

JULY AND AUGUST 2008

COMMISSION DECISIONS AND ORDERS

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JULY AND AUGUST 2008

Review was granted in the following cases during the months of July and August 2008:

Secretary of Labor, MSHA on behalf of Lawrence Pendley v. Highland Mining Company, Docket No. KENT 2007-383-D. (Judge Barbour, June 5, 2008)

Secretary of Labor, MSHA v. SCP Investments, LLC., Docket Nos. SE 2006-148-M, SE 2006-163-M. (Judge Feldman, June 24, 2008)

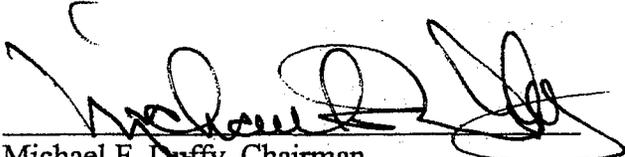
COMMISSION DECISIONS AND ORDERS

record that MSHA's Civil Penalty Compliance Office in Arlington, Virginia, received a contest of the proposed penalty for Citation No. 7063809.¹

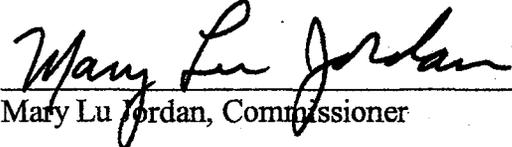
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

¹ By the terms of the proposed assessment, payment of a proposed penalty must be sent to MSHA at a Pittsburgh, Pennsylvania, address, while the form contesting a proposed penalty must be sent to MSHA at an Arlington, Virginia, address.

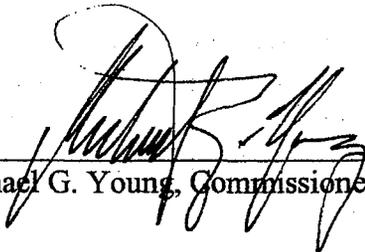
Having reviewed T.J.S. Mining's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether T.J.S. Mining timely contested the penalty proposal and, if not, whether good cause exists for granting relief from the final order. If it is found that T.J.S. Mining did, in fact, contest the penalty proposed, the date of the contest should be ascertained. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



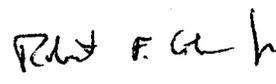
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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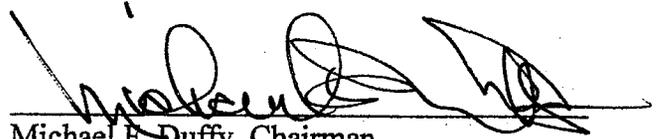
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**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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Solicitor's Office, who instructed the company's counsel to submit the proposed assessment contest with a cover letter to the Civil Penalty Compliance Office. Five Star explains that it inquired with the Civil Penalty Compliance Office when it did not hear back from MSHA and was told to file a request to reopen with the Commission. The Secretary states that she does not oppose Five Star's request to reopen 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).

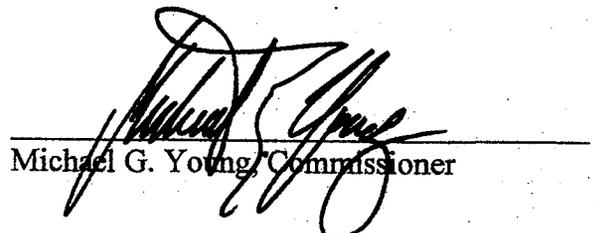
Having reviewed Five Star's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Five Star's failure to timely contest the penalty proposal and whether relief from the final order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



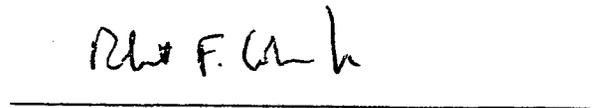
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Mary Lu Jordan, Commissioner



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Robert F. Cohen, Jr., Commissioner

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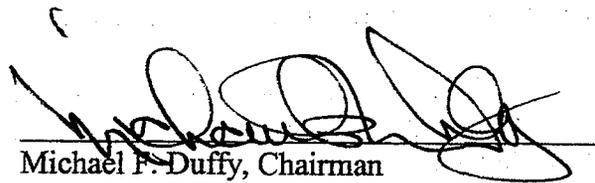
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Chief Administrative Law Judge Robert J. Lesnick
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According to Chemical Lime, it then learned that it was too late to contest the penalties related to the citations that had been discussed with MSHA at conference. The Secretary does not oppose the reopening of the 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) 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).

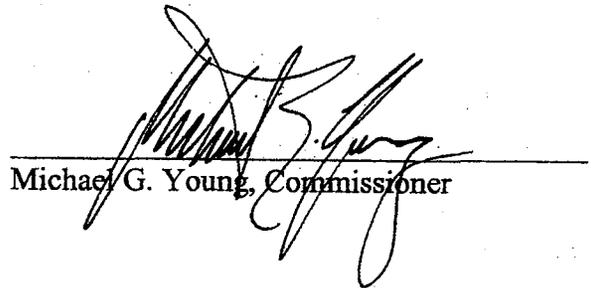
Having reviewed Chemical Lime's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Chemical Lime's failure to timely contest the penalty proposals and whether relief from the final orders should be granted.¹ 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

¹ While our dissenting colleague suggests that we grant the operator's request, there is not a sufficient factual record to permit us to make such a decision in this case.

Commissioner Cohen, dissenting:

I do not believe that this matter needs to be remanded to the Chief Administrative Law Judge. Chemical Lime filed a motion to reopen a penalty assessment in which it described in detail why it did not file a notice of contest of the proposed penalty. Its motion was fully documented. The Secretary did not dispute any of the facts alleged by Chemical Lime, and so we accept them as true for purposes of this motion.

The undisputed facts establish that Chemical Lime questioned 14 of 24 citations issued against it by MSHA. As to seven of these citations, the operator timely requested a conference. The conference was held on October 29, 2007, at the conclusion of which MSHA informed Chemical Lime that it would reconsider these seven citations and let the operator know its position.

On December 13, 2007, while the seven conferenced citations were still being considered, MSHA issued penalty assessments as to all 24 citations. On January 8, 2008, Chemical Lime sent a timely notice of contest to MSHA in which it contested penalties resulting from seven citations which were not in the conference procedure. In an accompanying cover letter, Chemical Lime stated, “[n]ote that this contest is in addition to citations now waiting a decision on conference.” Chemical Lime states that because the results of the conference had not yet been received, it did not know whether there would be any aspects of the seven conferenced citations in dispute. At the time, Chemical Lime was not represented by counsel.

On January 24, 2008, MSHA informed Chemical Lime that it was upholding six of the conferenced citations as issued and modifying the other citation. It was only then that Chemical Lime learned that the deadline for submitting a notice of contest was dependent on the date of the proposed penalty assessment rather than the date of the conference results. Chemical Lime acted within a reasonable time in submitting this motion to reopen with the Commission. The Secretary does not oppose this motion to reopen the penalty assessment.

Under these circumstances, I do not see how the Chief Administrative Law Judge can do anything but grant the Rule 60(b) motion for the reason that Chemical Lime’s failure to timely file a notice of contest of the seven conferenced citations was the result of a reasonable mistake. Specifically, (1) Chemical Lime timely disputed the seven citations and sought to challenge them through the conference procedure; (2) while waiting the results of the conference, Chemical Lime timely filed a notice of contest of penalties for seven other citations and explicitly stated that this was “in addition to” the citations which were pending in conference; (3) Chemical Lime did not have legal counsel when it made the mistake of not contesting the penalty assessments on all 14 citations; and (4) Chemical Lime sought to rectify its mistake within a reasonable time.

In light of undisputed facts and a clearly reasonable mistake, I believe that the Commission itself should grant this motion rather than remand the case to the Chief Administrative Law Judge to reach the same result. The evidence presented on this record supports no other conclusion than that good cause existed for Chemical Lime's failure to timely contest the penalty assessment. Consequently, a remand to the Chief Administrative Law Judge would serve no purpose. *See American Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

Robert F. Cohen, Jr.

Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 2008

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

v.

DRUMMOND COMPANY, INC.

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Docket No. SE 2008-575
A.C. No. 01-02901-137662

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 9, 2008, the Commission received from Drummond Company, Inc. (“Drummond”) 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).

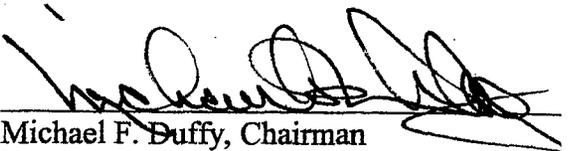
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On January 30, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Drummond. Drummond asserts that it had previously filed contests of two of the citations contained in the assessment: Citations Nos. 7692121 and 7692122, assigned to Docket Nos. SE 2007-384-R and SE 2007-385-R. Drummond states that it intended to contest the penalties for the two citations but that its safety superintendent had to assume additional duties and was unable to timely contest them. The Secretary states that she does not oppose the reopening of the assessment.

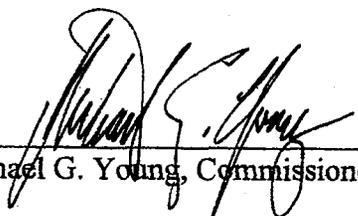
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

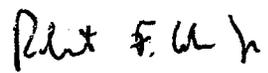
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil 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 Drummond’s request and the Secretary’s response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Drummond’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


Robert F. Cohen, Jr., 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 9, 2008

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

v.

DRISCO TRUCKING COMPANY

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Docket No. CENT 2008-473-M
A.C. No. 14-00124-133600 R993

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 9, 2008, the Commission received from Drisco Trucking Company ("Drisco") 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).

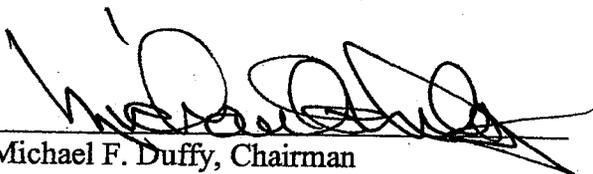
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On December 7, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment covering Citation No. 7937378 to Drisco. In its letter, Drisco asserts that the proposed penalty assessment was inadvertently misplaced and, on February 1, 2008, it attempted to contest the citation with MSHA. MSHA informed Drisco that it could not honor its request for a hearing because of Drisco's failure to contest the case within 30 days. In seeking reopening, Drisco asserts that this is its first citation and that it is unfamiliar with Mine Act proceedings. The Secretary states that she does not oppose the reopening of the assessment.

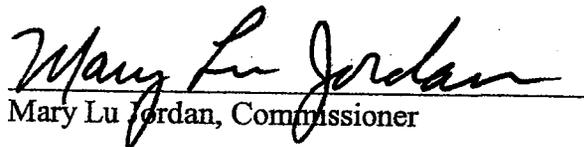
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to

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).

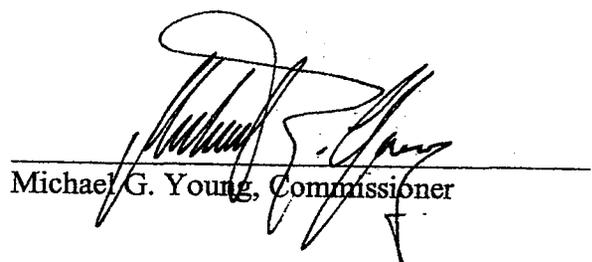
Having reviewed Drisco’s request and the Secretary’s response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Drisco’s failure to timely contest the penalty proposal and whether relief from the final order 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.



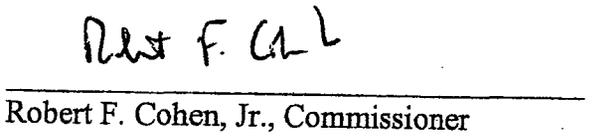
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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July 10, 2008

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

v.

LITTLE EAGLE COAL CO.

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Docket No. WEVA 2008-1085
A.C. No. 46-08676-141980

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

ORDER

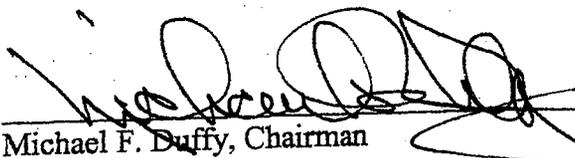
BY THE COMMISSION:

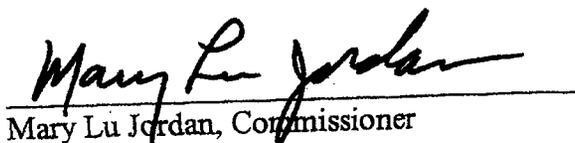
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On May 8, 2008, the Commission received from Little Eagle Coal Co. (“Little Eagle”) a motion by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

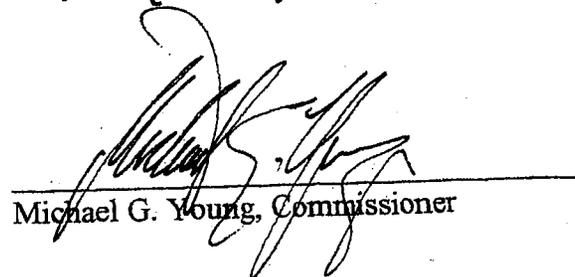
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

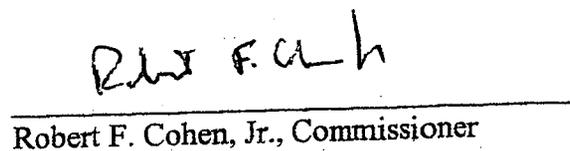
On February 27, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Little Eagle Proposed Assessment No. 000141980, which proposed civil penalties for several citations. Little Eagle states that it mailed its contest of the proposed penalties for some of the citations on April 4, 2008, as the result of a delay in forwarding the assessment form. In response, the Secretary states that after reviewing the records in this case, she determined that the contest of the proposed assessment was timely, and docketed by the Commission as WEVA 2008-957.

Having reviewed Little Eagle's request and the Secretary's response, we conclude that the proposed assessment at issue has not become a final order of the Commission because Little Eagle timely contested it. We deny Little Eagle's motion as moot. Appropriate proceedings on Proposed Assessment No. 000141980 shall proceed in Docket No. WEVA 2008-957 pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. See *Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
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July 15, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 2002-207
v.	:	WEST 2002-278
	:	
PLATEAU MINING CORPORATION	:	

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

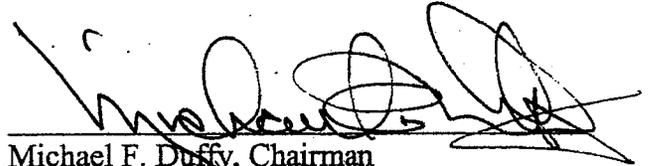
ORDER

BY THE COMMISSION:

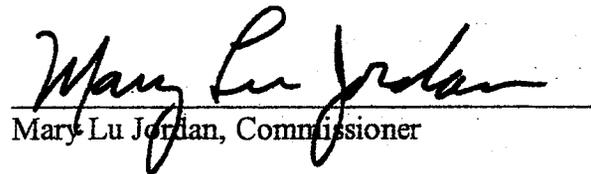
These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). The Department of Labor’s Mine Safety and Health Administration issued Citation No. 7143395 alleging a violation of 30 C.F.R. § 75.334(b)(1) to Plateau Mining Corporation (“Plateau”). Administrative Law Judge Richard Manning affirmed the citation and assessed a civil penalty of \$25,000 for the violation. 25 FMSHRC 738, 763 (Dec. 2003) (ALJ). Plateau filed a petition for discretionary review, challenging the judge’s determination, which the Commission granted. On review, Commissioners were evenly divided regarding whether Plateau violated section 75.334(b)(1). 28 FMSHRC 501, 510 (Aug. 2006). The effect of the split decision was to allow the judge’s affirmation of Citation No. 7143395 and assessment of penalty to stand. *Id.* (citations omitted).

In *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176 (10th Cir. 2008), the Tenth Circuit Court of Appeals reversed the judge’s decision. The court determined that substantial evidence did not support the judge’s finding that Plateau was on notice that its ventilation system was performing inadequately. *Id.* at 1197. On May 9, 2008, the court issued its mandate in this matter, returning the case to the Commission’s jurisdiction.

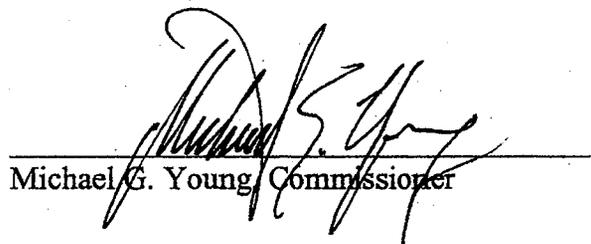
Accordingly, consistent with the decision of the Tenth Circuit, we hereby vacate Citation No. 7143395 and the penalty assessed by the judge.



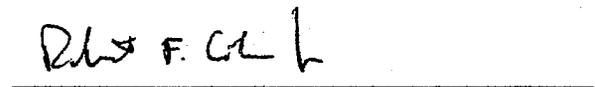
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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Judge Richard Manning
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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).

In its motion, the operator states only that its failure to timely contest the penalty involved “an unintentional error in the transfer of the Proposed Assessment from Atlanta Sand to counsel” which resulted in a “misunderstanding regarding whether the penalties were mailed to counsel and counsel’s not learning that the penalties had been assessed until after the time for filing a hearing request had run.” Because Atlanta Sand provides no specific facts justifying relief, we deny its motion without prejudice.

Atlanta Sand bases its request to reopen on Rule 60(b) of the Federal Rules of Civil Procedure. However, in a recent case involving a motion to reopen pursuant to Rule 60(b), the Commission denied without prejudice an operator’s request that was based merely on “clerical error,” because this was not “a sufficiently detailed explanation.” *Eastern Associated Coal LLC*, 30 FMSHRC _____, slip op. at 1-3, No. WEVA 2008-488 (May 16, 2008). In that decision, in which we noted the failure of operators to “provide meaningful explanations for their failure to timely contest proposed penalty assessments” in several other cases, the Commission insisted that if the operator chose to refile its request to reopen, it must “disclose with specificity its grounds for relief.” *Id.* at 3, n.2.

Similarly, in *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007), the motion to reopen was based on general assertions of “clerical error, mistake and excusable neglect” so that “the citations were misplaced and not timely responded to.” The Commission denied the request without prejudice due to the operator’s failure to provide any specific explanation to justify its failure to file a timely contest and required the operator to disclose with specificity its grounds for relief if it decided to refile. *Id.* at 570-71.

Just as the motions in *Eastern Associated* and *James Hamilton* were found to be insufficiently clear, the submission by Atlanta Sand fails to provide sufficient information to determine whether or not good cause may exist to reopen the final order. Indeed, the motion is so lacking in facts that it does not even provide a basis for a remand of the matter to an administrative law judge.

The federal courts, like the Commission in the above-cited cases, have required specificity in motions filed pursuant to Rule 60(b). In *Park Corp. v. Lexington Insurance Co.*, 812 F.2d 894 (4th Cir. 1987), for example, the Fourth Circuit affirmed the district court's denial of Lexington's motion for relief from a judgment (entered due to its failure to respond to a complaint) filed pursuant to Rule 60(b)(1) and (6). *Id.* at 896. In support of its motion, Lexington had filed only an affidavit explaining that the summons and complaint were received in the mail room, signed for by a Lexington employee, disappeared, and thus were not brought to the attention of the appropriate staff so that the matter could be referred to an attorney and an answer filed. *Id.* at 897. The Fourth Circuit stated that because Lexington could give no reason for the loss of the documents, the district court could not determine whether it had an acceptable excuse for the default. *Id.* In holding that the district court did not abuse its discretion, the Fourth Circuit noted that "to hold otherwise would be to allow defaulting defendants to escape the consequences of their inaction simply by asserting that the legal process to which they failed to respond was lost." *Id.*

In a similar case in which a 60(b) motion was based on the disappearance of a summons and complaint, the district court, in denying the motion, emphasized that "[w]here a party asserts excusable neglect as the basis for its omission, it is insufficient for the party to state simply that the summons and complaint, once properly accepted, disappeared." *UMWA v. Banner Coal & Land Co.*, 2006 WL 4524337, at *3 (S.D. W.Va. 2006).

Also, in *U.S. v. \$3,216.59 in U.S. Currency*, 41 F.R.D. 433, 434 (D.S.C. 1967), the district court denied a Rule 60(b) motion that had alleged the default was due to "excusable neglect and mistake of counsel." It emphasized that

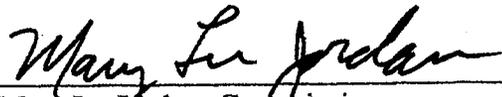
"[i]t is not enough that movant assert that this default resulted from a mistake. He must go farther. The nature of the mistake itself must be stated, so that the Court may determine whether it is such a mistake as to warrant relief under 60(b). Rule 9, Rules of Civil Procedure expressly requires that in all averments of mistake "the circumstances constituting . . . mistake shall be stated with particularity."

Id. at 435 (citation omitted). The Court noted that the affidavit upon which the movant based his motion nowhere stated the nature of the mistake made by the attorney. *Id.*

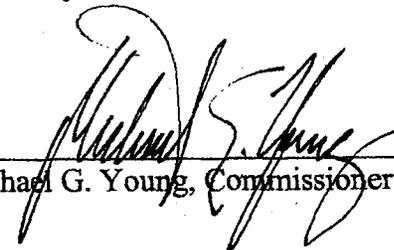
Moreover, in *Vela v. Western Electric Co.*, 709 F.2d 375, 377 (5th Cir. 1983), the Fifth Circuit upheld the district court judge's refusal to grant relief when counsel for plaintiffs asserted that his default was due to "excusable neglect" but advanced no explanation for his dereliction. *See also* 21A Fed. Proc., L.Ed. § 51.139 (2008) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity. . . . Thus, it is

insufficient for a movant to assert that his or her default resulted from a mistake; rather, the movant must assert the nature of the mistake so that the court may determine whether it is a mistake warranting relief under Rule 60(b)(1) – and this averment must be in the moving papers and not merely in the argument.”). Thus, whether it is the disappearance of documents, a mistake by counsel, or, as asserted in this case, a miscommunication with counsel, terse justifications do not suffice as a basis for relief.

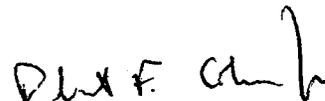
The Commission has recognized that Rule 60(b) “is a tool which . . . courts are to use sparingly” *JWR*, 15 FMSHRC at 789 (citation omitted). Consequently, a grant of relief pursuant to 60(b) – or a remand to an administrative law judge – should not be based on general assertions or conclusory statements as to why an operator failed to timely contest a penalty assessment. Rule 60(b) was not intended as a license for parties to fail to exercise due diligence in regard to litigation. See Brett Warren Weathersbee, Note: *No More Excuses: Refusing to Condone Mere Carelessness or Negligence under the “Excusable Neglect” Standard in Federal Rule of Civil Procedure 60(b)(1)*, 50 Vand. L. Rev. 1619, 1646 (Nov. 1997). Consequently, we consider the submissions of Atlanta Sand to be insufficient, and deny the motion without prejudice.



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

Chairman Duffy, dissenting:

Having reviewed Atlanta Sand's request and the Secretary's response, in the interests of justice, I would remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Atlanta Sand's failure to timely contest the penalty proposal and whether relief from the final order should be granted. Unlike in the recent Commission cases denying reopening that are cited by my colleagues, Atlanta Sand did not merely recite the words of Rule 60(b) in asking for relief from its failure to contest the penalty on a timely basis. It offered a general explanation of where in the process of contesting the penalty it erred and presented a cogent argument in favor of our invoking the equitable relief provided by recourse to the guidance of Rule 60(b).

Indeed, I note for the record that within the past year, this Commission granted this same operator's motion to reopen a penalty assessment that had become a final order on the grounds that the operator had "inadvertently omitted the proposed assessment in the records that it transferred to counsel." *Atlanta Sand & Supply Co.*, 29 FMSHRC 754 (Sept. 2007). The operator's grounds for relief in that instance, a mis-communication between client and counsel, are substantially similar to those presented here. If we are adopting a more rigorous standard for considering the merits of reopening proceedings on the basis of the equity considerations inherent in Rule 60(b), it will come as an unpleasant surprise to this operator.

While Atlanta Sand's explanation could have been more detailed, the lack of detail did not lead the Secretary to oppose the motion to reopen. In a case like this, where a general and plausible explanation has been offered and the Secretary does not oppose the motion, I do not believe the administration of the Mine Act is advanced by requiring the operator to resubmit a more detailed motion to the Commission, which, if the past is prologue, will likely remand it to Chief Administrative Law Judge for the ultimate determination on whether reopening is warranted.

Lastly, I am troubled by the majority's strict reliance upon federal court case law under Rule 60(b). Commission Procedural Rule 1 is quite clear. First, "[o]n 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 . . ." 29 C.F.R. § 2700.1(b) (emphasis added). Secondly, the Commission's rules "shall be construed to secure the just, speedy and inexpensive determination of all proceedings . . ." 29 C.F.R. § 2700.1(c). In none of the four federal court cases applying Rule 60(b) that are cited by my colleagues is there any indication that the motion to reopen was unopposed. Consequently, given our prior treatment of this operator, I fail to see how it is "practicable" to use such cases as "guidance" in this instance, and do not believe doing so leads to either a "speedy" or "inexpensive determination" in this proceeding.

Moreover, the Commission is not a federal court and is thus not bound by strictures that may prevail in such a setting. For example, Commission hearings are not conducted in strict

accordance with the Federal Rules of Evidence; on the contrary, our rules unequivocally allow for the admission of hearsay testimony. 29 CFR § 2700.63(a).

Over the past year the Commission has experienced an unprecedented increase in the number of cases filed before it. New filings are approaching a five-fold increase over filings two or three years ago. Requests to reopen appear to have increased proportionately. It may well be that the Commission needs to reconsider the circumstances under which it affords relief in cases such as this one before us now. I do not, however, believe that it is productive to conduct that reconsideration piecemeal through adjudication. The mine safety community may be better served by a rulemaking proceeding addressing motions to reopen final Commission orders. In such a proceeding interested parties could state their views on what extent, if any, Rule 60(b) and the cases interpreting and applying it should inform the Commission's decisions on motions to reopen.



Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2008-286
ADMINISTRATION (MSHA)	:	A.C. No. 12-02010-120120
	:	
v.	:	
	:	Docket No. LAKE 2008-287
BLACK BEAUTY COAL COMPANY	:	A.C. No. 12-02295-120222
	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 March 24, 2008, the Commission received from Black Beauty Coal Company (“Black Beauty”) motions by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator 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 13, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Black Beauty two proposed assessments. According to Black Beauty, it elected to contest certain penalties on each of the proposed assessments and the appropriate boxes were checked. Black Beauty states that it elected not to contest the remaining penalties

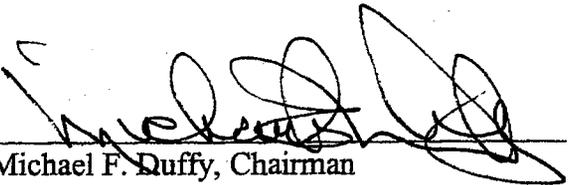
¹ Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. Lake 2008-286 and LAKE 2008-287, as both dockets involve similar procedural issues and similar factual backgrounds.

and forwarded payment checks and the proposed assessment forms to MSHA within 30 days from receipt of the proposed assessments. On September 12, 2007, MSHA issued delinquency notices as a result of the unpaid penalties in the two proposed assessments. Thereafter, on December 17, 2007, MSHA issued to Black Beauty civil penalty collection reports, which indicated that the penalties that Black Beauty had contested were outstanding.

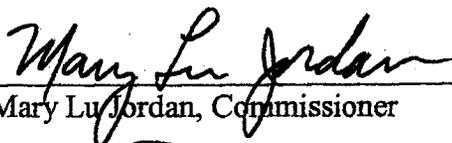
In response, the Secretary states that Black Beauty's payments for the uncontested penalties and the penalty assessment forms were mailed to MSHA's payment processing office in Pittsburgh, Pennsylvania. However, the Secretary states that all notices of contest must be sent to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The Secretary concludes by stating that she does not oppose the reopening of the assessments.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessment forms 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).

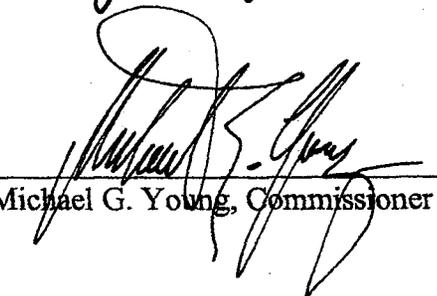
Having reviewed Black Beauty's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Black Beauty's failure to timely contest the penalty proposals and whether relief from the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



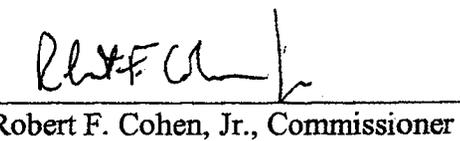
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 16, 2008

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

v.

OLD DOMINION ENERGY, INC.

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Docket No. VA 2008-227
A.C. No. 44-07018-134221-02

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 8, 2008, the Commission received from Old Dominion Energy, Inc. (“Old Dominion”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

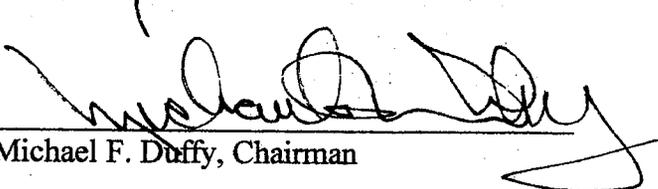
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On December 13, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000134221 to Old Dominion, proposing penalties for two violations that previously had been issued to the company. Old Dominion states that “due to a clerical error by the office staff that works for several coal companies,” the proposed penalty assessment form was not sent to MSHA’s Civil Penalty Compliance Office to contest the penalty for Citation No. 6628958, which it now seeks to reopen. Old Dominion further states that it contested the assessment for Order No. 6628988 on the same form. It asserts that it became aware that the penalty for the citation was not contested when it received a Notice of Delinquency dated March 6, 2008, from the U.S. Department of Labor. The Secretary states that she does not oppose Old Dominion’s request to reopen, but

notes that the operator was able to contest the proposed assessment for the other violation on the same form.

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).

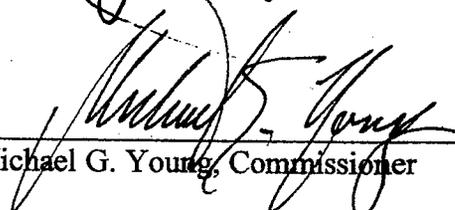
While Old Dominion explains that it failed to timely submit a contest of the proposed assessment for the citation because of a clerical error, it does not explain why it contested the other proposed assessment for the order, but not the assessment for the citation on the same form. Nor does it provide any facts to support its claim of clerical error. Consequently, we deny Old Dominion’s request without prejudice. *See Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).



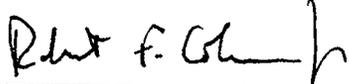
Michael F. Duffy, Chairman



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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July 16, 2008

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

v.

WAROQUIER COAL COMPANY

:
:
:
: Docket No. PENN 2008-367
: A.C. No. 36-06586-142894
:
:

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

ORDER

BY THE COMMISSION:

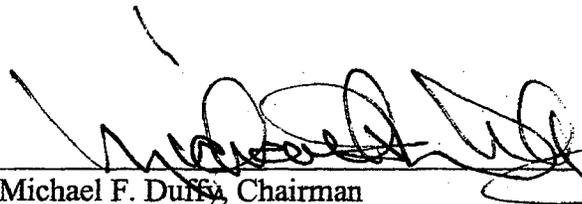
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 8, 2008, the Commission received from DMS Safety Services ("DMS") a letter seeking to reopen a penalty assessment issued to Waroquier Coal Company ("Waroquier") that had become 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).

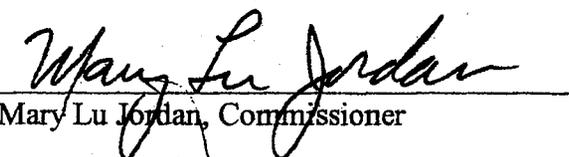
On March 5, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Waroquier Proposed Assessment No. 000142894, which proposed civil penalties for several citations. DMS states that the company received the proposed assessment on March 11, 2008. DMS alleges that the receptionist, who signed for receipt of the proposed assessment, was unaware of the 30-day deadline and did not pass the form to the safety director until April 7, 2008. DMS submits that the safety director did not know about the delay and mailed the contest of the proposed assessment on April 17. The Secretary states that she does not oppose this request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

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).

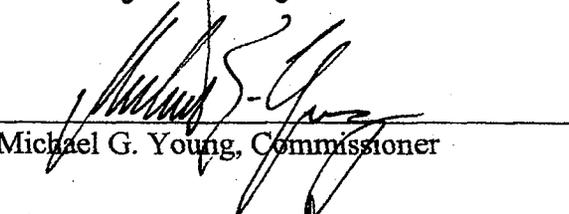
Having reviewed this request and the Secretary’s response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Waroquier’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. On remand, the judge should determine whether DMS has the legal authority to file this request on behalf of Waroquier. He should also evaluate the reason why the safety director believed that the proposed assessment dated March 5, 2008 had not been received until the beginning of April. 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.



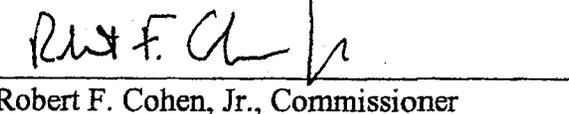
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 16, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 2008-773
	:	A.C. No. 42-01890-135225
v.	:	
	:	
CANYON FUEL COMPANY, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 2, 2008, the Commission received from Canyon Fuel Company, LLC ("Canyon") a motion by counsel 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 July 19, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Order No. 7287633 to Canyon after a regular safety inspection. Canyon filed a notice of contest of the order, which has been assigned Docket No. WEST 2007-739-R. On

January 3, 2008, MSHA issued an assessment covering the order with a proposed penalty of \$27,959. In its motion, Canyon states that its safety manager indicated to his administrative assistant that the penalty for Order No. 7287633 should not be paid but “overlooked mailing” the contest of the penalty to MSHA. In March, Canyon requested a copy of the Secretary’s Petition for Assessment of Penalty and learned that no penalty contest had been filed.

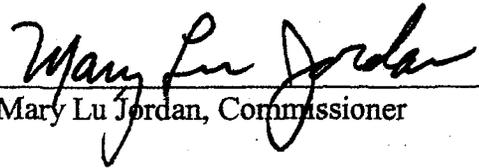
In response, the Secretary states that she does not oppose Canyon’s request to reopen. However, the Secretary notes that Canyon recently claimed mistake or inadvertence as the basis for seeking to reopen an assessment of \$59,392, which had become final. *See Canyon Fuel Co.*, 29 FMSHRC 987 (Dec. 2007). This matter is pending before the Chief Administrative Law Judge.

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).

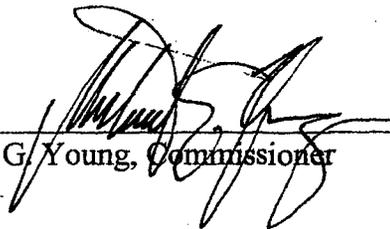
Having reviewed Canyon's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Canyon's failure to timely contest the penalty proposal and whether relief from the final order 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



Robert F. Cohen, Jr., Commissioner

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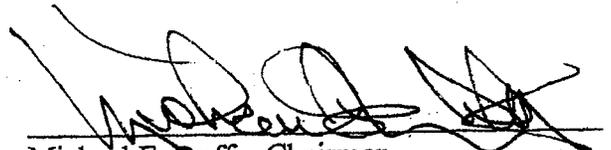
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Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

hardship because it believed the civil penalties would be reduced if the operator proved its compliance. On May 30, the Commission received a response from the Secretary, in which the Secretary states that in its second request, BRS again failed to allege reasons sufficient to allow reopening under Rule 60(b). She notes in particular that the operator still has not explained its failure to timely contest the proposed assessment. The Secretary requests that the Commission provide the operator with an opportunity to satisfy the requirements for reopening. She states that once the operator submits a response, the Secretary will indicate whether she believes that reopening is warranted.

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.

