explain the difference between the charts, whether both were correct, neither was correct, or one was more reliable than the other.

¹ Prior to his testifying, the Respondent offered Mr. White as an expert witness on this citation and I overruled the Secretary’s objection to him so testifying. (Tr. 95, 101.) However, after reviewing his testimony, it is obvious that he is not an expert. Therefore, I reconsider my previous ruling and hold that he was not testifying as an electrical expert. Clearly, Inspector Perales was not an expert either.

As always, the burden was on the Secretary to prove this violation by a preponderance of the evidence. She has failed to do so. Accordingly, the citation will be vacated.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$247.00 for Citation No. 6263615. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties stipulated that in 2005 the Operator employed an average of ten miners, who worked 34,246 hours and that the assessment of civil penalties would not affect the company's ability to remain in business. (Jt. Ex. 1 at 2.) From this, I conclude that CSA Materials is a relatively small operation and that any penalty assessed will not adversely affect its ability to continue operating. From its "Assessed Violation History Report," I find that the operator has a better than average history of previous violations. (Pet. Ex. 7.) I further find that the company demonstrated good faith in rapidly abating the violations after being notified of them.

With regard to the violation's gravity, I find that while it could have resulted in a fatality, the chances of that happening in this case were unlikely, so the violation was not as serious as it could have been. Finally, I agree with the inspector that the negligence of the operator in committing this violation was "low." (Pet. Ex. 1.)

Taking all of these factors into consideration, I conclude that a penalty of \$60.00 is appropriate for the violation.

Order

In view of the above, Citation No. 6263615 is **MODIFIED** by changing the likelihood of injury from "Reasonably Likely" to "Unlikely" and the "Significant and Substantial" designation from "Yes" to "No" and is **AFFIRMED** as modified. Citation No. 6263616 is **VACATED**.

CSA Materials, Inc., is **ORDERED TO PAY** a civil penalty of **\$60.00** within 30 days of the date of this decision.



T. Todd Hodgson
Administrative Law Judge

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Tony Vinson, Safety Director, CSA Materials, Inc., P.O. Box 60693, San Angelo, TX 76906

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 6, 2007

POWDER RIVER COAL, LLC,
Contestant

CONTEST PROCEEDING

v.

Docket No. WEST 2006-514-R
Citation No. 7610111; 7/18/2006

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

North Antelope Rochelle Mine
Id. No. 48-01353

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

CIVIL PENALTY PROCEEDING

v.

Docket No. WEST 2007-197
A.C. No. 48-01353-106519

POWDER RIVER COAL, LLC,
Respondent

North Antelope Rochelle Mine

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania,
for Powder River Coal, LLC;
Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor,
Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on a notice of contest filed by Powder River Coal, LLC (“Powder River”) and a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). Powder River contested a citation issued under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 50.20(a). An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND

Powder River owns and operates a large surface coal mine known as the North Antelope Rochelle Mine in Campbell County, Wyoming. The mine employed about 836 people in May 2006 and produced about 88.5 million tons of coal in 2006. The mine is in a remote location surrounded by ranch lands.

On May 27, 2006, Lee Boyd, a miner at Powder River, was leaving the mine at the end of his shift. He lost control of his motorcycle and skidded off the road onto the shoulder. At the time of the accident, Boyd was traveling west on County Road 31. He was about 2 miles beyond Powder River's guard shack and 1.5 miles from Campbell County Road 4 (Antelope Road). (Tr. 15, Ex. G-5). The accident occurred within the outside permit boundary of the mine and adjacent to surface land owned by Powder River. Boyd sustained serious injuries.

Deborah Diedrich, Powder River's safety and training manager, was notified of the accident.¹ Because the accident involved serious injuries, she called Allyn Davis, MSHA's District 9 Manager, to report the accident. The Campbell County Sheriff's Office and MSHA investigated the accident. (Ex. G-3). MSHA Inspector William Younkin issued Citation No. 7610111 alleging a violation of section 50.20(a) because Powder River failed to file an accident/injury report with MSHA within 10 days of the accident. The citation states:

The mine operator did not complete and mail a Mine Accident Injury Report Form 7000-1 to MSHA within ten working days after the motorcycle injury accident that occurred on May 27, 2006 at 7:15 pm. The accident makes reference to employee Lee Boyd, the motorcycle operator that received the injuries.

Inspector Younkin determined that an injury was unlikely but that any injury resulting from the violation is likely to result in lost workdays or restricted duties. He determined that the violation was not of a significant and substantial nature ("S&S") and that Powder River's negligence was high. The regulation provides, in part, that "[e]ach operator shall report each accident, occupational injury, or occupational illness at the mine." The regulation sets forth the form to be used for reporting and states that this form must be mailed within ten working days after the accident or occupational injury. Section 50(2)(e) defines occupational injury, in part, as "any injury to a miner which occurs at a mine for which medical treatment is administered" The Secretary proposes a penalty of \$500.00 for this citation.

The parties do not dispute that Boyd was seriously injured in his motorcycle accident. Powder River contends, however, that the injuries did not occur at its mine because the road on which the accident occurred was a public road.

¹ In some of the testimony and exhibits, Ms. Diedrich is referred to as Deborah Heimann, which is her maiden name.

II. SUMMARY OF THE EVIDENCE

Inspector Younkin testified that he issued the citation when Powder River did not file the accident form. The inspector relied, in part, on MSHA's Program Policy Manual ("PPM") in issuing the citation. (Tr. 17; Ex. G-2). In his testimony, Inspector Younkin pointed out that the officer from the Campbell County Sheriff's Department indicated on his report that the accident occurred on private property. (Tr. 19; Ex. G-3). Inspector Younkin also relied on signs along the roadway between the County Road 4 and the accident site that read "Permit boundary. North Antelope Rochelle Complex. Notice: Restricted Area. Keep Out." (Tr. 25; Ex. G-5 p. 1). These signs face west so that "people driving east, towards the mine site" would see them. *Id.* The inspector also relied on a sign that included the following language: "Powder River Coal Company, North Antelope/Rochelle Mine." (Tr. 26; Ex. G-5 p. 4). He testified that this sign was located "at the antelope entrance towards the access road, on the west end." (Tr. 26). He admitted that these signs were on the other side of the fences on the lands adjacent to the roadway and that they warned people to keep off those lands. (Tr. 54). He also admitted that there were no signs restricting access to the road. Similar signs are posted along County Road 4.

Inspector Younkin also testified the road was the primary access road to the mine and that the entire road was built by Powder River Coal Company in 1982. (Tr. 28). He notes that all of the mine's employees used the road to access the mine, as well as "all the vendors, contractors that are required to accomplish work on the mine site" and "commercial and industrial" vehicles that carry equipment to be used on the mine site. (Tr. 28-29). He testified that the primary use of the road is for those traveling to or from the mine.² *Id.* The inspector testified that this road is different from other county roads because it is not a "throughput destination" that allows traffic to enter from different directions. The road terminates at the mine access road. In addition, it is not labeled with a road name and there were no "signs of any kind designating it as part of Campbell County's jurisdiction." *Id.* Inspector Younkin admitted that this road also provides access to parts of the Bridle Bit Ranch Company ("BBRC").

In addition, Inspector Younkin testified that Don Gibson, a supervisory MSHA inspector, discussed the road with Powder River in 2004 because he was concerned about the adequacy of the berms on one section of the road. The company showed Gibson the design specifications for the road and berms, which satisfied him. (Tr. 31-33). No citations were issued.

Inspector Younkin testified that an independent contractor of Powder River was cited for not reporting an accident on the same road in September 2005. (Tr. 34; Ex. G-8). The sheriff's report for that accident also indicated that it occurred on private property.

Finally, Inspector Younkin testified that the mine access road has "undergone a complete change" since he issued the citation. There is a sign at the entrance of the road on County Road 4

² Coal is transported from the mine on railroad cars, so coal haul trucks do not travel on County Road 31.

that states that the new access road for the mine is 1.3 miles to the north. (Tr. 35; G-9). This change occurred because Powder River is planning to expand the pit into the area occupied by that part of the access road that is closest to the mine.

Ms. Diedrich testified on behalf of Powder River. She stated that she advised the independent contractor to contest the citation it received for not reporting the accident on the road, but the contractor just wanted to pay the fine. (Tr. 69).

Diedrich also testified that when she discussed the road with Inspector Gibson in 2004, she brought up the jurisdictional issue with him. Gibson, on the other hand, testified that he could not recall having a conversation with Diedrich about jurisdiction over the road prior to the May 2006 accident. (Tr. 118). The area of concern to Inspector Gibson was closer to the guard shack and the company installed additional berms at that location. (Tr. 70-72). Powder River used its own employees to complete this work. (Tr. 79).

Ms. Diedrich made the decision to call Mr. Davis at MSHA when she was told that Boyd was seriously injured in the accident. (Tr. 73). She stated that she called Davis despite "differing opinions as to jurisdiction on that road" to "err on the cautious side to make the report." *Id.* Diedrich added that she informed Davis that she did not believe that MSHA had jurisdiction, but she called anyway. *Id.* She states that Davis asked her "who maintains the road" and she told him that the mine did. *Id.*

Diedrich says she traveled to the accident site after Inspector Younkin arrived that day. She took a number of photos the next day and labeled them. (Tr. 74; Ex. R-11). Based on her examination of the evidence she determined that Boyd "was traveling too fast, and as he went around this slight curve, he failed to negotiate appropriately and he skidded off the road." (Tr. 76).

Diedrich testified that the area of the road where the accident occurred was open to the public. (Tr. 78). She does not dispute that a "majority of the use on that road is for Powder River purposes." (Tr. 80-81). Also, in response to her conversation with Inspector Gibson in 2004, Powder River installed signs that read "Caution Low Shoulder" in several locations. (Tr. 81; Ex. G-5 p. 3). She also admitted that Powder River built and maintained the road along its entire length. (Tr. 82).

Curtis Belden, a senior manager of engineering for Powder River's strategic planning office, testified that he prepared Exhibit G-7, a map of the mine and access road. The aerial photography on which the map was based was completed two days before the accident occurred. (Tr. 88). The access road is color coded on the map into three parts. The first section, which connects to County Road 4 is labeled "U.S.F.S. Dedication," the middle section is labeled "Peabody Coal Company Dedication," and the section closest to the mine is labeled "NARM

Access Road.”³ The accident occurred on the middle portion of the road denoted as the Peabody Coal Company Dedication. Belden noted that the “BBRC Ranch Approach” labels on the map show the access roads off County Road 31 that “give Bridle Bit Ranch company employees and owners access to the properties they control on both sides of the road.” *Id.*

Belden testified that the portion of the road where the accident occurred was dedicated by Peabody to the county. He stated that Peabody gave the county the right to occupy a 100 foot wide tract of land for use as a county road. (Tr. 91; Ex. R-2). He testified that the road was built so that the center line of the road is in the center of the right-of-way. (Tr. 92).

Belden then testified that the portion of the road identified as a U.S.F.S. dedication was a conveyance of an easement by the United States of America, through the Forest Service to Campbell County for a right-of-way for a public road. (Tr. 93; Ex. R-3). After the two rights-of-way were granted to the county, “the Campbell County commissioners passed a resolution to dedicate this road as a county road.” (Tr. 94; Ex. R-4). The resolution establishes the road “as a public county road” and references both the right-of-way from Peabody and the easement from the Forest Service. (Tr. 95; Ex. R-4). Belden testified that County Road 31 was shown on the county’s database of county roads. *Id.* He stated that it is not unusual for a county road to dead end at a ranch or other property. (Tr. 96). County Road 31 begins at its intersection with County Road 4 and ends at the NARM access road. The map denotes this end point as “End CR #31.” (Ex. G-7). Belden stated that the road was created mostly for the benefit of the mine and that the county would not have built the road independently. (Tr. 112). Belden admitted that a “majority of the use of that road at the time of the accident was for Powder River.” (Tr. 113-114). Before the road was built, there was a dirt “two-track” road in the same location, with grass growing between the tracks.

Belden said that the maintenance of the road is performed by Powder River “pursuant to a maintenance agreement with the county.” (Tr. 96; Ex. R-5 & R-6). The road maintenance is completed using Campbell County road standards. *Id.* He also noted that Powder River assists in clearing snow from County Road 4. (Tr. 97).

Belden testified that the subject road is no longer being used by vehicles traveling to and from the mine because Powder River will be expanding the pit through part of the NARM access road. (Tr. 98). Powder River requested that Campbell County vacate the road and the county formally abandoned the road in October 2006. (Tr. 98; Ex. R-22). Upon vacation, the ownership of the road reverted back to the surface owners. Most of the road is now a private road that is used by various people to get to the Bridle Bit Ranch and other properties from County Road 4. (Tr. 111). Powder River no longer uses the road.

³ U.S.F.S. refers to the United States Forest Service. Peabody Coal Company is Powder River’s parent company. NARM refers to the North Antelope Rochelle Mine.

Using Exhibit G-7, Belden testified that intersections on County Road 31 used by Bridle Bit Ranch were “constructed . . . with appropriate drainage that allow[s] larger trucks to exit County Road 31 and go north and south on the Bridle Bit Ranch property.” (Tr. 99). He stated that Bridle Bit Ranch employees use its roads to tend livestock on the property and that suppliers for Bridle Bit Ranch “bring repair equipment or supplies on the property to repair fences, to maintain water wells, to bring in the winter . . . feed onto the property.” (Tr. 100). Belden contacted the Bridle Bit Ranch foreman and was told that “the ranch used those accesses on average three to six times a week and in the wintertime . . . everyday.” *Id.* Vehicles used by BBRC include a “three-quarter ton pickup . . . and in some cases larger trucks” and trucks to transport livestock such as “large stock trailers pulled by a large pickup truck, or in some cases they have had 18-wheel stock trailers.” (Tr. 102). The Bridle Bit Ranch access points are at several locations along County Road 31. The subject road is still used by BBRC to travel to and from County Road 4.

Oil and gas operators also used County Road 31 to access their operations. These operators send large tank trucks down the road to collect the oil. (Tr. 105). These wells are also serviced on a regular basis. *Id.* Belden also testified that gas pipelines pass through the area and that crews used County Road 31 to access these pipelines about once a month. *Id.* Power distribution lines run through the area and were checked “about once a month” by crews who traveled to them via County Road 31. (Tr. 106). Qwest also uses the road to access the telephone lines. (Tr. 107). Belden admitted that these utilities are present in the area primarily to service the mine. Though the road is now private, BBRC and the other entities still use the road by right of their oil and gas development or because of pre-existing relationships with the surface land owners. (Tr. 112).

Belden stated that the signs testified to by Inspector Younkin that restricted access to the property adjacent to the roadway were required to be placed and oriented in a specific way by the Wyoming Department of Environmental Quality. (Tr. 108). He says these signs “are intended to convey the location of the permit boundary that is approved by the Wyoming Department of Environmental Quality” and to warn people that the surrounding property is an active mining operation. He testified that these signs concern the area behind the fence and not the road. *Id.*

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Brief Summary of the Argument

The Secretary argues that the access road was “related to the mining activity of NARM and was used in the manner of a private road from the date it was constructed by the mine to the date the mine decided to mine through the road.” (S. Br. 6). Because the road was constructed by Powder River solely for the purpose of providing access to the mine and it was maintained by Powder River for its benefit, it exercised sufficient control over the road to consider it to be a

private road appurtenant to the mine for the purposes of the Mine Act. Signs posted along the road indicate that the road was intended for private use.

Powder River argues that because the road was a county road open to the public it was not subject to MSHA jurisdiction. The access road was declared to be a public road by Campbell County in 1982 and it remained so for the 24 years leading up to the accident. The road was also actually used as a public road. Indeed, many vehicles on the road were going to other destinations, such as the Bridle Bit Ranch. Although Powder River performs all maintenance on the road, it does so using Campbell County road standards as required by the maintenance agreement. The fact that Powder River was granted the authority to keep the road in good repair does not confer Mine Act jurisdiction over the road.

B. Analysis

Section 3(h)(1) of the Mine Act defines “coal or other mine” as:

(A) an area of land from which minerals are extracted . . . (B) *private ways and roads* appurtenant to such area, and (C) lands, excavations, . . . workings, structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits

30 U.S.C. § 803(h)(1) (emphasis added).

I find that the portion of the access road where the motorcycle accident occurred is not included within the definition of coal or other mine because it was not a private way or road. Consequently, MSHA did not have jurisdiction over the road or the accident that occurred on the road. The evidence demonstrates that Peabody and the Forest Service granted Campbell County a right-of-way for the establishment of a road. In 1982, the Campbell County Board of Commissioners created County Road 31 on this right-of-way. All of the instruments necessary to effectuate the creation of this road were duly executed and recorded.⁴ (Exs. R-2 through R-7). There were no legal or physical restrictions on anyone entering the road from County Road 4 and driving down the road past the location of the accident. The accident occurred on the road near the intersection of a dirt road leading south onto the Bridle Bit Ranch to an active oil and gas well. This part of County Road 31 had been dedicated to the county by Peabody and the land on either side of the road was North Antelope Rochelle Mine property. (See Ex. G-7). No extraction or other mining activities were taking place near the accident site.

⁴ The evidence shows that officers with the Campbell County Sheriff's office checked the “Yes” box on traffic accident report forms where the form asks “On Private Property?” (Exs. G-3 & G-8). This fact does not have the effect of turning a public road into a private road.

There is no dispute that the county did not construct or maintain the road. Powder River agreed to perform those functions at its cost under a maintenance agreement it entered into with the county. Nevertheless, the road was a county road open to the public. The Secretary argues that the road is essentially Powder River's road because most traffic on the road is generated by the mine and Powder River built and maintains the road. Thus, the Secretary contends that, because Powder River effectively "controlled" the road, she has the authority to exercise jurisdiction over the road under the Mine Act. The Secretary ignores the fact that the language of the Mine Act specifically grants MSHA jurisdiction over *private* roads. The Mine Act does not grant MSHA jurisdiction over a public road if a mine operator built and maintained the road or exercises some degree of control over the road. In this instance, the county allowed Powder River to build and maintain the road but Powder River does not have the right to control the traffic on the road. It is clear that Powder River does not have the authority to limit the amount or type of traffic on the road. In addition, it is worth noting that mines are usually located in rural areas. In most cases, a high percentage of the traffic on local public roads near such mines is directly related to the mining activity. This fact does not give MSHA jurisdiction over a public road. Indeed, much of the traffic on County Road 4, which is clearly not subject to MSHA jurisdiction, also travels to and from the mine.

The Secretary also relies on the warning signs Powder River posted along the road. I find that it is clear that these signs warn people to keep out of the land adjacent to the road and they do not restrict access to the road. (See Ex. G-5). Similar signs are located along County Road 4. These signs are similar to "No Trespassing" signs that are often found on land adjacent to rural roads. Indeed, these signs support the position of Powder River that the road is open to the public. If the road were private, there would be no need for such signs. All that would be necessary for a private road would be a gate, warning signs, or no trespassing signs at the entrance of the road.

The Secretary relies on MSHA's PPM to confer jurisdiction. The section of the PPM introduced at the hearing states that MSHA has the authority to assume jurisdiction of mine roads which pass through federal land administered by agencies that do not have responsibility for health and safety on those roads. (Ex. G-2). The PPM states that the presence of any of several factors should weigh in favor of including of the road under MSHA jurisdiction. Included among the factors listed in the PPM are whether the road is maintained by the operator, whether the operator has the legal right to bring the road into compliance with MSHA regulations, whether the road provides a major means of access for mine vehicles, and whether the road was built by or for the mine operator. *Id.* I hold that the Secretary does not have the authority to confer jurisdiction over public roads to MSHA through the PPM. If a road is a public dedicated road, that is the end of the question because the Mine Act specifically limits MSHA jurisdiction to private ways and roads. Both the federal government and Powder River granted a right-of-way to Campbell County for the purpose of creating a public road and such road was actually established by the county.

At least one court as well as the Commission have addressed similar issues. In *Bush & Burchett, Inc. v. Reich*, the Sixth Circuit held that a road used to connect a surface mine on one side of a river to a rail load-out facility on the other side was not a mine because the road was conveyed to the state after it was constructed. (117 F.3d 932 (6th Cir. 1997)). The road was open to public use even though it was constructed for the benefit of the mine and the mine operator was a primary user of the road. In *National Cement Co. of Calif.*, the Commission determined that a private road constructed and used by a mine operator was not subject to the Mine Act because the operator did not exercise sufficient control over the road. (27 FMSHRC 721 (Nov. 2005)).⁵ Use of the road was restricted to those traveling to the mine, the adjacent ranch, and those authorized by the state. A majority of the Commissioners held that, although the road was private, it was not appurtenant to an area of land from which minerals are extracted. National Cement had been cited for not constructing a berm along the road. Looking at the statutory framework as a whole, the majority reasoned that a “finding of Mine Act jurisdiction over the subject road in this instance would not simply mean that National Cement would be obligated to install guardrails or berms along the road; such a finding would raise a host of issues regarding compliance with the Mine Act and Mine Act standards under circumstances where National Cement could not control other users of the road.” (27 FMSHRC at 730). The Commission further stated that a finding that property is a coal or other mine “has far ranging consequences under the Act.” The decision set forth some of these potential consequences in detail. (27 FMSHRC at 731-35).

These two decisions support a finding that County Road 31 is not a coal or other mine. If the road is a coal mine, not only would Powder River be required to report all traffic accidents on the road to MSHA, but all of the terms and conditions of the Mine Act and the Secretary’s safety and health standards would apply to the road. For example, section 3(g) defines a miner as “any individual working in a coal or other mine.” If an employee of the Bridle Brit Ranch were to commit a violation of a safety standard while driving down the road for his employer, he could be considered to be a miner because he would be an individual working in a coal or other mine. It is important to remember that the Mine Act is a strict liability statute. If the road is deemed to be part of its coal mine, Powder River’s liability under the Mine Act would expand significantly to include individuals over which it can exercise little or no control. Thus, I find that the road is not appurtenant to an area of land from which minerals are extracted.

In summary, I hold, based on the definition contained in section 3(h)(1) of the Mine Act, that the subject road is not a coal or other mine. The road is not a private way or road.⁶

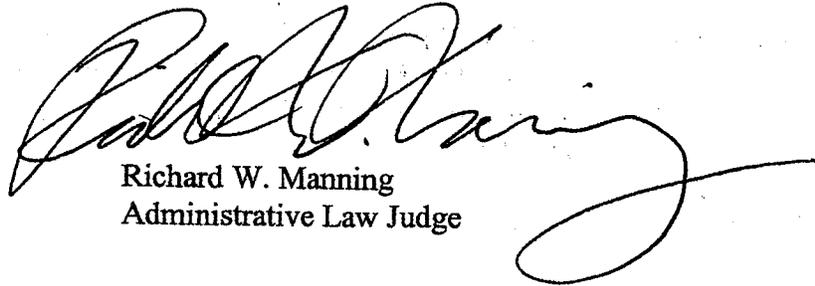
⁵ The Secretary appealed the Commission’s decision to the D.C. Circuit, where the case is still pending (No. 06-1094).

⁶ My holding in this case is limited to those portions of the road that were dedicated to the county to create County Road 31. I do not make any jurisdictional findings for that portion of the road between the designations “End CR 31” and “Security Gate,” labeled as the “NARM Access Road” on Exhibit G-7. This distinction is somewhat moot under the facts here because, after the

Secondarily, I find that the road is not appurtenant to an area of land from which minerals are extracted because Powder River is unable to control the use of the road by others. It is not disputed that Powder River made modifications to some berms because of concerns raised by Inspector Gibson and that Ms. Diedrich called Mr. Davis to notify MSHA of the accident. These facts do not prevent Powder River from raising the jurisdictional issues in this case. Because I find that County Road 31 is not a coal or other mine, MSHA did not have jurisdiction to issue Citation No. 7610111 to Powder River and the citation must be vacated. In addition, because section 50.20(a) requires mine operators to report injuries that occur at "the mine," Powder River was not required to report Mr. Boyd's accident because it did not occur at the mine.

IV. ORDER

For the reasons set forth above, Powder River's notice of contest is **GRANTED**, Citation No. 7610111 is hereby **VACATED**, and these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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RWM

citation was issued, the road was vacated and Powder River constructed a new mine access road to the north of the pit. A decision on the merits was necessary to resolve Powder River's contest of the citation. In addition, my resolution of the issues may help resolve similar issues along the newly constructed road.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 13, 2007

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 2007-126
Petitioner : A.C. No. 36-05466-106793
v. :
: :
EMERALD COAL RESOURCES, LP, : Emerald Mine No. 1
Respondent :

DECISION

Appearances: Ronald M. Miller, Conference & Litigation Representative, U.S. Department of Labor, Hunker, PA, on behalf of the Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, PA, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Emerald Coal Resources, LP (Emerald) with one violation of the mandatory standard at 30 C.F.R. § 75.516-2(c) and proposing a civil penalty for the violation. The general issue before me is whether Emerald violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

The citation at bar, No. 7019806, charges as follows:

The communication wire for the telephone located at the B-4 long wall belt starter was not effectively protected with additional insulation where it came into contact with 480-volt energized power cables. The phone cable was intermingled with the power cables from the phone to the track.

The cited standard, as relevant hereto, provides that "[a]dditional insulation shall be provided for communication circuits at points where they pass over or under any power conductor."

The undisputed evidence in this case establishes that additional insulation was in fact provided for the communication circuit at issue where it contacted the cited power conductor. The Secretary also acknowledges that there was no safety hazard presented under the facts herein.

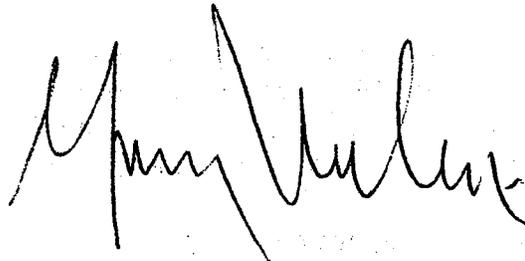
Indeed, while the regulation at bar requires no measurable level of protection, it is undisputed that the insulated circuit herein far exceeded the required dielectric strength.¹

The Secretary argues in this case that the additional insulation required by her regulatory standard must be provided by the mine operator and cannot legally be provided by the manufacturer as in the instant case. She provides no legal or rational basis for this argument.² Indeed, the Secretary does not even claim that her interpretation of the standard requires deference under applicable law. In any event, deference to an agency's construction of its own regulation is due only when the plain meaning of the rule itself is doubtful or ambiguous. Here the meaning of the regulation is clear on its face. See e.g. *Udall v. Tallman*, 380 U.S. 1 (1965); *Pfizer v. Heckler*, 735 F2d 1502, 1509 (D.C. Cir 1984); *Exportal LTDA v. U.S.*, 902 F2d 45 (D.C. Cir. 1990).

Under the circumstances I find that there was no violation of the cited standard.

ORDER

Citation No. 7019806 is hereby vacated and this civil penalty proceeding dismissed.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

Ronald M. Miller, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 319 Painterville Road, Hunker, PA 15639

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/lh

¹ "Dielectric strength" is the voltage which an insulation can withstand before breakdown occurs (Respondent's Exh. No. 6).

² *Western Fuels-Utah, Inc. v. Secretary*, 17 FMSHRC 756(May 1995)(ALJ) cited by the Secretary is inapposite.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 19, 2007

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner : Docket No. CENT 2007-115-M
: A.C. No. 14-01650-105541
v. :
: :
: :
HIGGINS STONE, INC., : Higgins Stone, Inc.
Respondent :

DECISION

Before: Judge Barbour

This case concerns a proposal for assessment of a civil penalty filed pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. 30 U.S.C. §§ 815, 820 (Mine Act or Act). The proposal seeks \$1,769.00 for an alleged violation of the mandatory occupational noise exposure standard found at 30 C.F.R. § 62.130(a).¹

The parties agreed to numerous stipulations, which, *inter alia*, establish the Commission's jurisdiction, the fact of violation and almost all of the statutory civil penalty criteria. See Sec's Brief in Support of Motion for Summary Decision (Sec's Br.), Exh. A, Joint Stipulations. In addition, the Secretary moved for summary decision. Sec's Motion for Summary Decision Based on Stipulated Facts and Attached Brief (Sec's Mot.). Under the Commission's rules a summary decision motion may be granted if "there is no genuine issue as to any material fact; and . . . the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §§ 2700.67(b)(1), 2700.67(b)(2).

Before ruling on the motion, it is necessary to set forth fully the parties' stipulations and their factual assertions.

THE JOINT STIPULATIONS

The stipulations are as follows:

¹The standard requires each operator to assure no miner is exposed during any work shift to noise that exceeds the permissible exposure level (PEL).

1. Higgins Stone, Inc. [Higgins or the company] is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
2. [Higgins] is the operator of the . . . [subject mine].
3. [Higgins] is subject to the jurisdiction of the . . . [Act].
4. The . . . Commission and the assigned Administrative Law Judge . . . have jurisdiction over this matter.
5. MSHA Inspector Chrystal A. Dye conducted a regular inspection of the . . . [mine] on June 28, 2006. She conducted a full-shift noise sample on the hydro splitter operator working in the splitter shed . . . and issued Citation No. 6332898 as a result of . . . the noise sampling.² Inspector Dye's dosimeter readings indicated exposure of the [splitter] operator to a[n] . . . exposure level . . . of 326.5%. [T]his was in excess of the . . . (PEL) of 132%.
6. [Higgins] violated [section] 62.130(a) as alleged in Citation No. 6332898. The abatement time was set for July 28, 2006.
7. [The citation] . . . and [the subsequent] continuations [of the citation] were properly served . . . upon an agent of [Higgins] . . . on the date and place stated therein.
8. On August 15, 2006, Inspector Dye went back to [the mine] . . . and re-sampled the splitter operator. Prior to her arrival . . . [Higgins] had run the mufflers of both splitters in the splitter shed through the roof and had built a wooden frame around the motor in order to shield the motor with Plexiglass. On that date, the dosimeter readings came in at 341.50% (again in excess of the PEL set in . . . [section] 62.130(a)[]). Inspector Dye granted an extension to . . . [Higgins] to try more engineering or administrative controls.
9. On September 20, 2006, . . . Dye went to . . . [the mine] to check on abatement. Dosimeter readings after a full shift sample of the splitter operator showed a PEL of 226.50[%].

²The hydro splitter is a mechanism used to split and shape stone. Sec.'s Mot., Exh. B. at 1, ¶ 2.

Between August 15, 2006, and September 20, 2006 . . . [Higgins] had not tried any additional measures. While Inspector Dye was on the mine site, Scott Wichman, Plant Operator, took the smaller splitter out of operation, covered the motor with blankets, and called the CAT dealer to see about having a sound absorbent compartment built to house the motor. Based on these actions . . . Dye granted a second extension of the abatement date (until October 20, 2006). Dye informed . . . [Higgins] no further extensions would be granted.

10. On November 9, 2006, . . . Dye conducted a full shift noise sample and issued [section] 104(b) Order No. 6332985 when no apparent further efforts had been taken to reduce noise (i.e., the CAT operation had not built the noise absorbing compartment).[³]

11. On November 14, 2006 . . . Dye terminated Order No. 6332985 . . . [Higgins] had built a sound absorbent enclosure around the splitter motor and her dosimeter reading came in at a permissible PEL of 62.150%.

12. The penalty issued for the citation . . . will not affect . . . [the company's] ability to continue in business.

13. The information contained on . . . [MSHA's] . . . [Assessment] Data Sheet accurately reflects the number of violations issued to . . . [Higgins] and the number of inspection days from October 17, 2005 (the date on which . . . [Higgins] began its operations), to December 2006.

14. MSHA Form [No.] 1000-179, which reflects the points that were used to formulate the assessment at issue, accurately

³Section 104(b) provides in part, if an inspector:

finds (1) that a violation described in a citation . . . (a) has not been totally abated within the time as originally fixed . . . or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he [or she] shall . . . promptly issue a [withdrawal] order.

30 U.S.C. § 814(b).

depicts points attributable to . . . [the company's] size; the history of previous violations; negligence; and gravity. The total number of points, 9550, was used to compute the penalty of \$1,769.00. **[Higgins] does not stipulate to the 10 points added for lack of good faith and does not agree with the failure to allow an allowance of a 30% penalty reduction for good faith abatement [emphasis in original].**

Sec.'s Br., Exh. A.

AFFIDAVIT

An affidavit from Inspector Dye is attached to the Secretary's brief. Sec's Br., Exh. B. In the affidavit, which tracks the stipulations, Dye states, on June 28, 2006, she conducted a full shift-noise sample on the operator of the larger of the two splitters in the splitter shed. Sec's Mot., Exh. B at 1-2, ¶ 3. The smaller splitter was pushed up against the larger splitter, end-to-end. Therefore, the sampled splitter operator was exposed to the noise from both splitters. *Id.* At the time of the sample, the splitter operator was enrolled in a hearing conservation program and was wearing hearing protection. The sample revealed the splitter operator was exposed to a dosimeter reading of 326.5% that equated to 98.5 dBA, which was a violation of section 62.130(a). *Id.* at 2, ¶ 2. Inspector Dye further states, 30 days is the maximum abatement time for health violations, and she allowed Higgins the full 30 days to install all feasible engineering and administrative controls. *Id.* at 2-3, ¶ 4.

Dye maintains she returned to the mine after more than 30 days had run, and although Higgins had redirected the noise from the splitters and built a frame to enclose the motor with plexiglass, a noise sample revealed continued non-compliance. Therefore, she extended the abatement time to September 15, to allow the company "to try some more engineering or administrative controls." Sec's Mot., Exh. B at 3, ¶ 5. When she returned to the mine on September 20, a full shift noise sample on the splitter operator revealed continued non-compliance. She also maintains no work had been done on reducing the noise between August 15 (the date of her prior visit) and September 20. Dye states she warned the plant manager she would issue a closure order for failure to abate, and the manager responded by taking the smaller splitter out of service and by wrapping blankets around the larger splitter's engine. This lowered the dBA, but the noise level was still non-compliant. The manager then arranged for a contractor to build a sound absorbent compartment for the splitter's engine.⁴ Dye states she again warned the manager she would not grant a further extension. Sec's Mot., Exh. B at 3, ¶ 6. When Dye returned to the mine on November 9, 2006, the compartment was not built. Dye found out no Higgins employee had spoken to the person responsible for building the compartment in three

⁴ I assume the "contractor" is the "CAT dealer" referenced in the stipulations. See Sec's Br., Exh. A, ¶ 9.

weeks. She also noted Higgins had not called MSHA to ask for additional time. Moreover, the person responsible for building the compartment was not available to confirm the plant manager's statements about the contractor and the compartment. Accordingly, on November 14, she issued an order to Higgins for failing to comply with the citation. *Id.* at 4, ¶ 7. Finally, Dye states she terminated the order on November 16, when installation of a sound absorbent enclosure around the engine and other ameliorative actions brought the PEL within the requirements of the regulation. *Id.*

THE SECRETARY'S POSITION

The Secretary argues the stipulations establish the appropriateness of MSHA's proposed penalty of \$1,769.00. In particular, the record supports finding Higgins failed to take timely action to abate the violation. Sec's Br. 2.

THE COMPANY'S POSITION

Rather than file a brief, the representative of the Respondent indicates the company relies on paragraph 14 of the stipulations, in which the company states in part, "Respondent does not stipulate to the 10 points added for lack of good faith and does not agree with the failure to allow an allowance of a 30% reduction for good faith abatement." (bold type face omitted); *See* e-mail from Sec's counsel to ALJ (June 27, 2007). The company's position is consistent with its answer to the petition, wherein it stated:

We were aware . . . the noise in the [s]plitter [s]hed would require the employees that operate the equipment to wear hearing protection at all times as well as [to participate] in . . . [a] Hearing Conservation Program [HCP]. Both of these necessities were complied with. However, we were not aware . . . the noise level, even with the hearing protection and HCP in place, was at the level measured by the inspector. We underst[an]d . . . our unawareness [sic] is no excuse, so since the noise level discovery was made, we have made several attempts to buffer the noise and [we have] spent countless dollars and hours to fix the problem. We feel we have done our best to comply with MSHA regulations and we [feel] . . . we should have received more credit towards . . . [the] "Good Faith" [abatement]. . . [penalty criteria].

Letter to Federal Mine Safety and Health Review Commission (April 6, 2007).

RULING

The motion is **GRANTED IN PART**.

The parties agree Higgins violated section 62.130(a) as alleged. Sec's Br., Exh. A, ¶ 6. A violation having been found, a penalty must be assessed. The Commission has made clear the duty of a judge is to assess penalties de novo based on the statutory civil penalty criteria. The judge is not required to give "equal weight . . . to each of the penalty . . . criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (September 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty. *Cantera Green*, 22 FMSHRC 616, 625-626 (May 2000). While I agree with the Secretary with respect to almost all of the penalty criteria, my conclusions concerning the company's attempts at good faith abatement lead me to assess a penalty lower than the one she has proposed.

With regard to the penalty criteria, based on Stipulation 13, I find Higgins has a small history of previous violations. Sec's Pet'n, Exh. A, ¶ 13. There was no stipulation regarding the size of the company, but the Secretary asserts Higgins is small in size, the company does not argue otherwise, and I so find. Sec's Pet'n, Exh. A. The Secretary also asserts the violation was due to moderate neglect on the company's part, Higgins does not disagree, and I so find. Citation No. 6332898. Further, based on stipulation 12, I find any penalty assessed will not affect the company's ability to continue in business. Sec's Br., Exh. A, ¶ 12. While there is no stipulation regarding the gravity of the violation, the Secretary asserts the violation was unlikely to result in a permanently disabling injury to the affected splitter operator, and Higgins does not argue otherwise. Citation No. 6332898. I, therefore, find the violation was not serious.

Finally, I conclude the company is entitled to more credit for its abatement efforts than the Secretary is prepared to give. As the company points out (and as the citation states), the splitter operator was required to wear ear protection and to participate in an HCP program. Letter (April 26, 2007); Citation No. 6332898. I conclude from this the company was mindful of the danger of exposure to excessive noise and was trying to minimize the hazard. I further note, as the inspector's extensions of the citation and her affidavit establish, the company took what appear to have been reasonable steps to come into compliance. It relocated the mufflers of the subject engines (Citation No. 6332898-02; Sec's Br., Exh. B, ¶ 5); it moved the smaller splitter; it muffled the larger splitter's engine; and it arranged for the building of a sound absorbent compartment around the larger splitter (Citation No. 6332898-03; Sec's Br., Exh. B, ¶ 6). The Secretary's determination the company lacked good faith seems have been based on the fact the sound absorbent compartment was not built when the inspector went to the mine on November 9, and on the fact three weeks passed during which the company and the contractor had not been in contact. Inspector Dye also seems to have been frustrated she or a company representative could not reach the contractor "to confirm any information." Sec's Br., Exh. 4.

Good faith is a matter of degree. When abatement requires a series of steps, a determination of the degree to which the operator exhibits good faith in attempting to achieve compliance should be made in the context of all the operator did and is doing. The determination

should not be based solely on the fact abatement has not been accomplished within the time as set or extended. In fact, an operator may fail to comply within the time set by the inspector, be subject to a section 104(b) order, yet the operator may still have exhibited a degree of good faith in trying to comply. In other words, the issuance of a section 104(b) order is not necessarily incompatible with finding a degree of good faith on the operator's part.

Here, Higgins did several things as it tried to bring down the noise level to which the splitter operator was subjected. It was not successful within the time set by the inspector, and Dye issued a "failure to abate order" in the face of the company's unexplained three-week lapse of contact with those trying to help it attain compliance. Yet the company's various efforts, upon which its ultimate compliance was based, warrant full consideration and credit when its good faith is evaluated for penalty purposes. For these reasons, I find Higgins did not totally fail to make a good faith effort to achieve rapid compliance but, rather, it exhibited a moderate degree of good faith toward attaining compliance. In view of this finding and all of the other statutory civil penalty criteria, I conclude a penalty of \$1,000.00 is appropriate.

ORDER

Higgins is **ORDERED** to pay a civil penalty of \$1,000.00 within 30 days of the date of this decision, and upon payment of the penalty, this matter is **DISMISSED**.


David F. Barbour
Administrative Law Judge
(202) 434-9980

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 25, 2007

PHELPS DODGE TYRONE, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. CENT 2006-212-RM
	:	Citation No. 6244790; 6/17/2006
v.	:	
	:	
SECRETARY OF LABOR,	:	Tyrone Mine
MINE SAFETY AND HEALTH	:	Id. No. 29-00159
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Timothy R. Olson, Esq., Jackson Kelly PLLC, Denver, Colorado, for Phelps Dodge Tyrone, Inc.,
Brian L. Hurt, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary of Labor.

Before: Judge Manning

This case is before me on a notice of contest filed by Phelps Dodge Tyrone, Inc., (“Phelps Dodge”) against the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 (the “Mine Act”). Phelps Dodge contested a citation issued under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 50.10. An evidentiary hearing was held in Albuquerque, New Mexico. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND

Phelps Dodge operates a large surface copper mine known as the Tyrone Mine in Grant County, New Mexico. The mine uses electric P&H mining shovels in its mining operations. Phelps Dodge sold its No. 16 electric shovel to a company called P&H Mine Pro (“P&H”). The No. 16 shovel was moved to a salvage yard at the mine so that P&H could remove all of its usable parts. This salvage yard is on mine property but it is several miles away from active mining operations. After P&H removed all of the shovel’s valuable parts, only the shovel’s car body remained.

At about 6:00 a.m. on Saturday, June 17, 2006, three employees of Metal Management of Arizona, LLC (“Metal Management”) arrived at the mine to conduct salvage operations on the

car body. The car body was resting on stacked railroad ties in the salvage yard. These employees were instructed to cut the car body into pieces using oxyacetylene torches. Raudel Davila, an employee of Metal Management, supervised this work. Davila filled out a Phelps Dodge hot work permit to allow Rafael Dominguez and Sergio Caudillo to cut up the car body with a torch. Davila was the fire watch for the crew. Fire extinguishers and a power washer were available for use at the car body.

At around 7:30 a.m., smoke began pouring out of the car body. MSHA contends that this smoke was caused by a fire inside the car body that was started by a torch. Phelps Dodge maintains that, although a lot of smoke was produced by grease on the car body that had been heated up by the cutting operations, there was never a fire that lasted more than 30 minutes. At the conclusion of MSHA's investigation into the incident, Inspector Jim Coats issued Citation No. 6244790 alleging a violation of 30 C.F.R. § 50.10. As modified, the citation states:

A fire occurred at this operation on June 17, 2006 at 7:30 a.m. when a contractor, using an oxygen/acetylene torch to cut apart the car body of the #16 shovel, ignited oil and grease which had been allowed to accumulate. The mine operator was aware of the fire, failed to extinguish the fire within 30 minutes of discovery and failed to notify MSHA after having knowledge [that] the fire was not extinguished within 30 minutes. After consulting with field office supervisor, it was determined that not reporting Immediate Notification to MSHA within the 15 minutes required is high negligence.

Inspector Coats determined that there was no likelihood of an injury and that any injury resulting from the violation is not likely to result in any lost workdays. He determined that the violation was not of a significant and substantial nature. The cited regulation provides, in part, that "[i]f an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." The regulation goes on to state that the "operator shall contact MSHA as described at once without delay and within 15 minutes." The regulation defines "accident" in section 50.2(h)(6) to include "[a]n unplanned mine fire not extinguished within 30 minutes of discovery."

II. SUMMARY OF THE EVIDENCE

At about 7:30 a.m., on June 17, Yancy McCauley, a mine shift supervisor for Phelps Dodge, was driving along a mine road when he observed smoke coming from the salvage yard. He traveled to the area and saw smoke rising from the car body. At the hearing, he testified that he did not see any flames. (Tr. 25, 27, 43-44). After briefly speaking with Mr. Davila, he left the area to resume his normal work duties. He also made sure that Phelps Dodge's fire brigade was alerted to stand watch in the event that a fire developed. McCauley testified that he would have

called a "mayday" over the mine radio if he had believed that there was an emergency situation at the car body. (Tr. 28-29). McCauley also told his supervisor that he requested a fire watch.

Hank Bobo is a firefighter for Phelps Dodge. He was told by the mine dispatch operator that McCauley wanted him to go to the salvage yard for fire watch. (Tr. 62-63). He took the mine's fire truck and drove to the No 16 shovel car body. He testified that he arrived at the car body sometime after 9:00 a.m. (Tr. 66-68). When Bobo arrived at the car body he saw Metal Management employees spraying the shovel with a pressure washer. He also saw that the car body was smoking. At the hearing Bobo testified that he did not observe any flames in the car body and he did not believe that there was a grease fire at that time. (Tr. 68, 94). Through a Spanish interpreter, he told the Metal Management employees to move away from the car body to get away from the smoke.