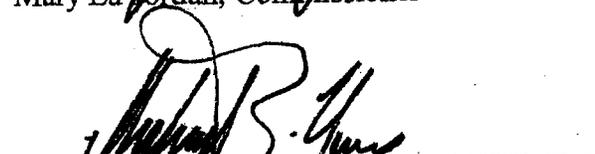
Because BRS's request for relief does not explain why the company failed to contest the proposed assessment in a timely manner and is not based on any of the grounds for relief set forth in Rule 60(b), we hereby deny the request for relief without prejudice. *See Marsh Coal Co.*, 28 FMSHRC 473, 475 (July 2006). The words "without prejudice" mean BRS may submit another request to reopen the case so that it can contest the citations and penalty assessments.¹



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

¹ If BRS submits another request to reopen the case, it must identify the specific citations and assessments it seeks to contest. BRS must also establish good cause for not contesting the citations and proposed assessments within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise or excusable fault on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation or other misconduct by the adverse party. BRS should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented BRS from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. BRS should also submit copies of supporting documents with its request to reopen the case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 24, 2008

SECRETARY OF LABOR,	:	Docket No. WEST 2008-992-M
MINE SAFETY AND HEALTH	:	A.C. No. 05-03153-142037
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-993-M
	:	A.C. No. 05-01197-145611
v.	:	
	:	Docket No. WEST 2008-994-M
DENISON MINES (USA) CORP.	:	A.C. No. 05-03780-145617
	:	
	:	Docket No. WEST 2008-995-M
	:	A.C. No. 42-00470-142235

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 12, 2008, the Commission received from Denison Mines (USA) Corp. ("Denison") a letter seeking to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

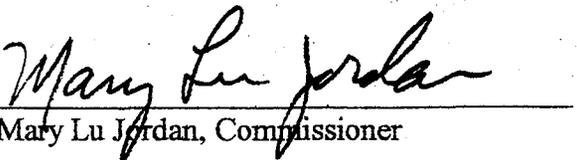
¹ Pursuant to Commission Procedural Rule 12, 29 C.F.R. § 2700.12, on our own motion, we hereby consolidate Docket Nos. WEST 2008-992-M, WEST 2008-993-M, WEST 2008-994-M, and WEST 2008-995-M, as all dockets involve similar procedural issues and similar factual backgrounds.

On February 28, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000142037, and 000142235 to Denison, proposing civil penalties for various citations. On April 3, 2008, MSHA issued Proposed Assessment Nos. 000145611 and 000145617, proposing penalties for other citations. In its request for relief, Denison states that it believed that it would be able to "discuss/contest" the citations during a meeting in Denver in April. It further explains that "[a]s this did not occur, we are later than we had planned on our response." The Secretary states that she does not oppose the reopening of the proposed assessments.

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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 25, 2008

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

v.

LAFARGE AGGREGATES
SOUTHEAST, INC.

Docket No. SE 2008-707-M
A.C. No. 09-00023-139485

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 May 21, 2008, the Commission received from Lafarge Aggregates Southeast, Inc. (“Lafarge”) a motion by counsel 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).

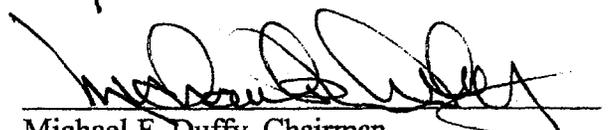
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

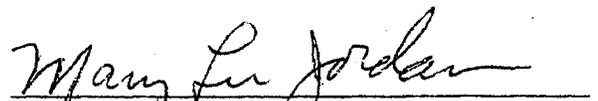
On February 12, 2008, the Department of Labor’s Mine Safety and Health Administration issued Proposed Penalty Assessment No. 000139485 to Lafarge, proposing a civil penalty for Citation No. 7794610. In its request, Lafarge states that it intended to timely contest the proposed penalty but that it failed to do so due to “administrative error.”

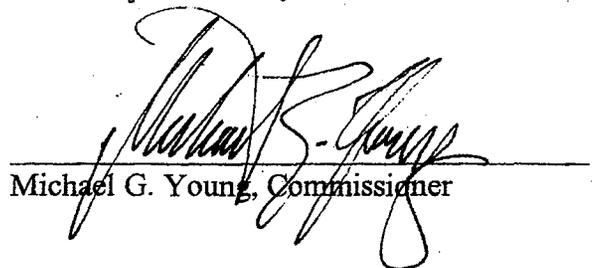
The Secretary states that Lafarge’s conclusory assertion of the cause for its failure to timely file does not constitute a showing of the circumstances required to obtain reopening under Fed. R. Civ. P. 60(b). She requests that the Commission provide the operator with an opportunity to satisfy the requirements for reopening. The Secretary states that once the operator submits a response, she will indicate whether she believes that reopening is warranted.

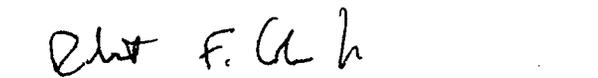
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the 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 Lafarge’s motion to reopen and the Secretary’s response thereto, we agree with the Secretary that Lafarge has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Lafarge’s conclusory statement that its failure to timely file was due to “administrative error” does not provide the Commission with an adequate basis to justify reopening. Accordingly, we deny without prejudice Lafarge’s request. *See, e.g., Eastern Associated Coal, LLC*, 30 FMSHRC __, slip op. at 2, No. WEVA 2008-488 (May 16, 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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July 29, 2008

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

v.

TWENTYMILE COAL COMPANY

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:
:
:
:
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:
:

Docket No. WEST 2008-879
A.C. No. 05-03836-123538

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 21, 2008, the Commission received from Twentymile Coal Company (“Twentymile”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 31, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000123538 to Twentymile, proposing penalties for 33 citations and orders that previously had been issued to the company’s Foidel Creek Mine. On December 10, 2007, Twentymile filed a request to reopen this proposed assessment, stating that the mine promptly processed and forwarded the assessment to Twentymile’s corporate office for payment, but that due to a processing error, the 26 penalties that Twentymile was not contesting were not paid until October 2007. On April 4, 2008, the Commission denied without prejudice Twentymile’s request because it neglected to explain the company’s separate failure to return the assessment form to MSHA in order to contest the seven penalties that it intended to contest. *Twentymile Coal Co.*, 30 FMSHRC 177, 178 (Apr. 2008).

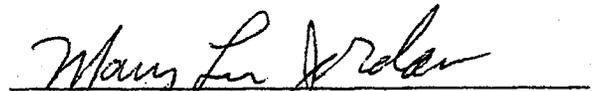
Twentymile now explains that its failure to timely submit its contest of the proposed penalty assessment was due to a change in its internal accounting practice. Twentymile states that under its former procedure, its safety assistant mailed the assessment forms indicating which citations and orders it wished to contest to MSHA, along with payment for the citations and orders it did not wish to contest. Twentymile asserts that beginning in August 2007, the company and its affiliate instituted a new accounting system, which required all payments to be made from its corporate headquarters in St. Louis, Missouri. Twentymile maintains that on August 28, 2007, its safety assistant forwarded the assessment form to the corporate headquarters with a request for payment of the uncontested penalties. It states that due to a processing error involving the new accounting system, its corporate headquarters did not prepare a check for payment until October 17, 2007. Twentymile further states that its safety assistant assumed that the corporate offices submitted to MSHA a check for the penalties it did not wish to contest, along with the proposed assessment form indicating which penalties it sought to contest. It asserts that upon discovering that the contest had not been timely submitted, its safety assistant filed with the Commission a request to reopen the proposed assessment on December 4, 2007, which the Commission denied without prejudice. Twentymile further states that it is now aware that the marked assessment forms and payment for uncontested citations and orders must be submitted separately, and has remedied its practices accordingly. Twentymile asserts that its failure to contest was due to inadvertence, mistake or miscommunication within its organization and requests that the Commission reopen the proposed assessment. The Secretary states that she does not oppose Twentymile's request to reopen.

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).

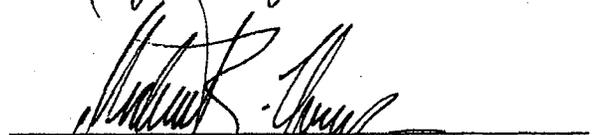
Having reviewed Twentymile's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Twentymile's failure to timely contest the penalty proposal and whether relief from the final 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.



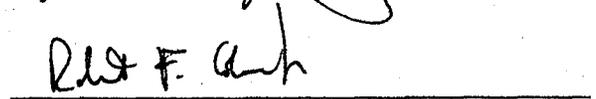
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 1, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2008-589-M
ADMINISTRATION (MSHA)	:	A.C. No. 01-03100-136465
	:	
v.	:	Docket No. SE 2008-590-M
	:	A.C. No. 01-03126-136466
BLOUNT SPRINGS MATERIALS	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 April 17, 2008, the Commission received from Blount Springs Materials (“Blount”) letters seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

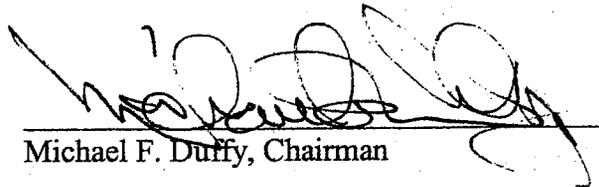
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On January 17, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued two proposed penalty assessments to Blount. Blount sent its contests of the proposed assessments to MSHA on March 21, 2008. On March 27, 2008, MSHA informed Blount that it had missed the 30-day deadline and that the penalties were due. Blount states that it failed to contest the penalty assessments within the required time because of a change in its safety directors. The Secretary states that she does not oppose the reopening of the assessments.

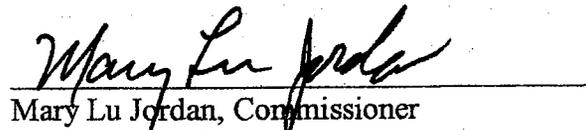
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2008-589-M and SE 2008-590-M, both captioned *Blount Springs Materials* and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

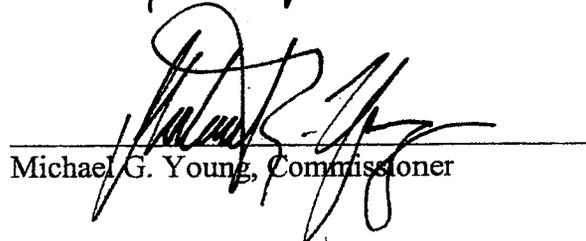
Having reviewed Blount’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Blount’s failure to timely contest the penalty proposals and whether relief from the final orders should be granted. The Chief Administrative Law Judge should obtain from Blount evidence as to the circumstances concerning why the change in personnel resulted in a failure to timely respond to the penalty assessments. 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.



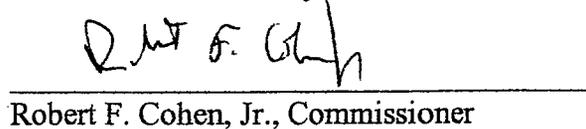
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 1, 2008

SECRETARY OF LABOR,	:	Docket No. WEST 2008-823-M
MINE SAFETY AND HEALTH	:	A.C. No. 02-02964-135305
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2008-824-M
v.	:	A.C. No. 02-02130-135308
	:	
PIONEER SAND COMPANY	:	Docket No. WEST 2008-825-M
	:	A.C. No. 02-03181-135310

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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 April 11, 2008, the Commission received from Pioneer Sand Company (“Pioneer”) letters seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 8, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued three proposed penalty assessments to Pioneer. Pioneer states that it indicated on the proposed penalty assessment forms that it wanted to contest all the penalties and “promptly” mailed the forms to MSHA. However, it allegedly learned that MSHA had not received the penalty contest forms when MSHA sent delinquency notices on April 3, 2008.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2008-823-M, WEST 2008-824-M, and WEST 2008-825-M, all captioned *Pioneer Sand Company* and involving similar procedural issues. 29 C.F.R. § 2700.12.

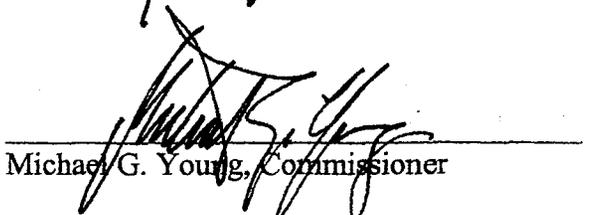
Although the Secretary notes that she has no record of receiving the penalty contest forms, she does not oppose the reopening of the assessments.

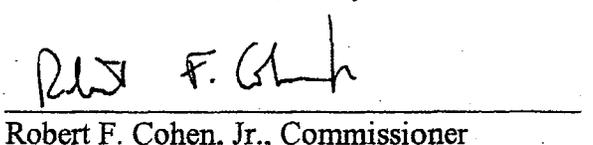
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) 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 Pioneer’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 Pioneer’s failure to timely contest the penalty proposals and whether relief from the final orders should be granted. The Chief Administrative Law Judge should obtain from Pioneer supporting evidence regarding when Pioneer mailed the contest forms. 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


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 6, 2008

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

v.

PHELPS DODGE TYRONE, INC.

:
:
:
:
:
:
:
:

Docket No. CENT 2006-212-RM

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

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”), Administrative Law Judge Richard W. Manning upheld a citation against Phelps Dodge Tyrone, Inc. (“Phelps Dodge”) for violating the requirement of 30 C.F.R. § 50.10 that a mine accident be reported to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) within 15 minutes.¹ 29 FMSHRC 669 (July 2007) (ALJ). Phelps Dodge petitioned for review of the judge’s decision, which the Commission granted.

¹ Section 50.10 provides in pertinent part that an “operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred.” 30 C.F.R. § 50.10. Section 50.2(h)(6) defines “[a]ccident” to include “in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery.” 30 C.F.R. § 50.2(h)(6).

I.

Factual and Procedural Background

Phelps Dodge's Tyrone Mine is a large surface copper mine in Grant County, New Mexico. 29 FMSHRC at 669. In 2006, Phelps Dodge sold one of the electric mining shovels it had been using there to P&H Mine Pro ("P&H") and moved the shovel to what was then the salvage yard at the mine. *Id.*; Tr. 126-27, 131; PD Ex. 1. The salvage yard was several miles away from active mining operations. 29 FMSHRC at 669; Tr. 126-27. P&H removed all of the shovel's usable parts, leaving only the shell of the shovel, referred to in this case at its "car body." 29 FMSHRC at 669; Tr. 131-32; Gov't Ex. 2. The car body was left resting on stacked railroad ties in the salvage yard. 29 FMSHRC at 670; PD Ex. 3.

At that point, Metal Management of Arizona, LLC ("Metal Management") became involved in further salvage work on the car body. Specifically, Metal Management was to cut the car body into smaller pieces so that the scrap metal could be hauled away from the mine. 29 FMSHRC at 669-70; Tr. 129-30.

Because oxyacetylene torches were to be used in cutting the car body, Phelps Dodge required that Metal Management complete a "hot work" permit at the mine. 29 FMSHRC at 670; Tr. 132, 188; PD Ex. 4. Upon arriving at the mine around 6:00 a.m. on June 17, 2006, Metal Management's Raudel Davila filled out the permit form. 29 FMSHRC at 669-70; Tr. 132; PD Ex. 4. Davila supervised two other Metal Management employees, Rafael Dominguez and Sergio Caudillo, in the salvage operation. 29 FMSHRC at 670; Tr. 100-01. The permit indicated that Davila would stand fire watch over the operation. 29 FMSHRC at 670; PD Ex. 4. None of the three Metal Management employees spoke much English. 29 FMSHRC at 673; Tr. 22, 101.

The account of further events that morning differs among the witnesses, and even between testimony and statements given by the same witness. None of the three Metal Management employees testified at the later hearing in this case. 29 FMSHRC at 675. Instead, each submitted written statements later that day to Phelps Dodge that were subsequently translated and entered into the record below. *Id.* at 673; Tr. 103-05; Gov't Exs. 5-7. The three explained that grease on the car body towards its center was ignited by the torches and began burning, and that the car body consequently was on fire by 7:30 a.m. 29 FMSHRC at 673; Gov't Exs. 5-7.

Around that same time, Phelps Dodge mine shift supervisor Yancy McCauley was driving along a mine road when he observed thick black smoke coming from the salvage yard, so he returned to investigate. 29 FMSHRC at 670; Tr. 16, 18-19. In a statement he drafted later that day, McCauley stated that there was a fire inside the car body of the shovel when he first arrived but that he "wasn't sure at that time if it was a concern or not." 29 FMSHRC at 674; Tr. 17; Gov't Ex. 4.

After briefly speaking with Metal Management supervisor Davila, McCauley left to resume his work duties and called the front gate to alert the Phelps Dodge fire brigade of the need to stand fire watch at the salvage area. 29 FMSHRC at 670; Tr. 28-31. Consequently, Phelps Dodge firefighter Hank Bobo was told by the mine dispatch operator that he was needed at the salvage yard for fire watch. 29 FMSHRC at 671; Tr. 61-63. Bobo drove the mine's fire truck to the scene. 29 FMSHRC at 671; Tr. 63.

Bobo testified that he arrived there shortly after 9:00 a.m. 29 FMSHRC at 671; Tr. 65-66. According to the written statement Bobo prepared and gave to MSHA later in the day, employees of Metal Management were then spraying water on the bottom of the car body, and "[t]here wasn't a lot of flames then but a lot of smoke." 29 FMSHRC at 672, 674; Gov't Ex. 8.

After finding a Spanish-speaking Phelps Dodge electrician to interpret, Bobo instructed the Metal Management employees to move away from the smoke, because he did not believe that they were wearing the proper protective equipment, given the amount of smoke they could be inhaling. 29 FMSHRC at 671; Tr. 66-67, 81-82. Bobo also called McCauley, who returned to the scene around 9:15 a.m. 29 FMSHRC at 671; Tr. 33-35, 67. Bobo explained to him that company policy required that three firefighters and a water truck be used when the fire brigade was activated. 29 FMSHRC at 671; Tr. 33-35. McCauley arranged to get the two additional firefighters and the mine's water truck to the area, and remained there for about 10 minutes. 29 FMSHRC at 671; Tr. 35-36.

In the statement he originally gave to MSHA, Bobo said that he put on his bunker gear, and while he saw flames inside the car body, he knew he could not douse them using the hose he had. Gov't Ex. 8. When the flames started coming out of the bottom of the car body, however, he began shooting water on the fire. *Id.* When the water truck arrived, he directed that its cannon be used to get water to the inside of the car body. *Id.*

McCauley visited the car body again after 10:30 a.m. 29 FMSHRC at 671; Tr. 36-37. The statement that he gave MSHA indicated that the fire had been put out by that time, after Bobo had decided that it needed to be extinguished. Gov't Ex. 4. McCauley later testified that, because he understood that the fire was extinguished in about 20 minutes, he believed that the fire did not have to be reported to MSHA. 29 FMSHRC at 671; Tr. 46-49.²

² McCauley states that he based this conclusion, in part, on an event which he understood to have occurred earlier in the year, where Phelps Dodge reported to MSHA as a "fire" an incident in which smoke inside an operating shovel activated the shovel's fire suppression system. 29 FMSHRC at 671-72; Tr. 47-48. Matthew Main, a health and safety specialist at the mine who in June 2006 became the mine's health and safety manager, 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. 29 FMSHRC at 672; Tr. 97, 123. At the conclusion of its investigation of the incident, MSHA decided that the event was not immediately reportable as a mine fire under section 50.10. 29 FMSHRC at 672; Tr. 125; PD Ex. 2 at 4.

McCauley tried to call Phil Tester, the company's safety supervisor on the shift, at about 10:45 a.m., for assurance that he was not required to call MSHA to report the fire. 29 FMSHRC at 672; Tr. 38. However, McCauley was not able to speak with Tester until around 11:30 a.m. 29 FMSHRC at 672; Tr. 39. After McCauley used the word "fire," Tester immediately ended the conversation and called MSHA at 11:40 a.m. to report the incident. 29 FMSHRC at 672; Tr. 39, 99, 161.

Tester and Matthew Main, the mine's health and safety specialist, also went to the car body at about 1:00 p.m. so that Main could investigate the incident. 29 FMSHRC at 672; Tr. 100-01. Main spoke with a number of witnesses and had the Metal Management employees provide their written statements for later translation. 29 FMSHRC at 672; Tr. 103-06. Main also called Benny Lara, MSHA's acting field office supervisor in Albuquerque. 29 FMSHRC at 672; Tr. 106. Lara asked for a written report of the event and issued an oral order of withdrawal for the car body pursuant to section 103(k) of the Act, 30 U.S.C. § 813(k), leading Phelps Dodge to cordon it off. 29 FMSHRC at 672; Tr. 106, 111, 134-35.

Later in the day, Main e-mailed Lara a summary of the event, writing that while working on the car body, around 7:30 a.m., the Metal Management employees had "*started a fire.*" 29 FMSHRC at 672 (emphasis added by judge); Gov't Ex. 3. Main informed 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." 29 FMSHRC at 672; Gov't Ex. 3. Main later testified that these statements were not accurate as they were the result of an incomplete investigation, and that any fire only lasted 20 minutes, between 9:30 and 9:50 a.m. 29 FMSHRC at 675; Tr. 112, 115, 146-47.

After an investigation, MSHA issued Citation No. 6244790, which alleged a violation of 30 C.F.R. § 50.10 on the ground that a fire started at 7:30 a.m, the fire was not extinguished within 30 minutes of discovery, and MSHA was not notified within 15 minutes of that failure to extinguish the fire. 29 FMSHRC at 670; Gov't Ex. 1. Phelps Dodge contested the citation, and a hearing was held.

At the hearing, McCauley testified that he did not see any flames when he first arrived at the scene of the incident at 7:30 a.m. 29 FMSHRC at 670, 674; Tr. 25, 27, 43-44, 50-51. When asked about his earlier statement that he saw a fire when he first arrived, he testified that he used the word "fire" as "a generalization of the scene," believing the smoke he saw coming from the car body to be an indication of a fire. 29 FMSHRC at 674; Tr. 20-22. McCauley also testified that he saw no flames during this second trip to the scene. 29 FMSHRC at 671; Tr. 43-44.

Bobo also contradicted his earlier statement, testifying that upon arriving at the scene he saw no flames at all. 29 FMSHRC at 671; Tr. 68. Bobo testified that during the 9:00 to 9:30 a.m. time period, he prepared fire hoses, set out air packs, and put on his bunker gear. 29

FMSHRC at 671; Tr. 67-68, 83-84. During that time, he observed the car closely for flame, including through the holes cut into its sides, and saw none. 29 FMSHRC at 671; Tr. 69-70, 83-84.

In the account that he gave at the hearing, Bobo stated that it was not until about 9:30 a.m. that he saw flames inside the car body. 29 FMSHRC at 671; Tr. 68, 72, 84. According to his testimony, as soon as he spotted flames, he put on his air pack and began spraying the flames with water from the fire truck, dumping, in his estimate, about 300 gallons of water on the car body in the next 20 minutes. 29 FMSHRC at 671; Tr. 72, 75, 77. Bobo testified that he extinguished all of the flames that he could see by around 9:50 a.m., right after which the water truck arrived. 29 FMSHRC at 671; Tr. 72, 75, 78, 85-86. Bobo testified that he had the water truck operator spray water at the smoke that was still rising from the car body, so as to cool the car body down and prevent more flare-ups. 29 FMSHRC at 671; Tr. 79, 86.

In his decision, the judge accepted Phelps Dodge's position that flames must be present for there to be a "fire" under the dictionary definition of that term. 29 FMSHRC at 674. The judge found that a fire started soon after 7:30 a.m., and was not completely extinguished in less than 30 minutes, as he further found it to have continued until it was fully extinguished at 9:50 a.m. *Id.* at 674-76. He relied primarily on the statements that witnesses provided shortly after the event and found them more probative than some of the witnesses' later accounts, including their trial testimony. *Id.* at 674-75. While acknowledging that the appearance of flames may have only been brief and intermittent, with each flare-up lasting less than 30 minutes, the judge rejected Phelps Dodge's argument that the company was not required to notify MSHA of the occurrence of a fire. *Id.* at 675-76. The judge held that once flames appear, the mine operator is under the obligation to report the fire to MSHA unless the fire is totally extinguished within 30 minutes. *Id.* at 676. The judge also concluded that the evidence of preparation for a fire occurring failed to establish that the fire was not "unplanned" and thus outside the ambit of the regulation. *Id.* at 676-77. The judge held that the regulatory language provided Phelps Dodge with sufficient notice that the conditions that day constituted an accident as defined by section 50.2(h)(6). *Id.* at 677. However, the judge reduced the negligence finding from high to low and affirmed the citation as modified. *Id.* at 677-78.

II.

Disposition

Phelps Dodge maintains that any fire that took place was not "unplanned" under the plain meaning of that term, and points to seven facts that it believes establishes that the fire was actually a planned fire. PDR at 18-20.³ The operator also argues that because there is no evidence that flames were present for 30 minutes, the judge erred in affirming the citation. *Id.* at 20-24. Phelps Dodge would also have the Commission reverse the judge's finding that it was on

³ Phelps Dodge adopted its PDR as its initial brief.

notice of the requirements of the regulation, both with respect to the judge's interpretation of "unplanned" and "extinguished," as well as the Secretary's interpretation, proffered here, that the smoldering of the car body was sufficient evidence by itself of a fire. *Id.* at 24-25; PD Reply Br. at 11-15.

The Secretary submits that the meaning of "fire" is ambiguous, and that there is reputable authority to consider a "fire" to include instances not just of flaming, but also those marked by smoldering, glowing, or nonflaming combustion. S. Br. at 13-17. According to the Secretary, the Commission should apply such an interpretation of "fire" in this instance and affirm the judge's decision in result. *Id.* at 17-20. In the alternative, the Secretary would have the Commission uphold the interpretation adopted by the judge and find that substantial evidence supports the judge's application of that interpretation. *Id.* at 20-27. The Secretary further argues that the judge properly found that the fire was not planned, and that the operator was on notice of the regulatory requirements in this instance. *Id.* at 27-30.

At issue in this case is whether, pursuant to section 50.10, an "accident" occurred which Phelps Dodge was required to report to MSHA within the 15 minutes required by the standard. "Accident" is defined in section 50.2(h), and in this instance the category of accident at issue is "an unplanned fire." Section 50.2(h)(6) specifies that an "[a]ccident" includes "[i]n underground mines, an unplanned mine fire not extinguished within 10 minutes of discovery; *in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery.*" 30 C.F.R. § 50.2(h)(6) (emphasis added).⁴

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly

⁴ On June 17, 2006, sections 50.10 and 50.2(h)(6) were each actually an emergency temporary standard ("ETS"). 71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006). Each was based on existing MSHA regulations, except that unplanned underground mine fires not extinguished within 10 minutes were to be reported to MSHA, rather than just those not extinguished within 30 minutes, as had been the case previously. That change is not relevant to this case. *See generally* 71 Fed. Reg. 71,430, 71,434-36, 71,452 (Dec. 8, 2006) (adoption of each ETS as new permanent standard).

erroneous or inconsistent with the regulation””) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)).⁵

The “language of a regulation . . . is the starting point for its interpretation.” *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, 111 F.3d 963 (D.C. Cir. 1997) (table).

A. Whether a Fire Occurred

Below, the Secretary did not directly address the issue of how the term “fire,” as it is used in section 50.2(h)(6), should be interpreted. Rather, she simply relied upon the statements of the three Metal Management employees, who described how their use of torches in cutting the car body resulted in an ignition and fire. S. Post-Hearing Br. at 4.⁶ In contrast, Phelps Dodge directly addressed the issue of interpretation and argued that the presence of flame was necessary for there to be a “fire” under the plain meaning of that term. PD Post-Hearing Br. at 19-20.

The judge, relying upon a dictionary definition of “fire,” agreed with Phelps Dodge that flame must be present for there to be a fire, and held that grease that was smoking without any flames did not qualify as a fire that must be immediately reported under section 50.10. 29 FMSHRC at 674. Specifically, the judge relied upon a definition of “fire” which describes it as a “rapid, persistent chemical change that releases heat and light and is accompanied by flame, especially the exothermic oxidation of a combustible substance.” *Id.* (quoting *American Heritage Dictionary of the English Language* 62 (4th ed. 2006)).

⁵ The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation [] and . . . serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission’s review, like the courts’ review, involves an examination of whether the Secretary’s interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec’y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); see also *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary’s interpretation was reasonable).

⁶ Metal Management supervisor Davila, said that “at about 7:30 the fire started,” as the torches “made sparks and ignited in the center of the structure. . . .” 29 FMSHRC at 673; Tr. 103-05; Gov’t Ex. 5. Mr. Caudillo confirmed in his written statement that at “7:30 we started the fire.” 29 FMSHRC at 673; Gov’t Ex. 6. In his written statement, Mr. Dominguez attributed the fire to cutting into the car body where there was a lot of grease and indicated that the grease started to burn after about 15 minutes. 29 FMSHRC at 673; Gov’t Ex 7.

Commissioners disagree as to how to address the judge's conclusion that a "fire" requires the presence of flames. The issue is discussed below in separate opinions, one by Chairman Duffy and Commissioner Young (slip op. at 18-19) and one by Commissioners Jordan and Cohen (slip op. at 12-15). It is not necessary to reach this issue, however, because the full Commission agrees that the judge's ultimate conclusion – that an unplanned fire which was not extinguished within 30 minutes of discovery – was based on substantial evidence and correct legal analysis.

The judge found that the statements provided to MSHA on the day of the incident, in which witnesses used the term "fire" to describe what they saw at times between 7:30 and 9:30 a.m., established that there were flames observed well before 9:30 a.m.⁷ The judge found that these statements were more reliable than the hearing testimony of some of those witnesses that they only saw smoke, and not flames. 29 FMSHRC 674-76. In essence, the judge credited the earlier version of events provided by witnesses over the later version.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1881 n.80 (Nov. 1995), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) ("*Dust Cases*") (citing *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)); *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here, there is nothing in the earlier version of events that the judge credited that is self-contradictory, and those versions are amply documented in the record. The statements provided on the day of the event by all four witnesses who were at the scene of the incident at 7:30 a.m.—the three Metal Management employees and then McCauley—all described the scene as a "fire" as of 7:30 a.m., and Main used that description in his e-mail message to MSHA's Lara later that day. Gov't Exs. 3, 4, 5, 6, 7. Moreover, Bobo's statement that day mentioned seeing some flames as soon as he arrived on the scene around 9:00 a.m. Tr. 63-66; Gov't Ex. 8.

While McCauley, Bobo, and Main all later testified to the contrary at the hearing, the judge was free to credit their earlier statements over their trial testimony. The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination." *Dust*

⁷ 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)).

Cases, 17 FMSHRC at 1878 (quoting *Ona*, 729 F.2d at 719). Consequently, we uphold the judge's finding that flames were observed at the scene as early as 7:30 a.m., and by Bobo as early as 9:00 a.m., and that the flames were not fully extinguished until 9:50 a.m.

B. Whether the Fire That Occurred Was "Unplanned"

As it did below, Phelps Dodge contends that any fire that occurred at the mine on June 17, 2006, was not "unplanned," and thus did not qualify as a reportable accident. PDR at 18-20; PD Reply Brief at 1-4. The judge rejected this argument on the ground that while the evidence suggests that Phelps Dodge and Metal Management knew that a fire was possible and took some of the precautions necessary to isolate and fight a fire, those precautions were not sufficient to establish that the fire that actually occurred was "planned." 29 FMSHRC at 676-77.

On review, Phelps Dodge, invoking the dictionary definition of "plan," argues that because the evidence shows that the mine fire that day was an event that Metal Management and Phelps Dodge to one degree or another "had in mind" and "projected" would occur, any subsequent fire cannot be considered to be "unplanned." PDR at 18; PD Reply Br. at 2.⁸ The Secretary urges the Commission to uphold the judge on this issue. S. Br. at 29-31. According to the Secretary, a planned fire is one in which there is an intent to have a fire, and in this instance the evidence shows that the fire in the car body was not intended. *Id.* at 30.

The regulation's use of the term "unplanned fire" clearly means that "planned" fires are excluded from the scope of the regulation. This is entirely consistent with the overall regulation, because a "planned" event can hardly be considered to be an "accident."

All four Commissioners agree in this instance that the fire that occurred was unplanned, and thus uphold the judge's determination. Their rationales are set forth in the separate opinions below.

⁸ As evidence of the event's planned nature, Phelps Dodge points out that: (1) the salvage work took place in the scrap yard, which was situated away from other aspects of the mine's operations; (2) it was not unexpected that Metal Management would use an oxyacetylene torch to cut the car body, and thus fire would be involved; (3) the Metal Management supervisor filled out a Phelps Dodge hot work permit upon arriving at the mine that day, under which it was acknowledged that one of its employees would stand fire watch; (4) the fire watch was established; (5) the Metal Management employees had fire extinguishers and a pressure watcher with them at the car body; (6) Phelps Dodge dispatched its fire truck to augment the fire watch; and (7) the truck was used to extinguish the flames on the car body when the need to do so arose. PDR at 18-20.

C. Whether the Fire Was Not Extinguished Within 30 Minutes

Lastly, Phelps Dodge takes issue with the judge's conclusion that the fire lasted for more than 30 minutes, reiterating the arguments it made below that what occurred was not a single fire, but rather individual episodes of flames lasting no more than a few minutes each. PDR at 22. The operator submits that the meaning of "extinguish" is plain in this instance, and relies upon dictionary entries for the term which define it in connection with a "flame" as having "died" or been "put out." *Id.* at 21 (quoting Oxford Am. Dictionary of Current English 274 (Oxford Univ. Press 2002)); *see also* PD Reply Br. at 8-10. The Secretary urges that the judge's analysis rejecting Phelps Dodge's interpretation of "extinguish" be upheld. S. Br. at 21-23.

In arguing that the meaning of "extinguish" is plain in this instance, Phelps Dodge is urging the Commission to accept a definition of "extinguish" that does not apply to the term as it is used in section 50.2(h)(6). Even if there must be evidence of flames for there to be a "fire," once such flames appear, there is no corollary notion that a fire is considered "extinguished" by the mere lack of flames. We agree with the judge that the interpretation of "extinguish" by Phelps Dodge is neither logical nor consistent with the language of the regulation or the purpose of the Mine Act: "[u]nder 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 [for] more tha[n] 30 minutes at a time." 29 FMSHRC at 676. It is not in the interest of mine safety to suggest that if a fire flares up and flames last for 20 minutes followed by billowing smoke with the potential to flare up again, the operator need not contact MSHA.

Accordingly, we believe that the judge properly applied the regulation when he concluded from the evidence of burning and intermittent flare-up that there continued to be a "fire" until it was "totally extinguished" or "fully extinguished" at 9:50 a.m. *Id.* at 676. The judge found, and Phelps Dodge does not dispute, that oil and grease were burning from 7:30 a.m. to 9:50 a.m, even if flames were not always present during that time. *Id.* at 675-76.⁹

In addition to this evidence of at least the intermittent appearance of flames, the description of the scene provided by McCauley and Bobo, the only two eyewitnesses to the events who testified at trial regarding the 7:30 a.m. to 9:50 a.m. time period, is of "thick," "a lot of," or "intense" smoke coming from the car body at all times. Tr. 19, 21, 25, 28, 33, 58, 66, 68, 69, 70, 77, 93. As Bobo explained, it was the oil and grease that was burning, the oil "was everywhere" inside the car body and the railroad ties upon which it sat, and there was too much grease on the car body for the Metal Management employees to avoid igniting it. Tr. 71, 80-81. This supports the judge's conclusion that the event should be considered as one fire, not separate individual fires, as maintained by Phelps Dodge. Accordingly, we affirm the judge's finding that

⁹ Furthermore, counsel for Phelps Dodge stated at oral argument before the Commission that from about 7:30 a.m. onwards, a period of over two hours, the Metal Management employees were not applying the torch to the car body. Oral Arg. Tr. 32-33.

the fire that occurred on June 17, 2006, was not extinguished within 30 minutes, and thus the operator was obligated to report the fire within 15 minutes to MSHA.

Phelps Dodge also argues that it did not have adequate notice that MSHA would consider what it claims were several discrete fires to be a single fire for reporting purposes. PDR at 24-25; PD Reply Br. at 14-15. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. See *Gen. Elec.*, 53 F.3d at 1333-34; *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

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

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

Alabama By-Products Corp., 4 FMSHRC 2128, 2129 (Dec. 1982); see also *Asarco, Inc.*, 14 FMSHRC 941, 948 (June 1992). As the Commission stated in *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990), "in interpreting and applying broadly worded standards, the appropriate test is not whether the operator had explicit prior notice of a specific prohibition or requirement," but whether a reasonably prudent person would have ascertained the specific prohibition of the standard and concluded that a hazard existed. The reasonably prudent person is based on an "objective standard." *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

Given the continual thick smoke that was emanating from the car body for over two hours, we cannot agree that a reasonably prudent person would conclude from the circumstances here that there was not a single fire. Accordingly, we conclude that Phelps Dodge had adequate notice as to what constituted "extinguished" under section 50.2(h)(6).

In summary, all Commissioners agree with the judge that a fire occurred, that it was unplanned, and that it was not extinguished within 30 minutes. Consequently, for the reasons stated herein, the Commission affirms the judge's determination that Phelps Dodge violated section 50.10.

III.