Mr. Bobo called McCauley to ask him to come to the car body. Once McCauley arrived at about 9:15 a.m., Bobo explained to him that, under company policy, there must be at least three firefighters and a water truck at the scene whenever the fire brigade is activated. McCauley took action to get two additional firefighters and a water truck dispatched to the area. He remained in the area for about ten minutes before he returned to his regular duties. McCauley testified that he did not see any flames while he was at the car body.

Between 9:00 a.m. and 9:30 a.m., Mr. Bobo testified that he closely observed the car body to look for flames, prepared the fire hoses, set out air packs, and put on his bunker gear. (Tr. 67, 69, 83-84). Because there were holes cut into the sides of the car body, he testified that he could see inside when he was looking for flames. (Tr. 69, 83-84). He stated that he did not observe any flames during this 30-minute period and he did not believe that there was a grease fire. (Tr. 68, 84, 96).

Bobo testified that, at about 9:30 a.m., he saw flames inside the car body. As soon as he saw the flames, he put on his air pack and began spraying the flames with water from the fire truck. He estimates that he sprayed about 300 gallons of water at the car body between 9:30 a.m. and 9:50 a.m. (Tr. 75). He testified that he extinguished all of the flames that he could see by 9:50 a.m. (Tr. 75). His air pack contains about 15 to 20 minutes of breathable air and he testified that he extinguished the flames before he ran out of air. (Tr. 85-86). The water truck arrived at about 9:50 a.m., after Bobo had removed his air pack. (Tr. 86). He directed the water truck operator to spray water at the smoke that was still rising from the car body. Bobo testified that he wanted to cool down the car body to prevent any flare ups. (Tr. 79).

McCauley visited the car body again sometime after 10:30 a.m. He did not see any flames at that time. (Tr. 43-44). Bobo briefed McCauley on his fire fighting efforts. McCauley remained at the car body for about ten minutes. McCauley testified that, because he understood that the fire was extinguished in about 20 minutes, he determined that the fire did not have to be reported to MSHA. (Tr. 47-49). McCauley based this conclusion, in part, on MSHA's finding that Phelps Dodge was not required to report an event that occurred on March 23, 2006. On that

day, smoke inside an operating shovel activated the shovel's fire suppression system. Matthew Main, the mine's safety director, called a "mayday" and reported the event to MSHA as a mine fire lasting more than 30 minutes because there was smoke coming from the shovel for more than 30 minutes. MSHA issued a section 104(k) order for the shovel but did not investigate the situation until six days later. (Tr. 124). At the conclusion of its investigation, MSHA decided that the event was not immediately reportable as a mine fire under section 50.10. (Tr. 125). MSHA determined that a transformer on the shovel overheated and that there had not been a fire. As a consequence, McCauley determined, in the instant case, that Phelps Dodge was not required to report the fire in the car body because, although there was a lot of smoke, the flames were extinguished within 30 minutes.

At about 10:45 a.m., McCauley tried to call Phil Tester, the company's safety supervisor on the shift. He wanted to make sure that he was not required to call MSHA to report the fire. McCauley was not able to talk to Tester until about 11:30 a.m. When McCauley used the word "fire" in this conversation, Tester immediately ended the conversation to call MSHA to report the fire. Tester reported the fire to MSHA at 11:40 a.m. (Tr. 99, 161, 178). Tester next called Matthew Main at home and both Tester and Main arrived at the car body at about 1:00 p.m. Mr. Main then proceeded to investigate the incident. He talked to a number of people including security personnel, McCauley, and Davila. He asked the Metal Management employees to provide written statements, which were in Spanish. Mr. Main also called Benny Lara, MSHA's acting field office supervisor in Albuquerque. Inspector Lara asked for a written report of the events. Inspector Lara also issued an oral section 104(k) order of withdrawal for the car body and the car body was cordoned off by Phelps Dodge.

At about 3:40 p.m., Main sent Inspector Lara an e-mail describing the events of the day. (Ex. G-3). In the e-mail, Main wrote, in part, "[t]oday at approximately 7:30 AM contractors, Metal Management, MSHA ID 6JQ, was cutting apart the car body on the 16 shovel that had been sold to P&H and *started a fire.*" *Id.* (emphasis added). The e-mail further states that the mine shift supervisor saw that the car body "was smoking" and that he called for a fire brigade. Main advised Inspector Lara that the "incident commander decided to let the grease on the car body burn itself out," but that later he "made the decision to put the fire out and the fire was out by 10:45 A.M." *Id.*

Later in the day on June 17, Mr. McCauley prepared a written statement describing the events at the car body. (Ex. G-4). His description of the events is the same as his testimony at the hearing except that he wrote that, as he was traveling at the mine at 7:30 a.m. that day, he "saw a fire at the 16 shovel salvage area." *Id.* He also wrote that the "fire was inside the car body." *Id.*

Hank Bobo also prepared a written statement that day. He wrote, in part, that when he arrived at the shovel, employees of Metal Management were spraying water on the bottom of the car body. He then wrote, "[t]here wasn't a lot of flames then but a lot of smoke." (Ex. G-8). Without specifying any time frames, Bobo wrote:

I put on my bunker gear and asked the O-2 to call a water truck and other fire brigade members that were on the property. I saw flames inside the car body but I couldn't get to them with my hose. The flames then started coming out the bottom of the car body. That's when I started fighting the fire. When the water truck arrived we were able to get to the inside of the car body with the cannon on the water truck and get it under control.

Id.

As stated above, the three Metal Management employees also provided written statements that were subsequently translated into English. The statement of Mr. Davila states that the Metal Management crew arrived at 6:00 a.m. (Ex. G-5). He then wrote that "at about 7:30 the fire started." *Id.* He states that the torches "made sparks and ignited in the center of the structure. . . ." *Id.* "The fire progressed . . . [and] when the fire was on top, the fire brigade arrived and put the fire out." *Id.* He stated that the fire was extinguished at about 8:00 a.m. Sergio Caudillo wrote that at "7:30 we started the fire." (Ex. G-6). He also wrote that "[w]e attempted to put out the fire but couldn't so we used water and extinguisher but it was impossible, after a while the fire truck arrived and put out the fire." *Id.* Rafael Dominguez stated that he was cutting into the car body where there was a lot a grease. His statement is not very clear but he wrote that after about 15 minutes "the grease started to burn." (Ex. G-7). He then wrote that he got down and Caudillo "attempted to put out fire and put water on [the] fire but it was impossible to put it out completely." *Id.* He stated that after the fire truck arrived, the fire was put out.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Brief Summary of the Argument

The Secretary contends that the preponderance of the evidence demonstrates that a fire started at 7:30 a.m. or shortly thereafter and that it was not totally extinguished until at least 9:50 that morning. Thus, the fire was not extinguished within 30 minutes of its discovery. The Secretary also argues that the evidence shows that the fire was an "unplanned mine fire." There is no dispute that Phelps Dodge did not notify MSHA that there had been a fire at the mine until 11:40 a.m. Thus, the Secretary contends that Phelps Dodge failed to immediately notify MSHA of the fire and a violation of section 50.10 was established.

Phelps Dodge contends that there was no fire at the car body that burned for more that 30 minutes. It maintains that if there are no flames, there is no fire. It believes that the Secretary is twisting the definition of fire to include those periods when the car body was smoking without a flame being present. The testimony presented by Inspectors Coats and Lara failed to establish that there was a fire lasting more than 30 minutes. The hearing testimony of McCauley, Bobo

and Main, on the other hand, demonstrates that the fire was extinguished in less than 30 minutes after it was discovered. In addition, it argues that Main's e-mail to Inspector Lara cannot be used to establish the Secretary's case. Much of the information in Main's e-mail was later determined to be inaccurate and it should not be given any evidentiary weight. Phelps Dodge also argues that the fire was not "unplanned." Finally, Phelps Dodge maintains that the Secretary failed to provide adequate notice that the presence of smoke for more than 30 minutes triggers the immediate notification requirement. It relies, in part, on the events in March 2006 when Phelps Dodge reported as a fire, smoke that emanated from a shovel for more than 30 minutes. As discussed above, following the investigation, MSHA determined that there had not been a fire in that instance because there had not been any flames.

B. Analysis

1. Fact of Violation

The term "mine fire" is not defined in the Mine Act or the Secretary's regulations. Thus, a "mine fire" is a fire that occurs in a "coal or other mine," as that term is defined in section 3(h)(1) of the Mine Act. The term "fire" can be defined as a "rapid, persistent chemical change that releases heat and light and is accompanied by flame, especially the exothermic oxidation of a combustible substance." (*American Heritage Dictionary of the English Language*, 62 (4th ed. 2006)). I agree with Phelps Dodge that flames must be present for there to be a fire. Grease that is smoking without any flames does present an event that must be immediately reported under section 50.10.

The description of events provided by Phelps Dodge employees in their written statements differs significantly from the description presented in their testimony at the hearing. As stated above, Mr. Bobo wrote in his statement that when he arrived at the shovel there "wasn't a lot of flames then. . . ." (Ex. G-8). Sometime after he put on his bunker gear he saw "flames inside the car body." He also stated that the fire was not put out until after the water truck arrived. At the hearing, Bobo testified that he did not see any flames, which he referred to as "flare-ups," until about 9:30 that morning. (Tr. 68). He admitted that he could not see inside the car body very well and there could have been flames in there. (Tr. 70). Thick black smoke was rising from the car body. He also indicated that he put the fire out before the water truck arrived and the water truck was used to cool down the car body.

McCauley wrote in his statement that he saw a "fire at the 16 shovel salvage area" when he first arrived but that he "wasn't sure at that time if it was a concern or not." (Ex. G-4). He further stated that the fire was inside the car body. *Id.* At the hearing, he testified that he is sure that he went to the car body shortly after 7:30 a.m. (Tr. 19-20, 53). When he was asked about his statement that he saw a fire when he first arrived at the car body, he testified that he used the word "fire" as "a generalization of the scene." (Tr. 20). He stated that he saw smoke coming from the car body and believed that there was a fire. (Tr. 20-22). He testified, however, that he did not see any flames at that time. (Tr. 25, 27, 43-44, 50-51).

The e-mail that Main sent to Inspector Lara states that the Metal Management employees “started a fire” sometime after 7:30 a.m. and that the incident commander decided to let the “grease on the car body burn itself out.” (Ex. G-3). It further states that this incident commander later decided to “put the fire out” and it was out by 10:45 a.m. *Id.* At the hearing, Main testified that he conducted an investigation of the incident when he arrived at the mine at 1:00 p.m. When he called Inspector Lara, he told him that there was smoke “or it could have been a fire” at the 16 shovel car body and that “sometime later, the fire brigade put the fire out.” (Tr. 107). Main further testified that he now believes that McCauley actually first went to the salvage yard to see the car body at 8:30 rather than 7:30 a.m. (Tr. 112). He also testified that his statement in the e-mail that the incident commander decided to let the grease on the car body burn itself out was not accurate. (Tr. 113). Main testified that he now believes that the fire was put out between 9:50 and 10:00. (Tr. 115). Thus, he believes that the fire only lasted about 20 minutes starting at 9:30 a.m. (Tr. 146). Main testified that the e-mail is not accurate because it was written before he had the opportunity to fully investigate the situation. (Tr. 133).

None of the Metal Management employees testified at the hearing. As summarized above, all of the Metal Management employees described the events in written statements. Each of them reported that a fire started sometime soon after 7:30 that morning.

I find that a preponderance of the evidence establishes that a fire started inside the car body soon after 7:30 a.m. on June 17. My finding is supported by the statements of the Metal Management employees, the statements of Bobo and McCauley, and the e-mail sent by Matthew Main. Hank Bobo wrote in his statement that when he arrived at about 9:00 that morning, there “wasn’t a lot of flames then but a lot of smoke.” (Ex. G-4). Thus, flames were present at that time. He observed even more flames after 9:30 so he used the fire truck to start extinguishing the fire.

The eyewitnesses independently wrote their statements on the day of the fire and their memories of the events were still fresh. Each of them reported that they saw a fire or flames at either 7:30 or 9:00 that morning. I credit the events described in these statements over inconsistent hearing testimony. (*See Master Aggregates TOA Baja Corp.* 28 FMSHRC 835, 836-37 (Sept. 2006) (ALJ)). Phelps Dodge argues that these statements should not be given any weight because the company had not gathered all of the facts necessary to complete its investigation at the time that the statements were made. Although that is true, it is not necessary for the investigation to be complete in order for eyewitnesses to record the sequence of events as they saw them. I did not give as much weight to Main’s e-mail to Inspector Lara because he was not an eyewitness to the events.

The preponderance of the evidence shows that the torch heated grease in the car body. The grease began to smolder and smoke. At several points in time flames appeared. There were flames sometime between 7:30 and 8:00 a.m., which the Metal Management employees tried to control. There were flames when Mr. Bobo arrived at the car body. When a larger fire flared up soon after 9:30 a.m., Bobo determined that he needed to extinguish the fire using the hose on the

fire truck and he did so in less than 30 minutes. Based on this evidence, I find that the fire was not extinguished within 30 minutes of its discovery. The fire was discovered soon after 7:30 a.m. and MSHA was not notified until after 11:30 a.m.

Phelps Dodge takes the position that, if flames were only present for short intervals during the morning of June 17, then the event did not need to be immediately reported under section 50.10. I hold that such an interpretation of the regulation is neither logical nor consistent with the language of the regulation or the purposes of the Mine Act. Under Phelps Dodge's interpretation, a fire could last for hours and not come under the definition of an accident under section 50.2(h)(6) so long as flames are not present more than 30 minutes at a time. Each flare up would be counted as a separate, discrete fire under this interpretation. I hold that once flames appear, the mine operator is under the obligation to report the fire unless the fire is totally extinguished within 30 minutes.

In this case, a fire developed at the salvage yard at about 7:30 a.m. and it was not fully extinguished until about 9:50 a.m. Although it does not appear that flames were present or at least visible the entire time, I find that this event constituted one fire, not multiple fires. I agree with Phelps Dodge that there can be smoke without fire, but I find that once flames appear, it is a fire. The fire was not extinguished within 30 minutes of discovery. Metal Management employees and Mr. McCauley became aware of the fire at about 7:30 that morning.¹

I reject Phelps Dodge's argument that the fire was not an "unplanned mine fire." It contends that because cutting was being performed with torches, a fire was anticipated. (Tr. 116). It points to the fact that the Metal Management employees had a water sprayer and a fire extinguisher at the site. Precautions were taken by Metal Management and later by Phelps Dodge to make sure that the planned fire would not create a safety hazard. The cutting was performed in a remote area, a hot work permit was obtained, and a fire watch was established. Thus, it argues that the fire was planned. I agree that Metals Management and Phelps Dodge knew that a fire was possible because of the nature of the work being performed and, as a

¹ For purposes of this decision, I do not need to determine exactly when Phelps Dodge was required to immediately notify MSHA of the fire. The Secretary takes the position that Phelps Dodge was required to notify MSHA by no later than 8:15 that morning, assuming that the fire started at 7:30. I believe that, in the case of a fire with intermittent flames, the answer is not always that straightforward. For example, if grease and oil starts to smolder and flames appear at 7:30, the operator may reasonably believe that it extinguished the fire at 7:50 as a result of its firefighting efforts. Thus, it would not be required to report the fire under section 50.10 at that time even if the grease continues to smoke. If the flames flare up again at 8:20, the mine operator's obligation to immediately report the fire would arise at that time because more than 30 minutes had passed since the fire started at 7:30. The two flare-ups constitute a single fire because they occurred close together in time at the same location. Consequently, the mine operator would be required to report the fire by no later than 8:35 because its belief that the fire had been extinguished at 7:50, although reasonable at the time, was not correct.

consequence, they took precautions necessary to isolate and fight a possible fire. Nevertheless, I agree with the Secretary that the fire was not a planned event. (Tr. 180). The precautions were taken in case there was a fire rather than because a fire was planned. Indeed, Metal Management did not specifically advise Phelps Dodge that this work was going to be performed on June 17 or that a fire was anticipated. (Tr. 118). McCauley did not know that Metal Management employees were at the mine that day. When Mr. Bobo arrived, he saw that Metal Management did not have sufficient firefighting equipment and protective gear to fight a fire. Thus, it appears that Metal Management did not believe that a fire was reasonably likely.

Phelps Dodge also argues that it was not on notice that the conditions at the car body constituted an accident as defined by section 50.2(h)(6). It relies on the events of March 2006 when MSHA determined that the presence of smoke emanating from a shovel for more than 30 minutes did not constitute a fire. I find that this previous event was not sufficiently similar to the events of June 17, 2006, to have any direct relevance to the issue of notice. There were never any flames on the shovel in March, just a lot of smoke. Thus, there was never a fire. I find that the language of the section 50.10, when read in conjunction with the definition of accident in section 50.2(h)(6), provided sufficient notice of the requirements of the regulation in this instance. A fire started at about 7:30 a.m. at the car body and flames were present on an intermittent basis until 9:50 a.m. It is clear from the language of the regulation that immediate reporting was required.

2. Negligence

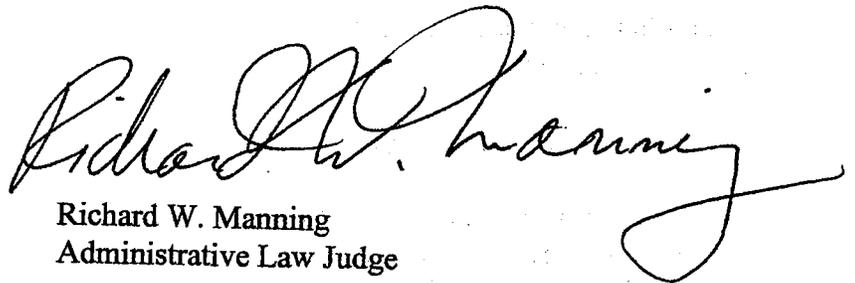
The parties presented evidence and argument on the negligence criterion. I find that the Secretary did not establish that the violation was the result of Phelps Dodge's high negligence. As justification for the high negligence determination, Inspector Lara testified that Phelps Dodge was aware of the requirements of the immediate notification regulation. (Tr. 164-65, 178). While it is true that Phelps Dodge was aware of the regulation, the application of the regulation to the facts presented is at issue here. For the reasons set forth below, I find that the negligence of Phelps Dodge was low in this instance.

The fire started on a Saturday morning at a remote location at the mine. Phelps Dodge personnel at the mine were not aware that Metal Management employees would be cutting up the car body that morning. There were no Phelps Dodge employees working at or near the salvage yard. Phelps Dodge only became aware of the fire when McCauley saw smoke arising from the area. McCauley did not have any supervisory responsibility over the salvage area or Metal Management. As Inspector Coats recognized, the fire did not present a safety hazard to employees of Metal Management or Phelps Dodge. It was highly unlikely that the fire would spread beyond the car body because it was located away from flammable materials. (See Ex. C-1). When Phelps Dodge became aware of the fire, its fire brigade was dispatched to the area with appropriate firefighting personnel and equipment. The fire was extinguished soon after the fire brigade arrived and the water truck was used to cool down the car body.

Because it was a Saturday, the mine's safety manager was not at the mine. McCauley did not believe that the situation warranted calling a "mayday." (Tr. 28-29). MSHA was not immediately called because it was a grease fire with intermittent flames and it did not pose a safety hazard to miners. In addition, Phelps Dodge called MSHA in March 2006 when there was smoke coming from a shovel and was advised that the call was not required. I credit the testimony of Mr. McCauley that he genuinely believed that the company was not required to immediately report the grease fire. Although Mr. Tester, the safety supervisor for the shift, should have been notified of the fire earlier that morning, Tester called MSHA immediately after McCauley told him about the fire. Although I find that the fire was required to be reported under section 50.10, I hold that this violation was the result of an honest mistake by mine management under unusual circumstances. The negligence of Phelps Dodge was low.

IV. ORDER

For the reasons set forth above, Phelps Dodge's notice of contest of Citation No. 6244790 is **DENIED**, in part, the citation is **AFFIRMED** as **MODIFIED** by this decision, and this proceeding is **DISMISSED**.



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

July 27, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-258-M
Petitioner	:	A.C. No. 14-01651-94799
	:	
v.	:	
	:	Higgins Ranch
HIGGINS RANCH,	:	
Respondent	:	

**DECISION GRANTING THE SECRETARY'S MOTION
FOR SUMMARY DECISION**

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The Secretary filed a motion for summary decision. The case involves two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 104(a) of the Act. Higgins Ranch has agreed to pay the Secretary's proposed \$60.00 penalty for Citation No. 6332403.

On June 1, 2006, MSHA Inspector Chrystal Dye issued Citation No. 6332448 to Higgins Ranch alleging a violation of 30 C.F.R. § 56.9300(a), as follows:

The scales were not provided with railings on either side to prevent vehicles from over traveling. The drop off is approximately 3½ to the ground. There is minimal truck traffic crossing the scales and the clearance is adequate. There are markers at each end of the scale for visual reference. The company had begun the process back in March 2006. The pipes were ordered and cut, however, the project was never finished.

Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not of a significant and substantial nature but that the negligence was high. The safety standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." On June 26, 2006, Inspector Dye issued a section 104(b) order because Higgins

Ranch had not terminated the citation. The Secretary proposes a penalty of \$2,793.00 for this citation.

At the conclusion of discovery, the Secretary filed a motion for summary decision under Commission Procedural Rule 67. (29 C.F.R. § 2700.67). The motion is supported by an affidavit signed by Inspector Dye. Higgins Ranch did not respond to the Secretary's motion even after I granted it an extension of time to respond. In its answer to the Secretary's petition for the assessment of penalty, Higgins Ranch stated that, because the scale is in a separate location from both Higgins Ranch and Higgins Stone Company, it is not a mine. It argues that the scale house is not connected to any other mining site. It states that the Mine Act does not authorize MSHA jurisdiction over "the activities of a truck scale 'appurtenant' only to cattle operations." It further states that the sole purpose of the scale is to weigh trucks and that "neither Higgins Stone nor Higgins Ranch [requires] trucks carrying stone that has been sold by either Higgins Ranch or Higgins Stone to weigh at the scale house." The drivers of these trucks can use other scales if they wish. The land on which the scale is located is owned by Michael W. Higgins and it is connected only to the cattle pens and cattle lots by means of a private gate." The only way to get to the scale from the quarry is on a public road.

The Secretary maintains that there are no issues to be resolved at a hearing and that she is entitled to summary decision as a matter of law. The Commission's Procedural Rules provide that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission's procedural rule further states that a motion for summary decision must be supported. As stated above, the Secretary's motion is supported by the affidavit of MSHA Inspector Chrystal Dye.

There is no dispute that the conditions described in the citation existed at the time the citation was issued. I find that Higgins Ranch admitted these facts in its response to the Secretary's discovery requests. It denies, however, that MSHA has jurisdiction over the scale and scale house.

Higgins Ranch operates a stone quarry. Higgins Ranch extracts rock at the quarry and sizes some of this rock at a nearby plant, known as Higgins Stone, which is operated under a separate MSHA identification number. (Dye Affidavit). The scale house, which is located about 0.59 of a mile from the Higgins Ranch mine entrance, is used by both Higgins Ranch and Higgins Stone. Inspector Dye stated that when customer trucks leave the Higgins Ranch quarry filled with stone, they often use the scale house to weigh the stone. Customer trucks also use the scale when they transport crushed stone from the Higgins Stone plant. Inspector Dye states that, although she cannot say that every truck that transports stone from Higgins Ranch uses the cited scale, "a majority of customer trucks do get weighed at the scale house." *Id.* She concluded that the scale house is "an essential part of the mining operations at Higgins Ranch. . . ." *Id.*

In its discovery responses, Higgins Ranch agrees that MSHA has jurisdiction over its quarrying operation. It maintains that MSHA does not have jurisdiction over its scale house because it is at a separate location and it does not otherwise qualify as a mine under section 3(h) of the Mine Act. It is accessible from the quarry only by traveling on public roads. No employees of Higgins Ranch work at the scale house. Higgins Ranch does not deny that some customer trucks use the scale after leaving the quarry.

I find that MSHA has jurisdiction to inspect the scale and scale house. The term “coal or other mine” is defined in section 3(h)(1) as:

(A) an area of land from which minerals are extracted, . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, . . . workings, structures, facilities, equipment, machines, tools, or other property . . . on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals

30 U.S.C. 802(h)(1). The scale house and scale are “structures, facilities, equipment . . . used in . . . the work of extracting . . . minerals from their natural deposits. . . .” The definition of a mine is quite broad and “is more encompassing than the usual meaning attributed to it” *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). The scale house and scale are used to weigh trucks that have been filled with stone from the quarry so that Higgins Ranch will know how much stone was purchased. This operation is an integral part of its mining operations. Whether the drivers of these trucks are permitted to use other scales is not determinative. Because the quarry is located in a rural area in Kansas, the scale provided by Higgins Ranch is the scale that is most likely to be used. The land under the scale is owned by Michael W. Higgins, who also owns Higgins Ranch and is an owner of Higgins Stone.

The land used for the scale house need not be contiguous to the quarry. In *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (2000), the mine operator owned and operated a machine shop and a supply shop that were not on the same property as its extraction activities. These machine and supply shops were between 1 and 25 miles from the operator’s four mines. The Commission held that these shops were “facilities” and “equipment” used in the company’s mining operations. 22 FMSHRC at 25. The Commission rejected the operator’s argument that MSHA did not have jurisdiction over the shops because they were not on land from which minerals are extracted. *Id.* In *W.J. Bokus Indus., Inc.*, 16 FMSHRC 704, 708 (April 1994), the Commission held that MSHA properly cited equipment in a storage garage that was shared by a sand and gravel operation and an asphalt plant. The Commission rejected the argument that title to the cited equipment was determinative. Similarly, in *Justis Supply & Machine Shop*, 22 FMSHRC 1292 (Nov. 2000), the Commission held that a dragline that was being assembled in a bermed off area about a mile from extraction activities was subject to MSHA inspection because the dragline was equipment to be used in the extraction of minerals.

The record demonstrates that the scale and scale house are integral parts of the mining operations of Higgins Ranch. The fact that the scale is a self-service facility does not change that fact. Many stone and aggregate operations let truck drivers weigh their own trucks. The scale is present so that customers can weigh their trucks to determine the amount of stone they have purchased from the Higgins Ranch quarry.

As stated above, Higgins Ranch does not dispute the facts set forth in the "condition or practice" section of the citation, as set forth above. As justification for the high negligence determination, Inspector Dye states that Higgins Ranch had started the process of installing posts and rails but had not completed the project. (Dye Affidavit). During a compliance assistance visit January 2006, Inspector Dye issued a CAV notice advising Higgins Ranch that guard rails needed to be installed at the scale. During an inspection on March 8, 2006, she was told that pipes and posts were being cut and that a guard rail would be installed in about a week. *Id.* Guard rails had not been installed by June 1, 2006. Inspector Dye stated that "the operator was aware of and on notice of the need and the requirement to provide rails around the scales, but did not bother to complete the project." As stated above, she issued a section 104(b) order of withdrawal on June 26, 2006, because the guard rails had still not been installed. Higgins Ranch did not offer any evidence to dispute these facts. I hold that the Secretary established that the violation was the result of the operator's high negligence.

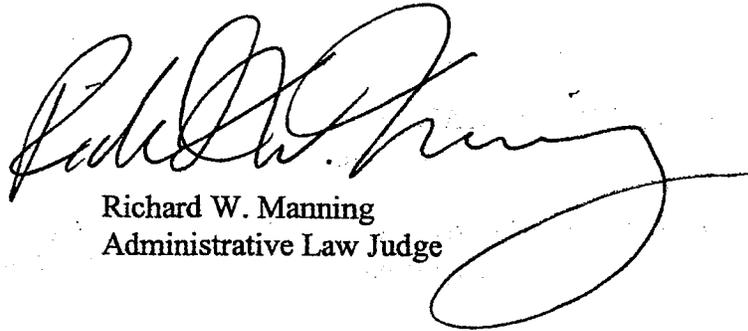
The Secretary seeks a civil penalty of \$2,793.00. I find that this penalty is not appropriate taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act. Higgins Ranch is a very small operation. It employed about three people and worked about 7,500 hours in 2006. Higgins Stone Company, a related company, employed about 12 people and worked about 23,400 hours in 2006. The violation was neither serious nor significant and substantial. The negligence was high and Higgins Ranch did not abate the violation in good faith. Higgins Ranch was issued six citations prior to June 1, 2006. MSHA assigned a high number of penalty points for the mine's history of previous violations because of the relatively high number of "violations per inspection day." Information at MSHA's website makes clear that MSHA's first inspection at the mine was on October 18, 2005. Four of the previous citations were issued on that day. Consequently, I have reduced the penalty because the "violations per inspection day" was high due to the fact that the mine had only been inspected for a short time. A penalty of \$1,800.00 is appropriate.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
6332488	56.9300(a)	\$1,800.00
6332403	62.130(a)	60.00

Accordingly, the Secretary's motion for summary decision is **GRANTED**, the citations contested in this case are **AFFIRMED**, and Higgins Ranch is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,860.00. This penalty shall be paid within 40 days of the date of this decision unless Higgins Ranch makes other payment arrangements with counsel for the Secretary.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 6, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-251
Petitioner	:	A.C. No. 15-05106-03501 WNH
	:	
v.	:	
	:	
GEO-ENVIRONMENTAL ASSOCIATES	:	
Respondent	:	
	:	
GEO/ENVIRONMENTAL ASSOCIATES,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	Docket No. EAJ 2004-01
	:	
SECRETARY OF LABOR,	:	Formerly KENT 2002-251
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 15-05106-03501 WNH
Respondent	:	Preparation Plant

ORDER OF DISMISSAL

Before: Judge Zielinski

The Civil Penalty Proceeding is before me on remand from the Commission, which by Decision dated May 30, 2006, reversed the dismissal of Citation No. 7044409, and remanded for assessment of a civil penalty. *Martin County Coal, Corp*, 28 FMSHRC 247, 258-59 (May 2006). The parties have jointly filed a motion to dismiss the petition on grounds that the underlying Citation No. 7044409 has now been vacated.¹ Respondent, GEO-Environmental has agreed to withdraw its application for attorney's fees and expenses under the Equal Access to Justice Act, and has joined in the motion to dismiss the Equal Access to Justice Proceeding.

Upon consideration of the foregoing, the motion is hereby **GRANTED** and these cases are hereby **DISMISSED**.


Michael E. Zielinski
Administrative Law Judge

¹ Three other citations that were at issue in Docket No. KENT 2002-251, have been resolved by previous Administrative Law Judge and Commission decisions.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 10, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-73-M
Petitioner	:	A.C. No. 26-00002-99280
	:	
v.	:	
	:	Premier Chemicals
PREMIER CHEMICALS, LLC,	:	
Respondent	:	

DECISION GRANTING RESPONDENT’S MOTION FOR SUMMARY DECISION AND DENYING THE SECRETARY’S MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The parties filed joint stipulations of fact and cross-motions for summary decision. The case involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) under section 104(a) of the Act alleging a violation of 30 C.F.R. § 50.10. The parties stipulated to the following facts:

1. Respondent, Premier Chemicals, LLC (“Premier”) was the operator of the Premier Mine in Gabbs, Nevada, Mine Identification No. 2600002, within the meaning of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et. seq* (“Act” or “Mine Act”), specifically Section 802(d).
2. At all relevant times, the Premier Mine was a “coal or other mine” within the meaning of the Act, specifically Section 802(h).
3. At all relevant times, the products of the Premier Mine entered commerce, or the operations or products of the Premier Mine affected commerce, within the meaning of the Act, specifically Sections 802(b) and 803.
4. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*
5. Citation No. 6391461 was properly served by a duly authorized representative of the Secretary of Labor, the Mine Safety and Health Administration, upon an agent of the Respondent on the date and place stated therein.

6. The Mine Safety and Health Administration assessed a civil money penalty against Respondent for the violation alleged in Citation No. 6391461.

7. Payment by Respondent of the proposed penalty of \$5,000 will not affect Respondent's ability to remain in business.

8. A Premier Chemicals employee, John LaCroix (Lower Shop Mechanic, 56 years old), began work at 6:30 a.m. on July 19, 2006, and collapsed near the Lower Maintenance Shop around 6:35 a.m. in the presence of Alan Hermance, who immediately called for help and began life-saving efforts, which included CPR. It was a generally known fact that Mr. LaCroix suffered from high blood pressure and had been complaining of feeling bad for a number of days prior to the incident.

9. Between 6:35 a.m. and 6:40 a.m., fellow employees Elvie Selbach, Shift Foreman, and James Loeppky, Maintenance Supervisor, arrived at the scene to assist in the first aid efforts.

10. At 6:45 a.m., fellow employee, Maintenance Leadman, Bobby Adamson informed Jennifer Williamson, Safety Coordinator, of Mr. LaCroix's collapse by cell phone. Mrs. Williamson was in her vehicle about ten minutes away from the mine at the time she received the call.

11. At 6:45 a.m., all lifesaving efforts at the scene ceased based on the statement of Scott Janis, a licensed EMT.

12. At 6:55 a.m., Jennifer Williamson arrived at main mine site office. Adam Knight, Plant Manager, accompanied Mrs. Williamson to the Lower Maintenance Shop where Mr. LaCroix was located, approximately a ten minute trip from the main office. At 7:05 a.m., Mr. Knight and Mrs. Williamson arrived at the scene. Present at the scene were fellow employees Alan Hermance, Elvie Selbach, Scott Janis, Bobby Adamson and James Loeppky. Immediate efforts were undertaken to ensure that all attempts at lifesaving had indeed been performed; as well as a safety assessment of immediate area and discussions with employees on the scene as to what had occurred, when and where. It was determined that there were no dangers to other employees and no further actions were required, other than notifying MSHA of the incident.

13. At 7:40 a.m., Jennifer Williamson returned to the main mine site office and made the call to MSHA District Office in Boulder City, Nevada. Mrs. Williamson left a message for John Melfi on that answering machine.

14. At 7:55 a.m., MSHA returned the phone message and, given that there had been a death at a mine under their jurisdiction, they indicated they would be at the mine site the following day to conduct their investigation. There was no emergency response action implemented by MSHA based on the accident.

15. On July 20, 2006, MSHA personnel, Miles Frandsen and Paul Wildrick arrived, interviewed the appropriate employees, investigated the scene and, after consultation with the MSHA district office, issued Citation No. 6391461.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary argues that MSHA's Emergency Temporary Standard ("ETS") and the MINER Act required Premier to notify MSHA of LaCroix's death within 15 minutes of the time of his death. As applicable here, the ETS modified 30 C.F.R. § 50.10 to provide that when an accident occurs at a mine, the operator must immediately contact the MSHA District Office having jurisdiction over its mine "at once and without delay and within 15 minutes." The term "accident" is defined to include a "death of an individual at a mine." (30 C.F.R. § 50.2(h)(1)).

The Secretary contends that the stipulations show that Mr. LaCroix collapsed at about 6:35 a.m. and lifesaving efforts were discontinued at about 6:45 a.m. Lifesaving efforts were discontinued based on the EMT's apparent determination that Mr. LaCroix had died. The Secretary takes the position that Ms. Williamson knew that LaCroix had died immediately upon her arrival at the machine shop at 7:05 a.m. As a consequence, Premier was obligated to contact MSHA by no later than 7:20 that morning to provide notice of the accident. Because Williamson did not call MSHA until 7:40 a.m., Premier violated section 50.10. The only exception to the 15-minute reporting requirement in the ETS is for situations in which the mine has lost communications because of an emergency or some other unexpected event. This exception clearly does not apply to this case.

Section 5(b) of the MINER Act provides that the operator of a mine who "fails to provide timely notification to the Secretary as required by section 103(j) (relating to the 15 minute requirement) shall be assessed a civil penalty by the Secretary of not less than \$5,000 and not more than \$60,000." (30 U.S.C. § 820(a)(2)). The Secretary argues that there are no exceptions to this provision. As a consequence, she maintains that she has "absolutely no discretion to assess a penalty lower than \$5,000 for this violation." (S. Motion 7). MSHA assessed the lowest possible penalty based on the fact that the violation was not significant and substantial and the operator's negligence was low.

B. Premier

Premier argues that after Ms. Williamson arrived at 7:05 a.m., "immediate efforts were undertaken to ensure that all attempts at lifesaving had indeed been performed; as well as a safety assessment of the immediate area and discussions with employees on the scene as to what occurred, when and where." (P. Motion 2). After this assessment was completed, it "was determined that there were no dangers to other employees and no further actions were required, other than notifying MSHA of the incident." *Id.* Premier also states that it is a "ten minute walk

from the scene to the main office where a phone call to MSHA could be made.” *Id.* Premier further states that “due to the remote location of the mine site in Gabbs, Nevada, cell phones are not a reliable communication source to make a call to MSHA or any other third party that is not in the immediate vicinity of the mine site.” *Id.* Premier states that Ms. Williamson immediately called MSHA as soon as she arrived at the mine office.

Premier contends that it did immediately call MSHA as soon as it determined that an accident occurred. Premier relies on the language in the preamble to the ETS which states:

The ETS does not change the basic interpretation of § 50.10. By the terms of the provision, an operator is required to notify MSHA only after determining whether an “accident” as defined in existing paragraph 50.2(h) has occurred. This affords operators a reasonable opportunity to investigate an event prior to notifying MSHA.

(71 Fed. Reg. 12252, 12260 (March 9, 2006)). Premier contends that it notified MSHA within the 15-minute time period “based on its determination that an accident had occurred, life saving measures had concluded and the site was declared secure and of no danger to other employees at 7:25 a.m. . . .” (P. Motion 2-3).

Premier also argues, in the alternative, that any determination that it “exceeded the 15 minute time frame is mitigated by the time spent rendering life assistance, inspecting the premises, and perhaps most importantly, verifying that Mr. LaCroix presumably died of natural causes and not of any conditions that existed at the accident site that could pose a subsequent danger to other employees.” (P. Motion 3-4). Premier also argues that the LaCroix accident, although tragic, did not involve a mine emergency or require a mine evacuation. MSHA did not activate any emergency response and did not arrive at the facility until the next day. As a consequence, it argues that the penalty should be significantly reduced.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties maintain that there are no issues to be resolved at a hearing because they stipulated to the essential facts. They filed cross-motions for summary decision. The Commission’s Procedural Rules provide that a “motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). I find that the facts stipulated to by the parties are sufficiently comprehensive for me to render a decision on the legal issues raised in the parties’ cross motions.

Premier operates a surface mine and plant in Nye County, Nevada. Material containing magnesite is mined, crushed, milled, and then processed at this facility. The end product has various applications including uses in animal feed and water treatment facilities. (26 FMSHRC 414). Citation No. 6391461 states that the "mine operator did not notify MSHA within the required 15 minute time frame, after becoming aware of an accident in the lower shop." Inspector Miles Frandsen determined that there was no likelihood of an injury or illness as a result of this violation and that it was not significant and substantial. He also determined that Premier's negligence was low.

There can be little question that, before the MINER Act was enacted and the ETS was promulgated, this citation would not have been issued under these facts. The MINER Act imposed a new 15-minute time limit for reporting accidents. As relevant here, the language of section 813(j) of the Mine Act, as amended by the MINER Act, provides that notification to MSHA "shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at a mine . . . has occurred." Based on that mandate in the MINER Act, the Secretary revised her regulation at section 50.10 to insert a requirement that the operator contact MSHA "at once without delay and within 15 minutes."

The preamble to this rule provides some explanation of MSHA's interpretation of the amended regulation at issue here. As stated above, an operator is afforded a "reasonable opportunity to investigate an event prior to notifying MSHA" to determine whether an accident occurred. (71 Fed. Reg. 12260). The MINER Act's notification provision was enacted because, in part, "MSHA was not notified of the Sago Mine Accident until approximately two hours after the occurrence of the accident." (71 Fed. Reg. 12256). The Secretary explained why immediate notification of accidents is so important, as follows:

Operator notification to MSHA in the event of a mine accident is vital to enable the Agency to effectively respond in emergency and potentially life threatening situations. Notification alerts the Agency so that accident investigations and assistance to trapped or injured miners can be initiated. MSHA is particularly concerned that failure to immediately notify the Agency of mine emergencies can cost lives by delaying rescue services.

(71 Fed. Reg. 12257).

The stipulations establish that Mr. LaCroix arrived at the mine at 6:30 a.m. and collapsed a few minutes later. Mr. Hermance, who was in the area, immediately called for help and began life saving efforts, which included CPR. Although Mr. LaCroix suffered from high blood pressure and had been complaining of feeling bad for a number of days prior to the incident, the cause of his collapse was not immediately known. Safety Director Williamson was notified of the events at about 6:45 a.m. as she was on her way to the mine. According to Scott Janis, a licensed EMT, all lifesaving efforts were stopped at about 6:45 a.m. When Ms. Williamson

arrived at the scene at about 7:05, she immediately made sure that all attempts at life saving had indeed been performed, that a safety assessment of the immediate area had been performed, and that she understood what had occurred. Once she determined that conditions did not pose a hazard to other employees and no further remedial actions were required, Ms. Williamson went to the mine office and called MSHA. The issue is whether this call was made "at once without delay and within 15 minutes."

I find that the Secretary did not establish a violation of section 50.10 under the particular facts presented by this case. When Ms. Williamson arrived at the shop, she first had to determine whether an accident occurred. She did this by making sure that all life saving measures had been taken. When a person collapses for no obvious reason, the operator must be certain that his collapse was not the result of an occupational hazard, such as an electric shock. As a consequence, the operator must immediately take measures to ensure that all hazards are eliminated so that no other miners are injured or killed. In order to determine whether any hazards were present, Premier had to investigate the accident site. Ms. Williamson completed this investigation by about 7:25 a.m. and reported the death the MSHA at 7:40 a.m. As a result of her initial investigation of the accident, Ms. Williamson was able to describe the events to MSHA with enough detail so that MSHA saw no need to immediately dispatch inspectors to the remote accident site, thereby conserving MSHA's resources.

In reaching my conclusion that Premier did not violate section 50.10, I relied on a number of facts. Many of these facts are unique to the circumstances of this case. First, the accident was not caused by occupational factors. Mr. LaCroix died shortly after he arrived at the plant of natural causes. There was no "potentially life threatening situation" presented by this accident that required MSHA action. (71 Fed. Reg. 12257). The amendment to section 813(j) of the Mine Act, as well as the Secretary's ETS, were enacted to enable MSHA to quickly respond to situations that could endanger miners. Because Ms. Williamson determined that Mr. LaCroix's death did not pose a hazard to other miners, no rescue or response action by MSHA was necessary. Indeed, MSHA inspectors did not travel to the mine until the following day.

Second, as interpreted by the Secretary in the ETS, a violation does not necessarily automatically occur 15 minutes after the moment of death of a miner. The operator may not even know exactly when a miner died. Rather, a mine operator is given a "reasonable opportunity to investigate an event prior to notifying MSHA." This "reasonable opportunity" is not a fixed concept. In the event of a mine explosion or an entrapment of miners, for example, a mine must quickly notify MSHA even before it begins its own investigation or its own recovery efforts. Such an explosion or entrapment presents a major hazard to miners, with the result that any delay by a mine operator in providing MSHA with notification would be unreasonable. MSHA would need to be involved in rescue and recovery operations. Such rescue and recovery operations take time to coordinate and assemble. When a man collapses for no readily apparent reason, on the other hand, it is reasonable for the mine operator to conduct a brief investigation to see if a hazard was present that could endanger other miners. I find that it was reasonable for Premier to take a few steps to investigate the situation before it notified MSHA of the death. At the

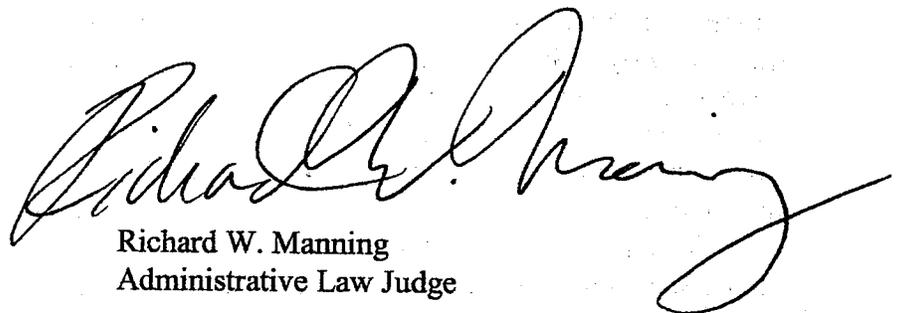
conclusion of Ms. Williamson's brief investigation, she determined that the accident needed to be immediately reported to MSHA and she was able to describe what had happened.

Third, and most importantly, Premier's notification was prompt. Based on the time line presented in the stipulations, it is clear that Ms. Williamson completed her investigation by approximately 7:25 a.m., about 20 minutes after she arrived at the lower shop. She immediately went to the mine office to make the call. Gabbs, Nevada, is in as remote a location as one can find. Her need to use a land line to make the call is understandable given the location of the mine. Premier should set up a procedure so that, in the event of an accident, Ms. Williamson or another management official can call the office on the mine radio and instruct office personnel to make the initial call to MSHA. A ten-minute delay to travel to the office would not be acceptable in most instances. Ms. Williamson can always call MSHA back a few minutes later with more details about the accident.