Separate Opinions of the Commissioners

Opinion of Commissioners Jordan and Cohen, in favor of addressing the Secretary's alternate interpretation of the term "fire," and finding that the fire that occurred was unplanned:

A. The Secretary's Alternative Interpretation of "Fire"

The Commission is affirming the judge's determination that Phelps Dodge violated 30 C.F.R. § 50.10 because the operator failed to contact MSHA within 15 minutes once it knew that an accident (an unplanned fire not extinguished within 30 minutes) had occurred. Slip op. at 7-11. In so doing, the Commission has presumed, for purposes of this analysis, that a "fire" requires the existence of flames, as the judge concluded. 29 FMSHRC at 674. Thus, the Commission has determined that substantial evidence supports the judge's finding that flames occurred as early as 7:30 a.m. and were not extinguished for approximately two and one-half hours. Slip op. at 8-9, 10.

The Commission's opinion disposes of the issues in the case. Strictly speaking, it is not necessary to reach the issue of whether the existence of flames is necessary to constitute a "fire" within the meaning of 30 C.F.R. § 50.2(h)(6). Nevertheless, we are concerned about the possible ramifications of the judge's finding that a "fire" requires the presence of flames.¹ Under the judge's formulation, smoking grease alone would not be reportable under section 50.10. This was the position that the operator argued vigorously in its post-trial brief (PD Post-Hearing Br. at 19-20), and Judge Manning accepted. His decision in this regard is not a precedent binding upon the Commission. 29 C.F.R. § 2700.69(d). However, the judge's determination on this issue conceivably could influence operators not to report incidents involving smoldering or smoke in the absence of flame. Such an outcome, particularly in an underground mine, is detrimental to the safety of miners and contrary to the purpose of the Mine Act. Hence, although we recognize that it is dicta, we feel compelled to address this question.

Our colleagues are reluctant to reach this issue because they believe that notice and comment rulemaking is a more appropriate forum in which to address this matter. Slip op. at 19. Our colleagues make the good point that there are a myriad of situations where smoldering or smoking could exist in which different reporting requirements would be appropriate. *Id.* The

¹ Although the decisions of administrative law judges are not precedents binding upon the Commission, we note that parties at times do base their arguments on the reasoning in these decisions to support their positions before the Commission. This occurred in a case presently pending before the Commission. *Spartan Mining Co.*, Docket Nos. WEVA 2004-117-RM, et seq., Sp. Br. at 14-15, Sp. Reply Br. at 8-10, Oral Arg. Tr. 23-25. Hence, parties do rely on decisions of administrative law judges when the Commission itself has not resolved an issue.

issue certainly is appropriate for notice and comment rulemaking.² However, the Secretary has requested the Commission's guidance on this issue in the context of this case. Oral Arg. Tr. 56. Similarly, counsel for Phelps Dodge agreed that "the regulated community needs to understand and know what is intended by the definitions in this section [of the regulations] . . . what is unplanned, what is a fire, what is extinguished." Oral Arg. Tr. 8. In this separate opinion, we are not purporting to define reporting requirements for all of the myriad of situations which could occur. We are merely stating our view that the judge was incorrect when he found that a fire requires flames to be reportable under 30 C.F.R. § 50.10.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation . . . is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (other citations omitted))).

The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted).

Here, section 50.2(h)(6), which defines "[a]ccident" to include "an unplanned fire," is silent as to whether flame must be present before a fire can be said to have occurred.

² However, it is clearly established that an agency may choose to define law or policy through adjudication even if it has rulemaking authority, and the Supreme Court has held that an agency can expand on a rule through adjudication. 1 Charles H. Koch, Jr., *Administrative Law & Practice* § 2.12 (2d ed. 2007). In *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 96 (1995), the Court emphasized that "[t]he APA does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication." The D.C. Circuit has also noted that "[i]nherent in an agency's ability to choose adjudication rather than rulemaking, *see SEC v. Chenery Corp.*, 332 U.S. 194 (1947), . . . is the option to make policy choices in small steps, and only as a case obliges it to." *SBC Commc'ns Inc. v. FCC*, 138 F.3d 410, 421 (D.C. Cir. 1998).

Accordingly, we must examine the Secretary's interpretation and decide whether it is reasonable and entitled to deference.

The Secretary interprets the word "fire" in section 50.2(h)(6) to include both events marked by flaming combustion and those marked by "smoldering combustion that reasonably has the potential to burst into flames." S. Br. at 17. We believe that this interpretation is reasonable. It is consistent with the preamble to the relevant Emergency Temporary Standard (ETS) in effect when this incident occurred. In the preamble, the Secretary stated:

Existing paragraph (h)(6) of § 50.2 defines "accident" to include "an unplanned mine fire not extinguished within 30 minutes of discovery." MSHA believes that there are situations in the mines that involve more than one fire *or a smoldering condition at a particular place*. Each episode of flame *or smolder* may have been extinguished within 30 minutes.

The Agency is concerned that such events may represent a serious or potentially serious hazard, and should be reported as an "accident" and subject to the immediate notification requirement of § 50.10.

71 Fed. Reg. 12,252, 12,260 (Mar. 9, 2006) (emphases added).

The Secretary's regulation regarding the minimum requirements for "[a]utomatic fire sensor and warning device systems" in underground mines³ is also consistent with a broad reading of the term "fire" that is not confined to the presence of flame. That standard, 30 C.F.R. § 75.1103-4(a)(2), refers to "sensors responding to radiation, smoke, gases, *or other indications of fire*" (emphasis added). Thus, if a belt in an underground mine were smoking, detection alarms would go off, it would be treated as a fire, and every effort would be made to extinguish it. The absence of flame would not reassure the miners and operator of an underground mine that no danger was present.

The Secretary also relied on publications of the National Fire Protection Association ("NFPA") indicating that fire may exist without flame. S. Br. at 14-16. One such publication states that:

The combustion process occurs in two modes: (1) the flaming mode, and (2) the flameless surface mode. The flaming mode, which includes explosions, is characterized by relatively high burning rates. This results in intense temperatures and high

³ The regulations at issue here, 30 C.F.R. § 50.10, and the definition in section 50.2(h)(6), also apply to underground mines.

rates of heat release. On the other hand, an example of the flameless surface mode is the presence of glowing embers.

Arthur Cote, P.E., and Percy Bugbee, National Fire Protection Association, *Principles of Fire Protection*, 59-60 (1988).⁴

Finally, the meaning of the word “extinguish” adopted by the Secretary (S. Br. at 21-23), the judge (29 FMSHRC at 676), and all Commissioners (slip op. at 10), is consistent with our view that flames need not be present to constitute a fire. Phelps Dodge argues that the incident of June 17, 2006, involved individual episodes of flames lasting only a few minutes each (and thus not reportable) rather than a single fire. PDR at 21-22. However, both the judge and our colleagues agree that once flames appear, a fire is not extinguished even if the flame disappears. They thus acknowledge that, as long as there is the potential for the flame to reoccur, a fire exists even when the flame goes out. In fact, despite the judge’s holding that there is no fire without flame, he states in the same breath that once a fire starts, it is still a fire *even in the absence of flame*. 29 FMSHRC at 676 (“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.”). If a fire is considered to endure, even in the absence of flame, because the possibility of flame continues to exist, then it is reasonable to conclude that a fire is present initially, even if there are no flames visible but the smoldering combustion has a reasonable potential to burst into flames.

For the reasons noted above, we find the Secretary’s interpretation reasonable, as clearly it is not “plainly erroneous or inconsistent with the regulation.” *Western Fuels-Utah*, 900 F.2d at 321 (citations omitted). Accordingly, we would hold that to constitute a reportable accident under 30 C.F.R. § 50.10, a fire, as defined in 30 C.F.R. § 50.2(h)(6), need not contain flames.⁵

⁴ Our colleagues note that some of the NFPA materials cited by the Secretary indicate that at times there can be fire without flame but at other times there must be flame to constitute a fire. Slip op. at 19. This is one of the rationales they offer for refusing to squarely address the definition of “fire” in their opinion. However, these NFPA references indicate that, at a minimum, the interpretation adopted by the judge (that, for purposes of the accident-reporting regulation, there is no fire without flame) is underinclusive. Thus, we are reluctant to allow his determination to stand unaddressed.

⁵ Although Commissioner Cohen finds the Secretary’s interpretation reasonable, he believes that Phelps Dodge did not have the requisite notice of her interpretation required to support the imposition of a civil penalty on this theory. *See Gen. Elec.*, 53 F.3d at 1333-34. In March 2006, approximately three months prior to the citation at issue here, MSHA issued an order at the same mine, pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k). PD Ex. 2. The order, citing a “reportable fire,” required the operator to obtain prior approval from MSHA for all actions to recover or restore operations to the affected areas of the mine. *Id.* at 1. However, the order was terminated several days later. In the termination order, the inspector stated “[t]he conditions that contributed to the smoke were corrected and normal operations can

B. Whether the Fire was Unplanned

On the question of intent and what Phelps Dodge had in mind with respect to “fire,” there is no question that there was an intent that fire would be present. This fire would come from the tip of the oxyacetylene torch, and the Metal Management crew filled out the “hot work” permit in advance as a prerequisite to using the torch on the Phelps Dodge property.

The fire that Phelps Dodge was charged with failing to timely report to MSHA, however, was not the fire coming from the torch,⁶ but rather the fire that resulted from using the torch. 29 FMSHRC at 675; Gov’t Ex. 1 at 4 (“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.”). As Bobo explained, it was the oil and grease that was burning, as the oil “was everywhere” on the car body and the railroad ties upon which it sat. Tr. 71, 80-81.

At the hearing, Phelps Dodge’s safety director Main conceded that the ignition of these materials into flame was an “unplanned” part of work being performed by the Metal Management crew. Tr. 120. Thus, Phelps Dodge cannot maintain that it intended that the oil and grease be burned off as part of the operation.⁷

resume[.] *No fire existed.*” *Id.* at 4 (emphasis added). Commissioner Cohen concludes that a reasonably prudent mine operator (the standard applied by the Commission in addressing notice questions, *Alabama By-Products Corp.*, 4 FMSHRC at 2129) who had received such an order would not recognize that the June 17 incident was a reportable fire, as the March termination order implied that smoke alone did not constitute such a fire. He recognizes, however, that because the Commission is upholding the judge’s finding that flames were observed as early as 7:30 a.m. and not extinguished until 9:50 a.m., there is an alternative theory of liability serving as the basis for the penalty. Consequently, the operator’s lack of notice of the Secretary’s interpretation of “fire” would not affect the ultimate outcome of this case.

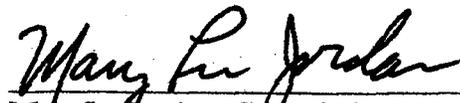
⁶ Phelps Dodge points to MSHA guidance indicating that “hot work” projects are considered to be “planned.” PD Reply Br. at 3-4, 12 (citing Emergency Mine Evacuation Final Rule Questions & Answers on MSHA’s web site). It is true that Metal Management had permission from Phelps Dodge to conduct “hot work.” However, we cannot agree that the “planned” nature of the hot work here – use of the torch on the car body – can be reasonably considered to extend to any fire that results from the hot work, regardless of how big the fire was, the damage that it caused, and the lives that it put in danger. To interpret the MSHA guidance regarding “hot work” in the way Phelps Dodge urges would eviscerate the meaning of “accident” and lead to absurd results. *See Central Sand & Gravel Co.*, 23 FMSHRC 250, 254 (Mar. 2001).

⁷ In contrast, immediately adjacent to the mine’s scrap yard, Phelps Dodge would burn scrap wood, as part of its fire brigade training program. Tr. 90-91, 127-28.

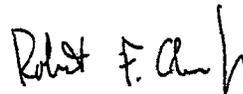
As for whether the actions that Phelps Dodge took in advance that indicate that it anticipated a fire could result from use of the torch on the car body, those actions mean that Phelps Dodge “planned for” a fire possibly occurring, not that the fire that occurred was a “planned” fire.

Moreover, as our colleagues agree, slip op. at 20-21, the fire that took place exceeded whatever expectations of fire there were prior to the start of the work that led to the fire. Despite the precautions taken by the Metal Management employees, McCauley, upon observing the scene and speaking with Metal Management supervisor Davila, had to call for the Phelps Dodge fire brigade to come and stand watch on the site. 29 FMSHRC at 670; Tr. 28-29, 63. Consequently, Phelps Dodge firefighter Bobo was dispatched in the mine’s fire truck to the scene, whereupon on his arrival he had to have the Metal Management employees instructed to move away from the emanating smoke, because they did not have the equipment necessary to protect them from smoke inhalation. 29 FMSHRC at 671; Tr. 62-63, 66-67, 81-82. Bobo also had McCauley take action to get two additional firefighters and a water truck dispatched to the area. 29 FMSHRC at 671; Tr. 33-35. Because of the flames, Bobo found it necessary to put on his air pack and spray the flames with approximately 300 gallons of water before the water truck could arrive. 29 FMSHRC at 671; Tr. 72, 75.

Thus, even accepting Phelps Dodge’s argument that actions taken in anticipation of a fire occurring are relevant to establishing that the fire was “planned,” in this case it quickly became apparent to the Phelps Dodge personnel that, regardless of what fire the Metal Management employees may have “had in mind” or “projected” could occur when they started working, the measures taken in advance were going to be insufficient. Consequently, we uphold the judge’s finding that the fire was “unplanned” under section 50.2(h)(6).



Mary Lu Jordan, Commissioner



Robert F. Cohen, Jr. Commissioner

Opinion of Chairman Duffy and Commissioner Young, in favor of not reaching the Secretary's alternate interpretation of the term "fire," and finding that the fire that occurred was unplanned:

A. The Secretary's Alternative Interpretation of "Fire"

On review, the Secretary takes the position that the Commission need not even take into account the evidence of flaming. According to the Secretary, the term "fire" is ambiguous, and she interprets it to "include both events marked by flaming combustion *and* events marked by smoldering combustion that reasonably has the potential to burst into flames." S. Br. at 13, 17 (emphasis in original). To demonstrate the reasonableness of this interpretation of "fire," the Secretary points to a different dictionary definition of "fire" than the judge relied upon and fire protection industry literature on the subject. *Id.* at 13-16.

The Secretary thus would have the Commission treat "fire" as a technical term, and have us decide between competing technical definitions of the term, one which requires the presence of flame, and one which does not. While it is apparent from the facts of this case and many others that have come before the Commission that the hazard posed by a fire is not limited to exposure to flame, we do not see the need in this case to choose between the parties' definitions and establish the full parameters of what constitutes a "fire" as that term is used in the definition of "accident." Rather, we believe the issue of whether there was a "fire" in this case can and should be decided on the narrower grounds found by the judge in his decision below.

Thus, while it may be reasonable for the Secretary to construe the term "fire" more broadly, encompassing combustion which produces no flame yet threatens the health or safety of miners, we see no need to address in deciding this case whether the smoldering of the car body and the smoke billowing from it was sufficient by itself to establish a "fire" under section 50.2(h)(6). The judge found that the observations of flames were roughly concurrent with the other indications that there could be a fire occurring, so this case simply does not hinge upon whether those other indications, by themselves, establish that a "fire" was in fact occurring.

Judicial principles of temperance and restraint dictate that cases not be over-decided; rather, they should be resolved on the narrowest set of grounds supported by the facts. Far-ranging conclusions, not necessary to the disposition of issues presented to the reviewing court in one case, may, ironically, end up constricting the court's discretion in subsequent cases where the facts may be significantly different. This is particularly true in instances where the reviewing court is presented with a broader rationale for deciding the case for the first time on appeal.

Such is definitely the case here, where all Commissioners unanimously agree that a "fire," even by the Judge's or Phelps Dodge's definition, occurred at 7:30 am on June 17, 2006, and recurred, intermittently, until it was successfully extinguished more than two hours later. As such, we further agree that the "fire" needed to be reported once it had not been extinguished within 30 minutes. We need not, and should not, decide more.

Moreover, we do not view this appeal as the proper vehicle to engraft upon the Mine Act and its regulations the broader interpretation of “fire” the Secretary has urged upon the Commission as an alternative to relying upon the definition of the term the judge utilized in upholding the citation. While we are not unsympathetic to the notion that there need not be evidence of flame to establish a “fire” under section 50.2(h)(6), we do not agree with the Secretary that it is necessarily the Commission’s role to use this case to establish a broader definition of “fire,” particularly where, as here, the Secretary did not even attempt to argue for the broader definition below.

Furthermore, section 50.2(h)(6)’s employment of the term “fire” is hardly unique in the Mine Act and its regulations. “Fire” is found in numerous sections of the amended Mine Act and in more than 100 of MSHA’s Mine Act regulations. We are reluctant to accept the Secretary’s suggestion to use this case, involving a relatively minor incident in a remote area of a surface mine, to establish the meaning of a term so prevalent in MSHA’s regulatory regime.

Rather, we believe notice and comment rulemaking is a much more appropriate forum in which to establish a definition of a term that is so prevalent in, and important to, the amended Mine Act.¹ See generally I Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.68, at 368-74 (4th ed. 2002) (discussing nine different advantages of rulemaking over adjudication as a source of generally applicable rules).

This conclusion is confirmed by the substance of the authority the Secretary cites for broadening the definition of “fire,” the National Fire Protection Association (“NFPA”). S Br. at 13-16. The NFPA literature cited by the Secretary indicates that not all solids can be considered to be on fire without the presence of flame. See I Arthur E. Cote, P.E., NFPA, *Fire Protection Handbook*, 2-55 (19th ed. 2003) (“Some solids can burn directly by glowing combustion or smoldering.”) (emphasis added) (quoted in S. Br. at 15); Raymond Friedman, NFPA, *Principles of Fire Protection Chemistry* 56 (2d ed. 1989) (“Smoldering generally is limited to porous materials that can form a carbonaceous char when heated”) (cited in S. Br. at 15-16). Developing a definition of fire that reflects that some of the time there can be fire without flame, but at other times there must be flame, is clearly a task much better accomplished through rulemaking than in a case such as this.

Lastly, adoption of the Secretary’s alternative interpretation of “fire” would raise notice issues. We see no need to complicate the resolution of this case by substituting as the basis for upholding the citation an interpretation of “fire” that the operator offered below that the Secretary did not oppose, for one that was not suggested by the Secretary until the appellate stage of this case.

¹ “[A] brief review of the legislative history of the [Mine] Act makes clear that fire is one of the primary safety concerns that has motivated federal regulation of the coal mining industry.” *Buck Creek Coal Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995) (citing H.R. Rep. No. 312, 95th Cong., 1st Sess. (1977); S. Rep. No. 181, 95th Cong., 1st Sess. (1977)).

B. Whether the Fire was Unplanned

While we agree with our colleagues that the fire at issue was not a planned fire exempt from the reporting requirements of 30 C.F.R. § 50.10, we write separately because we disagree with the analysis supporting the conclusion. We do not agree that only a fire planned and executed with the intent of generating combustion may be exempt from the reporting requirement. The cramped focus on the objective is not the most protective approach, and we believe miner safety and health would be enhanced by directing our attention instead to the preparations made in advance of any incident where combustion is a foreseeable result. In that case, the operator's planning for the consequences of the use of torches or other heat sources in proximity to or contact with combustible materials must be evaluated in terms of whether the consequences were fully anticipated by thorough planning before and proper action during the event in question.

The Secretary's assertion, accepted by our colleagues, that only a deliberately set fire may be exempt from the reporting requirement is unnecessarily narrow. While it is true that in this case, Phelps Dodge Health and Safety Manager Main conceded that the ignition of materials was an "unplanned" result of the work being performed by the Metal Management crew (Tr. 120), mine hazards are often a foreseeable consequence of ordinary operations. If they are foreseen, planned *for*, and anticipated with proper precautionary measures to ensure miners are not exposed to danger, the circumstances do not ordinarily cause a hazard. For instance, the *planned* subsidence incident to longwall mining is not a reportable "accident." The collapse of the gob is simply a foreseeable event proximately caused by the operator's ordinary operations. The operator proceeds with a plan to mine in a way that prevents miners from being exposed to the hazards of the collapsing gob, and no "accident" occurs when the gob caves in as foreseen.

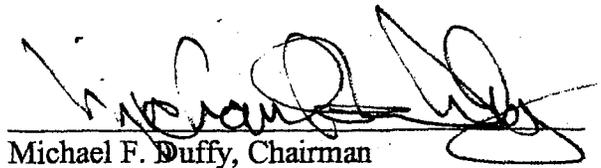
In much the same way, an operator may not intend that a fire consume the grease and other combustible material in a piece of equipment that is being cut with a torch for salvage. However, if the operator proceeds with a plan that fully anticipates that possibility, prepares for its occurrence in advance, and fully manages the event by extinguishing the fire, the event should not be a reportable accident under section 50.2(h)(6). We would therefore allow the exception to include activities from which an operator reasonably expects a fire to result, prepares for that event as though the fire will in effect happen, and maintains control over the progress of the fire from ignition through extinction.

Applying this analysis, we would nonetheless affirm the violation because the foresight and preparation in this case were inadequate. Phelps Dodge took a number of steps, as detailed *supra*, slip op. at 9 n.8, in preparation for the hot work involved in cutting up the car body, but the activity did not proceed as foreseen by those charged with carrying it out. As a result, Phelps Dodge management, employees, and equipment necessary for controlling any anticipated problems arising from the salvage work had to be assigned after the fact to help control and extinguish the fire. See 29 FMSHRC at 670-71; Tr. 28-29, 33-36, 72-75 (McCauley, fire marshal Bobo and two additional firefighters responded to the scene; water truck summoned and Bobo

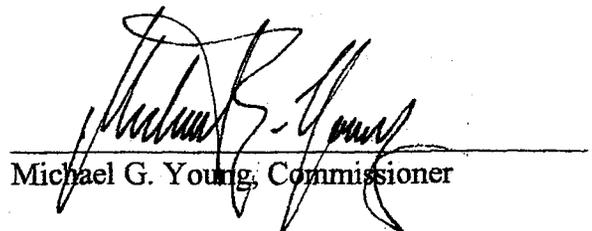
required to spray car body with approximately 300 gallons of water to control fire until water truck arrived).

By affirming the violation on this basis, we would encourage operators to engage in thoughtful preparation before undertaking activities that pose danger and risk exceeding the operator's efforts to contain them without such preparation. It is also entirely consistent with the organic source term used in 30 C.F.R. § 50.10, which is not "fire" but "accident." Finally, it is consistent with logic and sound public policy. Had the operator prepared in advance for a significant and prolonged fire, the likelihood of the fire getting out of control would have been greatly reduced. Applying the regulatory language in this way would thus be preventive, hortatory, within the language of the standard, and, therefore, more likely to protect miners from serious hazards.²

We would also strongly urge the Secretary, preferably through regulation, or, at least through clear guidelines, to distinguish between confined areas containing combustible materials where propagation could be expected, and remote, open, areas where the possibility of propagation is limited and threats to miners can be more easily controlled.



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

² Phelps Dodge argues that it lacked notice of the ALJ's interpretation that the term "planned" was not satisfied by the precautions taken by Phelps Dodge. PD Reply Br. at 12-13. Application of the reasonably prudent person test demonstrates that the operator had adequate notice in this instance. There is no better evidence of what a reasonably prudent person would think in this case than the immediate reaction of the miners when faced with a situation. Here, it is plain from the actions of both McCauley and Bobo when they came upon the scene that neither believed that the Metal Management employees had adequately planned for the fire that resulted from their work on the car body. Consequently, we reject the notion that Phelps Dodge lacked adequate notice of how the term "unplanned" could be applied in this case.

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Id. at 1074-77. Consequently, the court vacated and remanded to the Commission its decision in *National Cement Co. of California*, 27 FMSHRC 721 (Nov. 2005), for the Secretary to submit such an interpretation. 494 F.3d at 1077. For the reasons that follow, we conclude that the Secretary's interpretation submitted on remand is not a permissible interpretation of section 3(h)(1).

I.

Factual and Procedural Background

As is more fully discussed in the Commission's original decision and the court's opinion, the issue in this case is whether the Department of Labor's Mine Safety and Health Administration ("MSHA") has jurisdiction to enforce the Mine Act with regard to the 4.3-mile two-lane access road running north from State Route 138 in northern Los Angeles County, California, to the Lebec cement plant and quarries operated by National Cement Company of California, Inc. ("National Cement") in southern Kern County, California ("Access Road"). See 494 F.3d at 1069-72; 27 FMSHRC at 722-25.² Both the National Cement facilities and the Access Road are on Tejon Ranch property ("Ranch"), which is owned by Tejon Ranchcorp ("Tejon"). 494 F.3d at 1069. National Cement leases the property from Tejon, and its use of the Access Road, which provides the sole vehicular access to the leasehold, is pursuant to easement deeds granted by Tejon. 27 FMSHRC at 722, 723.

Use of the Access Road is restricted to: (1) Tejon's employees, vendors, contractors, lessees, licensees, and visitors; (2) National Cement's employees, vendors, contractors, and visitors; and (3) those persons authorized to use the road by the State of California. *Id.* at 722. While the record reflects that the great majority of traffic on the road is due to the cement plant, the road is used by Tejon and its other lessees, licensees, and authorized visitors in the course of various other activities at the Ranch. *Id.* at 723. Some of the other activities are commercial, such as: management of ranching operations by Tejon and its lessees (27 FMSHRC at 92); entertainment production companies, commercial photographers, and others filming motion picture scenes, commercials, music videos, and taking commercial still photographs (*id.* at 92-93); and hunting and camping programs administered by Tejon management (*id.* at 93-94). The road is also used by representatives of utility companies to access portions of the Ranch subject to easements those utilities have entered into with Tejon, the Federal Aviation Administration to access a communications tower located on Tejon land, and the California Department of Water Resources ("DWR"), which owns the Access Road bridge over a DWR aqueduct. 27 FMSHRC at 723-24. Finally, as the Commission noted in its original decision, the subject road may also become a main traffic artery for an area of the Ranch for which there are extensive mixed-use development plans. *Id.* at 723 n.4.

² The factual record in this case consists of the 77 joint stipulations that the parties submitted to the administrative law judge, all of which he set forth in his original decision, and a book of Joint Exhibits filed by the parties. See 27 FMSHRC 84, 85-98 (Jan. 2005) (ALJ).

As far back as 1992, MSHA began citing National Cement for the lack of berms or guardrails along the Access Road, but MSHA subsequently vacated each of those citations on jurisdictional grounds. *Id.* at 724. In December 2003, however, MSHA definitively took the position that the Access Road was subject to the Mine Act, and shortly thereafter issued the citation that is at issue in this case, No. 6361036. *Id.* at 724-25. National Cement contested the citation, and Tejon intervened. *Id.* at 725. After filing their joint stipulations and exhibits, the parties subsequently filed cross-motions for summary decision on the issue of whether the road is subject to Mine Act jurisdiction. 27 FMSHRC at 84.

Administrative Law Judge Jerold Feldman granted the Secretary of Labor's motion for summary decision and held that the Access Road is a "coal or other mine" and is thus subject to the jurisdiction of the Mine Act and MSHA. *Id.* at 103. In determining that the road at issue was a "coal or other mine" under section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1), the judge read subsection (B) according to what he considered to be its plain meaning. 27 FMSHRC at 98-99. He concluded that the parties' stipulations established that the road was "private," and that under the commonly understood meaning of the term, the road was "appurtenant" to the cement plant. *Id.* at 99. Upon the subsequent motion of National Cement, the judge certified his interlocutory ruling (27 FMSHRC 157 (Feb. 2005) (ALJ)), and we ordered review of the judge's decision.

On the interlocutory appeal, a majority of the Commission held that applying "private" and "appurtenant to" according to the interpretation of those terms advanced by the Secretary would in this instance, under the strict liability scheme of the Mine Act, lead to the absurd result of National Cement being responsible for use of the road by parties over whom it had no control. 27 FMSHRC at 728-35.³ Consequently, we vacated the judge's order granting the Secretary's motion for summary decision. *Id.* at 735. We also remanded the case to the judge for a determination whether any part of the Access Road was used exclusively by cement plant traffic, and thus was properly subject to Mine Act jurisdiction as a "coal or other mine" under section 3(h)(1)(B). *Id.* The judge subsequently found that the entire road was subject to use by other users authorized by Tejon and vacated the citation that had been issued to National Cement. 28 FMSHRC 21, 22 (Jan. 2006) (ALJ).

The Secretary appealed our decision, and a majority of the D.C. Circuit panel considering the case held that both "private" and "appurtenant" as they are used in section 3(h)(1)(B) each have more than one meaning, and thus are ambiguous. 494 F.3d at 1073-75. Because the Secretary had erroneously interpreted the terms as having plain, unambiguous meanings, the court vacated our decision and remanded it to us to obtain from the Secretary a "Chevron step 2" interpretation of subsection (B). *Id.* at 1077; see *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

³ Commissioner Jordan dissented on the ground that application of the plain meaning of section 3(h)(1)(B) indicated that MSHA had jurisdiction over the Access Road and that such an interpretation would not lead to absurd results. *Id.* at 737-43 (Comm. Jordan, dissenting).

Specifically, the Secretary's position had been that because the term "private" meant "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public," the Access Road could be considered to be "private" due to the fact that it could only be used by a particular group or class – those authorized to use it by Tejon. *See* 27 FMSHRC at 727-28 (citations omitted). The court held, however, that the term "private" is actually ambiguous, because it "may be construed more narrowly to mean restricted to the use of 'a particular person' such as National Cement," which it is not in this case. 494 F.3d at 1074.

Similarly, the Secretary believed that the Access Road could be considered "appurtenant to" the cement plant because National Cement had the right to use the Access Road as a result of a transferable right-of-way easement. *See* 27 FMSHRC at 728. The court concluded, however, that the term "appurtenant" was also ambiguous, as it too was subject to a narrower construction, "as suggested by the definitional language 'annexed or belonging legally to,' to mean dedicated exclusively to the use of the mine." 494 F.3d at 1074. Again, the Access Road is not dedicated exclusively to the use of National Cement.

The court further instructed that the Secretary's interpretation on remand would have to address the problematic issues raised by National Cement and Tejon before the court, which the court characterized as "not frivolous concerns." *Id.* at 1075-77. The court questioned whether National Cement, as a non-exclusive right-of-way grantee, had the right to install the guardrails or berms MSHA was seeking along the Access Road. *Id.* at 1075. The court also questioned how National Cement could carry out various obligations the Mine Act imposes on it as a mine "operator" with respect to road users "over whom it has no authority and with whom it has no business connection whatsoever." *Id.* Finally, the court suggested that the Secretary's interpretation would extend Mine Act jurisdiction to Tejon and others "with right-of-way control over the Access Road notwithstanding the party lacks any relation whatsoever to the mine's operation." *Id.* at 1076.

Subsequently, the Commission issued a briefing order requesting that the Secretary file a brief upon remand that includes the interpretation required by the Court, supported by argument and authority. Unpublished Order at 3 (Oct. 11, 2007). That order also provided for the filing of briefs by National Cement and Intervenor Tejon. *Id.*⁴

⁴ On January 10, 2008, the parties jointly moved for permission for the Secretary to file a reply brief and National Cement and Tejon to file surreply briefs, and later filed such briefs. The Commission lacked a quorum at that time to act upon the joint motion. All four Commissioners subsequently voted and hereby grant the joint motion. Similarly, all four Commissioners voted and hereby grant the Secretary's unopposed January 29, 2008, motion to file a reply brief slightly in excess of the Commission's 15-page limit on reply briefs.

In her brief on remand, the Secretary stated the following as the interpretation she was offering in response to the court's opinion:

In view of the Court's holdings that the language of Section 3(h)(1)(B) is ambiguous and that the Secretary is required to issue citations for all violations over which she has jurisdiction, even if the violative conditions have no effect on miner safety, the Secretary interprets the definition of "mine" in Section 3(h)(1)(B) of the Mine Act to encompass the [A]ccess [R]oad in this case. The Secretary, however, interprets Section 3(h)(1)(C) of the Act to exclude from the definition of "mine" vehicles on the road that are not related to National Cement's mining operations.

S. Remand Br. at 13.

II.

Disposition

The Secretary submits that using the terms of section 3(h)(1)(C) to limit the scope of her jurisdiction under section 3(h)(1)(B) is consistent with the language of section 3(h)(1)'s definition of "coal or other mine." S. Remand Br. at 13-17; S. Remand Reply Br. at 1-5. As she did the first time this case was before the Commission, the Secretary also maintains that her interpretation of section 3(h)(1)(B) is consistent with the legislative history of the Mine Act and a predecessor statute. S. Remand Br. at 17-22; S. Remand Reply Br. at 5-8. In arguing that her interpretation on remand is consistent with the overall structure of the Mine Act, the Secretary addresses the specific concerns raised in the court's opinion regarding the reasonableness of such an interpretation in light of the enforcement provisions of the Mine Act. S. Remand Br. at 23-34; S. Remand Reply Br. at 8-14. The Secretary takes the position that even though her interpretation upon remand is different than previous interpretations of section 3(h)(1) that she has advanced during and prior to this litigation, it is nevertheless entitled to deference. S. Remand Reply Br. at 14-16.

National Cement describes the Secretary's interpretation upon remand as unprecedented and illogical, arguing that it is impermissible for her to read section 3(h)(1)(C) to modify the scope of section 3(h)(1)(B). NC Remand Br. at 15, 20-23; NC Remand Surreply Br. at 8-12. National Cement also believes that the legislative history supports its position that the Access Road is neither "private" nor "appurtenant to" the cement plant. NC Remand Br. at 16-20, 31-34. According to National Cement, the Secretary's interpretation upon remand clashes with the text and structure of the Mine Act as a whole, and thus does not satisfy the Court's instruction in remanding the case. NC Remand Br. at 23-31, 36-39; NC Remand Surreply Br. at 5-8, 13-15. National Cement suggests that because the Secretary's interpretation on remand is the latest in a series of policy shifts on her part regarding the status of the Access Road, the Commission

should refuse to accord that interpretation the deference it otherwise would be owed. NC Remand Br. at 34-36.

Intervenor Tejon objects that the Secretary's interpretation on remand would have her treating the Access Road as a mine only some of the time, depending on who was using it, which Tejon argues the Secretary cannot do under the Mine Act. T. Remand Br. at 7-14; T. Remand Surreply Br. at 6-10. Tejon is also concerned that it and other non-mine users of the Access Road will be considered as "operators" to the extent that National Cement does not control non-mine traffic on the Road. T. Remand Br. at 14-18; T. Remand Surreply Br. at 10-13. Like National Cement, Tejon believes that the Commission should reject the Secretary's interpretation upon remand because of her history of constantly changing her position on whether the Access Road is a "coal or other mine" under section 3(h)(1). T. Remand Surreply Br. at 2-6.

Section 3(h)(1) of the Mine Act reads in pertinent part:

"coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, 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 in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1) (emphases added).

Until now, the Secretary has relied solely on subsections (A) and (B) of section 3(h)(1) of the Mine Act to argue that MSHA's jurisdiction over the cement plant extends to the Access Road.⁵ She now advances an interpretation that also relies upon the final subsection of section

⁵ It is undisputed that the cement plant is a "mine" and thus subject to the jurisdiction of MSHA under the Mine Act. 27 FMSHRC at 85, 98; *see also* 27 FMSHRC at 726 n.5 (discussing interagency agreement between MSHA and the Occupational Safety and Health Administration which allocates to MSHA jurisdiction over cement plants). As we noted in our earlier decision, all parties to the case "also are apparently assuming that the entire National Cement facility qualifies as an 'area of land from which minerals are extracted' under subsection (A)" of section 3(h)(1). 27 FMSHRC at 727 n.6. Thus, the case has always focused on whether the Access Road can be considered "appurtenant to" to the cement plant, and not specifically to just that part of the plant that falls within the subsection (A) language, which possibly could be read to describe less than the entire plant, such as the quarry areas only.

3(h)(1), subsection (C), to support her position that it is reasonable for her to consider the Access Road as “private” and “appurtenant to” the cement plant property. According to the Secretary’s interpretation on remand, jurisdiction under the Mine Act over “equipment, machines, tools, or other property” pursuant to subsection (C) attaches only to such items that are used or to be used in a mining, milling, or coal preparation process. Therefore, under this interpretation, vehicles not used in any of those processes that are on a road described in subsection (B) fall outside Mine Act jurisdiction. S. Remand Br. at 16-17; S. Remand Reply Br. at 1-5. The Secretary further takes the position that she can look to subsection (C) to establish the scope of subsection (B), but need not likewise do so to establish the scope of subsection (A). S. Remand Reply Br. at 3-5.

The Secretary’s interpretation on remand thus raises two related questions: (1) whether her new interpretation of section 3(h)(1) is a permissible reading of that provision as a preliminary matter; and (2) if so, does her interpretation adequately address the concerns the court enumerated in questioning whether, given the enforcement provisions of the Mine Act, it is reasonable to consider the Access Road to be “private” and “appurtenant to” the cement plant and thus within the jurisdiction of the Mine Act. *See* 494 F.3d at 1075-76.

A. The Standard of Review

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). The Commission has held that “[i]n determining [the] coverage [of section 3(h)(1)], we must give effect to Congress’ clear intention in the Mine Act, discerned from the ‘text, structure, and legislative history.’” *Harless Towing, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994) (quoting *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989)). In ascertaining the plain meaning of a statute, courts utilize traditional tools of construction, including an examination of the “particular statutory language at issue, as well as the language and design of the statute as a whole,” to determine whether Congress had an intention on the specific question at issue. *K Mart Corp.*, 486 U.S. at 291; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project*, 889 F.2d at 1131.

It is only after a statute has been found to be ambiguous or silent on a point in question that the second inquiry – a “*Chevron* step 2” inquiry – is made as to 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; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). 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. *See Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

In her initial remand brief, the Secretary was silent on whether she is relying on the plain meaning of section 3(h)(1)(C), or whether its terms are, like the ones at issue in section 3(h)(1)(B), also ambiguous (and the Commission must also defer to a reasonable interpretation of that subsection by her). In her reply remand brief, however, she states that, with respect to the interaction of subsections (B) and (C) of section 3(h)(1), “[b]ecause the Secretary’s interpretation is reasonable, it should be affirmed.” S. Remand Reply Br. at 3. Consequently, we do not consider the Secretary to be relying upon the plain meaning of the statute.

Unlike with subsection (B) of section 3(h)(1) (*see* 27 FMSHRC at 727 & n.7), there have been numerous court and Commission cases involving the interpretation and application of the terms of subsection (C) in determining whether the definition of “coal or other mine” has been met in a particular instance. Moreover, almost from the onset of passage of the Mine Act, the meaning of subsection (C) within that definition has been described as “clear” as it relates to Mine Act jurisdiction. *See, e.g., Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 592 (3rd Cir. 1979) (finding a subsection (C) structure and facility to be a “mine” because “the word means what the statute says it means”), *cert. denied*, 444 U.S. 1015 (1980); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 796 (4th Cir. 1981) (under terms of section 3(h)(1)(C), it is clear that facilities and equipment used in preparing coal are included in the definition of “mine”).⁶

Until now, there has been no controversy regarding the plain meaning of section 3(h)(1)(C). It means that “[t]he definition [of ‘coal or other mine’] is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.” *Harless*, 16 FMSHRC at 687. In other words, and as indicated in the cited cases, subsection (C) has been interpreted to plainly mean that Mine Act jurisdiction extends beyond subsections (A) and (B), to reach subjects that may not be encompassed by the terms of those subsections. Now, the Secretary interprets subsection (C) to serve an additional purpose: to limit the scope of subsection (B).

⁶ *See also U.S. Steel Mining Co.*, 10 FMSHRC 146, 148-49 (Feb. 1988) (stating that “applicable legal framework is clear” in finding that separate repair shop for three of operator’s mines is also a mine under section 3(h)(1)(C)); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (Jan. 2000) (“conclud[ing] that the language of [section 3(h)(1)(C)] is clear” in finding that a supply shop separate from the operator’s four mines was also a mine); *Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000) (language of section 3(h)(1)(C) is clear).

B. The Language of Section 3(h)(1)

The starting point for interpreting the statutory definition of “coal or other mine” is the language of the definition. *See, e.g., Harman*, 671 F.2d at 796; *Justis*, 22 FMSHRC at 1296. In support of the interpretation of section 3(h)(1) she has offered on remand, the Secretary argues that “the definition of ‘mine’ in [s]ection 3(h)(1)(B) refers only to ‘private’ roads ‘appurtenant to’ extraction areas, and is silent as to whether vehicles using such roads are also included within the definition of ‘mine.’” S. Remand Reply Br. at 2.

While the Secretary’s assertion is true, it is far from persuasive. In our prior decision in this case, we interpreted section 3(h)(1), including the reference in subsection (B) to “ways and roads,” as follows:

[S]ection 3(h)(1) defines “coal or other mine” in geographic terms. *Energy West Mining Co.*, 15 FMSHRC 587, 592 & n.9 (Apr. 1993). All activities that occur within a mine’s consequential boundaries are covered by the Mine Act. There is nothing in the Mine Act which would limit jurisdiction over the [A]ccess [R]oad temporally or functionally, such as only when the road is being used in furtherance of National Cement’s operations.

27 FMSHRC at 732 n.12. This construction of section 3(h)(1) by the Commission was not rejected by the court. The Secretary’s position that the silence in subsection (B) regarding vehicles (or any other potential subject of Mine Act jurisdiction, for that matter) permits her to look to subsection (C) to temporally or functionally limit her jurisdiction under subsection (B) flatly contradicts the statute.

We instead agree with National Cement (NC Remand Br. at 21-23) that section 3(h)(1), by including subsection (C) within the definition of “coal or other mine,” provides an independent basis for jurisdiction over the enumerated subjects of the mining, milling, or coal preparation process that may not otherwise be encompassed within the geographic areas established by subsections (A) and (B). Congress recognized the potential for certain aspects of those processes to be performed beyond the extraction lands and the private roads appurtenant to those lands.⁷ The three subsections of section 3(h)(1) were plainly drafted and placed

⁷ Indeed, the Secretary, using the language of subsection (C), stated to the D.C. Circuit that there is “longstanding case law holding that [s]ection 3(h)(1) encompasses structures, facilities, and other areas and equipment that are *not* on the site of the extraction area.” S. Court Reply Br. at 10-11 (emphasis in original) (citations omitted). *See, e.g., U.S. Steel*, 10 FMSHRC at 147-48 (central repair shop for three of operator’s mines, that were as far as eight and one-half miles away, is a mine under section 3(h)(1)(C)); *Jim Walter*, 22 FMSHRC at 22, 25 (finding that a central supply shop as far as 25 miles away from the operator’s four mines was also a mine); *Justis*, 22 FMSHRC at 1293, 1296 (equipment being assembled one mile away from where it was

sequentially in order to collectively cast a jurisdictional net over all those subjects that can possibly be considered to be part of the mining process, in order to reach as many of the potential dangers that are specific to mining that can possibly be reached.

In short, there simply is no precedent or support for the Secretary's argument that one of the subsections of section 3(h)(1) can be used to limit the reach of one of the other subsections and effectively modify the wording of that subsection. Nothing in section 3(h)(1) indicates that the limiting language appearing in subsection (C) – used or to be used in mining, milling, or coal preparation – was also intended to limit the subject of subsection (B).⁸ Given the well-established plain meaning of subsection (C), such an interpretation is not permissible. Subsection (C) was drafted to further extend the overall definition of “coal or other mine,” not for the contrary purpose of limiting the scope of subsection (B).

Moreover, the Secretary's interpretation upon remand excludes from subsection (B) jurisdiction only *vehicles* unrelated to National Cement, but many other potential subjects of MSHA regulation could conceivably arise upon the Access Road. As the Commission stated in its original decision in this case:

Considering 30 C.F.R. Part 56 alone, National Cement would be potentially liable for violations of a myriad of Mine Act standards that would apply to parties using the [A]ccess [R]oad for any number of non-cement plant purposes if we were to uphold MSHA's jurisdiction over the [A]ccess [R]oad. While many Part 56 standards are by their nature limited in their application to mining operations, a significant number are not and are relevant to the various non-cement plant uses of the access road. *See, e.g.*, 30 C.F.R. Part 56, Subpart C (Fire Prevention and Control), Subpart D (Air Quality and Physical Agents), Subpart E (Explosives), Subpart H (includes traffic safety provisions), Subpart Q (Safety Programs), and Subpart S (Miscellaneous).

27 FMSHRC at 733. As can be seen from this partial summary of Part 56, it is not just vehicular use of the Access Road unrelated to National Cement that implicates MSHA standards; rather

to be used in mining fell within the definition in section 3(h)(1)(C)).

⁸ In our opinion, the Secretary further weakens her argument by taking the position that the terms of subsection (C) limit the scope of subsection (B), but not of subsection (A). She argues that this is a reasonable position because Congress used the “geographically encompassing term ‘area’” in subsection (A) but not in subsection (B). S. Remand Reply Br. at 3-5. The subject of subsection (B) – ways and roads – seems to us to be just as “geographically encompassing” as section 3(h)(1)(A)'s reference to “area of land,” and has the added benefit of being a more concretely defined subject of geographic jurisdiction.

other non-National Cement activities could occur on or along the road that would also be covered by those standards should the Access Road be considered to be part of the mine under section 3(h)(1)(B).⁹ Excluding non-National Cement vehicles from the reach of MSHA's subsection (B) jurisdiction simply does not do nearly enough to prevent MSHA jurisdiction from potentially attaching to the possible non-mine uses of the Access Road should the road be subject to MSHA regulation as a mine. If the Access Road is considered to fall within the definition of "coal or other mine," it would subject those on it to regulation of much more than their use of vehicular transport over it.

C. The Legislative History of Section 3(h)(1)

The Secretary cites no legislative history in support of her interpretation upon remand that subsection (C) of section 3(h)(1) can be read to limit the scope of subsection (B). Rather, she repeats arguments she previously made before the Commission in this case that the legislative history supports a generally expansive interpretation of subsection (B), and thus the Access Road should be considered "private" and "appurtenant to" to the cement plant. S. Remand Br. at 17-21.

Specifically, the Secretary cites references in the Mine Act's history that the term "coal or other mine" should be given the broadest possible interpretation. S. Remand Br. at 17-18.¹⁰ In response to that argument in our original decision, we relied upon the decision in *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932 (6th Cir. 1977). There, the court acknowledged the legislative intention that "coal or other mine" be given "a very broad reading," but held that such general legislative history does not mean that section 3(h)(1)(B) should be read contrary to common sense. *Id.* at 936-37. The D.C. Circuit cited with approval the *Bush & Burchett* court's opinion regarding the need to read some limit into section 3(h)(1)(B). *See* 494 F.3d at 1077. Accordingly, we remain unpersuaded that this general gloss on section 3(h)(1) is adequate by itself with respect to the terms of subsection (B) at issue here.

⁹ In fact, in our earlier decision, we specifically mentioned the use of explosives by a film company along the road as one potentially problematic subject of MSHA regulation resulting from the Access Road being considered a mine under section 3(h)(1)(B). 27 FMSHRC at 731.

¹⁰ In considering the legislation that eventually became the Mine Act, the Senate Committee responsible for drafting it stated "that what is considered to be a mine and to be regulated under this Act [should] be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

The Secretary also cites the legislative history of a predecessor statute to the Mine Act, in which the language of section 3(h)(1)(B) originated. S. Remand Br. at 19-20. With regard to that legislative history, we stated in our first decision:

As both parties acknowledge . . . a definition of “mine” much along the lines of that now found in section 3(h)(1) of the Mine Act, and including the subsection (B) language at issue here, originated in a predecessor statute to the Mine Act, the Federal Metal and Nonmetallic Mine Safety Act [(“Metal Act”)]. See Pub. L. No. 89-577, Sec. 2(b), 80 Stat. 772, 772-73 (1966). There is no explanation in the reports that accompanied that legislation of the meaning of “private ways and roads appurtenant to.” See 1966 U.S.C.C.A.N. 2846 (S. Rep. No. 89-1296). Consequently, the applicable legislative history is of no assistance in determining whether Congress intended to extend MSHA’s jurisdiction to a road over which the mine operator substantially lacked the ability to exclude other users, as is the case here.

27 FMSHRC at 734 n.15.

The reason that we did not further consider the legislative history when we found no report language addressing the subject is because the testimony that first suggested the enactment of language along the lines of what is now section 3(h)(1)(B) included a request for a much broader definition of “coal or other mine” with respect to access roads. An earlier version of the Metal Act defined “mine” with the language now found in subsection (A) of section 3(h)(1) of the Mine Act and some of the language found in subsection (C) of that section. However, there was as yet no reference to “private ways or roads appurtenant” as appears now in subsection (B). See H.R. 6961, 89th Cong. § 2(b) (1965), *reprinted in* H.R. Select Subcomm. on Labor of the Comm. on Education and Labor, *Federal Metal and Nonmetallic Safety Act: Hearings on H.R. 6961 and Similar Bills*, at 1 (1965) (“*Hearings on H.R. 6961*”).

Subsequently, in hearings held on that and similar bills, Sidney Zagri, legislative counsel of the International Brotherhood of Teamsters, provided the testimony excerpted in the Secretary’s brief on remand. See S. Remand Br. at 19-20. He specifically further testified:

I would like to take up now specific amendments dealing with specific problems that we face as Teamsters in the mining industry.

Problem No. 1.

Access roads: The condition of access and service roads is a frequent cause of accidents for truckdrivers and others. Roads are too narrow, covered with dust in the summer and ice in the winter, with shoulders too soft for any

vehicle to venture into in any emergency and, in most cases, unposted with any uniform safety signs or any signs at all. Workings are often too close to access roads, adding falling rocks as an additional hazard to drivers. Blasting often takes place too close to access roads.

Amendment 1: After the word “minerals” add “all access and service roads leading into or from such areas,”

[Rep]. Gibbons. Does that include public highways?

Mr. Zagri. No, sir.

[Rep]. Gibbons. You are talking about the road on the private property?

Mr. Zagri. Yes. This is an area where there is no protection afforded at the present time.

Statement of Sidney Zagri, Legislative Counsel, International Brotherhood of Teamsters, Hearing held May 5, 1965, *reprinted in Hearings on H.R. 6961*, at 220, 223.

It was after the hearing that the House legislation, like the eventual Metal Act, included the language defining “mine” presently at issue: “(1) an area of land from which minerals . . . are extracted . . . , (2) private ways and roads appurtenant to such area, and (3)” *See H.R. 8989*, 89th Cong. § 2(b) (1965), *reprinted in Sen. Subcomm. on Labor of the Comm. on Labor and Public Welfare, Metal and Nonmetallic Safety Act: Hearings on H.R. 8989, S. 2972, S. 996, and S. 3094*, at 2, 3 (1966). Clearly, the purpose of the Teamsters’ suggested amendment to the legislation was to reach non-public roads in order to close a gap in safety coverage. In addition, the problem was described in the context of roads accessing and serving mines.

However, as National Cement points out, it is noteworthy that the more limited “private ways and roads appurtenant” language was ultimately adopted by Congress instead of the suggested broader language extending the definition to include *all* private access and service roads leading to or from a mineral extraction area. *See NC Remand Br. at 33-34*. The Teamsters’ suggested language seemed designed to cover more roads less immediately connected to extraction lands, including the Access Road, because all that would need to be shown was that the road was used in accessing extraction areas from public roads.

Because the legislative history regarding the intended reach of subsection (B) is inconclusive, it is insufficient to support, by itself, the Secretary’s interpretation of section 3(h)(1). The legislative history not only fails to adequately address the intent of Congress with respect to roads like the Access Road, but it offers no support whatsoever for the Secretary’s use of subsection (C) to limit the scope of subsection (B) in her interpretation on remand of section 3(h)(1).

Consequently, we find that as a preliminary matter the Secretary's interpretation upon remand of section 3(h)(1) is impermissible. That the Secretary cannot find a way to assert jurisdiction over the Access Road under the terms of section 3(h)(1)(B), without also bringing non-mine use of the road under the coverage of the Mine Act, is a strong indication that the terms "private" and "appurtenant to" only make sense within the context of the Mine Act in the narrower meaning of those terms noted by the court: restricted to use by the mine and dedicated exclusively to the mine's use. *See* 494 F.3d at 1074.

D. Treating Parties Other Than National Cement as Operators of the Access Road

Because we conclude that the Secretary's interpretation upon remand of section 3(h)(1) is impermissible, we need not reach the additional question of whether that interpretation adequately addresses the concerns the court enumerated in questioning whether, given the enforcement provisions of the Mine Act, it is reasonable to consider the Access Road to be "private" and "appurtenant to" the cement plant and thus within the jurisdiction of the Mine Act. *See* 494 F.3d at 1075-76. However, we feel compelled to address the Secretary's apparent assumption that her interpretation can be easily reconciled with those provisions of the Act by treating a party other than National Cement, such as Tejon, as a mine "operator" of the Access Road for purposes of the Mine Act in situations in which National Cement is not the "operator." In response to each of the three areas of concern the court outlined in its opinion (*see supra*, slip op. at 4), the Secretary falls back on this assumption. *See* S. Remand Br. at 33-34; S. Remand Reply Br. at 10-13.

The court in its decision specifically stated that:

[b]ecause the Act defines a mine "operator" expansively to include "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine," 30 U.S.C. § 802(d), under the Secretary's interpretation Mine Act jurisdiction would extend to Tejon as the "operator" (owner) of the Access Road and to any other party with right-of-way control over the Access Road *notwithstanding the party lacks any relation whatsoever to the mine's operations*. Each of them could be liable as a mine operator for mine safety infractions occurring on the Access Road.⁹

⁹ In fact, the Secretary acknowledges that she would treat Tejon as an operator subject to Mine Act jurisdiction.

494 F.3d at 1076 (emphasis added). The Secretary's response is to state that under her "interpretation . . . if Tejon retains (or any other entity is given) the authority to control

maintenance of the [Access R]oad, it is the operator of the road. As such, it is required to comply with MSHA standards relating to road maintenance.” S. Remand Br. at 33.

The court had ample grounds to question how a party with absolutely no involvement in mine operations can nevertheless be considered a mine “operator” under the Mine Act. In *Berwind Natural Resources Corp.*, 21 FMSHRC 1284 (Dec. 1999), the Commission explained:

When reviewing the Secretary’s decision to designate an entity as an operator under the Act, the Commission will examine whether the entity has substantial involvement with the mine. . . . [W]e will evaluate the participation and involvement of the entity in the mine’s engineering, financial, production, personnel, and health and safety matters to determine whether that entity qualified as an operator under the Act.

Id. at 1293. Thus, the Commission has made clear that an entity must have “substantial involvement” with mine-related activities in order to be considered a mine “operator.”

The Secretary provides no supporting authority for treating an entity like Tejon as an “operator” under the Mine Act. To do so would constitute an application of the Mine Act that should be undertaken only after a thorough consideration of the ramifications. Here, however, it is offered as little more than an aside to justifying the Secretary’s continued effort to establish jurisdiction over the Access Road.

On the present record, we simply cannot agree with the Secretary that the Access Road can be severed from the cement plant so that a separate entity can be deemed to be the operator of the Access Road and the Mine Act can be enforced against that operator. Given the factors that the Commission examines in determining who is a mine “operator,” it is inconceivable that a road like the Access Road would be considered as a stand-alone “mine” for purposes of the Mine Act.

In summary, the Secretary’s interpretation upon remand is not a permissible construction of section 3(h)(1)(B). Even if it were, it fails to adequately answer the D.C. Circuit’s concerns regarding the reconciliation of the interpretation with the enforcement provisions of the Mine Act.

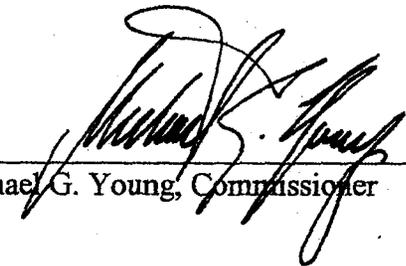
III.

Conclusion

For the foregoing reasons, we reject the Secretary's interpretation upon remand and vacate the citation.



Michael F. Duffy, Chairman



Michael G. Young, Commissioner

Commissioner Cohen, concurring in result:

I did not have a seat on the Commission when it first heard this case and issued its decision in *National Cement Co. of California*, 27 FMSHRC 721 (Nov. 2005). Had I been, I would have joined in the dissent to that decision of my colleague, Commissioner Jordan. See 27 FMSHRC at 737-43 (Comm. Jordan, dissenting). I believe that Commissioner Jordan's original opinion, as amplified by the subsequent dissent in the D.C. Circuit case, sets forth the proper interpretation of section 3(h)(1)(B) of the Mine Act, 30 U.S.C. § 802(h)(1)(B). See *Sec'y of Labor (MSHA) v. National Cement Co. of California*, 494 F.3d 1066, 1077-80 (D.C. Cir. 2007) (Rogers, J., dissenting).

Using, as we must, the framework for interpreting statutes first set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), I believe that the terms "private" and "appurtenant to" as they are used in section 3(h)(1)(B) have unambiguous meanings. "[P]rivate" means not open to the public, and it is undisputed that the Access Road is not open to the public. See 494 F.3d at 1078; 27 FMSHRC at 737-38. The term "appurtenant" is used to describe the relationship of a lesser property interest to a greater property interest, the most common example of which is an easement. Here, again, National Cement's use of the Access Road is by way of an easement that is coincident with its leasehold interest in the Tejon Ranch property for its cement plant facility. See 494 F.3d at 1078; 27 FMSHRC at 738-39. Thus, I would interpret section 3(h)(1)(B) to conclude that the Access Road falls within MSHA's jurisdiction.

I believe such a conclusion is particularly appropriate given the characteristics of the Access Road which prompted MSHA to seek the installation of berms or guardrails along the road. I disagree with the original majority in this case (27 FMSHRC at 733) that the Access Road can be equated with a typical highway with respect to the hazards that drivers face in using the road. The record amply documents the dangers faced by drivers on the road, particularly the drivers of the heavy trucks that are by far the most frequent users of the road. It is a two-lane road without berms or guardrails, traveled an average of 148 round-trips a day by trucks weighing approximately 80,000 pounds when loaded. 27 FMSHRC 84, 86, 91 (Jan. 2005) (ALJ). The drop-offs along the road range from six feet to approximately 25 feet. *Id.* at 86; Jt. Ex. 70 (Citation No. 6361036). Accidents have occurred along this road, including the rollover of one heavy truck and the partial rollover of another. S. Mot. for Summ. Dec., Exs. 5 (Aff. of Goldade), 6 (NC Accident Report & Mem. from Randy Logsdon dated Sept. 8, 2003), & 7 (NC First Supplemental Resp. to Interrog. No. 19). Miners have made complaints to MSHA about the road conditions. *Id.*, Ex. 5. MSHA determined that the road is hazardous, especially during inclement weather. 27 FMSHRC at 86-87; Jt. Ex. 70. Clearly, MSHA was motivated by significant safety concerns in asserting jurisdiction over the Access Road. See 494 F.3d at 1080; 27 FMSHRC at 741-43.

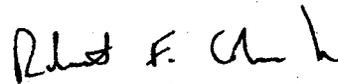
I also disagree with the original majority that the comparatively infrequent use of the Access Road for non-National Cement purposes would lead to such absurd results under the

Mine Act that the terms of section 3(h)(1)(B) cannot be literally applied in this instance. As the dissenting opinions cogently explain, concern for such results seems little more than speculation given the disparity in road use. *See* 27 FMSHRC at 739-42; 494 F.3d at 1079-80.

My opinion on these issues, however, is moot at this point in the case. The majority of the D.C. Circuit panel hearing the appeal of the Commission's original decision held that the terms of section 3(h)(1)(B) at issue do not have plain meanings but rather are ambiguous, and ruled that in order for the Secretary to assert jurisdiction over the Access Road, on remand before the Commission she must submit an interpretation of section 3(h)(1)(B) that both addresses the concerns of National Cement and Tejon and is in harmony with the Mine Act's overall enforcement scheme. *See* 494 F.3d at 1074-77.

Having reviewed the interpretation submitted on remand by the Secretary (S. Remand Br. at 13), I conclude that this interpretation is not a reasonable construction of section 3(h)(1). From the language of section 3(h)(1) setting forth its three subsections, it is clear to me that section 3(h)(1) was designed to provide alternative bases for Mine Act jurisdiction, such that it is sufficient for that jurisdiction to attach to a subject as long as the requirements of only one of the three subsections is met. Thus, I cannot agree with the Secretary that subsection (C) limits, modifies, or otherwise explains the reach of subsection (B), and I certainly cannot agree with the Secretary that subsection (C) can serve any such purpose with respect to subsection (B) but not with respect to subsection (A). *See* S. Remand Reply Br. at 3-5.

Consequently, I join Chairman Duffy and Commissioner Young in rejecting the Secretary's interpretation as an impermissible construction of section 3(h)(1). I do so based on the language of section 3(h)(1) alone, and I join in sections II.A and II.B of their opinion. *See* slip op. at 6-11. Accordingly, I do not feel it necessary to reach the Secretary's arguments regarding legislative history (*id.* at 11-14), nor do I join in my colleagues' conclusions regarding the Secretary's position on treating Tejon as an operator under the Mine Act. *See id.* at 14-15.



Robert F. Cohen, Jr., Commissioner

Commissioner Jordan, dissenting:

I agree with my colleagues that in this case the Secretary's interpretation of section 3(h)(1)(B), 30 U.S.C. § 802(h)(1)(B) (the section of the Mine Act defining a "mine,") is unreasonable. Consequently, I am also in agreement with the majority that we should not defer to the Secretary's interpretation. Nonetheless, I conclude that the statutory definition of "mine" incorporates the road at issue, and I find that the concerns articulated by the Court of Appeals, regarding the Secretary's assertion of jurisdiction over the road, *Secretary of Labor (MSHA) v. National Cement Co. of California*, 494 F.3d 1066, 1075-77 (D.C. Cir. 2007), have been addressed. Accordingly, I would reverse the judge's decision on remand in which he vacated the citation against National Cement.

Section 4 of the Mine Act provides in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. The term "coal or other mine" is defined in section 3 of the Act, 30 U.S.C. § 802. Specifically, section 3(h)(1) defines it in pertinent part as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, 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 in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

30 U.S.C. § 802(h)(1).

The Secretary interprets the definition of "mine" in section 3(h)(1)(B) of the Mine Act to include the road at issue in this case. S. Remand Br. at 13. However, she interprets section 3(h)(1)(C) to qualify section 3(h)(1)(B) and thus to exclude from the definition of "mine" vehicles on the road that are not related to National Cement's mining operations. *Id.* I reject this tortured reading of the Mine Act, and agree with my colleagues and with National Cement that Congress did not, in section 3(h)(1), articulate a three-part list of criteria that must be met before an entity is a "coal or other mine." Rather, Congress set forth three alternative and independent definitions, with any one being sufficient to bring an entity under the Secretary's jurisdiction as a "coal or other mine." Slip op. at 9-10; NC Remand Br. at 21.

Furthermore, the Secretary has failed to adequately explain the inconsistency between interpreting section 3(h)(1)(B)'s definition of mine so as to not include all equipment on such roads (because, according to her, the terms of section 3(h)(1)(C) limit the scope of section

3(h)(1)(B)) but interpreting section 3(h)(1)(A)'s definition of "mine" (an "area of land from which minerals are extracted") as including everything within the extraction area (and thus not applying section 3(h)(1)(C) to limit its scope). S. Remand Reply Br. at 3. National Cement rightly notes that Congress would not have meant to include everything on the land under MSHA's jurisdiction when extraction areas are involved, but not where roads leading to and from those areas are concerned. NC Remand Surreply Br. at 11. Thus, I find the Secretary's contorted interpretation unreasonable, and would not accord it deference.

That is not the end of our inquiry, however. In cases where we are not bound to accord deference to the Secretary's statutory interpretation (because we find it is not reasonable), we may proceed de novo. *See Rapaport v. Office of Thrift Supervision*, 59 F.3d 212, 216-17 (D.C. Cir. 1995) (Court proceeds with a de novo interpretation when it refuses to accord deference to an agency's statutory interpretation because the agency shared responsibility for the administration of the statute with other agencies); *Hecla Mining Co. v. U.S.*, 909 F.2d 1371, 1376-77 (10th Cir. 1990) (Court holds that agency's interpretation of the statutory language was unreasonable but upheld agency's ultimate conclusion on other grounds).¹

As to the statutory language in the Act's definition of "mine," the Court of Appeals observed that the word "private," as used in section 3(h)(1)(B), could conceivably mean restricted to the use of a certain "group or class of persons" – in this case, all of the grantees to whom Tejon may grant a right of way – and their invitees." 494 F.3d at 1074. It also acknowledged that the word "appurtenant" in the statute could permissibly be "construed to encompass a road such as the Access Road because it is subject to a transferable right of way benefitting the mine lessee." *Id.* As I discussed in detail in my previous dissent in this case, 27 FMSHRC 721, 737-39 (Nov. 2005), both the meaning of the statutory terms and the legislative history of the Mine Act support MSHA's jurisdiction over the road. Briefly, in terms of the statutory language, Tejon has admitted that the road is private. S. Mot. For Sum. Dec., Ex. 3 at 3 (Intervenor's Adm. No. 2). And, simply put, it is appurtenant to the mine because Tejon has granted National Cement an easement. 27 FMSHRC at 738.

Thus, I conclude that, pursuant to section 3(h)(1)(B) of the Mine Act, the Secretary may assert jurisdiction over the access road. The Court of Appeals, however, has raised legitimate concerns about the ramifications of a decision granting her such jurisdiction. I believe, however, that these concerns have been adequately addressed.

At the outset, it is essential to focus on the usual, day-to-day uses of the road in question. National Cement's activities dominate use of the road – it is undisputed that the majority of traffic on the road is for cement-plant-related purposes. 27 FMSHRC 84, 91 (Jan. 2005) (ALJ) (citing Stip. 38). As the judge found in his initial decision, "[n]on-National Cement use of the road is dwarfed by National Cement traffic." 27 FMSHRC at 101. Consequently, as I noted in

¹ My colleagues do the same, articulating their own interpretation of the statutory language after rejecting the Secretary's. Slip op. at 13-14.

my dissent in the first Commission decision in this case, we should not focus on theoretical scenarios that may be troubling at the expense of taking into account the potential dangers involved with the ongoing use of the road by heavy mine trucks. 27 FMSHRC at 741-43. Miners on a road with steep drops (up to 25 feet) driving heavy cement trucks more than 45,000 times a year, during all hours of the day and night, 27 FMSHRC at 86, 91 (citing Stips: 13, 41); S. Br. at 3, should not be deprived of the protection of berms and guardrails due to mere conjecture about the erratic, infrequent use of the road by a movie truck or hunter.

My colleagues' restrictive use of the terms "private" and "appurtenant," and their emphasis on the exclusive use of a road as a requirement for MSHA jurisdiction, slip op. at 13-14, creates as tortured a scenario as the interpretation of the Secretary that they reject. The cement trucks using the access road are under MSHA jurisdiction while at the quarry, and, as the case law cited by the majority holds, slip op. at 9-10 & n.7, could be under MSHA jurisdiction while being fixed at a repair shop off of the mine property. *See, e.g., U.S. Steel Mining Co.*, 10 FMSHRC 146, 147-48 (Feb. 1988) (central repair shop for three of operator's mines that were as far as eight and one-half miles away, constitutes a mine under section 3(h)(1)); *Jim Walter Res., Inc.*, 22 FMSHRC 21, 22-25 (Jan. 2000) (holding that a central supply shop as far as 25 miles away from the operator's four mines was a mine). Thus, the result of the majority's decision today means that MSHA cannot require protections for National Cement truck drivers as they traverse the access road from the quarry to the highway, but their trucks could be under MSHA jurisdiction once they are in a central repair shop located miles away from the mine.

It is in this context that I consider the three concerns set forth by the Court of Appeals. First, the Court questioned whether National Cement has the authority to alter the road as the Secretary requires. 494 F.3d at 1075. However, substantial evidence supports the finding of the judge that National Cement has the requisite control to install berms or guardrails on the road. 27 FMSHRC at 100 (citing Stips. 35, 36, 37). The stipulations establish that National Cement has a history of maintaining and improving the road without Tejon's pre-approval. This includes resurfacing, sealing, and restriping the road and installing speed limit signs and constructing speed bumps.

Next, the Court expressed a concern that National Cement would be required to assume responsibility for all road users, including those over whom it had no authority. 494 at F.3d 1075. This would include compliance with withdrawal orders,² accident notification, and hazard training. 494 F.3d at 1075-76. These concerns articulated by the Court are dramatically reduced,

² The Secretary rightly notes that if MSHA were to issue a withdrawal order to an independent contractor at a mine, the contractor likely would not have the authority to withdraw employees of the production operator from the affected area. S. Remand Br. at 28-29. Nonetheless, as the Secretary explains, the extraction area would still be a "mine" and, as she correctly reasons, "the fact that an independent contractor who is an operator does not have the requisite control to withdraw all persons from an affected area which it 'operates' is not a basis for determining that the affected area is not a 'mine . . .'" *Id.* at 29.

however, by the fact that Tejon, which owns the road, may be considered an operator. Section 3(d) of the Mine Act defines an “operator” as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). Moreover, case law makes clear that the “owner” of a mine is an operator, regardless of whether the owner exercises control or supervision of the mine. *Assoc. of Bituminous Contractors, Inc. v. Andrus*, 581 F.2d 853, 862 (D.C. Cir. 1978).

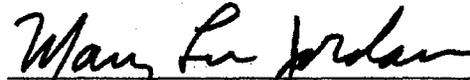
Berwind Natural Resources Corp., 21 FMSHRC 1284 (Dec. 1999), cited by my colleagues, slip op. at 15, does not require a different conclusion. In *Berwind*, the Commission rejected the Secretary’s decision to cite an entity that lacked substantial involvement with the mine, but in that case, unlike here, the Secretary was also able to cite the entity that exerted day-to-day supervision over the area in question.³ *Id.* at 1300-05. Here, National Cement has contended that it might not be able to abate violations or comply with withdrawal orders because it does not own the road or have any control over certain persons who use the road. In such a case it would be entirely appropriate to cite Tejon because, in spite of its non-involvement in the mining operations, as the owner Tejon can authorize any necessary construction to the road and impose any necessary conditions to persons’ access to the road. If National Cement lacked the authority to construct the necessary berms, and guardrails, Tejon can construct them. Alternatively, Tejon’s agreement with National Cement could provide National Cement with the authority to perform those repairs and alterations MSHA deems necessary for the road to comply with mandatory safety standards. Furthermore, Tejon can condition access to the road to those persons who agree to comply with withdrawal orders, accident reporting requirements, hazard training, or standards relating to the handling of explosives.

To the extent these obligations are viewed as burdensome for Tejon, given its lack of involvement in the mining operation, it is worth noting that as the mine owner, Tejon receives royalty payments based on cement sales and thus profits from National Cement’s use of the road. *Jt. Ex. 3* at 4-6. I believe that this satisfies the Court of Appeal’s third concern, 494 F.2d at 1076, that Tejon (or others with right-of-way control over the road) could be liable as an operator for mine safety infractions occurring on the road.

In any event, such compliance is not as burdensome as National Cement implies. For example, the immediate notification reporting requirements only apply when an operator knows or should know that an accident has occurred. *See* 30 C.F.R. § 50.10. Furthermore, generally only road accidents involving death, injury to an individual that has a reasonable potential to cause death, or entrapment for more than 30 minutes must be immediately reported and investigated. *See* 30 C.F.R. § 50.2(h). Finally, the record reflects that National Cement has previously reported accidents that occurred on the road. *S. Mot. for Summ. Dec., Ex. 6.*

³ In light of the D.C. Circuit’s decision in *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006), one could question the vitality of the *Berwind* holding cited by my colleagues.

For the reasons stated above, I would uphold the Secretary's jurisdiction over the access road. I agree with Judge Rogers that "[a] speculative concern about a tiny fraction of access-road users should not be used to uproot the major purpose of the Mine Act." 494 F.2d at 1080 (Rogers, J., dissenting). Accordingly, I respectfully dissent.



Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 27, 2008

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

v.

H.H. RAUH PAVING, INC.

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:
:
:

Docket No. YORK 2008-161-M
A.C. No. 30-03503-136593

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 25, 2008, the Commission received from H.H. Rauh Paving, Inc. ("Rauh") 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 January 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000136593 to Rauh, proposing penalties for eight citations and orders that previously had been issued to the company's Rauh Aggregate Mine. On April 26, 2008, Rauh filed a request to reopen this proposed assessment, stating that the operator is a seasonal business and, as a result, its CEO was out of town when the assessment arrived and did not receive it until late February. Rauh asserts that, in early March of 2008, it then contacted MSHA to reopen the penalty assessment. On April 16, 2008, Rauh received a delinquency

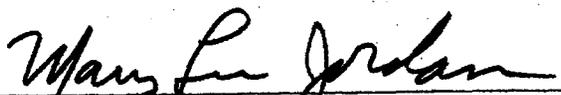
notification from MSHA and then filed the instant request to reopen. The Secretary states that she does not oppose Rauh's request to reopen.¹

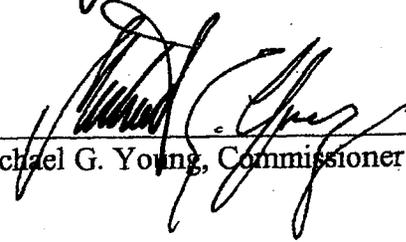
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

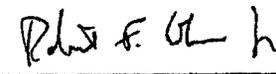
¹ We agree with the Secretary's assertion that the operator must make arrangements to assure in the future that proposed assessments are promptly processed when the CEO is not present.