It is important to understand that this case presents a novel situation that will only arise occasionally. My holding is limited to the facts of this case. At the conclusion of her investigation, Ms. Williamson determined that Mr. LaCroix's death was not related to his work activities and that an occupational hazard was not present in the lower shop. As a consequence, she was able to impart this information to MSHA when she made the call. In vacating the citation I rely on the language of the MINER Act, the amended language of section 50.10, and the Secretary's interpretation of the regulation as set forth in the preamble to the ETS. Although this "opportunity to investigate" to determine whether an accident occurred should be construed narrowly, the facts presented in this case demonstrate the wisdom of the Secretary's interpretation. Given her enforcement position in this case, it can reasonably be presumed that the Secretary will strictly enforce the 15-minute time limit set forth in the MINER Act and her ETS. It is also clear that she will narrowly construe the language in the preamble giving a mine operator time to investigate the events to determine whether there has been an accident.

III. ORDER

For the reasons set forth above, Premier's motion for summary decision is **GRANTED**, the Secretary's motion for summary decision is **DENIED**, Citation No. 6391461 is **VACATED**, and this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 17, 2007

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of Frederick Martin, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. VA 2007-40-D
	:	NORT CD 2007-01
DICKENSON-RUSSELL COAL CO., Respondent	:	Mine ID 44-07146
	:	Roaring Fork No. 4
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), On behalf of Frederick Martin, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. VA 2007-47-D
	:	NORT CD 2007-01
DICKENSON-RUSSELL COAL CO., Respondent	:	Mine: Roaring Fork No. 4
	:	Mine ID 44-07146

DECISION

Appearances: Robert S. Wilson, Esq., Nickole Winnett, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant; Joseph E. Wolfe, Esq., Wolfe, Williams & Rutherford, Norton, Virginia, for the Complainant; Wade W. Massie, Esq., Penn, Stuart & Eskridge, Abingdon, Virginia, for the Respondent.

Before: Judge Feldman

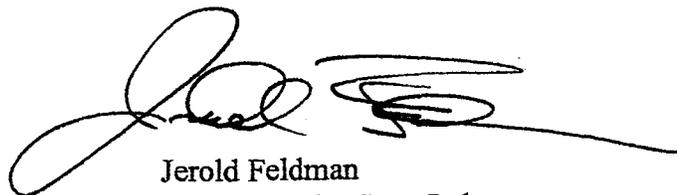
These matters are before me based on an application for temporary reinstatement, and a discrimination complaint, brought by the Secretary of Labor (the Secretary) on behalf of Frederick Martin against Dickenson-Russell Coal Company (Dickenson) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(2) (the Act). The Secretary's application for the temporary reinstatement of Martin to his former position of employment was stayed on May 21, 2007, as a consequence of Dickenson's agreement to

“economically reinstate” Martin until a full evidentiary hearing on the merits of Martin’s discrimination complaint could be conducted. Specifically, the Secretary and Dickenson agreed that, in lieu of Dickenson reinstating Martin to his job at the Roaring Fork No. 4 Mine, Dickenson agreed to pay Martin, on a bi-weekly basis consistent with Dickenson’s regular payroll practices, a sum of money, net of taxes and other required withholdings, equaling the net amount of wages that Martin would have earned if he had been reinstated to his former position.

The hearing in these matters was conducted on August 7 and August 8, 2007, in Abingdon, Virginia. At the beginning of the second day of the trial, the parties advised that they had reached a settlement agreement with respect to all matters in issue. The Secretary has agreed to withdraw her application for temporary reinstatement in this matter. The Secretary has also agreed to reduce her proposed civil penalty for the subject violation of the provisions of section 105(c)(1) from \$8,500.00 to \$500.00. Finally, Martin has waived his right to seek future employment with Dickenson or any subsidiary of Alpha Natural Resources, Inc.

In return, Dickenson has agreed to pay the \$500.00 civil penalty currently proposed by the Secretary. In addition, Dickenson will pay to Martin and his counsel Joseph E. Wolfe, within ten (10) days from the date of this Decision, an agreed upon sum, less all applicable deductions and withholdings, that shall remain confidential. Dickenson further represents that Martin’s personnel file will reflect that he voluntarily quit on March 7, 2007, and, if contacted by prospective employers, Dickenson will inform them that Martin voluntarily relinquished his job on that day.

I have considered the representations and documentation submitted in these matters, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i), 30 U.S.C. § 820(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and it **IS ORDERED** that, pursuant to their agreement, the Dickenson-Russell Coal Company shall pay to Martin, within ten (10) days from the date of this Decision, the agreed upon relief in complete satisfaction of the captioned temporary reinstatement and discrimination actions. **IT IS FURTHER ORDERED** that the Dickenson-Russell Coal Company pay a civil penalty of \$500.00 within 30 days of this Decision. Upon timely fulfillment of the terms of the parties’ agreement, including timely receipt of the \$500.00 civil penalty payment, the captioned temporary reinstatement and discrimination proceedings **ARE DISMISSED** with prejudice.



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 21, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2004-212-M
Petitioner	:	A. C. No. 29-02170-32227
v.	:	
	:	
SAN JUAN COAL COMPANY,	:	San Juan South
	:	
Respondent	:	

**CORRECTED DECISION APPROVING SETTLEMENT
ON REMAND**

Before: Judge Hodgdon

In accordance with Commission Rule 69(c), 29 C.F.R. § 2700.69(c), the following corrected decision, with the corrected language in italics, is substituted for the Decision Approving Settlement on Remand issued on August 15, 2007:

This case is before me on remand from the Commission. *San Juan Coal Co.*, 29 FMSHRC 125 (Mar. 2007). It was remanded for further analysis of Citation No. 4768527, consistent with the Commission’s decision, and “[i]f the judge concludes that San Juan’s violation of section 75.400 was caused by unwarrantable failure, he should reassess the penalty and modify Citation No. 4768527 from a section 104(a) citation to a 104(d)(1) citation and modify Citation No. 4768528 from a 104(d)(1) citation to a section 104(d)(1) order.” *Id.* at 137. The parties, by counsel, have filed a motion to approve a settlement agreement. Acceptance by the Respondent of Citation No. 4768527 as originally written and a reduction in penalty from \$6,300.00 to \$3,500.00 are proposed.

Having considered the evidence presented at trial, the Commission’s decision, *and* the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, the motion for approval of settlement is **GRANTED**, Citation No. 4768527 is **MODIFIED** from a 104(a) citation, 30 U.S.C. § 814(a), to a 104(d)(1) *citation*, 30 U.S.C. § 814(d)(1), Citation No. 4768528 is **MODIFIED** from a 104(d)(1) citation to a 104(d)(1) order and the

Respondent is **ORDERED TO PAY** a penalty of **\$3,500.00** within 30 days of the date of this order.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2007

MARFORK COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	
v.	:	Docket No. WEVA 2006-790-R
	:	Citation No. 7257568;06/27/2006
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Mine ID 46-09048
	:	Slip Ridge Cedar Grove Mine
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 2006-934
	:	A.C. No. 46-09048-94552
	:	
MARFORK COAL COMPANY, INC., Respondent	:	Slip Ridge Cedar Grove Mine

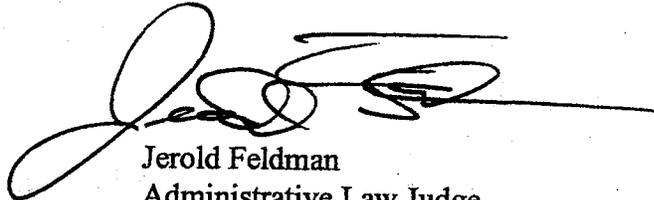
ORDER LIFTING STAY
CONSOLIDATION ORDER
AND
DECISION APPROVING SETTLEMENT

Before: Judge Feldman

The captioned contest was initially dismissed on September 27, 2006. 28 FMSHRC 842 (Sept. 2006) (ALJ). The related civil penalty matter in WEVA 2006-934 was stayed on January 22, 2007, pending Commission review of the contest dismissal. The Commission has reversed and reinstated the contest. 29 FMSHRC __ (Aug. 2007). Accordingly, the stay in WEVA 2006-934 **IS LIFTED** and the captioned contest in WEVA 2006-790-R **IS CONSOLIDATED** with WEVA 2006-934.

These consolidated contest and civil penalty cases are before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a settlement agreement and to dismiss these proceedings. A reduction in civil penalty from \$1,446.00 to \$783.00 is proposed. The reduction in the proposed penalty is based on deleting the significant and substantial designation from Citation No. 7257568.

I have considered the representations and documentation submitted in these matters and I conclude that the proffered settlement is appropriate 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 the respondent pay a civil penalty of \$783.00 within 30 days of this order in satisfaction of the two citations in issue. Upon receipt of timely payment, the captioned civil penalty and contest cases **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-99 / FAX: 202-434-9949

August 27, 2007

SPEED MINING, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 2005-20-R
	:	Citation No. 7208383; 10/18/04
	:	
	:	Docket No. WEVA 2005-21-R
	:	Citation No. 7208384; 10/18/04
	:	
	:	Docket No. WEVA 2005-22-R
	:	Citation No. 7208385; 10/18/04
	:	
	:	Docket No. WEVA 2005-23-R
	:	Citation No. 7208386; 10/18/04
	:	
	:	Docket No. WEVA 2005-24-R
	:	Citation No. 720388; 10/18/04
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2005-25-R
MINE SAFETY AND HEALTH	:	Citation No. 7208388; 10/18/04
ADMINISTRATION (MSHA)	:	
Respondent	:	Mine: American Eagle Mine
	:	Mine ID: 46-05437
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2005-97
Petitioner	:	A.C. No. 46-05437-52979
v.	:	
	:	
SPEED MINING, INC.,	:	
Respondent.	:	American Eagle Mine
	:	Mine ID: 46-05437

**ORDER GRANTING THE SECRETARY'S
MOTION FOR SUMMARY JUDGMENT**

Introduction

This consolidated proceeding relates to citations issued to Speed Mining Inc. ("Speed"), the operator of the American Eagle Mine. Speed had contracted with Cowin & Company

("Cowin") to conduct an elevator shaft sinking operation at the Eagle Mine. Cowin commenced construction of the elevator shaft. As a result of an accident involving a crane used to conduct the shaft sinking operation, the Secretary issued five citations to Speed relating to the condition of the crane and one citation alleging failure to train the crane operator.¹

After the issues had been joined, the parties agreed to bifurcate the proceedings and to initially litigate only the threshold issue of whether the Secretary abused her discretion in citing Speed. A hearing in this matter was held in Charleston, West Virginia on August 16 and 17, 2005. On December 2, 2005, a decision in this matter was issued. *Speed Mining Inc.*, 27 FMSHRC 935 (Dec. 2005) ("*Speed I*").

The decision set forth the issue as to whether the Secretary abused her discretion in citing Speed for the violations of its contractor. The decision applied four basic principles set forth by the Commission in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), in determining if the citation of an operator was consistent with the purpose and policies of the Mine Act.² The decision concluded that it had not been established that Speed was properly cited by the Secretary, that the Secretary's decision to cite Speed was an abuse of discretion, and that the notices of contest at issue should be sustained.

The Secretary filed a petition for discretionary review, which was granted. Subsequently, the Commission, 28 FMSHRC 773 (Sept. 2006), issued an order in which it noted that the Court of Appeals for the D.C. Circuit, *Secretary of Labor v. Twentymile Coal Company* 456 F.3d 151 (D.C. Circuit, 2006), reversed the decision of the Commission in *Twentymile Coal*, *supra*, holding that the Secretary's decision to cite the owner-operator of a mine as well as its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. The Commission directed as follows: "[i]n light of the court's decision, we remand the case to the judge for reconsideration of dismissal of the citations and the civil penalty proceeding." 28 FMSHRC, *supra*, 773-774.

Subsequent to the remand by the Commission, Speed filed a Motion for Summary Decision, in which it argued that the Secretary lacks authority under the Mine Act to cite one operator for violations committed by another operator. This Motion was denied in an Order issued March 7, 2007.

On March 7, 2007, a Pre-hearing Order was issued which ordered the parties to file 1) a statement setting forth proposed findings of fact relating to the alleged volative conditions and each of the penalty factors set forth in Section 110(i) of the Act, and 2) objections to their

¹These citations were for the same violations alleged in citations the Secretary had issued to Cowin.

²*Twentymile*, *supra*, was then on appeal before the Court of Appeals, but a decision had not yet been rendered.

adversary's proposed findings.³ Both parties filed responses to the Pre-Hearing Order, and Speed filed objections to the Secretary's response. Subsequently, the Secretary filed a Motion to Deem Requests for Admissions Admitted, and Speed filed a response.

The Secretary's Motion

On June 28, 2007 the Secretary filed a Motion for Summary Decision "on each of the issues before the Commission." On July 18, 2007, Speed filed a response in opposition to the motion.⁴

The facts set forth by the Secretary in her motion are as follows:

1. The Federal Mine Safety and Health Review Commission and the Administrative Law Judge assigned to this matter have jurisdiction to hear and decide these consolidated proceedings pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act").(Stipulation 1)⁵
2. Speed Mining, Inc., ("SMI") is the operator of the American Eagle Mine, an underground coal mine located in Dry Branch, West Virginia. (Stipulation 2)
3. Operations of the American Eagle Mine are subject to the jurisdiction of the Act.(Stipulation 3)
4. In 2004, SMI contracted with Cowin & Company, Inc. ("Cowin") to conduct an elevator shaft sinking operation at the American Eagle Mine. (Stipulation 4)

³The pre-hearing order also required the parties to confer to attempt to settle the outstanding issues, and, if a settlement was not reached, the parties were allowed until March 19, 2007, to file a motion requesting an evidentiary hearing relating to issues raised in the original pleadings. Neither party filed a motion to adduce additional evidence.

⁴In support of its motion, the Secretary attached Speed's responses to the Secretary's First Request for Admissions on Remand, (Attachment A), Speed's Responses to the Secretary's Second Request of discovery requests (Attachment B), and Speed's Response in Opposition to the Secretary's Motion to Deem Requests Admitted, which contains various admissions (Attachment C, p. 7). The Secretary also relies on documentary evidence and testimony adduced at the initial hearing, *Speed I*, on the threshold issue of whether the Secretary abused her discretion in citing Speed.

⁵The stipulations are those set forth in Joint Stipulations filed in *Speed I*, *supra*, on August 16, 2005.

5. Government Exhibit 28⁶ is an authentic copy of the contract ("Construction Agreement") between SMI and Cowin concerning, *inter alia*, the construction of the elevator shaft, and may be admitted into evidence. (Stipulation 5)
6. Gx. 7 is an authentic copy of the shaft sinking plan submitted by Cowin to MSHA on July 1, 2004 for the construction of the aforementioned elevator shaft at the American Eagle Mine, and may be admitted into evidence. (Stipulation 6)
7. Cowin began constructing the elevator shaft in August 2004. (Stipulation 7)
8. On September 29, 2004, the accident as alleged in Citation Nos. 7208383, 7208384, 7208385, 7208386, 7208387 and 7208388 occurred at the shaft sinking site. Authentic copies of those citations are marked Gx. 1-6, respectfully, and have been admitted into evidence, inclusive of all modifications, for purposes of establishing their issuance. (Stipulation 8)
9. Following an investigation of the accident referenced above, MSHA issued six citations and/or orders to Cowin. Those citations and/or orders are not at issue in these consolidated proceedings. (Stipulation 9)
10. MSHA Inspector Dennis Holbrook also issued six corresponding 104(a) citations to SMI for the same alleged violations (i.e., Citation Nos. 7208383, 7208384, 7208385, 7208386, 7208387 and 7208388). (Stipulation 10)
11. These consolidated proceedings involve the six citations ("contested citations") that were issued to SMI. (Stipulation 11)
12. MSHA Inspector Dennis Holbrook was acting in his official capacity and as an authorized representative of the Secretary of Labor when he issued the contested citations. (Stipulation 12)
13. True copies of the contested citations, along with all continuation forms and modifications, were served on SMI or its agent as required by the Act. (Stipulation 13)
14. The statement, "This violation is an unwarrantable failure to comply with a mandatory standard," which is included in Citation Nos. 7208385 (Gx. 3), 7208386 (Gx. 4), and 7208388 (Gx. 6) was carried over from the citations and/or orders issued to Cowin and is not applicable to SMI. (Stipulation 14)
15. The statement, "This is a contributing factor of the non-injury accident which occurred on 9/30/2004," which is included in Citation No. 7208383 (Gx. 1), should read as follows: "This is a contributing factor of the non-injury accident which occurred on 9/29/2004." (Stipulation 15)
16. No employees of SMI were working in the shaft or in the immediate vicinity

⁶The Secretary's exhibits admitted at the hearing in *Speed I*, *supra* are hereinafter referred to as Gx.

- of the shaft when the referenced accident occurred. (Stipulation 16)
17. No one was seriously injured as a result of the referenced accident. (Stipulation 17, T-43, 164)⁷
 18. On September 29, 2004, a Link-Belt crane, model no. HTC860, was being used by Cowin & Company as part of the shaft sinking operation at a shaft sinking site at the American Eagle Mine. (T-39,152, Gx. 17)
 19. The crane was being used to hoist out of the shaft concrete buckets ("muck buckets") which were filled with mucked materials (rock and dirt being removed from the shaft). (T-41-42)
 20. On September 29; 2094, between 1:00 p.m. and 1:30 p.m., the crane hoist failed and the bucket being hoisted out of the shaft free fell and landed next to the shaft opening. (T-41, 152)
 21. Government Exhibits 17 through 21 are photographs which accurately depict the shaft, the crane and the concrete bucket that were involved in this accident that occurred on September 29, 2004. (T-39, 45, 151)
 22. The buckets being used were approximately 60 inches in diameter and 60 in height. (T-43)
 23. Five employees of Cowin were working in the shaft when the above accident occurred. (T-42, 152).
 24. Had the bucket fallen a few feet more over the shaft, serious injuries, including possible fatalities, were likely to have occurred. (T-44)
 25. The buckets were also being used to transport men in and out of the shaft. (T-44, 179)
 26. The shaft being constructed was approximately 26 by 28 feet in diameter. (T-170)
 27. The shaft was approximately 25 feet in depth at the time that the accident occurred on September 29, 2004. (T-153)
 28. Pete Hendrick was the President of Speed Mining at the time of the accident (T-185)
 29. Morris Niday was employed by Speed Mining as an outside purchasing agent/supply man at the time of the accident. (T-330, 344)
 30. James Smith was employed by Speed Mining as an engineer at the time of the accident. (T-167, 168)
 31. Earl Brendel was employed by Cowin & Company as a project manager at the shaft sinking site. (T-38)

⁷This reference cites the transcript in *Speed I, supra.*

32. Dwight Smith was employed by Cowin & Company as a crane operator at the shaft sinking site. (T-151)
33. Don Fink was employed by the Mine Safety and Health Administration as a coal mine inspector. (T-32)
34. As President of Speed Mining, Pete Hendrick made the decision to contract with Cowin & Company to construct the shaft. (T-191)
35. As a condition of the contract, Speed Mining, through its President Pete Hendrick, required that Earl Brendel be the foreman in charge of the project. (T-194)
36. Before entering into the contract with Cowin & Company to construct the shaft at issue in this proceeding, Speed Mining did not determine or verify Cowin's history of violations under the Mine Act or its history of reportable injuries or accidents. (T-202)
37. During the two year period preceding September 29, 2004, Cowin & Company was issued 3 citations by MSHA. (Gx. 34)
38. For the four year period preceding September 29, 2004, Cowin had 79 reportable accidents, injuries or illnesses. (Gx. 35)
39. For the years from 1995 through 2003, Cowin's NFDL Incidence Rate was from four to ten times greater than the National NFDL Incidence rate. (Gx. 36)
40. Cowin's violation and accident history was readily available via MSHA's internet home page. (Gx. 36)
41. Speed Mining personnel were involved in designing the plans for the shaft and were setting center lines and offsets for the shaft. (T-169, 171, 200)
42. Speed Mining did not provide any safety related materials to Cowin. (T-213)
43. Once Cowin commenced work on the shaft sinking project, Speed Mining took no action to ensure that Cowin was working in a safe manner or in compliance with MSHA's safety standards. (T-182, 201)
44. Speed Mining took no action to ensure that Cowin was making required examinations of the worksite or the equipment being used. (T-211)
45. Before Cowin commenced work on the shaft, James Smith, a Speed Mining Engineer, went to the site to stake out the center lines for the shaft. (T-169)
46. James Smith went to the shaft site after the collar was poured and on a regular basis thereafter to ensure that the shaft was being constructed properly. (T-171, 113, 177, 181)
47. On the various occasions that James Smith went to the shaft site he did not conduct any type of safety examination. (T-182)
48. A Speed Mining employee operated a dozer in the vicinity of the shaft to

- spread out the mucked material that was being removed from the shaft. (T-201)
49. Since the time of the accident, Speed employees have been present at the shaft site on a regular basis performing engineering duties related to the shaft construction. (T-173)
 50. When performing such engineering duties, Speed's employees have been lowered into the shaft by use of a hoist. (T-179)
 51. Speed Mining has conducted no safety inspections of the shaft sinking site prior to the accident that occurred on September 29, 2004. (T-182, 201, 211)
 52. Speed Mining had no plans to conduct any safety inspections of Cowin's work site at any time before or after the accident that occurred on September 29, 2004. (T-212)
 53. No effort was made by management of Speed Mining to ensure that Cowin & Company was working in a safe manner or was working in compliance with MSHA's safety standards. (T-201)
 54. Don Fink was an MSHA inspector and electrical specialist whose job duties included performing monthly inspections of all new slope and shaft development sites, all major construction sites and all elevators and slope hoists in MSHA's District 4. (T-34)
 55. As part of his duties, Inspector Fink inspected the shaft sinking site at the American Eagle mine on August 31 and September 2 and 13, 2004. (T-45, 46, Gx. 33(a))
 56. During his inspections on those dates, Inspector Fink issued several citations involving the work being performed by Cowin and other contractors at the shaft sinking site and at a nearby electrical substation. (T-55, 56, 63, 64, 71, 77, 78, 80, 81 and 90; Gx. 10, 11, 12, 13, 14, 15 and 16)
 57. The shaft was approximately 620 to 640 feet from the electrical substation and both were on Speed Mining's property and under the same property permit. (T-53, 316 and 338)
 58. A copy of Citation No. 7229798 (Gx. 11) had been served on an agent of Speed Mining prior to September 29, 2004, thus placing Speed Mining on notice of safety related problems at the shaft site. (T-64)
 59. A copy of Order No. 7229802 (Gx. 15) had been served on an agent of Speed Mining prior to September 29, 2004, thus placing Speed Mining on notice of safety related problems at the shaft site. (T-83)
 60. On September 2, 2004, Inspector Fink had a discussion with Morris Niday at the Speed office at which time he expressed to Mr. Niday his concerns about contractors working in an unsafe manner at the shaft sinking site and the substation. (T-85 - 86, Gx. 33(a))

61. Inspector Fink informed Mr. Niday of a citation that he had previously issued to Cowin for men working under unconsolidated walls. (T-85, Gx. 12)
62. Inspector Fink informed Mr. Niday of MSHA's policy for issuing overlapping violations to production operators because they had a responsibility for the health and safety of contractors on their property. (T- 85)
63. Inspector Fink informed Mr. Niday that Speed Mining should have "some type of program or some type of proactive action that they would conduct at the shaft site to ensure the health and safety of the contractors working on their property." (T- 85)
64. Inspector Fink requested that a Speed Mining official accompany him to the shaft sinking site. (T-85, 90)
65. No one from Speed Mining accompanied Inspector Fink on any of his inspections of the shaft sinking site. (T-93)
66. As an outside purchasing agent for Speed Mining, Morris Niday was frequently the only Speed Mining employee available on the surface of the mine to accept physical service of MSHA citations and did so on numerous occasions. (T-66, 67, 78, 225, 257 and 258)
67. Mr. Niday had the authority to order the evacuation of the mine in the event of an emergency, (T-231)
68. Mr. Niday provided hazard training to persons coming into mine property acting on behalf of Speed Mining. (T-230, 352)
69. Mr. Niday conducted weekly electrical examinations and filled out and signed reports of those examinations on behalf of Speed Mining. (T-352)
70. Inspector Dennis Holbrook was the lead MSHA investigator into the accident that occurred at the shaft sinking site on September 24, 2004. (T-249)
71. Inspector Holbrook decided to cite Speed Mining, in addition to Cowin & Company, for the violations at issue in this proceeding. (T-255)
72. In deciding to issue citations to Speed Mining, Inspector Holbrook conferred with MSHA Assistant District Managers Link Self and Luther Marrs and with the Department of Labor's Solicitor's Office. (T-255)
73. Inspector Holbrook's decision to issue to Speed Mining the citations at issue in this proceeding was based upon the following factors:
 - a. Speed Mining had been placed on notice - through conversations between Inspector Fink and Morris Niday and prior citations that had been issued to Speed Mining - that Speed Mining needed to pay more attention to the work being performed by Cowin & Company;
 - b. Despite this notice, Speed Mining had taken no action to oversee the work being performed by Cowin or ensure that Cowin was in compliance

with MSHA's safety standards;

c. The violations at issue were obvious;

d. Speed Mining personnel were making regular trips to the shaft to ensure compliance with the contract specifications but made no safety inspection and thus were exposed to the worksite and any hazards. (T-254 - 264)

74. With respect to Citation No. 7208383 at issue in this proceeding, a violation of 30 C.F.R. §77.1606(c) occurred in that the conditions listed in the body of the citation as affecting the Link-Belt crane did exist at the time that the accident that occurred on September 29, 2004 and constituted defects that affected safety. (RFA 1, T-95, 96, 97, 108, 110, 128, 155, 157, 158, 160-61, 262-63; Gx. 1, 29, 30, 31, 32)⁸
75. The Link-Belt crane that was involved in the accident that occurred on September 29, 2004 constituted mobile loading or haulage equipment as that term is used in §77.1606(c). (RFA 2, T-278, 296)
76. The Link-Belt crane that was being used at the shaft sinking site at the time of the accident arrived on mine property on September 28, the day prior to the accident. (RFA 3, T-128, 155)
77. The crane was equipped with a computer that monitored safety features on the crane. (RFA 4, T-95)
78. The computer was in by-pass mode at the time of the accident. (RFA 5, T-96)
79. A red flashing light and an audible alarm in the cab of the crane indicated that the computer was in the bypass mode. (RFA 6, T-97, 160-61)
80. The crane had been modified in order to eliminate the free fall capability with which the crane had been manufactured. (RFA 7, T-41)
81. The modification to eliminate the free fall capability of the crane referenced above involved installing eight 1/4-inch bolts through the hoist brake shoes and into the brake drum. (RFA 8, T-4 1)
82. The eight bolts referenced above broke, resulting in the accident that occurred on September 29, 2004 and causing the hoist to fail and the bucket to fall to where it landed next to the shaft opening. (RFA 9, T-41, Gx. 17 through 21)
83. The hoist rope being used on the Link-Belt mobile crane was damaged from heat caused by welding. (RFA 10, T-97)
84. Government Exhibits 30, 31 and 32 are photographs that accurately depict the damaged sections of the hoist rope. (RFA 11, T-97)
85. The damaged section of the hoist rope was approximately 8 feet from the end of the rope that was attached to the hook, (RFA 12, T-262-63)

⁸“RFA” refers to Speed’s response to the Secretary’s requests for admissions.

86. The crane was equipped with an anti two block mechanism, which was a safety device designed to prevent the conveyance from being lifted too far into the boom of the crane. (RFA 13, T-108, 158)
87. At the time of the accident, the anti two block mechanism on the crane was not functioning. (RFA 14T-110,157, Gx. 29)
88. The accident that occurred on September 29, 2004 was highly likely to result in a fatal injury to at least five people. (T-44, Gx. 17 through 21)
89. The conditions cited in Citation No. 7208383 were obvious to casual observation of the crane. (T-100, 261)
90. With respect to Citation No. 7208384, a violation of 30 C.F.R. §77.404(b) occurred in that the operator of the Link-Belt crane at the time of the accident was not properly trained in the use of the crane including the safety features of the crane. (RFA 17, T-151, 152, 155, 161, 163,278)
91. Dwight Smith was employed by Cowin & Company and was working as a crane operator on September 29, 2004. (RFA 18, T-151)
92. Mr. Smith was operating the crane when the accident occurred on September 29, 2004 and had operated the crane on the previous day. (RFA 19, T-152, 155)
93. Dwight Smith received no training on the proper operation of the crane. (RFA 20, T-155)
94. Dwight Smith had never previously operated the specific crane model that was being operated at the time of the accident. (RFA 21, T-155)
95. Dwight Smith did not review the operator's manual for the crane that he was operating. (RFA 22, T-161)
96. Mr. Smith did not know the purpose of a flashing light and audible alarm that were going off during operation of the crane. (RFA 23, T-161)
97. Dwight Smith did not review the shaft construction plan applicable to the work being performed. (RFA 24, T-161)
98. Dwight Smith was not aware of the maximum allowable load for the crane set forth in the shaft construction plan. (RFA 25, T-163)
99. With respect to Citation No. 7208385, the citation correctly alleges a violation of 30 C.F.R. §77.1900-1 in that the approved shaft sinking plan for the American Eagle Mine was not being complied with when the accident occurred on September 29, 2004. (RFA 26, T-101, 103, 106-07, 162, 277; Gx. 7)
100. The approved shaft construction plan provided that the hoist rope being used on the crane would be "two parted (or greater) to double the breaking strength." (Gx. 7, p. 9; RFA 27)

101. When the crane arrived on Speed Mining's property, it was equipped with a six part line. (RFA 28, T-162)
102. When the accident occurred on September 29, 2004, the hoist rope being used to lift the muck bucket was a single part rope. (RFA 29, T-101, 162)
103. Earl Brendle, Johnnie Daniels and Daugie Hagar, Cowin employees, were involved in changing the hoist to a single rope line. (T-162)
104. Use of a two part rope would have made the accident less likely to have occurred. (T-106-07)
105. The use of a one part rope in violation of the approved shaft sinking plan would have been obvious to casual observation. (T-103, 277)
106. Government Exhibit 8 is an authentic copy of a letter dated August 17, 2004 from MSHA District Manager Jesse Cole to Richard M. Hendrick. (RFA 32, T-232)
107. Government Exhibit 9 is an authentic copy of a letter dated November 8, 2004 signed by Richard M. "Pete" Hendrick concerning Cowin & Company. (RFA 33, T-232)
108. Government Exhibits 8 and 9 establish that Speed Mining had been informed by MSHA that the shaft construction plan had to be submitted and approved under Speed Mining's mine identification number. (RFA 34, T-232, Gx. 8)
109. No effort was made by Speed Mining to ensure that Cowin & Company was complying with the approved shaft construction plan. (T-211)
110. With respect to Citation No. 7208386, the citation correctly alleges a violation of 30 C.F.R. §77.404(a) in that the Link-Belt mobile crane was not removed from service when an unsafe condition, the anti two block safety switches not being functional, was discovered during preoperational checks. (RFA 36, T-110, 253; Gx. 29)
111. The Link Belt crane that was being utilized at the shaft sinking project was equipped with anti two block safety switches which would prevent inadvertent pulling of the conveyance into the hoist boom. (RFA 37, T-108, 158)
112. When the accident occurred on September 29, 2004, the anti two block safety switches were not functional. (RFA 38, T-41)
113. The crane was not safe to operate without functional anti two block safety switches. (RFA 39, T-109, 253)
114. The condition of the anti two block safety switches was discovered during preoperational checks and the condition was recorded in a Daily Inspection Log on September 28 and September 29. (RFA 40, Gx. 29)
115. The failure to remove from service the Link-Belt crane when it was discovered that the anti two block safety switches were not functional was a

- contributing factor to the hoist failure that occurred on September 29, 2004. (T-41)
116. A review of the preoperational examination report would have revealed that the anti two block safety switches were not functional. (T-276; Gx. 29)
 117. With respect to Citation No. 7208387, the citation correctly alleges a violation of 30 C.F.R. §77.1606(a) in that an inadequate preoperational examination was performed on the Link-Belt mobile crane that was being used at the shaft sinking project. (RFA 43)
 118. Dwight Smith conducted preoperational examinations of the crane on September 28 and 29, 2004. (RFA 44, T-156)
 119. Government Exhibit 29 is an accurate copy of the daily preoperational examination report for the crane. (RFA 45, T-109, 157)
 120. The preoperational examination did not note the damaged section of the hoist rope. (RFA 46, GX. 29)
 121. The preoperational examination did not include an evaluation of the operation of the free fall function of the hoist. (RFA 47, Gx. 29)
 122. With respect to Citation No. 72083 88, the citation correctly alleges a violation of 30 C.F.R. §77.1900-1 in that the approved shaft sinking plan was not being followed as alleged in the citation. (RFA 49, T-43; Gx. 7)
 123. The approved shaft sinking plan provided that the maximum allowable load weight for the Link-Belt crane was 10,000 pounds, including the bucket and materials therein. (Gx. 7, page 9, RFA 50)
 124. At the time that the accident occurred on September 29, 2004, the weight of the load being lifted by the Link-Belt crane, including the bucket and materials therein, was 12,180 pounds. (RFA 51, T-43)
 125. Speed Mining's history of violations and production history are accurately set forth in MSHA's Violator Data Sheet which was included with the Secretary's petition for assessment of civil penalty. (RFA 52)
 126. The proposed assessments for the citations involved in these proceedings are appropriate with respect to Speed Mining's violation history and size. (RFA 53)
 127. The violations at issue in these proceedings were abated in good faith. (RFA 54)
 128. Payment of the proposed penalties involved herein would not adversely affect Speed Mining's ability to continue in business. (RFA 55)

Discussion

Speed's Response in Opposition to the Secretary's Motion, does not set forth any objection to the facts set forth in the motion.⁹ On July 26, 2007, Speed filed a statement which asserts that the parties have agreed that "... the cases are ripe for a final decision on both the merits of the alleged violations and any appropriate penalties." Accordingly, the issues presented for resolution are whether the Secretary has established that Speed violated the various mandatory safety standards alleged in the citations at issue, and if so, whether the violations were significant and substantial, and the amount of penalty to be assessed for each violation.

1. Citation No. 7208383 (Violation of 30 C.F.R. § 77.1606 (c)).

violation of Section 77.1606(c), *supra*

Section 77.1606(c), provides, as follows: "[e]quipment defects affecting safety shall be corrected before the equipment is used." The record indicates that on September 29, 2004, a section of the hoist rope on a crane being operated at the shaft sinking site was damaged. Donald William Fink, an MSHA inspector testified¹⁰ that the damage to the hoist rope weakened its integrity and that the crane should have been taken out of service. This testimony was not contradicted or impeached. In responses to the Secretary's requests for admissions, Speed indicated that it did not have any basis for contesting the substantive facts alleged in each of the citations at issue.

Based on all of the above, I find that it has been established that Speed violated Section 77.1606(c), *supra*.

significant and substantial

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine 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." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon 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." *Cement Division, National Gypsum Co.*,

⁹In its Response, Speed argues that the Secretary's Motion should be denied "on the negligence factor." This issue is addressed in this order at pages 15-16. In addition, Speed seeks the denial of the Secretary's Motion in its entirety for the reasons it had previously set forth in its Motion for Summary Decision filed November 17, 2006, which was denied in a Decision issued on March 7, 2007. This decision was not appealed and has become the law of the case regarding the issues raised by Speed's Motion, and thus any argument by Speed reiterating its position set forth in its previous motion, is rejected.

¹⁰"Testimony" refers to that adduced at the initial hearing in *Speed I, supra*.

3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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.

In *United States Steel Mining Company, 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 Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

As set forth above, the Secretary has established a violation of a mandatory safety standard i.e. Section 77.1606(c), *supra*.

It is alleged in the citation at issue that the safety computer for the crane was "bypassed", that one rope was defective, and that eight bolts that were installed to disable the free-fall function of the hoist broke, causing the loaded muck bucket to fall. In responses to the Secretary's requests for admissions, Speed indicated that it did not have any basis for contesting the substantive facts alleged in each of these citations at issue. Also, MSHA Inspector Fink, testified at the initial hearing (*Speed I, supra*) regarding these conditions and the hazards associated with them. Speed does not contest any of this testimony. I thus find that the volative conditions contributed to a measure of danger to safety. Further, since the volative conditions resulted in the bucket falling, I find that it has been established that there was a reasonable likelihood that the hazard contributed to will result in an injury. Moreover, considering that in normal operations the bucket is loaded with muck,¹¹ and men work in the area, I find that it was established that there was a reasonable likelihood that the hazard of the loaded bucket falling would result in an injury of a reasonably serious nature. Accordingly, I find that it has been

¹¹According to the approved plan for the construction of the shaft, the bucket can carry a maximum load of 10,000 pounds.

established that the violation was significant and substantial.

penalty

The Secretary conceded that each of the violations were abated in good faith. Neither party has adduced any evidence tending to establish that Speed's history of violations and size are the basis for either an increase, or decrease in penalty. Speed does not assert that a penalty will have an adverse effect on its ability to continue in business.

Speed admitted that aside from negligence, it does not dispute the statutory findings on which the Secretary's proposed penalty is based. Based on this admission, and for the reasons set forth above, (pp. 14-15, *infra*), I find that the level of gravity of the violation was relatively high.

The Secretary asserts that its determination that the violation was as a result of Speed's moderate negligence is based on testimony of Dennis J. Holbrook, an MSHA inspector, who also serves as an accident investigator. Holbrook testified, based on his investigation, that he determined that Speed had been put on notice that they had a contractor "... that may be needing of guidance." (Tr. 259). In this connection, Fink, testified that on August 31, he informed Speed's employee, Morris Niday, who was working in the mine office at the time, that there were untrained miners on the shaft construction site. According to Fink, Niday informed him that Speed did not have any person at the construction site to ensure the safety of the contractors working on its property. Also, Pete Hendrick, who was Speed's President from July 2001, until June 2005, admitted that Speed did not take any action to ensure that Cowin, its contractor, was working in a manner consistent with MSHA safety standards, that Speed did not review Cowin's history of violations or accidents, and that Speed had not conducted any safety inspections of the shaft sinking site prior to the accident. Further, according to Holbrook, it was obvious that the hoist rope was defective, and that a flashing red light and an audible alarm indicated that the crane computer was in by-pass mode.

On the other hand, Speed adduced evidence of various factors tending to mitigate the level of its negligence. According to Hendrick, the equipment at the site was not owned by Speed. He testified that Speed did not have any expertise regarding the construction of shafts, and it relied on Cowin and its supervisor whom it considered very experienced in shaft sinking operations. There is not any evidence that Speed had any authority to direct Cowin's day-to-day activities. Further, Speed's contract with Cowin required the latter to provide and maintain necessary equipment, and comply with safety regulations. Moreover, there was not any evidence adduced that Speed ignored any defects, or was directly involved with creating any volative conditions. Further, there was not any evidence adduced that the scope of the duties of any of the employees of Speed who were present on the site required any of them to check Cowin's equipment for safety defects.

In *Speed I, supra*, I found that Speed did not directly contribute to the violations at issue, and that any omission on its part was not significant. (27 FMSHRC, *supra*, at 944-946, 947). I reiterate the findings and rationale set forth in *Speed I, supra*. I also, reiterate finding set forth in *Speed I, supra*, that Speed's employees were not threatened by any of the hazards created by the

volative conditions and that Speed did not have significant control over the conditions of the crane. (27 FMSHRC, *supra*, at 947-948).

Based on the various significant mitigating factors set forth above, I find that the level of Speed's negligence was less than moderate.

Taking into account all of the factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 is appropriate for this violation.

2. Citation No. 7208384 (violation of 30 C.F.R. § 77.404(b)).

Section 77.404(b), provides that "[m]achinery and equipment shall be operated only by persons trained in the use of and authorized to operate such machinery or equipment."

Dwight Douglas Smith was employed by Cowin and was working as a crane operator on the site on September 29, 2004, operating the truck crane at issue. According to Smith's uncontradicted testimony he had never operated this specific model prior to working on the site, and had did not received any training or instruction regarding the operation of the crane. Speed did not adduce any evidence to the contrary, and admitted that it does not have any basis for contesting these facts. Accordingly, I find that the Secretary has established that Speed violated Section 77.404(a), *supra*.

Citation No 7208384 was issued as a non-significant and substantial violation, and it noted that an injury was unlikely. I thus find that the level of gravity of this violation was low. The citation indicated that the level of negligence was considered to be low. The Secretary did not adduce any evidence attending to establish that the level of negligence of this violation was more than low. I thus find that the negligence of Speed was low. The remaining factors set forth in Section 110(i) of the Act were discussed above, (p. 15-16, *infra*), and this discussion and the findings contained therein are incorporated herein.

Considering all the factors set forth in Section 110(i), of the Act, I find that a penalty of \$60 dollars is appropriate for this violation.

3. Citation No. 7208385 (Violation of 30 C.F.R. § 1900-1)

Section 77.1900-1, *supra*, provides as follows: "[u]pon approval by the Coal Mine Health and Safety District Manager of a slope or shaft sinking plan, the operator shall adopt and comply with such plan."

The shaft construction plan stipulates that the link belt crane be equipped with two ropes (Gx. 7, p.11). According to the uncontradicted testimony of Smith, when he was lifting the muck bucket out of the shaft, only a single line was attached from the crane to the bucket. Speed did not adduce any evidence to contradict Smith's testimony. Speed subsequently admitted that it does not have any basis to deny the facts alleged in the citations at issue. Accordingly, I find that the Secretary has established a violation of Section 77.1900-1, *supra*.

According to the uncontradicted testimony of Fink, in essence, the volative condition herein, the use of one rope rather than two as mandated in the plan, would increase the likelihood of an accident occurring. He explained that shear pressure would be doubled which might lead to the shearing of the bolts on the crane. Speed did not adduce any evidence to contradict this testimony, and has not requested an opportunity to present additional evidence. Accordingly, for all the above reasons, I find that the violation was significant and substantial.

Essentially, for the reasons set forth above regarding the finding of significant and substantial, I find that the level of gravity was relatively high. According to Fink, it would not have been difficult for a person observing or inspecting the crane in the rope to detect that there was only one rope attached to the bucket. In this connection, Smith indicated that he did not review the shaft sinking plan, and did not know the maximum allowable load that was set forth in the plan. On the other hand, there are various mitigating factors as discussed above (pp. 15-16, *infra*). For the reasons set forth therein, I find that the level of Speed's negligence to have been less than moderate. I reiterate the findings made above (*id. infra*), regarding the remaining factors set forth in Section 110(i) of the Act.

Taking into account all the factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 is appropriate for this violation.

4. Citation No. 7208386 (Violation of Section 77.404(a), *supra*)

Citation No. 7208386 alleges that Speed violated Section 77.404(a) because it "... did not remove the Link Belt mobile crane from service when unsafe conditions were found during pre-operational checks performed on 9/28/2004 and 9/29/2004. The pre-operational reports showed that the anti two block safety switches which prevents inadvertent pulling of the conveyance into the hoist boom was not functional." (*sic*) In this connection, Speed admitted that it does not have any basis for contesting the substantive facts alleged in all of the citations. Further, the daily inspection log (Gx. 29) corroborates the condition cited in the citation. According to the uncontradicted testimony of Fink as a consequence of this condition shear pressure would be increased, which could possibly damage equipment, or break the rope which would result in the conveyance falling back to the ground. Accordingly, I find that the Secretary has established a violation of Section 77.404(a). Based on the testimony of Fink, and considering the fact that an accident did occur, I find that the violation was significant and substantial.

I find, for all of the reasons set forth above, that the level of gravity was relatively high. Essentially, in arguing that it had established moderate negligence on behalf of the Respondent the Secretary argues that the notation "no two block" was entered by Smith in the daily inspection log on both September 28 and 29, 2004, and that reviewing the log would have revealed the defect. (Secretary's Motion, p. 28). On the other hand, the record contains numerous mitigating factors (pp. 15-16, *infra*), which are incorporated herein. I also incorporate my findings regarding the remaining Section 110(i) factors. (*id.*)

Considering all the factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 dollars is appropriate.

5. Citation No 7208387 (Violation of 30 C.F.R. § 77.1606(a)

Section 77.1606(a), *supra*, provides as follows: "Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator."

Citation No. 7208387 alleges that an inadequate pre-operational examination was performed on the crane at issue, because a damaged rope should have been discovered. Also, that the operational function of the free fall hoist was not examined. Speed admitted that it does not have any basis for contesting the substantive facts alleged in the citations at issue. Photographs taken after the accident clearly depict the damaged section of the rope. Fink testified that it would not be difficult to detect this condition. This testimony was not contradicted or impeached. Accordingly, I find that the Secretary has established that Speed violated Section 77.1606(a), *supra*.