Having reviewed Rauh's motion and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Rauh'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


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2008

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. SE 2008-563-M
v. : A.C. No. 22-00460-132151 V4I
PARHAM TRUCKING COMPANY :

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 8, 2008, the Commission received from Parham Trucking Company (“Parham Trucking”) 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 April 10, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6097286 to Parham Trucking. On November 20, 2007, MSHA issued an assessment covering the citation with a proposed penalty of \$2,500. In its letter, Parham Trucking states that it did not receive the proposed assessment and did not have an opportunity to contest it. The Secretary responds that the proposed assessment was sent by certified mail to the operator’s address of record, and was returned to MSHA with the notation: “RETURN TO SENDER[;] UNKNOWN REASON [;] UNABLE TO FORWARD.” On February 20, 2008, MSHA also sent a letter by first class mail to the operator’s address of record, indicating that the proposed penalty had become delinquent. MSHA claims that it has no record of the letter being returned. On these grounds, the Secretary requests that the Commission either

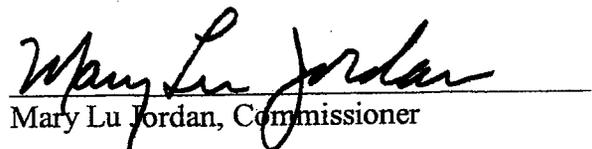
deny Parham Trucking's request to reopen or, alternatively, direct the operator to provide an explanation as to why service of the proposed assessment was defective.

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).

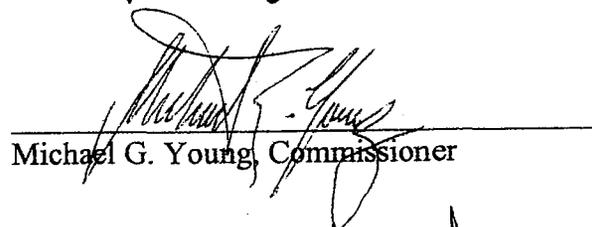
Having reviewed Parham Trucking's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Parham Trucking's failure to timely contest the penalty proposal and whether relief from the final order should be granted. Before granting such relief, the judge should require an explanation from Parham Trucking of why service of the proposed assessment was defective and of other circumstances that may have caused its delay. After that, if it is determined that relief from a final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



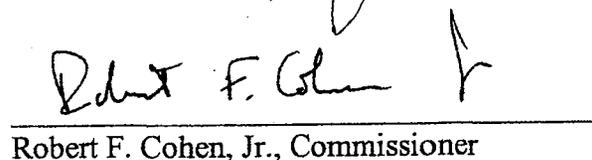
Michael F. Duffy, Chairman



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2008

SECRETARY OF LABOR,	:	Docket Nos. WEVA 2004-117-RM
MINE SAFETY AND HEALTH	:	WEVA 2004-118-RM
ADMINISTRATION (MSHA)	:	WEVA 2004-119-RM
	:	WEVA 2004-120-RM
v.	:	WEVA 2004-121-RM
	:	WEVA 2004-122-RM
SPARTAN MINING COMPANY, INC.	:	WEVA 2005-34
	:	WEVA 2005-53

BEFORE: Duffy, Chairman, Jordan, Young, and Cohen, Commissioners

DECISION

BY: Jordan, Young, and Cohen, Commissioners

These consolidated civil penalty and contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000), stem from a fatal electrical accident that occurred at Spartan Mining Company's ("Spartan") Ruby Energy Mine. Administrative Law Judge Jerold Feldman affirmed two citations arising under section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and one citation and one order arising under section 104(d), 30 U.S.C. § 814(d). 29 FMSHRC 465 (June 2007) (ALJ). He imposed penalty assessments of 190,000 for the violations. *Id.* at 488-89. Spartan successfully petitioned for review, and the Commission held oral argument in the case. For the reasons that follow, we affirm the judge in part, and vacate and reverse in part.

I.

Factual and Procedural Background

Spartan, owned by Massey Coal Services, operated the Ruby Energy Mine near Delbarton in Mingo County, West Virginia. 29 FMSHRC at 468-69. On February 5, 2004, the 002 section crew under the direction of section foreman William Sada entered the mine at its regular starting time of 7:00 a.m. *Id.* at 469. There were two continuous mining machines on the 002 section. The continuous miner on the left side of the section was used to mine a line of pillars from the No. 4 entry to the No. 1 entry. The continuous miner on the right side of the section mined pillars from the No. 8 entry to the No. 5 entry. *Id.* Continuous miner operator Jamie Hatfield

began operating the left continuous miner in the No. 4 entry at approximately 7:35 a.m. Mining continued in entries numbered 3, 2, and 1 as the day progressed. Upon completion of the No. 1 entry, Hatfield backed the continuous miner two crosscuts outby the pillar line in the No. 3 entry for servicing. *Id.* at 470. Hatfield and crew electrician Kenneth McNeely serviced the miner. *Id.* at 469, 470. After servicing, Sada instructed Hatfield to move the continuous mining machine into the No. 4 entry to start mining. At approximately 1:04 p.m., as Hatfield trammed the continuous miner, the ripper head or the cutting drum of the continuous miner struck the trailing cable, which provided electrical power to the continuous miner.¹ The damage caused two conductors to come into contact, resulting in a phase-to-phase short circuit. *Id.* at 470. The continuous miner immediately ceased operating, and power went out on the section and the power station. *Id.* The mine fan stopped, and ventilation ceased. *Id.*

Foreman Sada and shuttle car operator Kenneth Collins were a few feet outby the continuous mining machine when contact with the ripper head occurred. Jt. Ex. 2, ¶ 5. The foreman went to the section phone, located approximately 280 feet away by the feeder, to call the surface. 29 FMSHRC at 471. He spoke with Superintendent Steven Neace, who informed him that all power to the mine, including the mine fan and all power to surface facilities, including the preparation plant, was out. 29 FMSHRC at 471. Neace and Sada testified that Neace informed Sada that he thought Appalachian Power Company had caused the power outage. *Id.*; Tr. 559, 621.

Meanwhile, Hatfield and Collins unsuccessfully attempted to remove the trailing cable from beneath the continuous miner's ripper head. *Id.* at 472. Collins then walked approximately six crosscuts outby the section belt head to retrieve a scoop for the purpose of attempting to bump the ripper head from the cable. Collins met scoop operator Charles Smith, and both brought the scoop back to the continuous miner. *Id.* McNeely, who was not at the continuous miner at the time, went to the section phone and inquired about the power outage; Neace informed McNeely that if the ventilation did not resume operation within 15 minutes, all personnel would have to leave. *Id.*

Sada returned to the continuous miner at approximately 1:09 p.m. *Id.* As he approached, he saw McNeely sitting in a personnel carrier in the crosscut adjacent to Sada's position between the No. 3 and No. 2 crosscuts. *Id.* at 472-73. Sada stated that he told McNeely that they would have to go outside in 15 minutes. *Id.* at 473. Sada could see the scoop being operated in front of the continuous miner. *Id.* at 472; Jt. Ex. 2, ¶ 10. Smith bumped the scoop against the ripper drum of the continuous miner, allowing Hatfield to pull the cable free. 29 FMSHRC at 473. Sada heard Hatfield state that the cable was freed and the cable jacket "was not even busted." 29 FMSHRC at 473; Jt. Ex. 2, ¶ 11. Sada left to tell the miners in the right side of the section that they might have to evacuate the mine. 29 FMSHRC at 473. McNeely arrived at the continuous

¹ The ripper head extends the full width of the continuous mining machine. It contains a number of bit lugs, pointed metallic objects, that are attached to the cutting drum. The bit lugs are the equivalent of teeth on a circular saw. *Id.* at 467.

mining machine and told Hatfield and Collins that he needed to check the damaged area of the cable. *Id.* He also told Hatfield and Collins that “they only had 15 minutes until they had to leave the section.” *Id.*; Jt. Ex. 2, ¶ 12. McNeely began cutting the outer jacket off the trailing cable at the damaged area. 29 FMSHRC at 473. Smith returned the scoop to the section belt head. *Id.* After traveling to the right side of the section, Sada returned to the section mine phone. *Id.*

McNeely and Hatfield continued repairing the cable as Collins pulled on the waterline that was also struck, in an attempt to remove it from under the ripper drum. *Id.* McNeely cut about 14 inches of the outer jacket off the trailing cable, exposing the three power phases, a ground wire, and a monitor wire. *Id.* Two of the power phases were burned and needed to be cut and spliced. The outer jacket on the third power phase was damaged and needed to be re-insulated. The ground and monitor wires were not damaged. McNeely walked to his personnel carrier to get tape and connectors. He returned on his personnel carrier, parking it behind the continuous mining machine. *Id.* As McNeely worked on the second power phase, Hatfield heard a humming noise and felt air movement. The mine’s carbon monoxide sensor data base reflects that power was restored to the mine at 1:18 p.m., approximately 14 minutes after power was lost. *Id.* McNeely asked Collins to go to the section power center to see if mine power had been restored. McNeely began work on the third phase and cut the third phase apart. Foreman Sada was at the dumping point area at 1:18 p.m. and noticed that the mine power had been restored. He went to the section power center located approximately 400 feet from the left continuous miner and started closing the circuit breakers for all face equipment. 29 FMSHRC at 473. All cable plugs were still attached to their receptacles on the power center. *Id.*

At approximately 1:20 p.m., Sada closed the circuit breaker for the left continuous mining machine. As a result of the breaker being closed, McNeely received a fatal shock while repairing the cable. As Collins walked toward the power center to see if the power had been restored, he saw Sada closing the circuit breakers. Collins called out to Sada, telling him not to close the circuit breaker for the left continuous mining machine. Collins heard Sada say, “Oh no.” *Id.* at 474; Jt. Ex. 2, ¶ 18.

The Department of Labor’s Mine Safety and Health Administration (“MSHA”) investigated the accident and issued a number of citations and orders. A hearing was then held before Commission Administrative Law Judge Feldman. At the outset, the judge found that the violations concerned a high level of gravity, as self-evident from the fatality. 29 FMSHRC at 478. He also determined that the “magnitude of negligence” required the imposition of civil penalties that were higher than those initially proposed by the Secretary. *Id.* He discussed each violation separately.

A. Citation No. 7224651 – Protection of Cable Under 30 C.F.R § 75.606

The judge found a violation of 30 C.F.R. § 75.606² because the “fact that the trailing cable was run over and damaged by the continuous miner is beyond dispute.” 29 FMSHRC at 479. He rejected Spartan’s assertion that because it had a policy in place to prevent cables from damage it should not be held liable for the violation. *Id.* Although the judge determined that running over the cable evidences no more than a moderate degree of negligence,³ he found that the negligence analysis must also include the obligation to ensure that damaged cables are properly handled. 29 FMSHRC at 479. The judge found that Sada knew or should have known that there was at least a reasonable likelihood that the trailing cable was damaged. *Id.* at 479-80. In so doing, the judge discredited Sada’s and Hatfield’s testimony that they believed the cable was not damaged. *Id.* at 480. Relying on Spartan’s policy of removing the cathead⁴ from the power center and checking the cable after it is run over, the judge found that Sada’s failure to ensure that the cathead was disconnected and the cable tested to determine if it had been damaged constituted a reckless disregard of an electrocution hazard. 29 FMSHRC at 468, 479-80. The judge also found that the violation was significant and substantial (“S&S”)⁵ and that the gravity was extreme. 29 FMSHRC at 481. The judge raised the penalty from \$32,500 to \$50,000. *Id.* at 478, 481.

² Section 75.606 provides: “Trailing cables shall be adequately protected to prevent damage by mobile equipment.”

³ MSHA’s citation had indicated that the negligence was “moderate.” *Id.* at 478; Gov’t Ex. 4 at 1.

⁴ The catheads are the ends of the trailing cables that are plugged into the power center. “Catheads are physically . . . plugged into the receptacle [of the power center] similar to plugging a cable into [a] . . . television.” Tr. 45.

⁵ The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

B. Citation No. 7224650 – Lock Out Requirements under 30 C.F.R. § 75.511

Spartan stipulated that the trailing cable was not locked out, thereby violating 30 C.F.R. § 75.511.⁶ 29 FMSHRC at 482. The judge found that the violation was S&S, given the gravity of the violation resulting in a fatality. *Id.* at 483. The judge found that McNeely's failure to lock out and tag was a careless act that was highly negligent. *Id.* at 482-83. The judge found Spartan to be directly negligent because Sada knew that the cathead had not been locked out when he closed the continuous miner's circuit breaker. *Id.* at 476-77, 483. The judge also imputed the negligence of McNeely to the mine operator because of the lack of proper supervision received by McNeely, Hatfield and Collins. *Id.* at 475-77, 483. He found that Sada permitted McNeely to remain at the site of the damaged cable without ensuring that proper procedures were followed. *Id.* at 483. The judge concluded that Sada's lack of supervision, as evidenced by his asserted lack of knowledge of the activities of the members of his crew, including his electrician, after the power was lost and ventilation was interrupted, and a trailing cable had been struck, warrants the imputation of an extremely high degree of negligence. *Id.* Instead of the \$32,500 penalty proposed by the Secretary, the judge assessed a \$50,000 penalty given the S&S nature, the extreme gravity and the reckless disregard in supervision that enabled a splicing repair to occur on a damaged cable that Spartan knew was not locked and tagged out. *Id.*

C. Citation No. 7224652 – Removal From Service under 30 C.F.R. § 75.1725(a)

The judge found that Spartan violated 30 C.F.R. § 75.1725(a)⁷ because it failed to remove from service an electrical cable that had likely been damaged by the mobile equipment, consistent with its own policy. 29 FMSHRC at 484. The judge found the gravity to be severe and found the violation to be S&S. *Id.* The judge also determined that Spartan's conduct was aggravated because Sada knew that the cable was struck by the ripper head and that power was lost at the moment the trailing cable was struck. *Id.* Relying on Spartan's concession that a damaged cable represents an extremely hazardous condition, the judge also concluded that Spartan's failure to remove the cable from service was a result of unwarrantable failure. *Id.* He

⁶ Section 75.511 provides in pertinent part:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work

⁷ Section 75.1725(a) provides:

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

assessed a penalty of \$60,000 rather than the \$56,000 penalty proposed by the Secretary. *Id.* at 484, 485.

The judge rejected Spartan's argument that this citation and citation No. 7224650 (citing a violation of section 75.511, for failure to lock and tag out) were duplicative. The judge found that the standard obligated two distinct duties: Spartan could have locked out the continuous miner for the purpose of initiating repairs or it could have removed the equipment from service and postponed the repairs. The judge found that Spartan chose to do neither and that its inaction constituted separate and distinct acts of omission. *Id.* at 481-82.

D. Order No. 7228963 – Withdrawal from Working Section Requirement under 30 C.F.R. § 75.313(a)(3)

The judge found that Spartan violated section 75.313(a)(3)⁸ because Foreman Sada did not order his crew to retreat from the working section during the mine fan stoppage. 29 FMSHRC 486. He determined that “[i]f McNeely had been withdrawn from the working section, instead of being allowed to repair an electrical cable while mine fan power was lost, he would not have been electrocuted.” *Id.* Although the judge disagreed with the Secretary's conclusion that the violation was not S&S, he was not authorized to modify the order. *Id.* at 486-87. The judge found that the gravity of the violation was “extremely serious” because permitting mine operations to continue during the hazardous period of no mine ventilation exposed eight miners to serious or fatal injuries. *Id.* at 487. The judge concluded that the violation was properly designated as a result of unwarrantable failure because Sada's failure to withdraw the miners from the working section constituted reckless disregard of safety procedures. *Id.* The judge assessed a penalty of \$30,000, instead of the \$3,700 proposed by the Secretary, because of the grave nature of the violation and the reckless and conscious failure to withdraw miners from the working section. *Id.* at 486, 487.⁹

⁸ Section 75.313(a)(3) provides:

If a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system – . . . [e]veryone shall be withdrawn from the working sections and areas where the mechanized mining equipment is being installed or removed.

⁹ The judge approved the parties' settlement agreement with respect to a violation of 30 C.F.R. § 75.310(b)(1), which requires a mine's fan power circuit to operate independently of other mine circuits, and a violation of 30 C.F.R. § 75.313(b), which provides that, if fan ventilation is restored within 15 minutes, a methane exam must be performed before work is resumed. 29 FMSHRC at 488.

II.

Disposition¹⁰

A. Citation No. 7224651– Failure to Protect the Cable

Spartan argues that the judge's finding of a violation of section 75.606, requiring that "[t]railing cables shall be adequately protected to prevent damage by mobile equipment," was not supported and is contrary to law. PDR at 15. It relies on its policy that prevents cables from being damaged, and asserts that there was no history of running over cables at this mine, and that this was the first time that the cable had been damaged by the continuous mine operator. *Id.* at 15-16. Spartan further asserts that if a violation occurred, the violation was not S&S because the damaged cable in and of itself posed no hazard and there were also breaker switches designed to trip should there be a cable problem. Sp. Reply Br. at 12. Additionally, Spartan takes issue with the judge's raising of the negligence level from moderate to reckless disregard, asserting that the judge erroneously determined the degree of negligence for failing to protect the cable by considering events after the damage occurred. *Id.* at 10-12.

The Secretary responds that the judge properly concluded that Spartan violated section 75.606. She argues that the judge was correct in finding that, because the cable was damaged by mobile equipment, the cable was not adequately protected and a violation of section 75.606 occurred. Sec'y Br. at 15. The Secretary also asserts that the judge correctly concluded that the violation was S&S because the damaged cable posed a significant danger to miners. *Id.* at 17-20.

¹⁰ Three Commissioners agree on the disposition of the issues raised on review with regard to Citation No. 7224651, the violation of section 75.606, with Chairman Duffy writing separately to concur, except that he would remand the penalty for it to be determined by the judge instead of reinstating the penalty sought by the Secretary. All Commissioners also affirm the judge with regard to the S&S and unwarrantable violation of section 75.1725(a) alleged by Citation No. 7224652, except that Chairman Duffy and Commissioner Young believe that the record supports ascribing a lesser degree of negligence to the operator than the judge did in this instance. All Commissioners also affirm the penalty assessed by the judge for Citation No. 7224652. With respect to Citation No. 7224650, the violation of section 75.511, Commissioners Jordan and Cohen would affirm the judge that an S&S violation and high negligence occurred and affirm the penalty he assessed, while Chairman Duffy and Commissioner Young would reverse the judge on the ground that the citation alleges a violation duplicative of the section 75.1725(a) violation. Finally, three Commissioners affirm the judge regarding the unwarrantability of the section 75.313(a) violation alleged in Order No. 7228963 and the penalty, while Chairman Duffy would remand those issues to the judge for reconsideration. The effect of an evenly split decision on an issue is to allow the judge's decision to stand as if affirmed on that issue. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501, 1505 (3d Cir. 1992).

The Secretary maintains that the judge properly determined that the violation of section 75.606 was a result of reckless disregard, contending that Foreman Sada's failure to take action to ensure that the cable was not protected from further damage after it had been run over supports a high negligence finding. *Id.* at 22.

Section 75.606 provides that "[t]railing cables must be adequately protected to prevent damage by mobile equipment." It is undisputed that the trailing cable was run over and damaged by the continuous mining machine. 29 FMSHRC at 479. Marcus A. Smith, an MSHA electrical engineer who participated in the accident investigation, testified that whenever a multi-ton mining machine smashes into a cable, "it creates significant damage." Tr. 157, 159. Accordingly, the cable at issue was not adequately protected, and there was a violation of section 75.606.

We are not persuaded by Spartan's defenses that no violation should be found because this was the first time the operator had run over a cable and that Spartan had a policy in place to protect cables. The Mine Act is a strict liability statute, such that an operator will be held liable if a violation of a mandatory standard occurs regardless of the level of fault. *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989). Additionally, the Commission has held that compliance with an operator's plan, such as a ventilation or roof control plan, does not preclude a finding of violation of the underlying roof or dust control regulations. *Cumberland Coal Res. LP*, 28 FMSHRC 545, 553 (Aug 2006), *aff'd*, 515 F.3d 247 (3d Cir. 2008). If compliance with an MSHA-approved plan does not insulate an operator from liability, it follows *a fortiori* that compliance with an internal policy cannot preclude a finding of violation.

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

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

Id. at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. See *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

Although Spartan argues that the cable itself posed no hazard, Congress has emphasized the hazardous nature of unprotected trailing cables in mines. Section 75.606 mirrors section 306(f) of the Mine Act, 30 U.S.C. § 866(f), which was carried over from the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. § 801 et seq. (1976). In enacting that provision, Congress recognized the significant danger posed by damage to trailing cables, such as shock hazards and mine fires. S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 197 (1975) (“*Coal Act Legis. History*”).

In addition, MSHA Electrical Engineer Smith testified as to the great danger posed by an unprotected trailing cable. Tr. 172-73. Spartan’s contention that, because the cable was protected by a circuit breaker the cable was not hazardous, overlooks the fact that the circuit breaker function failed to prevent a fatal injury in the instant case. Moreover, the Commission and the Seventh Circuit have rejected an analogous argument with respect to installation of safety measures to contain mine fires. *Buck Creek*, 52 F.3d at 136; *Amax Coal Co.*, 18 FMSHRC 1355, 1359 n.8 (Aug. 1996). The court reasoned that the fact that an operator has “safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are presumably in place . . . precisely because of the significant dangers associated with coal mine fires.” *Buck Creek*, 52 F.3d at 136. Likewise, installing a breaker system does not mean that electrocution from cables will no longer pose a serious risk to miners. This case demonstrates that failure to protect cables from damage can result in extremely serious injuries. Accordingly, we affirm the judge’s S&S determination that failing to protect the cable contributed to an electrocution hazard that was reasonably likely to result in an injury of a reasonably serious nature.

On the question of the degree of negligence that should be attributed to Spartan, the judge found that “the act of running over the cable while tramping the continuous miner evidences, as the Secretary suggests, no more than a moderate degree of negligence.” 29 FMSHRC at 479. However, the judge determined that the analysis of the degree of negligence does not stop at that point. *Id.* He held that section 75.606 also required the mine operator to further protect cables after they have been struck. *Id.* The judge and the Secretary point to the operator’s actions after the cable was smashed to substantiate the reckless disregard allegation. For example, the judge faulted Spartan for “ignoring” the damaged cable and rested his reckless disregard determination on Sada’s failure to de-energize or otherwise isolate the cable so as to avoid an electrocution hazard. *Id.* at 480-81; see also Sec’y Br. at 21-22.

Contrary to the holding of the judge and the assertion of the Secretary, the text of section 75.606 does not apply to conditions after a violation has occurred. The regulation indicates that an operator has to protect a cable from damage from mobile equipment. As mentioned above, it states: "Trailing cables shall be adequately protected to prevent damage by mobile equipment." Similarly, the citation only focused on the failure to protect the cable before the continuous mining machine ran over it. Gov't Ex. 4.¹¹ The standard does not refer to conditions that arise *after* the damage has already occurred. The judge in effect faulted Spartan for failing to remove the cable from service and for failing to lock and tag out the cable before making a repair. These shortcomings are addressed in Citations Nos. 7224652 and 7224650, respectively, and are discussed more fully in this decision. Accordingly, we conclude that the judge erred in his determination of reckless disregard when he expanded his analysis beyond the time when the damage occurred to the cable by the continuous mining machine, and thus vacate his finding.

The judge determined that no more than a moderate degree of negligence is associated with the failure to protect the cable before the damage occurred. 29 FMSHRC at 479. Likewise, we conclude that the record demonstrates that the degree of negligence for the violation is moderate. Smith testified that his evaluation of moderate negligence was based on the fact that Sada was standing near the continuous miner and gave the directive for the machine to be moved whereby the machine then smashed into the cable. Tr. 173-74. *Cf. Virginia Slate Co.*, 24 FMSHRC 507, 513 (June 2002) (holding that involvement of supervisor who is held to a high standard of care is important to the unwarrantable failure analysis). However, the inspector determined that the foreman's action was not highly aggravated because his view was partially obscured. Tr. 174-76. Additionally, the company had a policy to protect cables, which in this case did not protect the cable in question. Tr. 160-61. Based on these factors, the Secretary found that the violation was a result of moderate negligence. Gov't Ex. 4. Similarly, we conclude that the record as a whole demonstrates that Spartan's violation of section 75.606 stemmed from moderate negligence. *American Mine Svcs. Inc.*, 15 FMSHRC 1830, 1833-34 (Sept. 1993) (holding that no need to remand exists when only one conclusion possible); *Walker Stone Co.*, 19 FMSHRC 48, 53 (Jan. 1997) (same), *aff'd on other grounds*, 156 F.3d 1076 (10th Cir. 1998).

¹¹ Citation No. 7224651 provides in pertinent part:

The . . . trailing cable that provides . . . power to the . . . left continuous mining machine . . . was not protected to prevent damage by mobile equipment. When the mining machine . . . was trammed forward about 21 inches, the cutter head smashed the cable. This forced energized conductors from two phases to come into contact, creating a short circuit that caused a loss of electrical power to the entire mine. This violation is a contributing factor to the fatal accident which occurred on February 5, 2004

B. Citation No. 7224650 – Failure to Lock and Tag Out¹²

1. Violation and S&S

Spartan stipulated that the trailing cable's cathead was connected to the power center and not locked and tagged out at the time McNeely was performing repairs. Consequently, the judge found a violation of section 75.511. 29 FMSHRC at 482. Spartan does not dispute the violation on appeal. Accordingly, we affirm the violation of section 75.511 for failing to lock and tag out before performing electrical repairs.

The judge also found that the violation was properly designated as S&S in that it was reasonably likely that the failure to lock out a damaged cable prior to performing repairs would result in a fatal electrocution. *Id.* at 483. He determined that the gravity was severe. Spartan does not take issue with these findings on review. Accordingly, we affirm the determinations that the violation of section 75.511 was S&S and that the gravity of the violation was severe.

2. Negligence

Spartan asserts that the judge's finding of high negligence was incorrect because he failed to consider McNeely's misconduct in determining the degree of Spartan's negligence and he incorrectly imputed Sada's conduct to Spartan. Sp. Br. at 25-27; Sp. Reply Br. at 26-28. The Secretary counters that the judge's finding of high negligence is supported by the record. Sec'y Br. at 29-32. She asserts that in reaching that negligence determination, the judge properly relied on Foreman Sada's failure to supervise his crew. *Id.* at 30.

Judge Feldman concluded that there was negligence both directly attributable to Spartan and also that McNeely's negligence was imputable to Spartan. 29 FMSHRC at 483. With regard to Spartan's direct negligence, the judge found that Sada knew that the continuous miner had lost power the instant that the ripper head contacted the trailing cable, and that the trailing cable had not been locked out at the power center even though it had been run over by the miner. *Id.* The judge found that Sada had reason to know that the cable was damaged, and that his failure to respond to this potential hazard constitutes a disregard that is directly attributable to Spartan. *Id.* The judge further found that Sada's mistaken belief that the cable was undamaged is not a mitigating circumstance because it was brought about by Spartan's failure to follow its own safety procedures, which would have confirmed the defective condition of the cable. *Id.*

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*

¹² As noted previously, Commissioner Young joins Chairman Duffy in his separate opinion on this issue. *See slip op.* at 7 n.10.

Coal Co., 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that “fairly detracts” from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

After reviewing the record, we conclude that the judge’s findings regarding Sada’s responsibility for the section 75.511 violation are supported by substantial evidence, and that the judge did not err in determining that the violation was directly attributable to Spartan’s own negligence.

With regard to imputing McNeely’s negligence to Spartan, in *Cougar Coal Co.*, 25 FMSHRC 513, 519 (Sept. 2003), the Commission reiterated that an operator may be held responsible for the negligent act of a rank-and-file miner based on its own conduct. As the Commission has stated, “[W]here a rank-and-file employee has violated the Act, the operator’s supervision, training and disciplining of the employees must be examined to determine if the operator has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Wayne Supply Co.*, 19 FMSHRC 447, 452-53 (Mar. 1997) (quoting *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (emphasis omitted)). Similarly, the Commission stated in *A.H. Smith Stone Co.* that:

[T]he fact that a violation was committed by a non-supervisory employee does not necessarily shield an operator from being deemed negligent. In this type of case, we look to such considerations as the foreseeability of the miner’s conduct, the risks involved, and the operator’s supervising, training, and disciplining of its employees to prevent violations of the standard in issue.

5 FMSHRC 13, 15 (Jan. 1983) (citation omitted).

The record reveals that McNeely, Hatfield, and Collins were working on the cable without any supervision by Foreman Sada. Under the circumstances of this case, where a cable had been smashed, power to the continuous miner had simultaneously gone out, and there was no mine ventilation, Spartan should have ensured that proper lock-out procedures were being followed. This is particularly true because Sada was aware of an earlier incident where McNeely neglected to lock and tag out equipment. This should have put Sada on notice that additional care was necessary with regard to supervising McNeely’s lock out procedures. In *A.H. Smith*, the Commission concluded that the operator was negligent in discharging its duty of care when it was foreseeable that an employee “might” engage in the violative conduct involving a highly dangerous instrumentality. 5 FMSHRC at 15-16.

By contrast, in *Cougar Coal*, 25 FMSHRC at 519, the Commission declined to hold the operator responsible for a miner’s negligence, where the supervisor expressly prohibited the

miner on two separate occasions from engaging in the violative conduct and the rank-and-file miner had never disobeyed a supervisory order. In the instant case, Sada never expressly told McNeely, Hatfield, or Collins not to work on the cable. He also did not order the cable locked and tagged out when the cable had been smashed by the continuous miner and when he saw Hatfield with the cable across his knee. The miners were working under a very stressful condition of no mine ventilation, which called for a higher duty of care on the part of Spartan.

As the judge found, Spartan cannot escape the imputation of negligence of rank-and-file personnel by asserting that Sada was unaware of the actions of its crew. 29 FMSHRC at 477, 483. The fact that Sada did not know that McNeely and Hatfield were repairing the cable is an aggravating factor which supports a showing of highly negligent supervision on the part of Sada.

Accordingly, we conclude that the judge's imputation of negligence to Spartan is supported by substantial evidence. Therefore, we affirm the judge's finding of high negligence for the lock-and-tag-out violation.

C. Citation No. 7224652 – Failure to Remove Unsafe Equipment from Service

1. Violation

Spartan asserts that the judge's finding of violation of section 75.1725(a) is erroneous because the cable was not unsafe as it tripped the power to the continuous miner causing it to become inoperable. PDR at 16. It also asserts that Foreman Sada did not foresee that McNeely would repair the cable without locking and tagging it out and therefore he did not consider the cable unsafe. Sp. Reply Br. at 17-19. The Secretary responds that the judge properly found a violation. Sec'y Br. at 33. She characterizes Spartan's assertion that the cable was not unsafe as specious because the circuit breaker could be re-closed and the cable would become a danger. *Id.* at 34-35.

Under section 75.1725(a), in deciding whether machinery or equipment is in an unsafe operating condition, the alleged violative condition is measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The standard imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation. 4 FMSHRC at 2130. The Commission requires that the unsafe equipment be removed from service immediately. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1607 (Aug. 1994).

We reject Spartan's argument that the cable was not unsafe at the time of the violation because it was not powered. The evidence overwhelmingly shows that when normal conditions were restored, the cable presented a safety hazard to miners, highlighting the grave danger from damaged trailing cables that are not immediately removed from service. The inspector testified

that the damaged cable posed serious safety risks to miners. Tr. 157, 172-73. Spartan's own policy also recognized the danger of damaged cables. Tr. 657-58. Spartan Superintendent Neace testified that it was the mine's policy, if a cable was run over, to remove the cable from service and check it for damage, and if damaged, to repair it. This is consistent with standard industry practice. Tr. 703. Moreover, the legislative history of the Coal Act discussed the danger of mine fires and electrocution that damaged cables pose in mines. *Coal Act Legis. History*, at 197.

At the hearing, Foreman Sada testified that he did not think that the cable was damaged and therefore did not consider it a danger. The judge, however, did not find his testimony credible. 29 FMSHRC at 479-80. We hold that substantial evidence supports the judge's credibility determination. The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he or she is ordinarily in the best position to make a credibility determination. *Virginia Slate*, 24 FMSHRC at 512 (citations omitted). Accordingly, the judge's credibility determinations, discounting the testimony of Sada and Hatfield, are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992).

Sada was standing in close proximity to the continuous miner when he observed the instantaneous loss of power when the ripper head of a multi-ton piece of equipment struck the cable. Tr. 550, 557, 561. Both Sada and Hatfield conceded that they initially believed the loss of power was caused by the damaged cable. Tr. 511-13, 554, 562, 563-64. The record also reveals that Sada saw that miners needed a scoop to remove the cable that was trapped under the multi-ton continuous miner. Tr. 208-09.

MSHA Electrical Engineer Smith and Inspector James Humphrey both testified that Sada, as foreman, should have known that when the mining machine hit the cable and power was subsequently lost, the cable was no longer functioning and should have been taken out of service, tested and repaired before being put to use again, or prior to closing the breaker. Tr. 207-10, 306-16, 462, 469. Inspector Humphrey testified that every time a cable is run over, it creates an unsafe condition, even if the jacket does not appear to be damaged. Tr. 464-65. The impact can create small pinhole openings where persons can receive an electrical shock even if the circuit breaker is not tripped. Tr. 464-65. Electrical Engineer Smith testified that during his investigation, many miners knew that the cable had been damaged and McNeely had overheard it from multiple people who were underground that day. Tr. 245, 329-30, 340.

Spartan's own expert, Keith Hainer, Director of Maintenance at Massey Coal Services, testified that if a trailing cable has been run over, that cable should be tested to see if there is any internal damage. Tr. 661, 665, 721. He further testified that it would have been prudent to examine the cable for problems as there was a concurrent power outage. Tr. 721. Spartan's expert stated that it would have been obvious and significant that there might have been a problem with the cable when it was run over by the ripper head. Tr. 738-39. We note that there was testimony that continuous miner operator Hatfield informed Sada that the cable jacket did not appear to be damaged. Tr. 528. However, Hatfield is not an electrician. On balance, the

weight of the evidence strongly supports the judge's determination that a reasonably prudent person would have recognized that the cable posed a hazard requiring corrective action.

We are not persuaded by Spartan's assertion that McNeely's act was unforeseeable and that, under section 75.1725, unforeseeable acts do not necessitate removal from service. Sp. Reply Br. at 18-19. The record revealed that approximately a week prior, Sada counseled McNeely for repairing without locking and tagging out. Tr. 223, 250. Additionally, the cable posed a danger to any miner underground, not just to the electrician, and Sada saw Hatfield sitting with the cable across his knee. Tr. 581. Therefore, we conclude that a reasonably prudent foreman would have recognized that the damaged cable constituted a hazard warranting corrective action as required under *Alabama By-Prods.*, 4 FMSHRC at 2129.

The second requirement of section 75.1725(a) requires removal from service. Inspector Smith testified that after the cable was smashed, a "prudent" foreman would require that the piece of equipment be removed from service to be troubleshot, tested, and repaired prior to being placed back in service. Tr. 181. The inspector testified that placing equipment out of service is a management decision and that the equipment is labeled out of service and the condition is entered in the books on the surface. Tr. 210-11, 216. A management decision is then needed to place the equipment back in service. Tr. 218. It is undisputed that neither Sada nor other Spartan management officials took any steps to remove the cable from service. Accordingly, the damaged cable posed a danger and should have been removed from service. Because it was not, we affirm the judge's finding of violation of section 75.1725(a).

2. S&S and Unwarrantable Failure¹³

As to the S&S determination, Spartan reiterates its assertions that the cable was not unsafe primarily because it was de-energized, and it was not foreseeable that McNeely would make an electrical repair without locking and tagging out. Sp. Br. at 17-18. It asserts that the violation was also not a result of unwarrantable failure because even if Sada knew that the cable was damaged, which Spartan disputes, Sada had no reason to know that it would pose a danger. Sp. Reply Br. at 20. The Secretary maintains that the violation of section 75.1725(a) was properly determined to be S&S because failure to take the cable out of service made it reasonably likely that the continuous mining machine would be energized and that the damaged cable would seriously injure miners through electrical shock or fire, as demonstrated by this case. Sec'y Br. at 36. She also submits that the judge correctly concluded that the violation was the result of unwarrantable failure. *Id.* at 36-38. The Secretary asserts that the violation was obvious, that it was extremely dangerous, that a supervisor was involved in the violative conduct and knew or should have known about the danger, and that the operator did nothing to abate the violative condition. *Id.*

¹³ Commissioner Young joins Chairman Duffy, writing separately on the issue of the degree of the operator's negligence. *See slip op.* at 7 n.10.