As noted above, Fink testified to the hazards of the use of only one rope. (p. 17, *infra*) This testimony was not impeached or contradicted. Hence, I find that a single damaged rope clearly contributed to a hazard. Failure to note this condition in a pre-operational examination and take it out of service clearly contributed to the hazard of the bucket falling. Further, for essentially the same reasons set forth above, which are incorporated herein (*id.*), I find that the third and fourth elements of the *Mathies* criteria have been met. I conclude that it has been established that the violation was significant and substantial.

Essentially for the reasons set forth above, I find that the level of gravity was relatively high. The Secretary asserts that the hazardous conditions which were not noted in a pre-operational examination were readily observable. However, as noted above, the record contains various factors tending to mitigate the level of Speed's negligence (pp. 15-16, *infra*). The remaining factors set forth in Section 110(i) of the Act were discussed above, and are incorporated herein.

Considering all of the factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 is appropriate.

6. Citation No. 7208388 (Violation of Section 77.1900-1)

Citation No. 7208388 alleges that the approved shaft sinking plan was not being followed in that the plan stipulates that the maximum load weight will be 10,000 pounds, and an investigation of the accident at issue revealed that the load being lifted at the time of the hoist failure was 12,180 pounds. Speed admitted that it does not have any basis to contest these substantive facts.

The plan clearly indicates that the link belt crane should have a maximum weight load of 10,000 pounds. (Gx. 7, p. 11). According to the uncontradicted and unimpeached testimony of Fink, during the investigation the bucket was weighed with a calibrated scale which indicated that it weighed 2,180 pounds when it fell. For all these reasons, I conclude that it has been established that Speed violated Section 77.1900-1, *supra*.

significant and substantial

Citation No. 7208388 was issued as a significant and substantial violation. Since Speed's admissions indicate that it is not contesting the finding of significant and substantial (Secretary's Motion, Attachment A), I find that the violation was significant and substantial.

penalty

For the reasons set forth above, I find that the gravity of the violation was relatively high. In support of its argument that Speed's negligence was moderate, the Secretary relies on testimony by Smith, that he had not read the approved shaft construction plan, and did not know the maximum allowable load.¹² However, as noted above, the record contains various factors tending to mitigate the level of Speed's negligence (pp.15-16, *infra*). The remaining factors set forth in Section 110(i) of the Act have been discussed above (*id, infra*), and that discussion is incorporated herein.

Considering all of the statutory factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 is appropriate.

¹²The Secretary also argues that Speed had "been specifically put on notice by MSHA that it was responsible for compliance with the shaft sinking plan." (The Secretary's Motion, p. 28, citing page 211 of the transcript and Gx. 8). However, neither support the Secretary's assertion. Page 211 of the transcript does not contain any testimony regarding Speed having been put on notice that it was responsible for compliance with the plan. In the same fashion, Gx. 8, a letter from the District Manager, District 4, Mine Safety Health Administration to Hendrick, states merely that the shaft construction plan was reviewed and approved, and that prior approval must be received from MSHA should revisions become necessary. This letter is not sufficient to have put Speed on notice that it was responsible for compliance with the plan.

ORDER

It is **Ordered** that Speed pay a total civil penalty of **\$3,260** within 30 days of this **Order**, and that these cases be **Dismissed**.



Avram Weisberger
Administrative Law Judge

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/lp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

August 27, 2007

SHAWN JOHNSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 2007-235-D
v.	:	HOPE CD 2006-04
	:	
HUFFMAN TRUCKING, INC.,	:	No. 10 A Mine
Respondent	:	Mine ID 46-08852 FVV

DECISION

Appearances: Mark L. French, Esq., Criswell and French, PLLC, Charleston, West Virginia, on behalf of the Complainant;
David Huffman, President, Huffman Trucking Inc., Mt. Nebo, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the Complaint by Mr. Shawn Johnson pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging, in effect, that he was laid off for several days after April 4, 2006, and was subsequently discharged by Huffman Trucking, Inc. (Huffman Trucking), on April 14, 2006, as a result of his activities protected under section 105(c)(1) of the Act.¹ In particular, Mr. Johnson states in his

¹ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

complaint to the Department of Labor's Mine Safety and Health Administration (MSHA), filed April 28, 2006, that he was not being called back to work by the Respondent, Huffman Trucking, "because I have made complaints about conditions of my assigned truck to David Huffman... [and] I feel that I am not being called to work because MSHA shut down my truck during an inspection." At hearings, the allegations of protected activity were narrowed by the Complainant to three categories, i.e. complaints about (1) the brakes on his assigned truck (Truck No. 19), (2) about the third axle valve leak on his assigned truck, and (3) the odor in his truck cab caused by the valve leak (Tr. 56). Hearings were bifurcated so that the hearings held on April 25, 2007, were limited to the issue of liability.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on grounds, *sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis on the miner's unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commissions' Pasula-Robinette test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

The record shows that Mr. Johnson was hired at Huffman Trucking on or about May 9, 2005, as a water truck driver and that sometime around July 2005 was assigned to drive the No. 19 haul truck. His complaints to Huffman Trucking regarding the brakes on the No. 19 truck are undisputed. Johnson apparently first complained about the brakes on August 11, 2005, when he noted a problem on the "Pre-Operational Inspection and Condition Report" (pre-op report or pre-op sheets) for the No. 19 truck (Tr. 57-58). Johnson explained that "if you press[ed] the brake pedal down, it would just start jumping. I mean, it was hard to hold steady pressure onto the brakes while it was going" (Tr. 59). "It was harder to get it stop because you couldn't hold steady pressure on the pedal" (Tr. 60).

According to Johnson, the problem was not corrected but he did not continue to report it on the pre-op reports because "we were told not to write the things down like that because he didn't want to see that kind of thing on the sheets. So for a long time, I didn't write anything on the pre-op sheets" (Tr. 63). According to Johnson, he was told by Virgil Bright not to mark on the pre-op

reports that there were problems with the truck (Tr. 66).² Nevertheless, on September 15th Johnson again checked off on his pre-op report that “brake accessories” were a problem. On November 7, 2005, he again checked off “brakes” and “brake accessories” on the pre-op report (Complainant’s Exhibit 1-3; Tr. 67). According to Johnson, he was told that the brakes were “cammed over” and the truck needed new brake pads (Tr. 67). Johnson again reported a problem with the brakes on the pre-op report for December 22nd and testified that the problem that he had reported on November 7th had still not been corrected as of December 22nd. The record shows that on December 22nd, a citation was issued by MSHA for defective brakes on the No. 19 truck (Complainant’s Exhibit No. 4; Tr. 69-70). According to Johnson “they [then] finally took it off the road to go ahead and put new brakes on it” (Tr. 68).

On February 24, 2006, Mr. Johnson again noted on his pre-op report a problem with his brakes, and testified that “the pedal was jumping again.” (Tr. 75). On April 4, 2006, Johnson again checked off on his pre-op report “brake accessories” (Tr. 77) and later the same day, MSHA inspectors appeared at the mine to check the brakes on “all the trucks on the hill”. Johnson testified that a few days before April 4th, he had called MSHA complaining about problems with several of the trucks. According to Johnson they had been unable to get these problems corrected (Tr. 81-82). On April 4th, MSHA issued citations for defective brakes on truck No. 19 as well as two other trucks and the trucks were then taken out of service for repairs (Complainant’s Exhibit No. 5; Tr. 79-81).

In addition to Johnson’s undisputed testimony regarding his reports of brake problems on the No. 19 truck noted above, the undisputed “Drivers Vehicle Inspection and Condition Reports” in evidence show problems noted for ‘brakes’ and/or “brake accessories” on the No. 19 truck on November 7, 2005, November 8, 2005, November 11, 2005, November 14, 2005, November 15, 2005, November 28, 2005, November 29, 2005, November 30, 2005, December 2, 2005, December 6, 2005, December 7, 2005, February 24, 2006, February 25, 2006, February 26, 2006, February 27, 2006, February 28, 2006, March 3, 2006, March 4, 2006, March 5, 2006, March 6, 2006, March 7, 2006, March 8, 2006, March 11, 2006, March 12, 2006, March 13, 2006, March 21, 2006, March 22, 2006, March 23, 2006, March 27, 2006, March 28, 2006, March 27, 2006, April 1, 2006, and April 4, 2006 (Complainant’s Exhibit Nos. 1-3). It is undisputed that these reports were filed with Huffman Trucking and it may reasonably be inferred that company President David Huffman was aware of some, if not all, of these complaints. Mr. Johnson’s testimony is also undisputed that he had also talked directly to Mr. Huffman on several occasions after February 24th about his problem with the brakes on the No. 19 truck (Tr. 85).

Mr. Johnson also noted defects in the third axle valve on his pre-op reports for February 10, 2006, February 26, 2006, February 27, 2006, February 28, 2006, March 3, 2006, March 4, 2006, March 5, 2006, March 6, 2006, March 7, 2006, March 8, 2006, March 11, 2006, March 12, 2006, March 13, 2006, March 21, 2006, March 22, 2006, and April 4, 2006 (Complainant’s Exhs. 1-3). Since MSHA cited the leak in the third axle valve on April 4, 2006, as a violation of the mandatory

² Johnson did not know whether Bright was a mechanic, a shop foreman or “exactly what” his position was. (Tr. 66).

safety standard at 30 C.F.R. § 77.404(a) it is apparent that Johnson's complaints in this regard were also protected under the Act.³ The record shows that Huffman was clearly aware of the later complaints concerning the third axle valve (Tr. 210-212, 216) and it may reasonably be inferred that he was aware of all of the above complaints.

Considering the above essentially undisputed evidence, it is clear that the Complainant engaged in a significant number of protected activities. As previously noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. Since Huffman admitted at hearings that he let Johnson go because of Johnson's complaints in his pre-op report on April 14, 2006, about the third axle leak - - a problem MSHA had previously issued a violation for only ten days earlier, it is clear that this adverse action was motivated by such protected activity (Tr. 210-212, 216).

In addition to this direct evidence of discriminatory intent there is also abundant indirect evidence of Huffman's discriminatory intent. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility toward protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

In the instant case there is no dispute that company President David Huffman had knowledge of Johnson's protected activity in filing numerous safety complaints in his pre-op reports for the brakes and the third axle valve leak on the No. 19 truck and was directly told of the brake defects by Johnson on several occasions (Tr.85). In addition, while there is no direct evidence that Huffman or any other agent of the Respondent was told of Johnson's complaints to MSHA preceding Johnson's layoff and subsequent termination, it may reasonably be inferred from the close proximity in time between Johnson's persistent complaints of brake and third axle valve defects in his pre-op reports and the MSHA inspection of Johnson's No. 19 truck and MSHA's issuance of citations for defective brakes and third axle leaks, that Huffman believed that Johnson had made such complaints to MSHA.

Hostility toward protected activity may also be inferred from Huffman's testimony that one of the reasons he did not retain Johnson was because "we couldn't get along with each other... [t]he problems he had with the truck none of the other drivers would have" (Tr. 209-210). In addition, when Huffman was asked at trial whether he would be calling Johnson back to work he responded that he would not, explaining that "this proceeding here would probably be the biggest reason for

³ 30 C.F.R. § 77.404(a) provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

not calling him back” (Tr. 205).

Huffman’s layoff of Johnson after Johnson’s complaint on April 4th was also only shortly after the MSHA citation of Johnson’s truck for defective brakes and the third axle leak on the same day and Johnson’s final separation came only 10 days later. Thus there was clearly a coincidence in timing between the protected activities and the adverse action.

Finally, there is clear evidence of disparate treatment from the fact that two other drivers were retained and only Johnson was laid off after all of their trucks were shut down by MSHA on April 4th (Tr. 100-101). Johnson was not called back to work until April 12th. The record shows that the two other drivers continued working. Moreover the MSHA citation issued for the No. 19 truck was abated on April 8, 2006, and the pre-op reports for April 8th through April 11th, show that other drivers were driving Johnson’s truck during this time (Complainant’s Exhibit No. 6; Tr. 88-90). The implausible reasons cited by Huffman as the basis for Johnson’s termination also reflect a lack of credibility and a transparent effort to cover-up the true reasons and motivation for Johnson’s termination i.e. Johnson’s protected activity (See discussion of this issue *infra.*). Under the circumstances, I find that the Complainant has clearly established a *prima facie* case of a discriminatory layoff and discharge under section 105(c) of the Act.

Huffman Trucking attempts to defend affirmatively by claiming that it would have taken the adverse action in any event on the basis of a business justification and Johnson’s unprotected activities alone. This argument attempts to address the affirmative defense under the *Pasula* analysis. In *Chacon* the Commission explained the proper criteria for analyzing an operator’s business justification for an adverse action:

Commission judges must often analyze the merits of an operator’s alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. But such inquires must be restrained.

The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Cf. *Youngstown Mine Corp.*, 1 FMSHRC 990, 994 (1979). Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator’s business judgment our views on “good” business practice or on whether a particular adverse action was “just” or “wise.” Cf. *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2 666, ((1st Cir. 19793). The proper focus, pursuant to *Pasula*, is on whether a credible justification figures into motivation and, if it did, whether it would have led to the adverse action apart from the miner’s protected activities. If a proffered justification survives pretext analysis...., then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge’s or our sense of fairness or enlightened

business practices. Rather, the narrow statutory question is whether the reason was enough to have legitimately moved that the operator to have disciplines the miner. Cf. *R-W Service System Inc.*, 243 NLRB 1202, 1203-04(1979) (articulating an analogous standard).

In this regard, David Huffman cites a number of alleged unprotected reasons for Johnson's removal. At hearings Huffman proffered that he terminated Johnson (did not call him back to work) for the following non-protected reasons: "[l]ate for work and absenteeism, and the complaints from fellow workers about working, you know, with his profanity and attitude" (Tr. 153). The record shows that Johnson did have a number of unexcused absences (See Respondent's Exhibit No. 3) and that Huffman issued a "Final Warning" on January 26, 2006, for his absenteeism. According to Huffman, under their written policy "[t]he final warning is your last warning, and your unexcused absence next time will lead to discharge" (Tr. 218-219). However, only a few weeks later, on February 12, 2006, Johnson had another unexcused absence, without termination or any other disciplinary action (Respondent's Exh. No. 3; Tr. 220). He also had unexcused absences on March 20, 29 and 30. Indeed, Huffman admitted that his absenteeism policy was not enforced (Tr. 218-222) and it was only after Johnson continued to engage in persistent protected activity culminating in his complaints on April 4, 2006, and April 14, 2006, and the MSHA inspection and shut down of three of Huffman's trucks, that Huffman laid off Johnson and subsequently terminated him. Clearly, Johnson's absenteeism was not taken seriously enough to terminate him until after he engaged in significant protected activity.

The same can be said for Johnson's purported tardiness. According to Respondent's witness, Virgil Bright, Johnson's tardiness began as early as May 2005 yet there is not even a claim that disciplinary action based on such tardiness was taken until almost a year later, and only shortly after Johnson engaged in extensive protected activities and several MSHA inspections and citations were issued for safety violations on Johnson's truck.

Huffman's claims that Johnson's "attitude" was the basis for his discharge are also not credible because the so-called "attitude" problems (i.e. by not wearing a hard hat, wearing short pants and tennis shoes even when it was snowing) were events that apparently occurred in May 2005 almost a year before the adverse action and while Johnson was employed for another company (Tr. 118-130). In addition, Huffman Trucking witness Virgil Bright testified that he knew of no one having ever been terminated at the mine for using profanity (Tr. 167). Moreover, since no specific examples of "profanity" were cited it is not possible to evaluate the gravity of the allegation. Finally, drawing a "smiley face" on a disciplinary report cannot seriously be cited as a justifiable grounds for a suspension and discharge.

Huffman subsequently added another alleged reason for terminating Johnson which he described as follows at hearing:

Yeah. Shawn and I had a clash, you know. It wasn't ever - - we couldn't get along with each other. We wasn't ever going get along with each other. The problems he had with the truck, none of the other drivers would have. The third axle valve was replaced, and

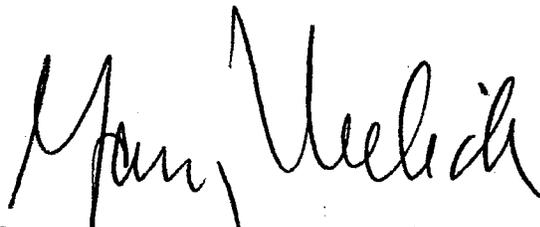
when Shawn come back to work, you know, he started to write the third axle valve down again. I went out and checked it. (Tr. 209-210).

According to Huffman there was no leak in the third axle valve but Johnson kept on reporting it.⁴ When later asked why he could not simply have transferred Johnson to another truck after he continued to complain about defects in truck No. 19, Huffman gave contradictory responses, stating at one point that "we never switch drivers" (Tr. 213) and then later acknowledging that any number of other drivers in fact drove truck No. 19 (Tr. 213-217).

Under all the circumstances, I find that the proffered rationale for Johnson's discharge is not credible and was merely a pretext for terminating him because of his protected safety complaints.⁵ Under the circumstances, I find that the Complainant herein has sustained his burden of proving that his layoff on April 4, 2006, and his subsequent termination were in violation of section 105 (c)(1) of the Act.

ORDER

Huffman Trucking, Inc., is hereby directed to immediately reinstate Shawn Johnson, the Complainant herein, to the job of truck driver at its No. 10 A mine or to a similar position at the mine with the same hours, rate of pay and benefits received prior to his termination. The parties hereto are directed to confer with respect to the possibility of reaching a settlement with respect to damages (including back pay) and attorney's fees and to report the results to the undersigned on or before September 14, 2007. Should the parties be unable to agree on all such issues further hearings will thereafter be scheduled.



Gary Melick
Administrative Law Judge
(202) 434-9977

⁴ While there is no requirement in the Act that the "alleged danger" or "safety or health violation" be proven to exist, I note that MSHA issued a citation on April 4, 2006, for a violation based on the third axle leak also reported by Johnson. I therefore find that Johnson's subsequent complaint on April 14, 2006, about third axle leaks was credible and based on a reasonable and good faith belief in the alleged danger and/or safety violation.

⁵ It is also noted that Mr. Huffman testified at hearing that he would not now call Mr. Johnson back to work because of the instant discrimination case brought by Johnson (Tr. 205-206).

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/lh

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

July 26, 2007

SECRETARY OF LABOR, MSHA, on : TEMPORARY REINSTATEMENT
behalf of LAWRENCE PENDLEY, :
Complainant : Docket No. KENT 2007-265-D
: MADI CD 2007-05
v. :
HIGHLAND MINING COMPANY, LLC, : Mine ID 15-02709
Respondent : Highland 9 Mine

**DENIAL OF MOTION TO ENFORCE ORDER OF
TEMPORARY REINSTATEMENT**

The Secretary moves to enforce an order of temporary reinstatement issued on May 30, 2007. The order requires Highland Mining Co. (Highland) to “reinstate Lawrence Pendley to the position from which he was suspended . . . on March 21, 2006, or to an equivalent position, at the same rate of pay and with equivalent duties.” Order 5. The order is based on my finding Mr. Pendley’s complaint of discrimination, which he filed with the Secretary on March 22, 2007, was not frivolously brought.¹

¹ The temporary reinstatement proceeding is related to another matter involving Mr. Pendly and Highland. See Order of Temporary Reinstatement n.5. In the other matter, the Secretary filed a discrimination complaint on behalf of Mr. Pendley alleging Highland disciplined him because of various safety complaints he made in the fall of 2006. The Secretary’s complaint was docketed as KENT 2006-506-D. It was settled and dismissed, but because Mr. Pendley maintained that he was not a party to the settlement, the Commission vacated the order approving the settlement and remanded the matter for “appropriate proceedings”. 29 FMSHRC 164, 166 (April, 2007). In the meantime, Mr. Pendley lodged another complaint with the Secretary alleging he was harassed and laid off because, among other things, in March, 2007 he expressed more safety concerns. He sought temporary reinstatement, which, as noted above, I granted. While all of this was going on, the Secretary continued to investigate Mr. Pendley’s March complaint to determine whether to file another discrimination proceeding based on the incidents in March. The parties and I agreed Docket Kent 2006-506-D should be effectively stayed pending the conclusion of the Secretary’s investigation. If the Secretary filed another complaint, the parties and I further agreed all of the pending matters should be resolved together.

The Secretary recently filed another complaint on Mr. Pendley’s behalf. The case is in the process of being docketed. Once a docket number is assigned and an answer is filed, the case will be assigned to me. As agreed, when I receive the case, I will consolidate it with previously

In seeking the enforcement order, the Secretary asserts, *inter alia*, that “[s]ince his return to work [on June 7, 2007], [Mr.] Pendley . . . has encountered a number of difficulties[.]” Sec’s Mot. 1. Among the “difficulties” (all of which are attested to in Mr. Pendley’s attached affidavit) are a delay in reinstating his health insurance, assignment of more work than in the past, assignment of different and unusual work, encountering a “dummy hanging with a noose around its neck” (*Id.* 2), failure to receive a “man-light” (*Id.* [2]), failure to be placed on the seniority list, the receipt by all miners working in similar positions of letters informing them of their job duties while miners working in all other positions did not receive such “job duty letters”, and, finally, the posting of Mr. Pendley’s “job duty letter” on a mine bulletin board. *Id.* 1-2.

The Secretary states the “difficulties” “appear[] . . . calculated to embarrass and harass Mr. Pendly” and she asserts Highland and its agents “appear to be subjecting . . . [Mr. Pendley] to petty harassment.” Sec’s Br. 2. To remedy this, the Secretary wants an order enforcing the original order of temporary reinstatement and again directing Mr. Pendley’s “reinstatement in his prior or equivalent position”. Sec’s Mot. 2. The Secretary also wants the enforcement order to require “appropriate work assignments in line with the number of hours in a shift and comparable to assignments given to other miners in the same position.” *Id.* 2-3. The Secretary further wants the order to require Mr. Pendley “receive all benefits, in pay and otherwise, including seniority list status, and equipment that he normally would have been awarded or received had he not been discharged.” Sec’s Mot. 3. Additionally, the Secretary wants Highland to “ensure[] . . . Mr. Pendley is not harassed or treated disparately based upon his reinstatement or other protected activity”, and she wants a copy of the enforcement order posted on a bulletin board in a “common area” of the mine. *Id.*

In response, Highland either denies the Secretary’s allegations or claims incidents regarding the direction of its work force are wholly within its prerogatives as Mr. Pendly’s employer. Highland asserts Mr. Pendley’s health insurance was in fact reinstated on June 6, 2007 back to its original effective date so that Mr. Pendley never suffered a lapse of coverage; that the letter detailing his work assignments was issued to all three miners holding the job of supply man after Mr. Pendley appeared to be confused about his work duties and that all of the work assignments were completely within Mr. Pendley’s job description; that Highland has no evidence the letter was placed on the mine bulletin board; that the “dummy incident” was directed at another employee, not at Mr. Pendley; that Mr. Pendley’s “man-light” was assigned to him on June 8, and that in the interim other lights were available and apparently were used by Mr. Pendley; that Mr. Pendley was in fact on the seniority list whether his name appeared on a posted roster or not, that he was offered a job based on his seniority during the week of June 18

filed Docket No. Kent 2006-506-D. I intend to hear the matters on September 10, 11 and 12, 2007 in Evansville, Indiana, or at an earlier date if possible, and will soon issue an order to that effect.

² The Secretary’s counsel orally advised me the term refers to a miner’s cap lamp.

and that he turned it down. Finally, the company argues the Act does not provide for a copy of any order arising as a result of the Secretary's motion to be placed on a mine bulletin board. Highland's Response 1-6. Like the Secretary, Highland supports its assertions with affidavits.

RULING

The motion is **DENIED**. Virtually all of the things the Secretary seeks are included *sub silentio* in the original order of reinstatement, which, requires Highland to reinstate Pendley to his prior position or to an equivalent position, at the same rate of pay and with equivalent duties. The requirement Pendley return to his old job or to an equivalent position carries with it the requirement he return under the same circumstances that would exist if he had not been suspended. In other words, under the original order, Mr. Pendley was required to be assigned to his usual work duties or to those someone in his position normally would be assigned. Moreover, under the original order Mr. Pendley was required to receive the same benefits and equipment he previously received or to be given the benefits and the equipment someone in his position normally would receive. Further, under the original order, Mr. Pendley was required to be returned to his old place on the seniority list or to the place he would have held had he not been suspended, and he was required to be treated as he had been treated prior to his suspension or to be treated as all other miners in his position currently are treated.

To issue a detailed order specifying requirements and prohibitions included in the previous order would be to engage in an essentially meaningless exercise. If the Secretary believes the initial order is not being fully enforced, her remedy is to go to a United States district court and seek injunctive relief, a restraining order or other appropriate relief. Like it or not, the Commission and its judges have no authority to enforce their own orders. 30 U.S.C. §818(a)(1)(A).

Further, and as noted, all of the Secretary's allegations have been challenged, and the process of resolving the factual conflicts created by the challenges would involve the Commission and the parties in a hearing concerning not so much the basis for the original order as new allegations of discrimination. Such allegations are reserved in the first instance for the employee to complain of and for the Secretary to investigate. It is the Secretary, not the Commission, who is required to make the initial findings regarding whether the complained of incidents constitute prohibited discrimination.

While I recognize I have continuing jurisdiction over the original reinstatement order (29 C.F.R. §2700.45(e)(4)), I also recognize, as should the parties, that all disputes involving implementation of the original order are not amenable to resolution by the Commission. With the possibility of still more complaints looming on the horizon, rather than moving for orders to enforce orders, it behooves all involved to redouble their efforts to promptly settle the pending matters and to end what promises to be interminable litigation. In the meantime, the Secretary should advise Mr. Pendley regarding the realities of the work place and the Secretary's and Commission's inability to right every perceived wrong or slight, and Highland should consider offering Mr. Pendley economic reinstatement to minimize the chances of future allegations of discrimination. In the alternative, Highland should make every effort to ensure Mr. Pendley's reinstatement in fact and in appearance comports with the letter and intent of the original order.



David F. Barbour
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Washington, D.C. 20001-2021
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July 26, 2007

WAMPUM HARDWARE COMPANY, : CONTEST PROCEEDINGS
Contestant :
 :
 : Docket No. LAKE 2007-155-RM
v. : Citation No. 6169828; 06/20/2007
 :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION, MSHA, : Petersburg Mine
Respondent : Mine ID 33-04195 BH8

ORDER OF ASSIGNMENT

This case is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 518(d). The Contestant "requests that a hearing be scheduled promptly on this matter."

Other than this bare request, the Contestant has not offered any reason for holding an expedited proceeding. Under Commission Rule 52, which was not referenced in the Contestant's motion, a party may request an expedited hearing on as little as "4 days notice." 29 C.F.R. § 2700.52(b). While the Procedural Rules do not offer a basis upon which such a request may be granted, judges have held that a mine operator must show "extraordinary or unique circumstances resulting in continuing harm or hardship." *Mountain Cement Co.*, 23 FMSHRC 694, 694 (June 2001) (ALJ); *Consolidation Coal Co.*, 16 FMSHRC 495, 496 (Feb. 1994) (ALJ); *Southwestern Portland Cement Co.*, 16 FMSHRC 2187, 2187 (Oct. 1994) (ALJ). Whether a party should be granted an expedited hearing is at the discretion of the assigned judge. *See, e.g., Wyoming Fuel Co.*, 14 FMSHRC 1282, 1287 (Aug. 1992) (Commission holding that "informed discretion remains with Commission judges" in scheduling expedited hearings on imminent danger orders.)

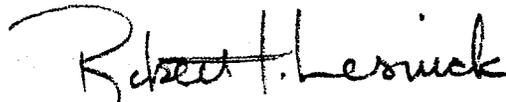
Since the Contestant does not mention Rule 52 and does not attempt to make a showing of extraordinary or unique circumstances, I will treat the request for an expedited proceeding as a request for a hearing prior to the assessment of civil penalty. Counsel must be mindful that "expedited hearing" is term of art for Rule 52 proceedings, and she should not use this term unless she is requesting such a proceeding.

The assigned administrative law judge will make the determination as to whether a hearing will be held prior to the assessment of civil penalty or the filing of a civil penalty case.

Accordingly, this case is hereby assigned to Administrative Law Judge Jerold Feldman. All future communications regarding this case should be addressed to Judge Feldman at the

following address:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, D.C. 20001
Telephone: (202) 434-9967
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Robert J. Lesnick
Chief Administrative Law Judge

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Washington, DC 20001-2021
Telephone No.: 202-434-9950
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July 27, 2007

R & D COAL COMPANY, INC., : CONTEST PROCEEDINGS
Contestant :
 :
 : Docket No. PENN 2007-50-R
 : Citation No. 7008536;12/01/2006
 :
 v. :
 : Docket No. PENN 2007-51-R
 : Order No. 7008537;12/01/2006
 :
 SECRETARY OF LABOR, :
 MINE SAFETY AND HEALTH : Docket No. PENN 2007-52-R
 ADMINISTRATION, (MSHA), : Order No. 7008538;12/01/2006
 Respondent :
 :
 : Docket No. PENN 2007-53-R
 : Order No. 7008539;12/01/2006
 :
 : Docket No. PENN 2007-54-R
 : Order No. 7008540;12/01/2006
 :
 : Docket No. PENN 2007-55-R
 : Citation No. 7009281;12/01/2006
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 : Docket No. PENN 2007-56-R
 : Order No. 7009282;12/01/2006
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 : Docket No. PENN 2007-57-R
 : Citation No. 7009283;12/01/2006
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 : Docket No. PENN 2007-58-R
 : Order No. 7009284;12/01/2006
 :
 : Docket No. PENN 2007-59-R
 : Citation No. 7009285;12/01/2006
 :
 : Docket No. PENN 2007-82-R
 : Citation No. 7009164; 12/08/2006
 :
 : R & D Coal Mine
 : Mine ID 36-02053

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-236
Petitioner	:	A. C. No. 36-02053-115138
v.	:	
	:	
R & D COAL COMPANY, INC.,	:	R & D Coal Mine
Respondent	:	
	:	

CONSOLIDATION ORDER
ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). The Notices of Contest are scheduled for trial on September 18, 2007. The petition proposes civil penalties for the citations and orders contested in the Notices of Contest. Accordingly, all of the proceedings are **CONSOLIDATED** for hearing.

On June 28, 2007, the Secretary, by counsel, filed a Motion to Stay the proceedings because the Mine Safety and Health Administration (MSHA) is making “a criminal referral of a matter arising from the same facts and circumstances as the instant case to the United States Attorney for the Middle District of Pennsylvania.” The motion requests that “all civil proceedings” and “all discovery in all civil proceedings” be stayed. The operator opposes the motion. I have reviewed the arguments of counsel made in a telephone conference call held on July 6, 2007; a July 13, 2007, letter submitted by the First Assistant U.S. Attorney for the Middle District of Pennsylvania for *in camera* review; and the briefs filed by the parties. For the reasons set forth below, the motion is granted.

Discussion

The Commission has held that the following factors should be considered in determining whether to grant a stay in cases where the prospect of criminal prosecution exists: (1) the commonality of evidence in the civil and criminal matters; (2) the timing of the stay request; (3) prejudice to the litigants; (4) the efficient use of agency resources; and (5) the public interest. *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995). All of these factors lead to the conclusion that the stay should be granted.

Commonality of Evidence

This element is “a key threshold factor,” since civil proceedings are properly stayed if they cover the same evidentiary material as the criminal case. *Id.* This case involves 12 orders and citations. All but two of them were issued on December 1, 2006. The other two were issued

on December 8 and 21, 2006, respectively. All but Order No. 7009170, which is not the subject of a contest proceeding, allege that the violation either resulted in, or was a contributing factor toward, fatal injuries suffered by a miner in the mine on October 23, 2006. It is hard to imagine how a criminal prosecution resulting from the October 23 fatal accident would not involve the same evidence as the eleven contest proceedings. Indeed, the letter from the U.S. Attorney does no more than draw this obvious conclusion.

With regard to this factor, the operator argues that:

Here, there are only a few core citations that could support a criminal referral or pursuit by the Justice Department, and R&D Coal avers that none of its actions warrant such a referral and that it may well be vindicated (or, in the alternative, any citations that are sustained may well be reduced to low or moderate negligence) if the civil matter can proceed to trial in a timely manner

(Cont. Opp. at 4.) Significantly, the company acknowledges that the citations could be involved in a criminal referral. The rest of the argument misses the point, however. The issue is not whether the orders and citations themselves support a criminal referral, but whether they involve the same evidence. In this connection, even if for some reason they were reduced to low or moderate negligence, the evidence would still be the same.

Unlike *Buck Creek*, where the Commission vacated a stay order in a case involving over 500 violations because there had not been a showing of commonality of evidence, there are only 12 violations in this case. They all relate to the October 23 fatality and the investigation thereof. Accordingly, I conclude that this factor supports the stay request.

Timing of the Request

The Commission has held that where there has been no criminal investigation and, therefore, no reference to the U.S. Attorney for criminal prosecution there is a “reduced need for a . . . stay.” *Capitol Cement Corp.*, 21 FMSHRC 883, 890 (Aug. 1999). Such is not the case here. MSHA has conducted its investigation and reference to the U.S. Attorney is imminent. The U.S. Attorney is anticipating referral within the next 60 days.

The operator asserts that until “an actual referral is made, the case should not be stayed, and should proceed to trial in mid-September. Discovery, including depositions should continue without further hindrance.” (Cont. Opp. at 5.) Thus, while recognizing that a stay is appropriate after referral, the operator apparently seeks to use the liberal discovery allowed in a civil case, to prepare for the criminal case. This is one of the main reasons why civil cases are stayed for criminal proceedings. As the Commission has noted:

Criminal defendants enjoy limited discovery compared with the

broad scope of discovery available in civil proceedings. *Compare* Rules 26 through 37, Fed. R. Civ. P., with Rules 15 and 16, Fed. R. Crim. P.; *see also Campbell v. Eastland*, 307 F.2d [478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963)]. When the government moves for a stay, it is generally seeking to prevent the prejudice that can result from a defendant's use of civil discovery to learn the government's strategy and evidence in the criminal matter. *See Campbell*, 307 F.2d at 487. Accordingly, courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable to them in the parallel criminal case. *E.g., United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966), *citing Campbell*.

Buck Creek, 17 FMSHRC at 504.

The Contestant also suggests that the Secretary is using the stay request as a delaying tactic and to gain an advantage in the criminal proceeding. This argument is advanced based solely on the timing of the case thus far. I find no such bad faith on the part of the Secretary. Indeed, these cases have been progressing much faster than the normal case.

The request for a stay was made as soon as the Secretary's counsel who is handling these cases was informed that a criminal referral was going to be made. It was made less than nine months after the accident occurred. The timing of the request is appropriate and there is no evidence that it was delayed for tactical reasons. Therefore, I find that this second factor also supports staying these cases.

Prejudice to the Litigants

The operator argues that its "ability to call necessary witnesses at trial will be unduly hampered if the stay were granted. A delay would prejudice Contestant because of disbursal of witnesses and the prospect of faded memories." (Cont. Opp. at 6.) The Contestant speculates that many of the MSHA witnesses are near retirement age or are in ill health. However, these are problems that can occur in any case. Further, the problem cuts both ways. Many of the MSHA employees that the operator postulates "may be unavailable" may also be witnesses the Secretary intends to call.

On the other hand, as discussed under the second factor, the government's criminal case could be significantly prejudiced if the stay is not granted, by the operator's using civil discovery to find out about the criminal case. The Commission has said that: "In evaluating the harm that may be caused by granting or refusing to grant a stay, the judge is required to balance the litigant's competing interests. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987)." *Id.* Here the Contestant has alleged no specific or actual prejudice, while the

government's case could suffer actual harm if the stay is denied. Consequently, I conclude that this factor favors granting the stay.

Efficient Use of Agency Resources

This factor also supports granting the stay. The Contestant has expressed a desire to proceed with discovery. Yet, with a criminal proceeding pending, any witness who may be subject to criminal prosecution is likely to assert his privilege against self-incrimination at a deposition or at trial of the civil case. Moreover, the Contestant suggests no remedy for this problem, stating only that: "Contestant can only speculate as to who will or will not invoke the privilege, but it is certain that the Secretary may call other witnesses who are available to provide substitute, but equivalent, testimony." (Cont. Opp. at 11.) However, if the civil proceeding is stayed, "it obviates the need to make rulings regarding potential discovery disputes involving issues that may affect the criminal case" and insures "that common issues of fact will be resolved and subsequent civil discovery will proceed unobstructed by concerns regarding self-incrimination." *Maloney v. Gordon*, 328 F.Supp.2d 508, 513 (D. Del. 2004).

It is apparent that not granting the stay would hinder rather than advance the efficient use of agency resources. "Furthermore, the outcome of the criminal proceedings may guide the parties in settlement discussions and potentially eliminate the need to litigate some or all of the issues in [these cases]." *Id.* It is even possible that the disposition of the criminal case will also dispose of the civil case. See e.g. *Southmountain Coal, Inc. et al*, 17 FMSHRC 1081 (June 1995) (ALJ) (civil penalty and contest cases dismissed in conjunction with the acceptance of the operator's guilty pleas in a related criminal proceeding and agreement to pay substantial criminal and civil penalties).

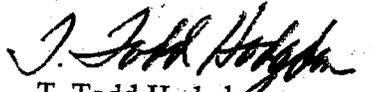
The Public Interest

Many years ago, the Commission observed that "there is a substantial public interest in the expeditious determination of whether penalties are warranted." *Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (Mar. 1980). However, that was in a decision holding that an administrative law judge did not abuse his discretion in lifting a stay, which had been in effect for over a year, for 20 of 28 cases which did not have a commonality of evidence with the criminal case. *Id.* at 634. That is not the situation here. All of the 12 violations in this case are inextricably intertwined with the fatal accident which is the subject of the Secretary's criminal referral, and proceedings have not yet been stayed.

Moreover, there is also a substantial public interest in the criminal prosecution of those who criminally violate the Mine Act. Indeed, this interest may be stronger than any interest in determining whether penalties are warranted. Accordingly, I conclude that this factor also supports staying these cases.

Order

As discussed above, all of the factors enumerated in *Buck Creek* to be considered in deciding whether to stay civil proceedings for criminal proceedings lead to the conclusion that these cases should be stayed. Therefore, the motion of the Secretary is **GRANTED** and further proceedings in these cases, specifically including discovery, are **STAYED** until the criminal proceedings have been completed. Counsel for the Secretary is directed to inform the judge, in writing, of the status of the criminal proceedings on **September 28, 2007**, and on the last working day of each quarter thereafter until the stay is lifted,


T. Todd Hodgden
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

August 3, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2006-29
Petitioner	:	A.C. No. 46-08909-70032 A
	:	
v.	:	
	:	
KENNETH D. BOWLES, employed by	:	Mine No. 1
NEW RIVER MINING COMPANY,	:	
Respondent	:	

ORDER DENYING MOTION FOR SUMMARY DECISION

On July 27, 2007, counsel for the Secretary filed a motion for summary decision. The Secretary asserts, based on facts she deems not to be in dispute, she is entitled to summary decision as a matter of law. She requests Order No. 7227134 be affirmed and a finding be entered that the Respondent, Kenneth Bowles, knowingly violated 30 C.F.R. §75.220(a)(1) as alleged in the order. The Secretary further requests Mr. Bowles be assessed a civil penalty of \$1,500.00 for the violation.

The Secretary's motion is carefully drafted. It is persuasive on its face. However, it is defective in one critical regard, and even though Mr. Bowles has not yet filed a response, the motion cannot be granted. The Commission's rule on summary decisions states in part, "At any time after commencement of a proceeding and no later than 25 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding." 29 C.F.R. §2700.67(a). On March 30, 2007, an amended notice was issued scheduling this case for hearing on August 14, 2007. Because the motion for summary decision was filed "later than 25 days before the date fixed for the hearing," it cannot be granted.

Mr. Bowles should find little comfort in this denial. Critical components of the motion are based on facts established by Mr. Bowles's failure to respond to requests for admissions. Mr. Bowles is advised that under applicable Federal Rules of Civil Procedure, "A matter is admitted unless, within 30 days after service of the request or within such shorter or longer time as the court may allow or as the parties may agree to in writing... the party to whom the request is directed serves upon the party requesting an admission a written answer or objection addressed to the matter." Fed. R. Civ. P. 36(a). Moreover, "[A]ny matter admitted under [the] rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed. R. Civ. P. 36(b).

Accordingly, the parties are advised the hearing on this matter will go forward as scheduled. Unless good cause is shown by Mr. Bowles, matters deemed admitted will be considered conclusively established.



David F. Barbour
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 31, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-321-M
Petitioner	:	A. C. No. 04-01299-111706 G861
v.	:	
	:	
MORNING GLORY GOLD MINES,	:	Sixteen to One Mine
Respondent	:	

ORDER DENYING MOTION FOR RECUSAL

On August 29, 2007, the Respondent, Morning Glory Gold Mines, by its owner, Michael M. Miller, filed an affidavit requesting that the undersigned Administrative Law Judge withdraw from the instant proceeding on the grounds that “throughout his proceeding with the company [in the case of Docket No. WEST 2002-226-M, Judge Melick] appeared to have a bias towards the MSHA agency and failed to act as an impartial participant”. In his affidavit Mr. Miller cites the unpublished memorandum decision of the United States Court of Appeals for the 9th Circuit (No. 04-71301) filed March 30, 2006, in which the court reversed the decision of the undersigned judge in the case of *Secretary v. Original Sixteen to One Mine, Inc.*, 26 FMSHRC 21 (January 2004) (ALJ) finding that a lead miner was an agent of the mine operator for purposes of imputing negligence to the mine operator. While the judge’s findings of violations in the case were not disturbed by the Circuit Court, the Court nevertheless vacated the assessment of penalties against the operator surmising that any penalty assessment would be “arbitrary and capricious”. It is noted that the Commission had previously denied review of the judge’s decision.

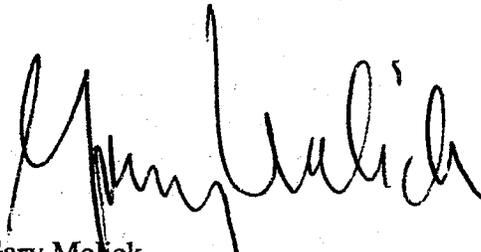
Other than citing the reversal of the judge’s findings that the lead miner was an agent of the operator for purposes of imputing negligence to the operator and citing Mr. Miller’s opening statement as evidence, the Respondent alleges no specific example of bias. Indeed, the undersigned judge has subsequently presided over hearings involving two other cases of the Original Sixteen to One Mine and mine owner Michael Miller (Docket Nos. WEST 2004-330-M and WEST 2004-472-M) and issued a decision in those cases on August 19, 2005. Review was denied by the Commission on September 29, 2005. In his recent affidavit Mr. Miller does not allege that the undersigned Judge showed “bias towards the MSHA agency” or “failed to act as an impartial participant” in these cases.

Commission Rule 81, 29 C.F.R. § 2700.81 permits a party to request a judge to withdraw on the grounds of personal bias or other disqualification. Commission Rule 81(b) requires, however, that a party make such a request by "filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification." The Respondent herein has failed to set forth "in detail the matters alleged to constitute personal bias or other grounds for disqualification". In the case of *Secretary of Labor v. Medusa Cement Company* 20 FMSHRC 144, 148-149 (February 1998) the Commission discussed when recusal may be appropriate. In that case the Commission quoted from the Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994) where the court distinguished between a judges' opinions derived from "extra judicial source[s]" and those derived from a prior judicial proceeding. *Id.* at 550-551. The Commission noted that the court held therein as follows:

First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. ... [T]hey cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required...when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the source of...current...or...prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgement impossible.

In his affidavit filed herein, the Respondent's owner cites only the decision of the 9th Circuit Court of Appeals reversing the undersigned judge's findings that the negligence of a lead miner should be imputed to the mine operator and the judge's use of Mr. Miller's admissions in his opening statement as a basis for finding "bias". Since these are not appropriate grounds for recusal, the Respondent's motion herein must be denied.

While I have denied the Motion for Recusal I note that the undersigned judge appears to have been disproportionately assigned cases involving the Sixteen to One Mine over the past several years. Under Commission Rule 50, 29 C.F.R. § 2700.50 cases are assigned to judges "in rotation as far as practicable". While there is no reason to believe that the instant case was not assigned in accordance with that rule, there may be such an appearance. Accordingly, I am referring the instant case to the Chief Judge for reassignment.



Gary Melick
Administrative Law Judge
(202) 434-9977

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Michael M. Miller, Owner, Morning Glory Gold Mines. P.O. Box 941, Alleghany, CA 95910

/lh

29 FMSHRC 745