As we held above, the fact that the cable was de-energized did not eliminate the significant danger it posed to miners. The cable remained in service, and when power was restored, miners were exposed to a severe electrical hazard. Tr. 157, 172-73; *Coal Act Legis. History*, at 197. The record also refutes Spartan's contention that the cable did not present a serious hazard to all miners on the section. The record reveals that the cable that had been run over by a continuous miner posed a danger to all miners, not just to McNeely. As we have already discussed herein, MSHA Inspector Humphrey testified that even if power was not lost, the impact from the cutting head can create small pinhole openings in the cable where persons can receive an electrical shock. Tr. 465-66. Sada testified that he observed Hatfield with the cable at issue across his knee just minutes before power was restored. Tr. 581. Accordingly, we affirm the judge's determination that failure to remove the cable from service was reasonably likely to result in a serious injury and, as such, was properly designated as S&S. 29 FMSHRC at 485.

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

The Commission has recognized that whether conduct is "aggravated" in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if any aggravating or mitigating circumstances exist. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

In determining that the failure to remove the cable from service was aggravated conduct, the judge pointed to the undisputed fact that Foreman Sada knew that the cable was struck by the ripper head and that power was simultaneously lost. Hence, the violative condition was known and obvious. 29 FMSHRC at 484-85. The damaged cable presented a condition of high danger to miners. *See Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding

violation to be aggravated and unwarrantable based upon “common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment”). Indeed, Spartan recognizes this danger by requiring all potentially damaged cables to be removed from service and to be tested and repaired. Tr. 657-58. Despite this knowledge and Spartan’s own policy, Foreman Sada did not take any steps to have the cable removed from service. As Electrical Engineer Smith testified, Sada had multiple opportunities to have the cable removed from service – once when he was present at the moment of impact and spoke to Hatfield about the condition of the cable, and a second time, when he returned to the left continuous miner and saw the miners trying to free the cable with the scoop. Tr. 243-44, 576-77, 579-80. At this time, he observed Hatfield with the cable across his knee. Tr. 581. On both of these occasions, Sada should have directed that the cable be taken out of service for trouble-shooting, testing, and repair. The foreman’s inaction is further aggravated because rather than taking the cable out of service when he was aware that miners had been working on it just minutes earlier, Sada energized the cable, an action directly contrary to what the regulation requires. We emphasize that Sada as a foreman is held to a high standard of care. *Virginia Slate*, 24 FMSHRC at 513 (holding that the involvement of a supervisor in the violation is an important factor in an unwarrantable failure determination because supervisors are held to a high standard of care).

We reject Spartan’s argument that, because Sada did not know that the cable was damaged, the failure to remove it from service was not unwarrantable failure. As discussed previously, the judge expressly discredited Sada’s testimony that he did not believe the cable was damaged. 29 FMSHRC at 480. We hold that there is no basis to overturn that credibility determination. *Farmer*, 14 FMSHRC at 1541. Additionally, even if Sada did not believe that the cable was damaged, the fact that the multi-ton continuous miner ran over the cable is indisputably cause for a prudent foreman to have the cable removed from service and tested. *See* Tr. 721 (testimony of Spartan’s expert, Keith Hainer). We find equally unpersuasive Spartan’s contention that a finding of unwarrantable failure is not justified because Sada had no reason to believe that McNeely would be undertaking repairs on the cable. Although the record showed that Sada was unaware that McNeely was repairing the cable, Sada was well aware that other miners were in contact with the cable as they were trying to free the cable and, the last time he observed the cable, it was on the knee of Hatfield. Given these circumstances, it is quite foreseeable that a miner could come into contact with the cable once Sada energized it. Accordingly, we uphold the judge’s finding that the violation of section 75.1725(a) was a result of unwarrantable failure.

3. Duplication¹⁴

Spartan maintains that the failure to lock out citation, No. 7224650, and the failure to remove from service citation, No. 7224652, punish it twice for the same actions. PDR at 19. It asserts that the judge erred when he ruled that the two citations were not duplicative. *Id.* Spartan

¹⁴ Commissioner Young joins Chairman Duffy in his separate opinion on this issue. *See* slip op. at 7 n.10.

contends that the crux of MSHA's case in both citations is the failure to lock and tag out, which is the most practical means to remove equipment from service. *Id.* at 20; Sp. Reply Br. at 19. The Secretary responds that the two citations at issue are not duplicative as the violations involve separate and distinct legal duties. Sec'y Br. at 38-40.

The Commission has held that citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator. *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-04 (June 1997) (citing *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (Mar. 1993); *Southern Ohio*, 4 FMSHRC at 1462-63; *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (Jan. 1981)). The record reveals that the responsibilities under sections 75.511 and 75.1725(a) were different. The section 75.511 standard only arises when electrical repairs are undertaken, and its implementation is, in the first instance, in the hands of the electrician. The section 75.1725(a) regulation is broader, applying to all machinery and equipment which becomes unsafe, and is exclusively in the hands of management. Tr. 254-55. It incorporates a management decision to remove equipment from service, and a management decision to place it back into service.¹⁵ Tr. 217-18. Moreover, the two regulations do not have identical purposes, as the lock-and-tag-out standard appears designed to protect the electrician actually repairing the equipment, while the removal from service requirement would protect anyone in the mine who might otherwise attempt to use the equipment not knowing it was unsafe.

Electrical Engineer Smith testified that under the "removal from service" standard, management should have removed the cable from service for troubleshooting, testing, and repair, prior to placing it back in service. Tr. 158, 188-89, 207. He clarified that removal from service did not mean that the cable had to be immediately repaired. Tr. 210-16. Smith also explained that locking and tagging out alone does not constitute placing equipment out-of-service, because to satisfy the requirements of section 75.1725(a), the equipment must be labeled out of service and be listed on electrical exam records as "out-of-service." Tr. 216-17.

As Smith further testified, the two violations occurred at different points in time. Tr. 254-55. The removal from service violation (section 75.1725(a)) occurred at the left continuous miner when the cable was smashed. *Id.*; see *Cyprus Plateau*, 16 FMSHRC at 1607 (holding that unsafe equipment must be removed from service immediately). However, the lock out violation (section 75.511) occurred a number of minutes later, when McNeely began working to repair the cable without first locking and tagging it out at the power center. Tr. 254-55.

We reject Spartan's contention that the crux of both of the violations was the failure to lock and tag out. The citations at issue allege distinct shortcomings on the part of Spartan. Citation No. 7224650 alleged that "[t]he section electrician and the continuous mining machine

¹⁵ Because the requirements of section 75.1725(a) involve management responsibilities, the negligence involved in a violation of that standard is not mitigated by the "unforeseen and idiosyncratic conduct of a rank and file miner," contrary to the suggestion of our colleagues. Slip op. at 29, 32.

operator performed electrical work on a distribution circuit while the disconnecting device was not locked out nor suitably tagged.” Gov’t Ex. 6. Citation No. 7224652 alleged that:

The operator, after witnessing the creation of an unsafe condition on a piece of mobile equipment, failed to cause the equipment to be immediately removed from service. When the . . . left continuous mining machine . . . trammed onto its . . . trailing cable, the section foreman was present and knew that the cable was damaged. He also witnessed the mining machine losing power when this occurred. Afterwards, the section foreman closed the circuit breaker, thereby energizing the trailing cable, without first: (A) causing the cable plug to be immediately disconnected from its receptacle and (B) instructing the section electrician to do the necessary troubleshooting, testing, and repair work on the cable to restore it to a safe condition.

Gov’t Ex. 5.

Thus, separate and distinct from the section 75.511 violation, section 75.1725(a) required Spartan’s management to remove the trailing cable from service and ensure that it was not brought back into service until it was certified as safe. However, by closing the circuit breaker, Foreman Sada not only failed to take unsafe equipment out of service, he also negligently put unsafe equipment into service, without testing it, thereby causing McNeely’s death. The distinctions between the violations are clearly stated in the two MSHA citations. Gov’t Exs. 5, 6.

We conclude that the standards impose separate and distinct duties on Spartan. Section 75.1725(a) requires that unsafe equipment be immediately removed from service. Not taking the continuous mining machine out of service represented a violation of omission. In contrast, section 75.511 requires that before electrical work is performed, the equipment must be locked and tagged out. Section 75.511 was violated in this case only upon McNeely’s commencement of the electrical work on the cable. By performing electrical work without locking and tagging out, Spartan committed a violation of commission. The Commission has held that a violation of omission and a violation of commission are not duplicative. *Dynatec Mining Corp.*, 23 FMSHRC 4, 20 n.14 (Jan. 2001); *Southern Ohio*, 4 FMSHRC at 1463. Here, Spartan failed in its affirmative duty to remove unsafe equipment from service, and then compounded the damage by undertaking electrical work without locking and tagging out.

Our colleagues rely on *Western Fuels* to support two propositions. They assert that when a duty to comply with the requirements of one regulation may be “subsumed” in the duty to comply with the requirements of another, only one regulation should be cited. Slip op. at 32, citing 19 FMSHRC at 1004. They also state that *Western Fuels* stands for the concept that if the method of abatement for two citations is the same, the citations are duplicative. Slip op. at 30-31, citing 19 FMSHRC at 1003-05. They are correct on the first point, but the analysis does not

apply to the facts of this case. We believe that our colleagues are mistaken regarding their second point.

As to subsuming one regulation in another, *Western Fuels* involved one regulation imposing a broad obligation to install dry powder chemical systems that will protect the components of a conveyor belt system most susceptible to fires (section 75.1101-14(a)), and another, more specific, regulation pertaining to the numerical sufficiency of nozzles and reservoirs of such dry powder chemical systems (section 75.1101-15(d)). 19 FMSHRC at 1004. In finding the citations duplicative, the Commission held,

Implicit in the duty to install a self-contained dry powder chemical system that protects the specified components of the conveyor belt is the duty to install a sufficient number of nozzles and reservoirs so that the chemical substance is effectively disbursed to those components. Because the duty to install a sufficient number of reservoirs is subsumed in the duty to install a dry powder chemical system that adequately protects the specified components, every violation of section 75.1101-15(d) will inexorably constitute a violation of section 75.1101-14(a).

Id. Thus, the Commission found that a violation of section 75.1101-15(d) could not be committed without also violating section 75.1101-14(a), and hence a violation of the latter was duplicative of a violation of the former.

In the present case, however, it is quite possible for a mine operator to violate section 75.511 without also violating section 75.1725(a), and vice versa. An electrician must lock and tag out prior to performing routine electrical maintenance work. If the electrician fails to lock and tag out the equipment before performing routine work, it is a violation of section 75.511. But if the maintenance work is routine, the equipment is not “in unsafe condition,” and need not be removed from service under section 75.1725(a). Thus, a violation of section 75.511 can be committed without violating section 75.1725(a). Hence, section 75.511 is not subsumed in section 75.1725(a), and *Western Fuels* is factually distinguishable.

Second, our colleagues assert that *Western Fuels* stands for the proposition that if the method of abatement of citations is the same, the citations are duplicative. However, the Commission never focused on abatement in its analysis. 19 FMSHRC at 1003-1005. Rather, it emphasized more than once that standards are not duplicative when the initial conduct required by each regulation involved different actions. *Id.* Thus, *Western Fuels* does not stand for the proposition asserted by our colleagues.

Furthermore, in *Western Fuels*, the Commission asked whether MSHA was citing the operator on the basis of more than one specific act or omission. *Id.* at 1004 n.12. It noted that if MSHA had presented evidence of additional deficiencies that violated one of the regulations instead of relying on the identical evidence used to support the other, it would not have found them duplicative. *Id.*

Here, the Secretary presented different evidence to prove that Spartan violated each of the regulations at issue. In particular, the citation for the section 75.511 violation alleged that the miners “performed electrical work” while a disconnecting device was not locked or tagged out. Gov’t Ex. 6. By contrast, the duty to refrain from performing electrical work simply does not come into play in her charge that 75.1725(a) was violated. Gov’t Ex. 5. Likewise, the citation for the section 75.1725(a) violation centered on Foreman Sada’s closing the circuit breaker, thereby energizing the trailing cable, without making sure that the necessary troubleshooting, testing and repair work had been performed. *Id.* Thus, this case is more similar to *Cyprus Tonopah*, in which the Commission emphasized that, although the operators’ violations “may have emanated from the same events, the citations are not duplicative because the two standards impose separate and distinct duties upon an operator.” 15 FMSHRC at 378.

Accordingly, we conclude that the violations are not duplicative and determine that both violations should be affirmed.

D. Order No. 7228963 – Failure to Withdraw Miners From Working Section

Spartan contends that the judge erred in finding unwarrantable failure with respect to the section 75.313(a)(3) violation because the record did not show reckless disregard, indifference, or intentional misconduct. Sp. Reply Br. at 23-25. It asserts that Sada instructed his crew that they had to leave the mine should power not be restored in 15 minutes and that, from this, they understood they had to withdraw from the working sections. Sp. Br. at 27. Spartan contends that all except Hatfield, McNeely, and Collins ceased to work and moved off the working section and there is no evidence that Sada knew that McNeely and Hatfield were not among those miners gathering and preparing to leave the mine. PDR at 28. The Secretary contends that the judge correctly found that the section 75.313(a) violation was a result of unwarrantable failure because Sada’s failure to inform all miners to leave the section immediately was an egregious disregard for safety procedures. Sec’y Br. at 43-45. She asserts that Sada’s silence in light of his crew’s actions could only be seen by them as tacit approval of their efforts to repair the cable when they should have been withdrawing from the working section. *Id.* at 43. The Secretary emphasizes that the loss of ventilation causes chaotic situations that breed poor judgment. *Id.* at 44.

Section 75.313(a)(3) provides: “If a main mine fan stops while anyone is underground and ventilating quantity provided by the fan is not maintained by a back-up fan system— . . . [e]veryone shall be withdrawn from the working sections and areas where mechanized mining equipment is being installed or removed.” 30 C.F.R. § 75.313(a)(3).

The judge determined that the failure to withdraw miners from the working section was a reckless disregard of proper safety procedures and a result of unwarrantable failure. 29 FMSHRC at 487. We are not persuaded by Spartan’s assertion that Sada’s instruction, that everyone would have to leave the mine in 15 minutes, mitigates that determination of unwarrantable failure. Inspector Humphrey testified that Sada’s statement did not fulfill the requirements of section 75.313(a)(3) because it “in no way . . . resemble[d]” a command to

withdraw from the working section within that 15-minute period. Tr. 431-32. At best, Sada's statement was vague and ambiguous.

When Sada returned to the left continuous miner after talking with Neace on the mine phone, he "told McNeely that the power was off, the mine fan was down, and they would have to go outside in 15 minutes." Jt. Ex. 2, ¶ 10. Then Sada left to go to the other side of the section, and McNeely went to the continuous mining machine. McNeely "told Hatfield and Collins that he needed to check the damaged area of the trailing cable. He also informed them that the fan was off and that they *only had 15 minutes until they had to leave the section.*" Jt. Ex. 2, ¶ 12 (emphasis added). Then "McNeely began cutting the outer jacket off the trailing cable at the damaged area." *Id.* "McNeely and Hatfield continued repairing the cable as Collins pulled on the waterline in an attempt to remove it from the ripper drum." Jt. Ex. 2, ¶ 14. Thus, it appears that McNeely, Hatfield, and Collins all believed that the direction from Sada was to get the cable repaired within 15 minutes and *then* leave the section if ventilation was not restored.

The inspector testified that a prudent foreman would have made it clear that all persons were to withdraw to a safe location and would have then ensured that all miners on the crew were at that safe location. Tr. 432. In contrast, Sada was in view of the miners at the continuous miner and at no point did he instruct them to leave the working section. Tr. 434. Sada testified that he never told the miners to leave the working section directly. Tr. 567. Nor did he take a head count to see if all the men on his crew had withdrawn. Tr. 569. Eight miners remained on the working section during the entire mine fan outage, leading us to conclude that they either did not understand the instruction or they were not given one. Continuous miner operator Hatfield stated that he never heard Sada's directive. Tr. 519. Accordingly, we conclude that Sada's alleged instruction, which did not meet the requirements of the standard, does not undercut the judge's unwarrantable failure determination.

We also reject Spartan's contention that the violation was not a result of unwarrantable failure because Sada was unaware that McNeely was working on the cable. Although it appears from the record that Sada did not know specifically that McNeely was working on the cable, this is no defense because Sada was aware that other crew members were working on the cable. 29 FMSHRC at 480 n.6. The Joint Stipulations state that Sada witnessed the scoop being operated and that Hatfield and the crew were working on the cable when Sada returned from talking on the phone with Neace. Jt. Ex. 2, ¶¶ 10, 11. Instead of directing those miners to leave the working section, Sada testified that he told the miners that they had to leave in 15 minutes if power was not restored. Tr. 581-82. Under these conditions, Sada should have expressly told his crew to stop working and withdraw. In *Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997), the Commission found that when a foreman witnessed a violation yet did not immediately stop it, the operator's violation was a result of unwarrantable failure. Similarly, Sada's failure to withdraw the miners supports a finding of unwarrantable failure.

We are likewise unconvinced by Spartan's contention that there is no time limit in section 75.313(a)(3) and therefore that Sada's failure to require the men to withdraw immediately cannot be considered a result of unwarrantable failure. Sp. Reply Br. at 24-25. We note that section

75.313, entitled "Main mine fan stoppage with persons underground," contains procedures that must be followed when a mine fan goes out. The standard has two applicable times that trigger different requirements: one if ventilation is restored within 15 minutes and, the second, if it is not restored within that 15 minute period. 30 C.F.R. § 75.313(b) & (c).¹⁶

The Commission adheres to the principle that "[t]he Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions." *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996). Construing section 75.313 in its entirety, it becomes clear that when a main mine fan stops, everyone should be withdrawn from a working section as soon as reasonably possible and well within 15 minutes, because after 15 minutes of fan stoppage, miners have to evacuate the entire mine. Miners must withdraw from the working section within 15 minutes, or else there would be no reason to include the working section withdrawal provision in the standard, because evacuation of the entire mine commences after 15 minutes of ventilation outage. *See Daanen & Janssen, Inc.*, 20 FMSHRC 189, 194 (Mar. 1998) (providing that effect must be given to every part of a regulation). Furthermore, subsection (b) of the regulation requires a methane check "before work is resumed" in the mine's "working places," even if the fan is restarted within 15 minutes. 30 C.F.R. § 75.313(b). Logically, work must have ceased in order to resume.

We hold that once a main mine fan stops, withdrawal from the working section must commence immediately, subject to completion of those tasks reasonably necessary to avoid

¹⁶ 30 C.F.R. § 75.313 provides in part:

- (a) If a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system—
 - (1) Electrically powered equipment in each working section shall be deenergized;
 - (2) Other mechanized equipment in each working section shall be shut off; and
 - (3) Everyone shall be withdrawn from the working sections and areas where mechanized mining equipment is being installed or removed.
- (b) If ventilation is restored within 15 minutes after a main mine fan stops, certified persons shall examine for methane in the working places and in other areas where methane is likely to accumulate before work is resumed and before equipment is energized or restarted in these areas.
- (c) If ventilation is not restored within 15 minutes after a main mine fan stops—
 - (1) Everyone shall be withdrawn from the mine

leaving hazards in the mine.¹⁷ This does not mean that miners should attempt to repair equipment such as a continuous mining cable during this time, but rather that the cable should be taken out of service so that it will not pose a danger to returning miners. Although Spartan argues that the lack of precise time limits would mitigate unwarrantability if it had withdrawn all miners within a reasonable time, we are not required to decide this issue because a significant number of miners remained on the working section for the entire mine fan outage, and Spartan's argument is thus unavailing.

We agree with the judge that a loss of ventilation in any mine can cause a "chaotic situation that breeds poor judgment and a lack of due diligence if miners are not removed from the working section." 29 FMSHRC at 486. As noted *supra*, the electrician was trying to quickly repair the cable before the mine needed to be evacuated. Jt. Ex. 2, ¶¶ 10, 12, 14. If withdrawal procedures had been followed, he would not have been able to continue working on the cable and this tragedy would have been averted. The heightened danger present in this case bolsters the conclusion that this violation resulted from the operator's unwarrantable failure. *Midwest Material*, 19 FMSHRC at 35 (holding that failure of foreman to exercise prudent care in a condition of extreme danger supports unwarrantable failure determination).

Substantial evidence supports the judge's determination of aggravated conduct and reckless disregard of proper safety procedures. 29 FMSHRC at 487. This violation involved a supervisor, a person held to a higher standard of care, who was aware that his miners continued working on the section after the mine fan went out, exposed to an obvious danger and serious hazards. *Id.* at 485-87. We conclude that Spartan exhibited a serious lack of reasonable care when it failed to ensure that all miners withdrew from the working section during the fan outage. *Rochester & Pittsburgh*, 13 FMSHRC at 194. Accordingly, we affirm the judge's determination

¹⁷ Chairman Duffy asserts that the requirement that the miners withdraw from the working section and assemble at the loading point did not arise until after Sada had "received confirmation from the surface that the mine fan was out and then returned to the left section." Slip op. at 35. However, the withdrawal requirement of section 75.313(a) is triggered when "a main mine fan stops while anyone is underground" and there is no back-up fan. 30 C.F.R. § 75.313(a). Nowhere in the language of the regulation is it implied, much less stated, that the withdrawal requirement only begins after a foreman receives confirmation from the surface of an outage and then arrives back at the section where he had been working.

Furthermore, the record reflects that Sada knew the fan was off even without receiving confirmation from the surface. Sada testified that when the fan shut down, he could feel the absence of ventilation. Tr. 577-78. Consequently, Sada did not call Neace to receive confirmation that the mine fan was out. Rather, he called him "[t]o see if the power was out outside." Tr. 558; *see also* Tr. 563, 621. We thus reject this proposed qualification of the withdrawal requirement under section 75.313(a), as it has no basis in the language of the regulation, and was not needed to alert those underground that the mine fan had indeed stopped.

that the section 75.313(a)(3) violation was a result of unwarrantable failure and reckless disregard.

E. Penalties

Spartan argues that in raising the penalties from the amounts that were proposed by the Secretary, the judge erred by failing to discuss the required penalty criteria under section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Sp. Br. at 31-32. It further asserts that the judge failed to adequately justify his significant departure from the Secretary's penalties, and that the penalties were unfair and excessive under the facts of the case. *Id.* at 30-31. The Secretary responds that the judge did not abuse his discretion in assessing the penalties at issue. Sec'y Br. at 46. She states that the judge specifically applied the penalty criteria and appropriately justified the bases for his penalty determinations. *Id.* at 47-48.

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In determining the amount of the penalty, neither the judge nor the Commission shall be bound by a penalty recommended by the Secretary. *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). However, such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act.¹⁸ *Cantera Green*, 22 FMSHRC at 620. Additionally, the Commission in *Sellersburg*, 5 FMSHRC at 293, explained that "when . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission." In *Cantera Green*, the Commission clarified that "[w]hile the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria." 22 FMSHRC at 621.

¹⁸ Section 110(i) provides in part:

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

30 U.S.C. § 820(i).

The judge generally discussed the civil penalty criteria with regard to all the violations at issue. 29 FMSHRC at 477-78. He found that Spartan is a large mine operator and that the imposition of the civil penalties would not impede Spartan's ongoing business operations. *Id.* at 478. The judge determined that the history of violations and Spartan's abatement efforts were neutral factors in determining the appropriate penalty liability. *Id.* He then explained that the two overarching material considerations for all penalties consisted of the magnitude of the gravity and the degree of negligence. *Id.* We agree with the judge's reasoning. Although Spartan broadly maintains that the judge did not discuss at length all six factors, Spartan itself specifically takes issue only with the two factors of negligence and gravity. Accordingly, we affirm the judge's general discussion of the other four penalty factors as adequate to support the penalty determinations. We now discuss the factors of negligence and gravity for each violation.

As to Citation No. 7224651, for the failure to protect the cable, we affirm the judge's determination that the violation was S&S and that the gravity was extreme given that this violation contributed to a fatal electrocution. *Id.* at 480-81. However, as discussed in our opinion, we vacate the judge's negligence determination of reckless disregard as it rests on Spartan's failure to protect the cable after it was already hit, which goes beyond the scope of section 75.606. We have concluded herein that the record demonstrates that the violation was a result of moderate negligence, which was the level of negligence originally proposed by the Secretary. *See also id.* at 479. As we have affirmed all the other five penalty factors for this assessment, we have determined that a remand of the penalty is not necessary. *See Sellersburg*, 5 FMSHRC at 293-94 (holding that remand for judge to make findings on discrete penalty factors not necessary in the interest of judicial economy and would unnecessarily prolong the case). In *LJ's Corp.*, 14 FMSHRC 1278, 1280 (Aug. 1992), when the Commission reversed the judge, it assessed the civil penalty that was proposed by the Secretary. So too, we determine that the Secretary's proposed penalty appropriately reflects all the Mine Act section 110(i) criteria. Accordingly, in this case, we reinstate the penalty assessment of \$32,500, which was the original amount proposed by the Secretary.

As to Citation No. 7224650, for the failure to lock and tag out, we reject Spartan's contention that the judge was bound by the Secretary's assessment of the degree of negligence of "moderate" contained in the citation. Sp. Reply Br. at 26. Spartan unpersuasively relies on *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996) (finding that judge may not designate a violation as S&S on his own initiative), to assert that the judge's alteration of the citation was impermissible. However, *Mechanicsville* is distinguishable because modifying a negligence determination, as the judge did here, is authorized by the Mine Act, whereas inserting an S&S designation is not. 30 U.S.C. § 814(h).

By this decision, we have affirmed the judge's finding of high negligence for the failure to lock and tag out. Spartan does not take issue with the judge's determination that the gravity of the violation was severe. 29 FMSHRC at 482-83. It has long been established that the Commission is not bound by the Secretary's penalty assessments and that the penalty to be assessed is a de novo determination based on the six statutory criteria specified in section 110(i) of the Act. *Sellersburg*, 5 FMSHRC at 291. The judge adequately substantiated the need for the penalty

increase due to the high levels of negligence and gravity. As a result, we hold that the judge did not abuse his discretion, and we affirm the penalty of \$50,000. 29 FMSHRC at 483.

As to Citation No. 7224652, for the failure to remove unsafe equipment from service, the judge found that the violation was S&S and that the gravity was extreme as it contributed to the electrocution fatality. *Id.* at 485. As discussed herein, these findings are supported by substantial evidence, including credibility determinations. With respect to the level of negligence, we have also affirmed the judge's findings that Spartan's conduct in failing to remove the cable from service was aggravated and a result of unwarrantable failure. Given these holdings, we conclude that the judge has not abused his discretion and has adequately substantiated the penalty increase to \$60,000. *Id.*

As to Order No. 7228963, for the failure to withdraw miners from the working section, we have affirmed the judge's determination that the violation was a result of unwarrantable failure and reckless disregard for the safety of miners. Additionally, we concur in the judge's finding that permitting miners to continue working during a hazardous period caused by an interruption of mine ventilation was an extremely grave and serious violation. *Id.* at 486-87. We reject Spartan's contention that the judge failed to substantiate the reason for significantly raising the penalty. On the contrary, the judge specifically discussed in detail his reasoning for increasing the penalty from \$3,700 to \$30,000. *Id.* He stated:

Thus, although the violation in Order No. 7228963 has been designated as non-S&S, greater weight must be accorded to the material facts that reflect that the cited condition affects the entire section's personnel, that is indicative of extreme gravity, and that is attributable to unjustifiable and inexcusable conduct. . . .

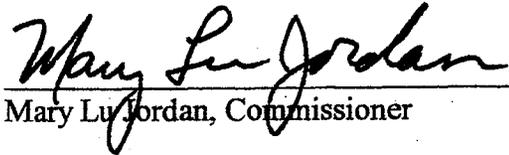
Ensuring the rapid and safe withdrawal of miners faced with hazardous conditions is fundamental to mine safety. . . . [T]he grave nature of the violation as well as the fatality that followed justify a substantial penalty.

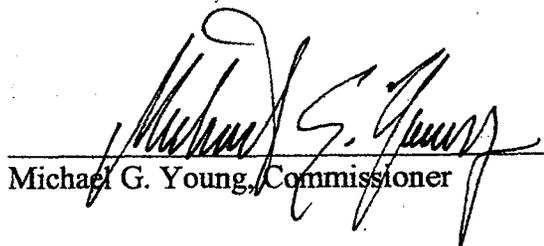
Id. at 487. The judge has adequately explained the bases for his decision to assess a higher penalty than originally proposed. We held in *Lopke Quarries, Inc.*, 23 FMSHRC 705, 713 (July 2001), that a judge did not abuse his discretion by weighing the factors of negligence and gravity more heavily than the other four statutory criteria. Similarly, we hold here that it was certainly appropriate for the judge to raise the penalty significantly based on his findings of extreme gravity and unwarrantable failure. 29 FMSHRC at 486-87. Accordingly, we hold that the judge was well within his discretion in assessing a penalty of \$30,000 for the section 75.313(a)(3) violation.

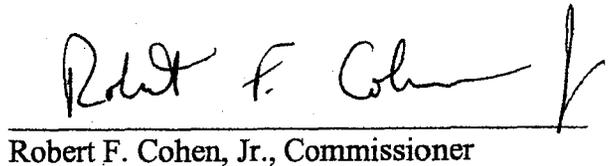
III.

Conclusion

For the foregoing reasons, with the exception of Citation No. 7224651, we affirm the judge's decision in its entirety. As to Citation No. 7224651, we affirm the violation of section 75.606 and its S&S designation. However, we vacate the negligence finding and conclude that the record demonstrates that the violation was a result of moderate negligence and, considering the factors in section 110(i) of the Mine Act, order the operator to pay a penalty of \$32,500 for this violation.


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

Chairman Duffy, concurring in part and dissenting in part:

I concur with my colleagues in affirming the judge's finding of a violation of 30 C.F.R. § 75.606, relating to the protection of trailing cables, and in affirming the judge's finding of a violation of 30 C.F.R. § 75.313(a)(3), relating to the withdrawal of miners from a working section during a mine fan outage. I further concur that with respect to the violation of section 75.606, the judge impermissibly considered events that occurred after the trailing cable was damaged in order to determine the level of negligence associated with the violation. Accordingly, I would vacate the judge's finding of reckless disregard with respect to that violation and remand to the judge the determination of an appropriate civil penalty in light of my colleagues' findings set forth at slip op. 8-10, above.

As for the alleged violation of 30 C.F.R. § 75.511, relating to locking and tagging out of electrical equipment before repair work is performed, and the alleged violation of 30 C.F.R. § 75.1725(a), relating to the immediate removal from service of unsafe machinery or equipment, I dissent from my colleagues' affirmance of the judge's finding that both standards were violated and, therefore, properly cited. Under the particular circumstances of this case, one might conclude that either of the standards – but not both – could appropriately have been cited. Upon further review of the facts, and for the reasons more fully set forth below, I believe that section 75.1725(a) should have been cited, and that the charge that Spartan violated section 75.511 was duplicative of the violation charged under section 75.1725(a). Accordingly, I would vacate Citation No. 7224650 relating to the failure to lock and tag out the trailing cable prior to initiating repairs.

Moreover, I dissent with respect to my colleagues' affirmance of certain negligence findings arrived at by the judge. To be sure, negligence is present in each of the three violations that I believe the judge correctly upheld. My conclusion, as further explained below, is that the levels of negligence found by the judge are higher than the record can support. Most particularly, the level of negligence attributed by the judge with respect to the violation of section 75.313(a)(3) is not only unsupported by the evidence, it is clearly contradicted by the undisputed testimony of the Secretary's own witness. Accordingly, I would therefore remand the issue of unwarrantable failure and the appropriate civil penalty to be assessed for further consideration by the judge.

With respect to the violation of section 75.1725(a), relating to the removal from service of unsafe equipment, while I believe that the violation involves unforeseen and idiosyncratic conduct of a rank-and-file miner, such conduct does not mitigate the level of negligence to a degree warranting remand to the judge for a reassessment of the civil penalty.

Lastly, it is important to place the events of the afternoon of February 5, 2004, in context, both as to the chronology of their occurrence and the conditions in which they occurred. The events that led to the death of Mr. McNeely took place over the space of 14 minutes during which time there was considerable confusion as to what was happening. Except for the violation relating to running into the trailing cable, the violations alleged to have directly or indirectly led to the

fatality transpired over the space of about nine minutes and apparently took place in total darkness save for the light from the miners' cap lamps and the battery-powered scoop.

Moreover, the Ruby Energy Mine is located in a fairly narrow coal seam with an average roof height of just under four and a half feet (Tr. 550-51), about the height of a wall switch in a typical home. Mr. Sada, who by his testimony is a large man (*id.*), stated that he had to "duckwalk" back to the mine phone to call the surface and to move between the left and right sections when he returned to tell the miners about the mine-wide power outage and to tell them they might have to evacuate. Tr. 550, 566-67. That labored travel to and fro did have an effect on his ability to observe everything that was going on in the left section during the period in question.¹ While these factors have no bearing on whether or not the violations should be upheld, they do affect the level of negligence attributable to Mr. Sada, and, in turn, to Spartan. As the judge noted at the hearing:

It's easy in hindsight to see things that weren't seen on the spur of the moment. But my function is to look at it with hindsight and see how the people should have acted – reacted without the benefit of hindsight. But that's what the term the degrees of negligence is about.

Tr. 774-75.

That said, I will proceed to each point upon which I disagree with my colleagues.

A. Duplicative Citations²

Spartan was cited for a violation of section 75.511 for failure to lock and tag out before engaging in repairs, and for a violation of section 75.1725 for failure to immediately remove the trailing cable from service. In my view, under the unique circumstances of this case, the citations are duplicative under the Commission's holding in *Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1003-05 (June 1997). I read the Commission's holding in *Western Fuels* as standing for the proposition that if the method of abatement for dual citations is the same, the citations are

¹ The distance between the continuous miner and the mine phone to the surface was 280 feet. Tr. 282-84. Thus, in the space of 14 minutes Mr. Sada crawled or duckwalked almost three football fields in order to reach the mine phone, return to the left section to inform the miners of the power outage, travel to the right section to apprise those miners of the problem, return to the mine phone to await further instructions from the surface, and then travel to the power center once power to the mine had been restored. I invite the reader to imagine doing the same while in a crouched position and to do so in pitch black darkness. In my view, Mr. Sada's actions hardly reflect the conduct of a disengaged supervisor.

² Commissioner Young joins Chairman Duffy in section A of his opinion.

duplicative. *Id.* That is the case here. Abatement for both citations was the disconnecting of the trailing cable from the power source and the locking and tagging out of that cable. There was no other practical way of abating the two violations.³

The question then becomes what actions was Spartan required to take with respect to the violation of section 75.1725 and the violation of section 75.511, and are those actions somehow different? The short answer is, they were not. Both citations would have been abated by disconnecting the cable and then locking and tagging it out.

The Secretary argues that there is a distinction between the two methods of abatement because one standard (section 75.511) only requires the actions of a certified electrician, while the other standard (section 75.1725) requires a decision by management. Oral Arg. Tr. 44. That argument is not borne out by the facts. Mr. Sada testified without contradiction that the policy in the Ruby Energy Mine was that a certified electrician was authorized to remove a trailing cable from service. Tr. 585. It should also be noted that “management” does not act but through its authorized agents or employees, which in this case was Mr. McNeely, who had authority to remove the trailing cable from service until such time it was determined that the cable was safe or was in need of repair before being returned to service.

Moreover, in terms of strict chronology, the cable should have, at first, been removed from service to allow for inspection, troubleshooting, and repair, as the inspector’s citation states. Gov’t Ex. 5. Had that been done, the citation relating to the protocol for repairs would have been superfluous and redundant.⁴

³ MSHA’s witness, Mr. Smith, testified that Spartan could have abated the violation of section 75.1725 by disconnecting the trailing cable and wrapping it around the continuous miner. Confronted with the impracticality of miners having to drag a 700-foot cable weighing over a thousand pounds several hundred feet back to the continuous miner in a matter of minutes, Mr. Smith was ultimately compelled to agree that locking and tagging out the cable was the most practical means of abating the violation of section 75.1725. Tr. 356-59.

⁴ In attempting to distinguish *Western Fuels* from the present case, my colleagues allude to instances where an operator could “violate section 75.511 without also violating section 75.1725(a), and vice versa.” Slip op. at 20. However, the scenario they postulate is not the facts in this case and hence, their distinction fails. Here, Spartan was not performing routine maintenance work on the cable, and the record clearly establishes that McNeely could have taken the steps to remove the damaged cable from service (Tr. 585), which, under the time constraints in this case, would have included locking and tagging out the cable at the power center before necessary troubleshooting, testing, and repair work could be performed. Thus, under the circumstances in this case, the Secretary’s citation of Spartan for both sections 75.511 and 75.1725(a) is duplicative.

The Secretary, the judge, and my colleagues make much of the fact that both citations are valid because one (section 75.511) relates to a “violation of commission,” while the other relates to a “violation of omission.” S. Br. at 39-40; 29 FMSHRC 465, 482 (June 2007) (ALJ); slip op. at 19. That attempt to differentiate the two citations is unavailing. One could just as easily say that McNeely’s failure to lock and tag out the trailing cable before initiating repairs was a “violation of omission” on a par with his failure to lock and tag the cable (thus removing it from service) once he suspected it was damaged. Failure to disconnect, lock out and tag out are essential elements of both offenses and, under the mine’s own protocol, should have been undertaken as the first steps of compliance with either standard. The safety purposes of both standards were met and satisfied by the same compliance action regardless of whether the underlying violations were of commission or omission, thus bringing this case within the parameters of *Western Fuels*.

Moreover, in terms of the Commission’s analysis in *Western Fuels*, when the duty to comply with the requirements of one standard can be “subsumed” in the duty to comply with the requirements of another standard, only one standard should be cited. 19 FMSHRC at 1004. Here the requirements of section 75.511 are subsumed in the requirements of section 75.1725 so that the commission/omission dichotomy becomes a distinction without a difference.

B. Negligence Associated With the Section 75.1725 Violation⁵

It is fundamental that the Mine Act is a strict liability statute so that violations committed by miners, even those committed in contravention of the mine operator’s workplace rules and contrary to the miner’s training, are attributable to the operator. The Commission has also, held, however, that the level of operator negligence can be mitigated in a case where the miner’s conduct is unforeseen and idiosyncratic, and contrary to the operator’s policies. See *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Asarco, Inc.*, 8 FMSHRC 1632, 1636 (Nov. 1986), *aff’d on other grounds*, 868 F.2d 1195 (10th Cir. 1989).

In this instance, I believe that Mr. McNeeley’s conduct falls within the scope of unforeseen and idiosyncratic conduct. He was an experienced and certified mine electrician, fully trained and retrained, and he violated a fundamental rule by failing to disconnect, lock, and tag out the trailing cable.

As for the incident that occurred the week earlier, when Mr. Sada told Mr. McNeeley not to do any electrical work without first locking and tagging out (slip op. at 15), I do not view that as an indication that Mr. Sada should have been put on notice that Mr. McNeeley was an unsafe worker. On the contrary, I view it as an admonishment that underscored the training that Mr. McNeeley had received, and demonstrates vigilance on Mr. Sada’s part.

⁵ Commissioner Young joins Chairman Duffy in section B of his opinion.

Nevertheless, McNeeley's conduct does not, in my view, serve to fully mitigate Spartan's negligence in this case. It was Mr. Sada's responsibility to make sure that Mr. McNeeley had removed the cable from service if he, Sada, had any suspicion that the cable was damaged. Accordingly, I believe Spartan's share of the negligence was more than moderate, and I would not overrule the Judge's finding of unwarrantable failure. My disagreement with the Judge on this issue is one of degree.

C. Withdrawal of Miners

As to this issue, I find a fundamental error on the part of the judge that does not contradict his conclusion that a violation occurred but seriously undermines his determination that the violation was caused by Spartan's unwarrantable failure to comply with section 75.313(a)(3). At the close of the hearing, the judge directed the parties to address a number of issues in their post-hearing briefs, and he summarized the evidence adduced at that point of the trial. With respect to the violation of section 75.313(a)(3), the judge stated the following:

I don't think that there's even anything in the testimony that indicates there was any communication by Mr. Sada or anybody else in authority that the personnel should have been removed from the working section. Mr. Sada repeatedly testified he told them they'd have to go out in 15 minutes if the fan didn't come on. But even Mr. Sada's testimony doesn't assert that he told them to leave the working section.

Tr. 755.

That characterization of the testimony, however, was incorrect. In point of fact, Mr. Sada testified without contradiction that he had instructed the miners in the left section to move to the loading point during questioning by the judge himself:

Q. Okay. Did you go and search out other miners ---

A. I went to the left ---.

Q. --- to talk to them based on your conversation with Mr. Neace?

A. I went to the left side of the section and started going across the faces, telling my people to come to the feeder.⁶

Q. Okay. So you just told them to come to the feeder?

⁶ The "feeder" and the "loading point" were at the same location. Tr. 427-28.

A. No, sir.

Q. What did you tell them?

A. I told them that the power and the fan was out outside, and for everybody to come to the feeder. We had to start evacuating in 15 minutes, or going outside. My exact words was get your stuff, we got to go outside in 15 minutes.

Q. Okay. Did you tell them that they needed to immediately come out outby the dumping point?

A. No, sir. I probably didn't, no, sir. I didn't say immediately. I just told them what I just told you.

Tr. 566-67.⁷

It is undisputed that the miners in the left section did not immediately move to the loading point; rather, they stayed on the section. Consequently, a violation of the standard occurred. Nevertheless, a reading of the judge's opinion reveals that his finding of unwarrantable failure was based on his mistaken belief that Mr. Sada had not specifically ordered the miners to leave the section and assemble at the loading point.⁸ See 29 FMSHRC at 487.

Furthermore, Neace testified that the miners had been trained to remove themselves from the working section whenever the main fan ceased operating so that Mr. Sada's

⁷ Sada later reasserted that point:

Q. Okay. So at that point, as I understand your testimony, you went over to talk to the right side?

A. I gave a direction that everybody to come out to the feeder. The power and the fan was off. I went to the right side loading crew.

Tr. 581.

⁸ It should be noted that Mr. Sada was called as the Secretary's witness, not Spartan's. Tr. 543. Accordingly, the Secretary must acknowledge and accept the thrust of Mr. Sada's testimony on this issue.

admonition to assemble at the loading point should have been obeyed. Tr. 637. Moreover, Mr. Sada testified that he did see the lights from the miners' cap lamps coming toward him as he waited by the mine phone, leading him to believe that they were obeying his order to move to the feeder. Tr. 585. The evidence clearly establishes that Mr. Sada definitely ordered the miners to evacuate the section. That they did not establishes a violation, but it does not establish an unwarrantable failure violation.

Lastly, the requirement that the miners withdraw from the working section and assemble at the loading point did not arise until after Sada received confirmation from the surface that the mine fan was out and then returned to the left section.⁹ Whatever Mr. Hatfield and Mr. Collins were doing to free the trailing cable while Mr. Sada was traveling back and forth between the left section and the mine phone would be permissible up to the point where Mr. Sada advised them of the fan outage and the need for them to move to the loading point.

When Mr. Sada gave that order, moreover, Mr. McNeeley was nowhere near the cable but was sitting on a personnel carrier on the section. Tr. 474; Gov't Ex. 1. At that point Mr. Sada moved on to the right section to give the same notification to the miners working there. Tr. 581. While Mr. Sada could have been more forceful in ordering the miners to the loading

⁹ This is borne out by the testimony of Mr. Humphrey, the head of the investigation and author of the official MSHA report in this case:

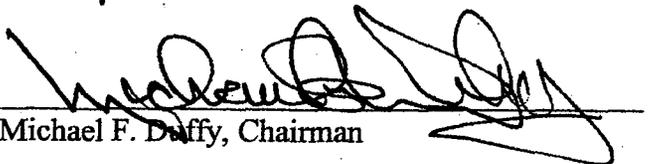
- Q. Okay. And in fact, when Mr. Sada walked up to the left machine, they were just --- had just bumped the ripper head; right, to get the cable free?
- A. The scoop was operating in by the miner, yes, sir.
- Q. Right. And he had not yet told them that the fan was down; right?
- A. That's unclear.
- Q. Well, didn't you find that he had to go back to the phone, talk to Mr. Neace?
- A. Yes.
- Q. Find out that the fan was off? Do you recall that?
- A. Yes. Uh-huh (yes).
- Q. And then he walked back over here as they're bumping the head free; correct?
- A. Right. And he observed those people.
- Q. Right. So when they went and got the scoop and brought it up there and bumped the head, he had not had a chance to tell them that the fan was off, had he?
- A. He had a chance within seconds to tell them after getting there.

Tr. 435-37.

Whether Mr. Sada suspected the fan was down before it was confirmed by his phone call to Mr. Neace on the surface is irrelevant in this case. The Secretary's chief investigator found that the violation arose *after* Mr. Sada had phoned up to the surface and returned to the left section, and that is the charge we are called upon to consider in this case.

point, I do not consider that his actions can be characterized as having “allowed the section electrician and several co-workers to perform electrical work on the trailing cable . . . during the power outage to the mine ventilation fan,” as the citation alleges. Gov’t Ex. 9. Nevertheless, by assuming that the requirement to withdraw the miners from the working section arose immediately (when the cable was hit and power was interrupted) rather than several minutes later when Mr. Sada received confirmation of the fan outage during his phone call to the surface, the judge also concluded that Mr. Sada “stood by” and allowed the miners to continue working rather than moving to the loading point.¹⁰ 29 FMSHRC at 487. So again, I believe the judge’s conclusions regarding the level of negligence are based on a misapprehension of the sequence of events following the continuous miner running into the trailing cable.

Accordingly, I would find a violation of the standard, but I would remand the unwarrantable failure issue to allow the judge an opportunity to reconsider his holding in light of Mr. Sada’s uncontradicted testimony that he did, indeed, direct the miners to move to the loading point and in light of the fact that the requirement to withdraw arose only after confirmation from the surface that the fan was out. I would also remand the matter of an appropriate civil penalty upon reconsideration of the unwarrantable failure issue.


Michael F. Duffy, Chairman

¹⁰ The evidence shows that Mr. Sada was not “standing by.” He was on his way to the mine phone to contact the surface and determine the extent of the power outage. Tr. 558, 584.

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August 29, 2008

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2007-892-E
v. :
 :
TWENTYMILE COAL COMPANY :

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

DECISION

BY THE COMMISSION:

This case is before the Commission on a referral of an emergency response plan dispute by the Secretary of Labor pursuant to Commission Rule 24(a), 29 C.F.R § 2700.24(a), and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 (“Mine Act” or “Act”), as amended by the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”), 30 U.S.C. § 876(b)(2)(G), 120 Stat. 493, 495-96. This proceeding involves a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Twentymile Coal Company (“Twentymile”). Administrative Law Judge Richard Manning affirmed the citation at issue and directed Twentymile to include a provision in its emergency response plan requiring a refuge chamber with post-accident breathable air for trapped miners in the main entries. 29 FMSHRC 844, 861 (Oct. 2007) (ALJ). Twentymile filed a petition for discretionary review that the Commission granted. For the reasons that follow, the judge’s decision stands as if affirmed.

I.

Factual and Procedural Background

A. The Statutory and Regulatory Backdrop

Section 2 of the MINER Act, which became effective on June 15, 2006, and amends section 316 of the Mine Act, 30 U.S.C. § 876, requires underground coal mine operators to

develop and submit for MSHA approval¹ and periodic review an emergency response and preparedness plan (“Emergency Response Plan” or “ERP”). *See* 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to evacuate miners who are endangered by a mine emergency; and to maintain miners who are trapped underground and are not able to evacuate. *Id.* at § 876(b)(2)(B)(i) and (ii). The MINER Act specified that operators were to develop ERPs within 60 days after the date of the statute’s enactment (June 15, 2006) and then submit them for approval by the Secretary. *Id.* at § 876(b)(2)(A) and (C).

In an effort to enhance the chances of survival of miners who are underground following a mine accident, the MINER Act specifies that all ERPs must contain, *inter alia*, provisions addressing post-accident communications, tracking of miners, lifelines, and breathable air. *Id.* at § 876(b)(2)(E)(i) – (vi). With regard to post-accident breathable air, the MINER Act specifies:

(iii) POST-ACCIDENT BREATHABLE AIR. – The plan shall provide for –

- (I) emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time;
- (II) in addition to the 2 hours of breathable air per miner required . . . under the emergency temporary standard . . . , caches of self rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the

¹ Section 316(b)(2)(C) provides:

- (C) PLAN APPROVAL. – The accident response plan . . . shall be subject to review and approval by the Secretary. In determining whether to approve a particular plan the Secretary shall take into consideration all comments submitted by miners or their representatives. Approved plans shall —
 - (i) afford miners a level of safety protection at least consistent with the existing standards, including standards mandated by law and regulation;
 - (ii) reflect the most recent credible scientific research;
 - (iii) be technologically feasible, make use of current commercially available technology, and account for the specific physical characteristics of the mine; and
 - (iv) reflect the improvements in mine safety gained from experience under this Act and other worker safety and health laws.

30 U.S.C. § 876(b)(2)(C).

deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes

30 U.S.C. § 876(b)(2)(E)(iii)(I) - (II).

In the legislative history accompanying the MINER Act, Congress made clear that “escape is the first and preferred option” in the event of an underground accident. S. Rep. No. 109-365, 109th Cong., at 6 (2006) (hereafter “*S. Rep.*”). “However, whether miners are effectuating an escape or awaiting rescue, where escape proves impossible, breathable air is essential” *Id.* As the report further noted, the MINER Act provided for increased numbers of self-contained self-rescuers (“SCSRs”) in the event of evacuation or entrapment, and “with regard to an entrapment, the [MINER Act] requires that emergency plans analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary” *Id.*

The Secretary elected to provide guidance to the mining community with respect to development of ERPs through a series of Program Policy Letters and a Program Information Bulletin. 29 FMSHRC at 845. On July 21, 2006, the Secretary issued Program Policy Letter No. P06-V-8 (“PPL”) to guide operators in drafting ERPs for MSHA approval. R. Ex. 50. In the PPL, the Secretary emphasized that miners should make every effort to evacuate the mine:

Barricading should be considered an absolute last resort and should be considered only when evacuation routes have been physically blocked. Lifelines, tethers, Self-Contained Self-Rescuers (SCSRs), and proper training provide essential tools for miners to evacuate through smoke and irrespirable atmospheres.

Id. at 1.

Subsequently, the Secretary issued a policy directive specifying her interpretation of the quantity of air necessary to maintain trapped miners for “a sustained period of time,” until a mine rescue team could reach them. Program Information Bulletin, No. P07-03, at 1 (Feb. 8, 2007) (hereafter “*PIB*”). The *PIB* directed mine operators to include in their ERPs a provision specifying how breathable air will be maintained. *Id.* at 2. In addition, the *PIB* specified several “options that may satisfy the breathable air requirement,” including that “each miner should be provided a 96-hour supply of breathable air located within 2,000 feet of the working section.” *Id.* The *PIB* concluded by stating that operators “must submit” the portion of their ERPs relating to breathable air within 30 days. *Id.* at 3.

Issued with the *PIB* was an attachment entitled “Breathable Air Questions and Answers.” 29 FMSHRC at 860; R. Ex. 57. In response to the question, “How can outby miners . . . be provided with breathable air?” MSHA stated:

As with air provided to miners at the working section, breathable air should be provided to outby miners working in established work positions within an inflatable chamber, barricade, or other alternative that isolates miners from contaminated environments To increase the chances that outby miners could reach breathable air supplies after an accident, District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other. This will help assure that miners would not need to travel more than 30 minutes in either direction to reach a refuge area.

29 FMSHRC at 860; R. Ex. 57 at 1. In the introduction to the questions and answers, MSHA emphasized that “mine-specific conditions in some mines may make alternative arrangements appropriate to the circumstances in the mine.” R. Ex. 57 at 1.

Also, MSHA issued a final rule, on December 8, 2006, addressing mine emergency evacuations, a matter that had been addressed in an emergency temporary standard (“ETS”) prior to the passage of the MINER Act.² 71 Fed. Reg. 71,430. A major aspect of the final rule was to increase the availability of SCSRs to evacuating miners in the event of a mine emergency. *Id.* at 71443. The rule further provided for additional SCSRs in escapeways, when each miner cannot safely evacuate within 30 minutes, by requiring that SCSR storage locations be no greater than the distance an average miner can walk in 30 minutes, consistent with provisions in the MINER Act. *Id.* Finally, the rule eliminated a requirement in the ETS that a mine operator submit an outby SCSR storage plan because that requirement was to be addressed in the ERP under the MINER Act. *Id.* at 71443-44.

B. Events Leading to the Citation

Twentymile operates the Foidel Creek Mine, an underground longwall coal mine in Colorado. *See* Jt. Ex. 7. About 100 miners work on each shift at the mine. Tr. 39. Miners enter and exit the mine through one of the two portals in the 1 Main North (“MN”) section. *See* Jt. Ex. 7. There are at least six entries in the mine between the portals and the 6 MN intake air shaft. Tr. 32-34; *see* Sec. Exs. 3, 3A. The direction of the air in the entries is from the portals inby the 6 MN. Tr. 35-36; 38-39. Approximately ten miners, including belt shovelers, rock dusters, and belt maintenance personnel, work in the area from the portals to the 6 MN. Tr. 160.

² On March 9, 2006, MSHA had issued an ETS, 71 Fed. Reg. 12,252, to establish “a more integrated approach to mine emergency response and evacuation.” 71 Fed. Reg. 71,430. The ETS went into effect immediately, and MSHA requested public comments on the ETS and held public hearings. *Id.* Following, inter alia, consideration of the hearings, public comments on the ETS, and provisions in the MINER Act, MSHA issued the final rule discussed above with some changes from the ETS. *Id.*

The entries are 18 to 20 feet wide and eight to nine feet high with a downward slope ranging from 14 to 17 percent on average. Tr. 32-35; *see* Jt. Ex. 7. The No. 2 entry, which is on the left side, and the No. 5 entry, which is on the right side, run parallel to each other and are designated as escapeways. These entries are supplied separately with intake air and isolated with stoppings so that there is no air exchange between them. Tr. 35-36; 60-61. Miners going to work typically travel through the No. 2 or 5 entries in pickup trucks or diesel-powered vehicles. Tr. 39. The belt line is in the No. 3 entry, which is separated from the other entries by permanent stoppings. Tr. 37.

In the event of a mine emergency, miners can exit the mine through the portals, using either the No. 2 or 5 escapeway. Tr. 35-36. In addition, miners can go through the escapeways to the 6 MN, where there is an intake air shaft with an escape hoist. Tr. 28. Finally, they can go inby the 6 MN where there are two other escape shafts in back of the longwall (11 right bleeder shaft and 18 right bleeder shaft). Stip. 37 at 11-12; Tr. 60; *see* Jt. Ex. 7 (the escape shafts that are inby the 6 MN are marked "C" and "D" on the mine map). The distance between the portals and the 6 MN intake shaft is about four miles. 29 FMSHRC at 858.

In compliance with the deadlines established in section 2 of the MINER Act, Twentymile submitted its first ERP on August 11, 2006. *Id.* at 846; R. Ex. 1. In the ERP, Twentymile stated that it was awaiting further guidance from MSHA to address the availability of breathable air for miners trapped underground. R. Ex. 1 at 2. However, in addressing the evacuation of miners, the plan provided for caches of SCSRs in escapeways, in addition to the two hours of breathable hour required in MSHA's ETS. *Id.* MSHA responded to Twentymile's plan on October 30, 2006, and subsequently met with representatives of Twentymile. 29 FMSHRC at 846; R. Ex. 2.

Twentymile submitted a revised ERP on February 1, 2007. 29 FMSHRC at 846; R. Ex. 3. As noted above, on February 8 (one week later), MSHA issued the PIB in order to give operators additional guidance on complying with the breathable air requirements in the MINER Act. The PIB also required all operators to submit revised ERPs for MSHA's review by March 12, 2007. 29 FMSHRC at 846. On March 2, 2007, MSHA responded to Twentymile's February 1 submission by stating that "the type, amount and location of oxygen must be specified for the ERP to be approved." *Id.* In addition, MSHA stated that caches of SCSRs must be located at intervals over distances that miners could walk in 30 minutes. R. Ex. 4 at 2.

On March 12, Twentymile submitted an amended ERP. 29 FMSHRC at 847; R. Ex. 5. Twentymile noted in the plan that "barricade chambers currently being developed do not provide the atmosphere acceptable to [us]. We are evaluating the individual units as improvements are made." R. Ex. 5 at 2. MSHA rejected the portion of the ERP dealing with post-accident breathable air and directed Twentymile to provide additional clarification of placement of breathable air for miners trapped underground. 29 FMSHRC at 847; R. Ex. 6.

On March 28, Twentymile submitted another revised ERP. 29 FMSHRC at 847; R. Ex. 7. In addressing post-accident breathable air, Twentymile specified the use of rescue chambers

for miners in the working sections of the longwall panels. R. Ex. 7 at 2. For miners “outby the section,” the ERP provided that “[t]he recently completed intake ventilation shaft [in the 6 MN] can be easily isolated from the main air courses with equipment doors and is accessible.” 29 FMSHRC at 847; R. Ex. 7 at 3. On April 13, MSHA’s District Manager, Allyn Davis, responded to Twentymile, stating that its ERP did not meet the post-accident breathable air provisions of the MINER Act and that Twentymile should specify how the breathable air requirement will be met for “outby personnel.” 29 FMSHRC at 847; R. Ex. 8.

On April 23, in response to MSHA’s comments, Twentymile submitted an ERP in which it had revised the provision on post-accident breathable air. 29 FMSHRC at 847. The ERP continued to provide for rescue chambers with 96 hours of breathable air in the working sections within 2000 feet of the loading point. R. Ex. 9 at 2. The plan also contained a new provision addressing post-accident breathable air for outby miners:

Outby the section

Personnel working in outby areas can readily access the recently completed intake ventilation shaft should escape from the mine be impossible.

This shaft will be outfitted with an emergency escape hoist later this year.

Personnel working outby the working sections, either inby or outby the shaft, will have access to the shaft or access to one of the two intake escapeways to the portal.

Other means of escape are available to outby personnel, depending on their location, including the 18 Right intake bleeder shaft.

29 FMSHRC at 847; R. Ex. 9 at 2-3. As did the prior ERP submitted to MSHA, this plan also contained a succeeding section entitled “Additional SCSR’s in Escapeways,” in which Twentymile provided for additional caches of SCSRs beyond the number required by the Secretary’s ETS (*see n.2, supra*). R. Ex. 9 at 3-4.

In late May, a Twentymile representative spoke with MSHA employee Hillary Smith, who was involved with plan review at MSHA District 9, to discuss the issue of outby personnel and breathable air. 29 FMSHRC at 847. The Twentymile representative asked Smith to explain why Twentymile’s ERP had not been approved when plans with similar breathable air provisions for outby personnel had been approved in another MSHA district. *Id.* at 847-48. In addition to citing differences at the Foidel Creek Mine, Smith said that she did not think District Manager Davis would approve an ERP that failed to provide breathable air in the main entries at the mine

for travel distances exceeding 15,000 feet. *Id.* at 848. The Twentymile representative responded that he did not believe that MSHA's position was correct. *Id.*

On June 14, 2007, Twentymile submitted an ERP in which it revised the section addressing breathable air for miners in the outby section. *Id.* at 848-49; R. Ex. 10. The ERP contained greater detail with regard to the intake air shaft in the 6 MN and how miners could barricade themselves there and be hoisted out. 29 FMSHRC at 848-49. The ERP further specified:

Personnel working outby the working sections, either inby or outby the shaft, will have access to the shaft or access to one of the two intake escapeways to the portal. Personnel working in these areas will at no time be more than 10,000 feet from either the portal or the 6 Main North intake shaft. The main entries are outfitted with two separate intake escapeways, each travelable with diesel pick-up mantrips, each containing caches sufficiently spaced for individuals walking and for the number of personnel working inby that point.

Id. at 849.

In a three-page letter dated June 22, MSHA District Manager Davis responded to Twentymile's ERP. *Id.*; R. Ex. 11. Davis stated that Twentymile's ERP must be modified in order to comply with the breathable air requirements in the MINER Act. R. Ex. 11. Initially, Davis noted that post-accident breathable air provisions may vary from mine to mine based on mine-specific circumstances. *Id.* at 2. He further stated that in the ERP for the Foidel Creek Mine:

Post accident breathable air needs to be addressed in the main entries an approximate distance of 10,000 to 15,000 feet from the portal. *The distance from the portal to the intake shaft is too great a distance not to maintain some sort of post accident breathable air*, and two isolated intake escapeways to the same portal locations do not provide the same amount of protection as breathable air.

29 FMSHRC at 849-50 (emphasis added). MSHA required that the ERP state how the "requirement of 96 hours of [b]reathable [a]ir will be met for those sections that do not have two intake air escapeways." R. Ex. 11 at 2.

In addressing "SCSRs Sufficient to Permit Escape," Davis requested that Twentymile "[i]nclude a map of the work areas, tracking zones, post-accident breathable air, and SCSR storage locations." *Id.* at 3. With regard to provisions of the ERP that MSHA had approved,

Davis instructed Twentymile to implement them. *Id.* Davis concluded by requesting that Twentymile address the deficiencies that MSHA had identified in the plan and submit a complete ERP by June 29, 2007. *Id.*

On June 28, Twentymile's safety director, Dick Conkle, informed MSHA that Twentymile's revised ERP would not include refuge chambers in the main entries and stated that miners could not be trapped in this area because they had multiple ways out of the mine. 29 FMSHRC at 850. On July 2, Twentymile submitted an ERP that was substantially similar to the one that it had submitted on June 14. *Id.*; Jt. Ex. 1. The section of the plan addressing post-accident breathable air for outby personnel was unchanged. *See* Jt. Ex.1 at 3-4.

By letter dated July 31, MSHA District Manager Davis notified Twentymile that its ERP was approved with the exception of the provision addressing breathable air for outby miners. 29 FMSHRC at 850. The letter stated, in relevant part:

[W]e have determined that the July 2nd ERP fails to provide sufficient quantities of breathable air for miners who might be trapped in outby areas. Specifically, we cannot approve an ERP in full for the Foidel Creek Mine unless post-accident breathable air is provided at some point in the main entries at a distance of between 10,000 to 15,000 feet from the portal. Breathable air is necessary within this area to maintain miners who are traveling or performing maintenance/examination activities in the main entries and who could be trapped within the approximately 20,000-foot and often significantly sloped, expanse between the portal and the intake air shaft, if an event (e.g., fire or explosion) compromises the intake escapeways and circumstances prevent miners from reaching the portal or the intake air shaft. In such an instance, breathable air would be necessary in the area that we have identified to permit miners to survive for a sustained period of time prior to rescue.

Id.; Jt. Ex. 2 at 1-2. The letter further stated that the conditions in the main entries required that a "revised ERP . . . provide[] breathable air for outby miners . . . in the same manner as that specified in the July 2nd ERP for miners in active gateroad and mains development locations."³ Jt. Ex. 2 at 2. The letter concluded by stating that Twentymile should correct the deficiencies in the ERP and submit it to MSHA by August 7, 2007. *Id.* at 3.

On August 7, Twentymile submitted the ERP which is the subject of this litigation. 29 FMSHRC at 850. In the cover letter that accompanied the ERP, Twentymile noted:

³ However, MSHA would allow Twentymile to provide 72 hours of breathable air for miners in the main entries, as opposed to the 96 hours of breathable air that was provided for miners in the active gateroads and main development locations. Jt. Ex. 2 at 2.

We consider the Twentymile Mine configuration unique in that multiple directions are available for personnel working underground to use if an event required evacuation from the mine. We feel the requirement of a rescue chamber for the area in question, from the portal to the intake shaft, is not applicable because of the multiple directions available

Id. at 850; Jt. Ex. 3 at 1. Therefore, with the exception of some minor wording changes in the breathable air section for outby personnel and the addition of some supplies at the 6 MN intake shaft, the ERP submitted was the same as the one that Twentymile had submitted on June 14. 29 FMSHRC at 851.

On September 10, MSHA District Manager Davis wrote to Twentymile and asked to be informed by September 13, 2007, what Twentymile intended to do with regard to the placement of a refuge chamber in the location between the portal and the 6 MN intake air shaft. *Id.*; Jt. Ex. 5. Davis concluded the letter by stating that, “if you still refuse to amend your current ERP and to place a rescue chamber or an established refuge area in this location, MSHA will conclude that the parties are at an impasse.” 29 FMSHRC at 851; Jt. Ex. 5 at 2. On September 13, Twentymile responded to Davis by reiterating its position that the Foidel Creek Mine was unique because “multiple directions are available for personnel working underground” from the portal to the intake air shaft. 29 FMSHRC at 851; Jt. Ex. 6.

On September 18, 2007, MSHA issued Citation No. 7284469 alleging that Twentymile violated section 316(b)(2) of the Mine Act by failing to develop and submit for approval an ERP that provided for the maintenance of miners trapped underground. 29 FMSHRC at 851; S. Referral, Attachment A. The citation further states that the ERP “does not provide materials and equipment necessary to supply breathable air for miners who may be trapped in the main entries . . . in the approximately 20,000-foot distance between the portal and intake air shaft near the 6 MN section.” 29 FMSHRC at 851; S. Referral, Attachment A. Because of this, MSHA could not approve the ERP. Thereafter, on September 20, the Secretary filed a referral with the Commission. 29 FMSHRC at 852; S. Referral. Twentymile timely responded to the referral and requested a hearing. 29 FMSHRC at 852; T. Resp. to Referral.

C. Judge’s Decision

On October 2, a hearing was held in Denver, Colorado. 29 FMSHRC 844. On October 16, the judge issued his decision. *See* 30 U.S.C. § 876(b)(2)(G)(ii).⁴ The judge agreed with the

⁴ Section 2 of the MINER Act provides for referral to the Commission of disputes arising over ERPs, and Commission Procedural Rule 24 implements the referral process by providing for the expeditious resolution of disputes that come before the Commission. Briefly, if there is a dispute between an operator and the Secretary over a plan provision, the Secretary must issue a citation. 30 U.S.C. § 876(b)(2)(G)(ii). Thereafter, Rule 24 provides for the filing of a referral of

Secretary that the central issue was whether MSHA's decision to require the placement of a refuge chamber in the main entry, near the midpoint between the portal and the 6 MN intake air shaft, was arbitrary and capricious. 29 FMSHRC at 857. With regard to Twentymile's arguments that the MINER Act is unconstitutionally vague and that the Secretary's use of PPLs and the PIB is contrary to law because they were not subject to notice-and-comment rulemaking, the judge held that the scope of the hearing was limited to review of the disputed plan provision. *Id.* at 857-58. The judge further held that the Secretary bore the burden of proving that MSHA's refusal to approve Twentymile's ERP was not arbitrary and capricious. *Id.* at 858.

The judge noted that it was about 4 miles from the portal to the 6 MN air shaft. *Id.* The judge rejected Twentymile's position that, because it was not "likely" that miners would ever become trapped in outby areas, it was unlikely that a refuge area in the outby areas would ever be used. *Id.* Rather, the judge concluded that it was not unreasonable for the District Manager to require the inclusion of an outby refuge area in the plan. *Id.* Although the judge noted that Twentymile was "an exemplary underground coal mine operator," the judge concluded that the Secretary established that there was a reasonable possibility of a major accident or multiple accidents that could trap miners, especially injured miners, between the portal and the 6 MN air shaft. *Id.* at 859. The judge rejected Twentymile's argument that the District Manager failed to consider the specific conditions at the mine when he refused to approve plan provisions for miners working in the outby area. *Id.* The judge also rejected Twentymile's reliance on the District Manager's approval of a provision for the active longwall section that was similar to what Twentymile proposed for the outby miners. *Id.* The judge found it persuasive that, in the longwall section, the entries receive intake air from two independent sources from opposite directions, in contrast to the mains where air travels down two parallel intake escapeways, thereby raising the threat of air contamination if ventilation controls were damaged. *Id.*

The judge also affirmed his trial ruling on the Secretary's motion *in limine* to exclude evidence that Twentymile sought to offer with regard to ERPs with breathable air provisions for outby miners that were approved in other districts. *Id.* at 860. The judge viewed Twentymile's effort to introduce this evidence as part of its larger argument that the Secretary's use of PPLs and the PIB produced inconsistent results. *Id.* However, the judge noted that the issue of breathable air for outby miners had been addressed in the "Breathable Air Questions and Answers," which had accompanied the PIB issued by the Secretary, pp. 3-4, *supra*. The judge stated that the District Manager's insistence on a refuge area was consistent with the guidelines.

the citation with the Commission within two days. 29 C.F.R. § 2700.24(a). The rule further provides for the submission of materials relevant to the dispute, or a hearing, within 15 days of the referral. *Id.* § 2700.24(e). Within 15 days of the judge's receipt of materials or hearing testimony, he or she must issue a decision. *Id.* § 2700.24(f)(1). Thereafter, if the judge rules in the Secretary's favor, the disputed provision must be included in the ERP unless the judge or the Commission grants a stay. *Id.* § 2700.24(f)(2). Following issuance of the judge's decision, a party may seek review of the judge's decision by filing a petition for discretionary review. *Id.* § 2700.24(g).

Id. The judge concluded by finding that the Secretary had carried her burden of proof that the District Manager's refusal to approve the breathable air provision for outby miners was not arbitrary and capricious and her position was taken in good faith and was not unreasonable. *Id.* at 860-61. The judge affirmed the citation and ordered further negotiations to work out the details of the post-accident breathable provision for the ERP. *Id.* at 861.

II.

Disposition

Before the Commission, Twentymile first challenges the judge's granting of the Secretary's motion *in limine* to preclude Twentymile from introducing into evidence approved ERPs from other mines in other MSHA districts that contained breathable air provisions similar to Twentymile's proposed ERP. T. Br. at 11; T. Reply Br. at 5-6. Twentymile maintains that this evidence would have shown that the District Manager acted improperly in requiring Twentymile to include a refuge chamber in the main entries in its plan. T. Br. at 11-14. Twentymile also argues that the judge erred when he applied an "arbitrary or capricious" standard of review in upholding the Secretary's refusal to accept Twentymile's plan. *Id.* at 15-16. Twentymile further argues that the judge erred in interpreting the MINER Act by requiring a refuge chamber for the "reasonable possibility" that an event such as a belt or equipment fire would entrap miners underground. T. Br. at 18-19; T. Reply Br. at 6-9. Twentymile contends that the legislative history of the MINER Act supports a reading that breathable air provisions in ERPs address "likely" risks. T. Br. at 19-20. Twentymile additionally contends that the judge misinterpreted "entrapped" as used in the MINER Act. *Id.* at 20-21. As a final argument, Twentymile contends that there were no standards to guide the District Manager's approval process and that he failed to account for the mine specific conditions at Twentymile. *Id.* at 23-30; T. Reply Br. at 9-11.

In response,⁵ the Secretary argues that the judge correctly applied the breathable air provisions of the Mine Act when the judge determined that it was "reasonably possible" that miners could be entrapped. S. Br. at 18-20. In support, the Secretary contends that a plain meaning approach to the MINER Act provisions supports her position, as does the legislative history. *Id.* at 20-26. Alternatively, the Secretary argues that, if the statutory language is ambiguous, the Commission should defer to her interpretation. *Id.* at 26-28. The Secretary further argues that the MSHA District Manager's refusal to approve Twentymile's ERP should be reviewed under an "arbitrary and capricious" standard. *Id.* at 29-34. The Secretary contends that the actions of the District Manager in refusing to approve the plan were reasonable in light of the conditions in the areas outby the 6 MN air shaft. *Id.* at 35-43. Finally, the Secretary argues

⁵ Prior to filing its brief in this proceeding, the Secretary filed a Motion to Exceed Page Limit as established in the Commission's Procedural Rules, 29 C.F.R. § 2700.75(c). The motion was unopposed. However, at the time the motion was filed, the Commission did not have a working quorum. We now grant the motion.

that the judge properly granted the Secretary's motion *in limine* to exclude evidence of MSHA approval of ERPs in other districts. *Id.* at 43-46. The Secretary concludes by requesting that the Commission affirm the judge's decision. *Id.* at 47.

A. Legislative Background

Passed in response to the tragic loss of life in several mine accidents in 2006, the MINER Act took a multi-faceted approach to enhancing safety and managing risk in underground coal mines. *S. Rep.* at 1-3. Section 2 of the MINER Act requires that each underground coal mine operator adopt a written Emergency Response Plan. 30 U.S.C. § 876(b)(1), (2). Thus, the MINER Act requires the development of plans, "which must provide for the evacuation of miners who may be endangered in an emergency or, if miners cannot evacuate, provide for their maintenance underground." *S. Rep.* at 4.

With regard to the drafting and approval of ERPs, the legislative history of the MINER Act states, "In order to facilitate implementation of the [MINER] [A]ct's revisions, the [Senate] committee decided to make use of the 'plan' model since all parties were familiar with its use in other contexts." *Id.* Thus, Congress intended that the principles governing the process of formulating ERPs be similar to those governing other mine plans under the Mine Act. With regard to mine plans, the Commission has long held, "[M]ine ventilation or roof control plan provisions must address the specific conditions of a particular mine." *Peabody Coal Co.*, 15 FMSHRC 381, 386 (Mar. 1993) ("*Peabody I*"). However, in addition to mine-specific provisions in plans, the MINER Act provides for the inclusion in ERPs of six "areas of concern that have universal applicability and are therefore susceptible of more generalized regulation." *S. Rep.* at 5. *See* 30 U.S.C. § 876(b)(2)(E)(i) - (vi). One of these areas of general applicability is post-accident breathable air. *Id.* at § 876(b)(2)(E)(iii).

The MINER Act further specifies certain minimum requirements for "post-accident breathable air in each plan." Thus, the MINER Act provides "for individuals trapped underground sufficient [air] to maintain such individuals for a sustained period of time," and for evacuating miners "caches of self-rescuers providing . . . not less than 2 hours per miner to be kept in escapeways from the deepest work areas to the surface . . ." 30 U.S.C. § 876(b)(2)(E)(iii)(I) and (II).

B. General Legal Principles – Standard of Review

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding, neither party disputes the presence of good faith consultations, and the record fully supports that the Secretary and Twentymile had

extensive back-and-forth consultations over a period of a year regarding the breathable air provisions in the ERP. *See Emerald Coal Res., LP*, 29 FMSHRC 956, 967 (Dec. 2007).

While the contents of a plan are based on consultations between the Secretary and operators, the Commission has recognized that “the Secretary is [not] in the same position as a private party conducting arm’s length negotiations in a free market.” *Id.* at 1746. As one court has noted, “the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan.” *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary’s part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) (“*Peabody II*”). “[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA’s conduct throughout the process was reasonable). In its initial decision involving review of MSHA’s refusal to approve an ERP, the Commission adopted the arbitrary and capricious standard to review MSHA’s actions in the plan approval process. *Emerald Coal*, 29 FMSHRC at 966.

On review in this proceeding, Twentymile argues that the “arbitrary and capricious” standard is not appropriate and that the Secretary should be required to demonstrate that the operator’s plan is unreasonable. T. Br. at 15. As the Commission stated in *Emerald Coal*, however, review of the Secretary’s actions under an “arbitrary and capricious” standard is in accordance with Commission precedent. 29 FMSHRC at 966. The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. To the extent that Twentymile argues that the Commission should apply a reasonableness standard, T. Br. 18, the Commission’s standard of review incorporates an element of reasonableness in reviewing the Secretary’s actions. *See Monterey Coal*, 5 FMSHRC at 1019 (in affirming a citation in which an operator was cited for failing to supply data relating to impoundment pond construction, the Commission concluded that the course of action taken by MSHA was “a reasonable approach, and not arbitrary or capricious”); *accord Peabody II*, 18 FMSHRC at 692 & n.6 (in reviewing the Secretary’s refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard).

In further support of its position that the Commission should review the reasonableness of the operator’s plan, Twentymile contends that the intent of the MINER Act was to permit operators to develop and implement their own plans before MSHA review. T. Br. at 18; T. Reply Br. at 1-4. We disagree. There is no statutory language that directs operators to unilaterally implement ERPs prior to MSHA approval. Rather, the legislative history accompanying the passage of the MINER Act makes clear that the approval process, with the involvement of

MSHA district office personnel, is an integral part of the plan formulation process. *S. Rep.* at 4. Moreover, the facts in this proceeding belie Twentymile's argument. In its June 22, 2007, response to Twentymile's draft ERP, MSHA specifically instructed Twentymile to implement the provisions of the ERP that MSHA had approved. *R. Ex.* 11 at 3. Thus, we are not persuaded that Twentymile was obligated to formally implement its ERP before MSHA approval.

To the extent that Twentymile also argues that the Secretary committed legal errors in the plan approval process, the Commission is well within its authority to review MSHA's decisions for those errors. See *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) ("Abuse of discretion may be broadly defined to include errors of law."). Finally, an arbitrary and capricious standard of review of the Secretary's actions in the plan approval process encompasses the Commission's review of the judge's factual findings under a substantial evidence standard.⁶ *Emerald Coal*, 29 FMSHRC at 966.

C. Whether the Secretary Properly Interpreted the Relevant Provisions of Section 316 of the Mine Act

Twentymile argues that the Secretary erred in interpreting the post-accident breathable air provisions of the Mine Act and then further erred when she applied those provisions at the Foidel Creek mine. *T. Br.* at 19-21. In response, the Secretary contends that, under a plain meaning approach, the MINER Act provisions that require breathable air for trapped miners clearly apply when a fire or explosion is "reasonably possible" and that the District Manager's refusal to approve Twentymile's ERP without a refuge chamber in the main entry between the portal and the 6MN intake shaft was not arbitrary and capricious. *S. Br.* at 18-34. The proceeding thus turns in large part on the meaning and application of the breathable air provisions of the MINER Act.

The breathable air provision in section 316 of the Mine Act, as amended by the MINER Act, requires: (1) that the ERP provide for "emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time" and (2) that the ERP provide for a minimum of 2 hours of breathable air per miner in the form of caches of SCSRs in escapeways "from the deepest work area to the surface at a distance of not further than an average miner could walk in 30 minutes" to facilitate the evacuation of miners. 30 U.S.C. § 876(b)(2)(E)(iii)(I) & (II).

⁶ 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)).

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. See *Chevron*, 467 U.S. at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In determining whether Congress had an intention on the specific question at issue, courts utilize traditional tools of construction, including an examination of the “particular statutory language at issue, as well as the language and design of the statute as a whole.” *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a “*Chevron Step One*” analysis. See *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). If the statute is ambiguous or silent on the point in question, a second inquiry, commonly referred to as a “*Chevron Step Two*” 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; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal Co.*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

1. The meaning of the word “trapped”

Twentymile and the Secretary disagree over the meaning of “trapped” as used in section 316 of the Mine Act, as amended by the MINER Act. Twentymile contends that, in order for miners to be trapped, there must be a “physical obstruction of egress from the mine.” T. Br. at 20. However, the Secretary maintains that no physical obstruction is necessary and that miners may be “trapped” for many other reasons. S. Br. at 27-28.

In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term. *E.g.*, *Jim Walter Res., Inc.*, 28 FMSHRC 983, 987-88 (Dec. 2006). “Trap” means “to place . . . in a restricted or difficult position; confine, entangle . . .” *Webster’s Third New Int’l Dictionary, Unabridged* 2431 (1986). Thus, the dictionary definition of the term does not specifically require a physical obstruction.

Further, in addition to the literal definition of “trapped,” the context in which the term is used also gives meaning to the term.⁷ As noted above, section 316 of the Mine Act contains the

⁷ “In order to discern a standard’s plain meaning, the standard must be read in context.” *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 n.7 (Feb. 2004), citing *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 45 (D.C. Cir. 1990) (“If the first rule of . . . construction is ‘Read,’ the second rule is ‘Read on!’”); *Borgner v. Brooks*, 284 F.3d 1204, 1208 (11th Cir. 2002), cert. denied sub nom. *Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (in discerning a statutory provision’s plain meaning, court must construe the statute in its entirety).

dual requirements of breathable air for evacuating miners and for those miners who are trapped and unable to evacuate. The legislative history that accompanied the MINER Act is instructive in describing the circumstances when miners would need breathable air and possibly face entrapment:

In committee hearings, there was agreement among safety experts that in the event of an underground mine accident, escape is the first and the preferred option. The act does not signify a change in that philosophy. However, whether miners are effectuating an escape or awaiting rescue, where *escape proves impossible*, breathable air is essential to sustaining life.

S. Rep. at 6 (emphasis added). The committee report further refers to “possible incidents” and conditions which give rise to the need for breathable air. *Id.* at 6-7. Notably absent from these broad descriptions of the events that trigger the need for breathable air are any words that would limit application to a specific mine condition. See *Walker Stone Co.*, 19 FMSHRC 48, 51 (Jan. 1997), *aff’d*, 156 F.3d 1076 (10th Cir. 1998). Accordingly, the events that give rise to the provision of breathable air are not limited to situations involving physical obstruction in mines. However, conditions in the mine must be so arduous that evacuation from the mine becomes impossible. This is the scenario envisioned by section 316, which imposes the additional breathable air requirement “sufficient to maintain such individuals for a sustained period of time.” 30 U.S.C. § 876(b)(2)(E)(iii)(I). This reading is also consistent with other sections of the MINER Act and the corresponding legislative history.⁸

Finally, the plain meaning approach to reading the MINER Act and the reference to “trapped” miners is not only consistent with the provisions of the statute and its legislative history, but also is consistent with the primary purpose of the legislation and experiences from the mine disasters that led to the legislation. As the legislative history states, the purpose of the MINER Act is to further the goals in the Mine Act and “to enhance worker safety in our nation’s mines.” *S. Rep.* at 1. A reading of the MINER Act that would include all types of mine emergencies that make escape impossible, not just physical obstructions in mines, best furthers this purpose.

⁸ Chairman Duffy and Commissioner Young note that, in addressing the requirement for post-accident lifelines in ERPs in the MINER Act, 30 U.S.C § 876(b)(2)(E)(iv), the committee report recognizes the importance of flame-resistant directional lifelines to provide assistance in following escape routes in circumstances of diminished visibility. *S. Rep.* at 7. They believe that the lifelines requirement for plans indicates a concern for dangers posed by smoke and fire that force miners to evacuate the mine. None of these circumstances involves physical obstructions in the mines. They conclude that it is apparent from these cumulative provisions that the drafters of the MINER Act foresaw that miners would attempt to evacuate mines under difficult circumstances, including the presence of smoke, fire, and non-breathable air. This leaves ERPs to address the maintenance of trapped miners who are faced with even more hazardous conditions of the same nature that make escape “impossible.”

In short, based on the clear language of the MINER Act, the context in which the language appears, and the legislative history accompanying the breathable air provisions, we conclude, in agreement with the Secretary, that the reference to “trapped” does not require a physical obstruction of egress from a mine.

2. The Secretary’s “reasonable possibility” test

The judge adopted the Secretary’s standard of “reasonable possibility” in considering whether outby miners at the Foidel Creek mine could become trapped, which would trigger the requirements of section 316(b)(2)(E)(iii)(I) of the Mine Act. 29 FMSHRC at 858-59.⁹ On appeal, as noted above, Twentymile continues to argue that the legislative history of the MINER Act supports its contention that breathable air beyond increased stores of SCSRs is necessary only in the event of “likely” risks of entrapment. T. Br. at 18-20; T. Reply Br. at 6-9.

The Secretary argues that, under a *Chevron I* analysis, a literal reading of section 316 indicates that the breathable air requirement applies any time that miner entrapment is a “reasonable possibility.” S. Br. at 20-22. In addition to the literal reading of the statutory language, the Secretary’s primary support for the “reasonable possibility” standard is the committee report accompanying the MINER Act in which the drafters referred to how much breathable air to provide:

Although at least one jurisdiction has adopted a fixed time standard for breathable air, the committee elected not to do so. Instead the committee believes an emergency plan should address *possible* incidents and the attendant need for sufficient breathable air. The projected need is obviously fact specific.

S. Rep. at 6 (emphasis added).

However, we are not convinced that Congress directly spoke to the issue of what test should be used in determining when additional breathable air should be required in case miners are trapped. Contrary to the Secretary’s argument, S. Br. at 20-26, nothing in the statutory language mentions a “reasonable possibility” test or otherwise indicates that such a test is mandated. In addition, the language from the committee report relied upon by the Secretary merely indicates that an ERP should address “possible incidents” and does not set forth any particular test for determining when breathable air is required.

⁹ The judge found that the Secretary established that “there is a ‘reasonable possibility’ that a major accident . . . could trap miners, especially injured miners, between the portal and the 6 MN air shaft.” 29 FMSHRC at 859. The judge further noted that the District Manager evaluated the “distances involved and the possibility of a belt fire, an equipment fire, or another unexpected event near the portal.” *Id.*

Moreover, as argued by Twentymile, T. Br. at 19-20, the same committee report accompanying the MINER Act can also be read to direct a different approach to assessing the need for breathable air by analyzing “*likely risks*” at a mine. *S. Rep.* at 6 (emphasis added). While the Secretary seeks to dismiss this portion of the committee report as a “single snippet of legislative history,” S. Br. at 25, we conclude that this “likely risk” standard would also comport with the language of the MINER Act and the context of the breathable air provision. In sum, we conclude that the Secretary’s “reasonably possible” interpretation is not compelled under a *Chevron I* analysis.

Where, as here, the statute appears to be silent on the point in question, a *Chevron II* analysis is therefore appropriate. Under that analysis, the question is whether the Secretary’s interpretation of the statute is a reasonable one. *Chevron*, 467 U.S. at 843-44. In this case, the Secretary’s reliance on a “reasonable possibility” test is a reasonable approach to interpreting and applying the breathable air requirement of section 316. Nothing in the statutory language would prevent the use of such an approach, and, as discussed above, the legislative history is generally consistent with such an approach even though other approaches would also be permissible. The Secretary’s interpretation also furthers the safety purposes of the Mine Act. Moreover, as the judge acknowledged, “The vast majority of refuge areas that are being established under the MINER Act will never be used because either the catastrophic events that could necessitate their use will never occur or because the affected miners will be able to escape the mine.” 29 FMSHRC at 858.

Thus, we affirm the judge’s use of a “reasonable possibility” test in this case. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994). We next consider whether the Secretary properly applied that test in considering Twentymile’s proposed ERP.

The Commissioners are evenly divided regarding whether the judge correctly determined that the MSHA District Manager did not act arbitrarily and capriciously when he rejected Twentymile’s draft ERP because it did not provide for a refuge chamber in the mains near the midpoint between the portals and the 6 MN intake air shaft. Commissioners Jordan and Cohen would affirm the portion of the judge’s decision in which he held that the District Manager’s refusal to approve the draft plan without such a provision was not arbitrary and capricious. Chairman Duffy and Commissioner Young would reverse the judge’s determination on that issue. The effect of the split decision is to allow the judge’s order, in which he required Twentymile to provide for a refuge chamber approximately halfway between the portals and the 6 MN air shaft, to stand, as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The Commissioners are also evenly divided on the issue of whether the judge properly granted the Secretary’s motion *in limine*. The separate opinions of the Commissioners follow:

III.

Separate Opinions of the Commissioners

Commissioner Jordan and Commissioner Cohen, in favor of affirming the decision of the administrative law judge:

A. Whether the District Manager's Action in Refusing to Approve Twentymile's ERP without a Provision for a Refuge Chamber in the Main Entry was Arbitrary and Capricious

This case emerges out of a lengthy process of good faith negotiations between Twentymile and District 9 of MSHA concerning the MINER Act's requirements for an emergency response plan, or "ERP." See 30 U.S.C. § 876(b)(2)(A). It appears that Twentymile and MSHA consulted with each other and both made adjustments in their positions on several issues. However, on one question they reached an impasse. This was whether Twentymile must make provision for "breathable air" under section 316(b)(2)(E)(iii)(I) of the Mine Act, 30 U.S.C. § 876(b)(2)(E)(iii)(I), for miners who work in the approximately 20,000-foot distance between the portals and the 6 Main North ("MN") intake air shaft ("outby miners"). In his opinion, Administrative Law Judge Richard W. Manning affirmed the District 9 decision to require a refuge chamber at a midpoint between the portals and the intake air shaft. 29 FMSHRC 844, 861 (Oct. 2007) (ALJ).

We must decide whether substantial evidence supports Judge Manning's decision that the District Manager's requirement of a refuge chamber in the mains was not arbitrary and capricious.¹ In so doing, we bear in mind the manner in which the arbitrary and capricious standard of review should be applied:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing that explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an

¹ 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)).

agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfr's. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

1. The Alleged Lack of Ascertainable Standards

Twentymile argues that the District Manager's decision was arbitrary and capricious because the Secretary has "no ascertainable standards" for applying section 316 of the Act. T. Br. at 23-25. According to Twentymile, there are no ascertainable standards because the Secretary has not promulgated regulations for ERPs through notice-and-comment rulemaking.² *Id.* at 24. However, Twentymile's argument fails in consideration of the record in this case and our recent decision in *Emerald Coal Resources, LP*, 29 FMSHRC 956 (Dec. 2007).

As the judge noted, the District Manager's insistence on the establishment of a refuge area between the portals and the 6 MN air shaft was consistent with guidelines published by the Secretary in an attachment to her Program Information Bulletin ("PIB") P07-03 (Feb. 8, 2007) entitled "Breathable Air Questions and Answers."³ 29 FMSHRC at 860. The attachment stated:

As with air provided to miners at the working section, breathable air should be provided to outby miners working in established work positions within an inflatable chamber, barricade, or other alternative that isolates miners from contaminated environments To increase the chances that outby miners could reach breathable air supplies after an accident, District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other. This will help assure that miners would not need to travel more than 30 minutes in either direction to reach a refuge area.

Id., citing R. Ex. 57.

² We note that the Secretary recently published a proposed rule addressing requirements for refuge alternatives. 73 Fed. Reg. 34,140 (June 16, 2008).

³ The Secretary also published an attachment to PIB P07-03 entitled "Methods for Providing Breathable Air." R. Ex. 59.

The record shows that after MSHA promulgated PIB 07-03, Twentymile submitted six separate Emergency Response Plans, to which the District Manager responded in five separate letters. 29 FMSHRC at 846-851. Discussions between the District Manager and Twentymile lasted for six months and included telephone calls, e-mails, and meetings, as well as letters. *See* Stip. 25-42 at 6-14; Tr. 156-57. In these negotiations, the District Manager spelled out the need for a refuge chamber for the outby miners. The District Manager noted that the refuge chamber for outby miners in the main entries would require only 72 hours of breathable air, in contrast with the 96 hours of breathable air per miner in active gateroad and mains development locations.⁴ In making this distinction, the District Manager specifically noted the “specific circumstances and conditions in which breathable air would be used at this location.” Jt. Ex. 2 at 2. Twentymile’s argument that it lacked notice of the Secretary’s requirements ultimately is belied by the fact that the District Manager approved the ERP in its entirety, except on the issue of breathable air for outby miners. 29 FMSHRC at 850; Jt. Ex. 2.

In *Emerald Coal*, the Commission noted that the MINER Act did not require notice and comment rulemaking. We stated, “Indeed, the short time period provided for the submission of ERPs following the passage of the MINER Act suggests that Congress did not intend for MSHA to proceed by rulemaking.” 29 FMSHRC at 970. We also held that operators had adequate notice of MSHA’s position because of the written communications specific to the proposed ERPs. *Id.* at 971. Thus, it cannot be said that Twentymile had inadequate notice of the requirements for breathable air. Indeed, if Twentymile is correct that the Secretary acted in an arbitrary and capricious manner because she has not promulgated regulations through notice and comment rulemaking, every MSHA decision on an Emergency Rescue Plan anywhere in the country would be vulnerable to attack.

2. Substantial Evidence

We now turn to an examination of the evidence in this case to determine whether the decision of the District Manager was arbitrary and capricious. Twentymile argues that he did not consider the specific conditions relating to the Foidel Creek Mine. However, Judge Manning found “that the [D]istrict [M]anager considered the specific conditions present in the outby areas of the mine when he reached his decision to reject the proposed language in the plan dealing with breathable air in outby areas.” 29 FMSHRC at 859. The judge further determined that “[t]he [D]istrict [M]anager took into consideration all of the safety features . . . as well as the presence of caches of SCSRs located along the intake entries and the availability of vehicles in the entries.” *Id.* at 860.

The consideration of whether Judge Manning’s decision is supported by substantial evidence involves two distinct factual issues – (1) whether there is a reasonable possibility that in

⁴ MSHA District 9 had originally required that the refuge chamber between the portals and 6 MN air shaft provide 96 hours of breathable air, R Ex. 11, but after further consideration reduced the requirement to 72 hours of breathable air. Jt. Ex. 2.

the event of a fire or explosion, outby miners will be unable to escape through the portals, and (2) whether, in the event of such inability to escape through the portals, outby miners will be unable to reach the 6 MN intake air shaft. We will address these two issues separately.

a. Escape Through the Portals

It is uncontroverted that Foidel Creek is a progressive mine with significant safety features. MSHA's witness William Reitze acknowledged that fact in his testimony, Tr. 30, 57, as did Judge Manning in his decision. 29 FMSHRC at 859. Judge Manning nevertheless concluded that there was a reasonable possibility that miners could be trapped by a mine accident between the portals and the 6 MN air shaft. For example, a single event could contaminate the intake air in the two escapeways, and thus block escape through the portals. *Id.* This determination is supported by substantial evidence.

Reitze, the supervisory mining engineer for the ventilation section of the MSHA District 9 technical services branch, testified in detail about the possibility of a belt fire that would compromise the stoppings, thus allowing smoke to travel into both escapeways. Tr. 29, 44-48. He also voiced concerns about an equipment fire that could generate significant amounts of smoke and possibly contaminated air that would restrict miners from exiting at the portals. Tr. 29, 52-54. In addition, Reitze testified about the possibility that float coal dust could be suspended into the air, and, coupled with the possibility of a fire from either a belt or mechanical equipment fire, create an explosion that would cause problems in the intake escapeways. Tr. 29-30, 55-56. The District Manager relied on these scenarios in refusing to fully approve Twentymile's ERP. 29 FMSHRC at 859; Tr. 58.

MSHA Senior Fire Protection Engineer Derrick Tjernlund also testified as to how a fire could start in the belt entry and how miners would not be able to escape through the portals. Tr. 123-27. In addition, he stated that the stoppings are not really built to be fire-resistant in conditions which occur in actual mine fires. Tr. 128. Tjernlund also explained how an equipment fire could occur, Tr. 135-38, and how an explosion could occur. Tr. 132-35. Tjernlund agreed with Reitze that in the event of a belt fire, equipment fire, or explosion, it was reasonably possible that outby miners could not escape the mine through the 1 MN portals. Tr. 129, 135, 138-39.

Judge Manning credited the testimony of Reitze and Tjernlund that outby miners could be trapped by a fire or explosion and thus be unable to escape through the 1 MN portals. 29 FMSHRC at 858. On issues of witness credibility, we are not permitted to substitute our judgment for that of the administrative law judge. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd*

sub nom. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096 (D.C. Cir. 1998).

We would further note that Twentymile witness Robert Thorel Johnson, a mining engineer who is Technical Safety Coordinator at the Foidel Creek Mine, agreed that there was a possibility that outby miners could be prevented by a fire from escaping through the portals. Tr. 154-55, 169. Twentymile's counsel conceded this possibility at oral argument. Oral Arg. Tr. 76-77. Moreover, our colleagues do not appear to dispute that the Secretary has established the reasonable possibility that outby miners could be prevented by a fire from escaping through the portals.

b. Reaching the 6 MN Air Shaft

Having found that substantial evidence supports the ALJ's conclusion that there was a reasonable possibility that outby miners could be prevented from escaping through the portals, we next address whether these miners might not be able to reach the 6 MN intake air shaft.

It is almost four miles from the portals to the 6 MN air shaft, mostly at a very steep downgrade slope. 29 FMSHRC at 858; Tr. 33-34, 42-43, 167. Thus, if escape through the portals is impossible, miners would have to travel potentially three-and-a-half miles to get to the shaft. 29 FMSHRC at 860. Twentymile claims that the miners would not be trapped because they could traverse this distance using motorized vehicles. T. Br. at 27-28. However, Judge Manning found that the District Manager took into consideration the availability of vehicles in the entries. 29 FMSHRC at 860. In fact, Reitze, who helped evaluate Twentymile's ERP for District 9, Tr. 26, was aware that vehicles were potentially available to be used to escape from the mine. Tr. 61-62.⁵ Twentymile's Johnson, stated that "[i]n most cases" people evacuating the mine would be using a vehicle," Tr. 162, which indicates that Twentymile does not contend that vehicles would be available to all outby miners. Similarly, at oral argument, Twentymile's counsel acknowledged the possibility that miners could be isolated from the vehicles. Oral Arg. Tr. 33. It was not unreasonable for the District Manager to conclude that there was no guarantee that all miners

⁵ Relying on our recent decision in *Emerald Coal* and the Supreme Court's decision in *State Farm*, our colleagues insist that any rationale for the District Manager's decision to require a refuge chamber in the ERP must appear within the four corners of his correspondence to the operator, and that trial testimony "cannot supply post hoc rationales that are absent from the District manager's decision." Slip op. at 39. Neither of these cases stand for this proposition. In *Emerald Coal*, in holding that the Secretary's ERP requirements were reasonable and not arbitrary and capricious, we relied on the testimony of MSHA's lead reviewer of ERPs for the relevant District, who stated at hearing why the District Manager insisted on the provision at issue. 29 FMSHRC at 968-969. *State Farm* involved petitions for review of an agency decision (after a lengthy rulemaking process) filed with the United States Court of Appeals. 463 U.S. at 39. In that case, the admonition that a court may not supply the basis for an agency decision came in the context of appellate review of a rulemaking in which there were "no findings and no analysis . . . to justify the choice made." *Id.* at 48. There was no subsequent testimony offered by the agency after its final rule was issued.

would have access to vehicles if an evacuation were necessary. The District Manager prudently insisted upon the refuge chamber as a safety measure for those miners who would need to evacuate by walking along the escapeway.⁶

The Secretary presented evidence that with smoke in the escapeways, miners who were exhausted, injured and/or disoriented might not be able to walk the three-and-a-half miles to the 6 MN intake shaft. Tr. 48-50, 130. At the hearing, Reitze was asked about the type of entrapment scenario that MSHA was particularly concerned about if both intake air escapeways became filled with smoke. He responded:

If they were both to the point where they could not escape through the portal areas, the individuals would have to travel a fair amount of distance, all the way into the Six Main North escape facility. While that is absolutely the preferable way to do it, if those individuals were for whatever reason exhausted from trying to fight the fire, or injured, or whatever, they may not be able to physically get to the Six Main North escape facility.

....

You would be walking downhill for up to approximately four miles, three and a half miles, to arrive at the escape facility, and you would be walking, again, downhill most of the way. Some of the areas could be very steep, as depicted by the 15 and 17 percent. And if you had an injured person or whatever, it could be fatiguing to get there. Or they may not be able to get to the Six Main North facility at all due to the injuries.

Tr. 49-50.

Our colleagues cite to the testimony of MSHA supervisor Donald Gibson, stating that he testified that “walking inby would be ‘downhill’” and it would be relatively “easy.” Slip op. at 42. However, that assessment was made in comparison to the effort it would take to exit the mine, which he declared would be “tough . . . It is uphill, the grade of the mine. It is a tough climb.” Tr. 111. In any event, Reitze’s compelling testimony, rebuts the contention that walking to the 6 MN

⁶ Indeed, in the preamble to its final rules on emergency mine evacuation, MSHA explained how an evacuation may involve a combination of travel modes, including both walking and mechanized transportation, and acknowledged that often mechanized transportation will be utilized. However, MSHA emphasized that “[t]he unique characteristics of the escapeways, [or] conditions caused by the emergency . . . may prevent the use of mechanized transportation. Walking may be necessary in those circumstances.” Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,440 (Dec. 8, 2006).

air shaft will be “easy.” Walking for three-and-a-half miles on a steep slope, on uneven ground, in intense smoke is not an “easy walk.” Considering that miners could be exhausted, injured, and/or disoriented, substantial evidence certainly supports the judge’s determination that the District Manager was not arbitrary or capricious in requiring a rescue chamber.

Quoting the “Breathable Air Questions and Answers” attached to the Secretary’s PIB 07-03, Ex. R. 57, our colleagues assert that “the Secretary has essentially directed District Managers to base their decisions regarding the requirement for additional breathable air in outby areas solely upon the distance over which miners would have to travel.” Slip op. at 36. They additionally assert that the Secretary would require “breathable air locations to be located not more than one hour travel distance from each other’ so that miners ‘would not need to travel more than 30 minutes in either direction to reach a refuge area.’” *Id.* at 37 (citation omitted). In support of this contention, our colleagues cite the statement by MSHA representative Hillary Smith that the District Manager would not “accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet.” *Id.*, citing Stip. 32 at 8. Based on these assertions, our colleagues then argue that the “Secretary’s policy for outby miners effectively ignores the individualized approach to ERPs and miner safety that is directed in the MINER Act” and avoids consideration of individual mine conditions, contrary to the intent of Congress. *Id.* at 37-38.

Our colleagues’ reference to the “Breathable Air Questions and Answers” is a red herring. The issue is not whether the Secretary would require refuge chambers to be placed so that miners would not have to travel more than 30 minutes. The Secretary here looked at this mine and recognized, as Reitze testified, Tr. 49-50, that it is approximately 20,000 feet from the 1 MN portals to the 6 MN air shaft, down a very steep slope. If the portals were blocked, and outby miners had to walk three and a half miles, this would take far longer than 30 minutes. In 30 C.F.R. § 75.1714-4(c)(2)(ii), addressing storage locations for caches of additional SCSRs in escapeways, MSHA has provided a rule of thumb that the maximum distance one could expect miners to travel in 30 minutes, in an entry where the miners could walk erect (as at Foidel Creek) with grades not over 5 percent (which is not the case at Foidel Creek), is 5700 feet. If outby miners were trapped near the portals at Foidel Creek, and had to walk to the 6 MN air shaft, it would take at least one and a half hours (without adjusting for the steep grade), using the regulation’s rule of thumb. This is the fact that the Secretary looked at, rather than a theoretical rule of not walking more than 30 minutes.⁷ Thus, the Secretary did not avoid consideration of the

⁷ Our colleagues assert that, in the Stipulations agreed to by the Secretary, it was agreed that “the questions and answers were *the basis* for the District Manager’s requiring Twentymile to provide for breathable air beyond the SCSRs in the mains.” Slip op. at 37 n.8, citing 29 FMSHRC at 847-48 (emphasis added). This is not a complete representation of the Stipulations. As noted by Judge Manning, 29 FMSHRC at 848, Stipulation 32 states that MSHA’s Hillary Smith stated to Twentymile that given the Questions and Answers, “she did not think that District Manager Davis would accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet.” The time it

individual mine conditions at Foidel Creek.

c. Alleged Inconsistency with a Refuge Chamber for the Active Longwall Section

Twentymile additionally argues that it was inconsistent, arbitrary and capricious for the District Manager to require a refuge chamber in the mains while not requiring a refuge chamber for the active longwall section. However, Judge Manning addressed this question, and found that the distinction made by the District Manager was reasonable. 29 FMSHRC at 859. The ALJ's decision in this regard is supported by substantial evidence. The testimony indicated that the longwall section receives intake air from two independent sources from opposite directions, unlike the intake air escapeways. Tr. 60-61, 87-88; J. Ex. 7. Miners in the longwall section can escape in two opposite directions. Tr. 60. Consequently, unlike in the main entries, a single event would not present the same chance of contaminating or disabling both means of escape from the longwall section. Tr. 87-88. By contrast, the two separate escapeways in the main entries are no longer separate if the stoppings and other ventilation controls become damaged or destroyed in a fire or explosion. Tr. 47-48, 87-88, 128-29.

After weighing all of the evidence, Judge Manning concluded that the District Manager's requirement of a refuge chamber approximately midway between the portals and the 6 MN shaft was not arbitrary and capricious. 29 FMSHRC at 860-61. We agree, as the testimony discussed above demonstrates, that the District Manager's decision to require the rescue chamber was not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfr's. Ass'n*, 463 U.S. at 43.

The Secretary conceded that it was not likely that a chain of events would occur whereby the outby miners are prevented from escaping through the portals because of a fire, and are then unable to reach the 6 MN shaft to escape. Tr. 30. But the issue is not the likelihood that such events will occur. The question is whether there is a "reasonable possibility" such events might occur. With that standard in mind, we conclude that substantial evidence supports Judge Manning's determination that the District Manager's refusal to accept Twentymile's proposal on breathable air in the outby area of the mine was not arbitrary and capricious.

3. The Legal Standard

In their discussion of the applicable law, our colleagues posit a two-step test to evaluate whether MSHA acted in an arbitrary and capricious manner in requiring Twentymile to make provisions in its ERP for a refuge chamber (i.e., breathable air beyond that provided by SCSRs) in the mains between the portals and the 6 MN air shaft. The first inquiry, according to them, is to determine whether the breathable air requirement in section 316(b)(2)(e)(iii) is "triggered in the

would take outby miners in the Foidel Creek mains to walk to the 6 MN air shaft would be approximately three times the maximum 30 minutes referred to in the Questions and Answers.

outby areas in this case.” Slip op. at 33. This inquiry is not limited to the needs of trapped miners, as section 316(b)(2)(e)(iii), to which they refer, contains all of the breathable air provisions of the Act, both those relating to trapped miners and those relating to miners who evacuate. Thus, in effect, their first inquiry includes the question: are SCSRs even required at all? The second prong of our colleagues’ proposed standard is whether, if the requirement for breathable air is “triggered,” the ERP must provide for breathable air beyond SCSRs. Slip op. at 33. This is the inquiry relating to trapped miners, who are referred to only in section 316(b)(2)(E)(iii)(I). With regard to the first inquiry, our colleagues say that the legal standard is whether there is a “reasonable possibility” that the breathable air requirements would be triggered. Slip op. at 33-34. However, with regard to the second inquiry, our colleagues say that the standard involves a weighing of “likely risks.” Our colleagues further state the two-step test that they posit, and the legal standards for each test, are directly mandated by Congress. *Id.* at 34-35.

The initial problem with our colleagues’ formulation is that the first step of their two-step test is not an “inquiry” which involves a “trigger.” Rather, it is a given, mandated by the statute in every ERP. The MINER Act’s provision for “POST-ACCIDENT BREATHABLE AIR,” section 316(b)(2)(E)(iii), provides that an ERP “shall provide for” various safety features including, in subsection (II), “caches of self-rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes.” 30 U.S.C. § 876(b)(2)(E)(iii)(II). In other words, *every* ERP for *every* underground mine *must* provide caches of SCSRs from the deepest part of the mine to the surface at intervals which an average miner could reach in walking for 30 minutes. This is because Congress has already made the initial determination that enough risk exists in *every* mine to require SCSRs. There is neither an “inquiry” nor a “trigger” under the statute, as our colleagues posit. Otherwise, it would be possible to have an ERP with no provision whatsoever for SCSRs. Hence, the only true question is what our colleagues have characterized as the second one, i.e. whether the ERP must provide, under subsection (I), emergency supplies of breathable air beyond SCSRs for trapped miners (in this case, a refuge chamber).

As noted above, our colleagues would apply a “reasonable possibility” standard to their first inquiry and a “likely risk” standard to their second inquiry. However, since their first “inquiry” is not an inquiry at all, this would in effect read the “reasonable possibility” standard out of the analysis. They have in effect created a straw man – a need to undertake an inquiry as to whether something is required, when the clear statutory language already mandates it. Having earlier assented to the use of the “reasonable probability test,” slip op. at 17-18, they now relegate its application to a meaningless inquiry, as the statutory language universally and emphatically has already answered the question they pose. Consequently, under their analysis, all that would be left is our colleagues’ standard involving the weighing of “likely risks” to determine if a refuge chamber is required as part of an ERP. The discussion in section II.C.2. of our joint opinion becomes essentially irrelevant to their analysis, as they have rendered the application of a “reasonable possibility” test a nullity.

Our colleagues state that the Secretary did not offer an interpretation of the statute that addresses the test to be used to determine whether breathable air beyond SCSRs is required. Slip

op. at 35. This assertion is incorrect. In urging adoption of a “reasonable possibility” test, the Secretary did not concern herself with the irrelevant first question posed by our colleagues. Rather, as discussed in detail in her brief, the Secretary focused on the legal standard to be applied in determining when emergency supplies of additional breathable air are required for miners who are “trapped underground.” S. Br. at 20-27, citing 30 U.S.C. § 876(b)(2)(E)(iii)(I). In this context, the Secretary argued that breathable air beyond SCSRs is required “where miner entrapment is a *reasonable possibility*.” S. Br. at 20 (emphasis in original).

In addition, our colleagues state that their two-step test, and their related use of the “reasonable possibility” and “likely risk” standards, are mandated by Congress because “Congress has directly spoken to the question.” Slip op. at 34-35. However, in rejecting the Secretary’s *Chevron I* analysis of the test to apply to determine when the breathable air requirement applies, all Commissioners agreed in our joint opinion that “the statute appears to be silent on the point in question,” *id.* at 18, and stated that “we are not convinced that Congress directly spoke to the issue of what test should be used in determining when additional breathable air should be required in case miners are trapped.” *Id.* at 17. We added that “[w]here, as here, the statute appears to be silent on the point in question, a *Chevron II* analysis is therefore appropriate,” *id.* at 18, and because the Secretary offered a reasonable interpretation of the test to be used to ascertain the need for breathable air for trapped miners, we adopted it. Consequently, we are puzzled by our colleagues’ subsequent assertion that, on the issue of “whether . . . breathable air beyond . . . SCSRs” is required, they believe that “Congress directly spoke to that issue,” *id.* at 34, in a manner inconsistent with the views expressed earlier.

We also question our colleagues’ analysis of the legislative history. To read their description of the relevant standard to apply, it would appear that Congress had clearly set out, in chronological order, two separate tests: a consideration of “possible incidents” at a mine and then an analysis of “likely risks” to miners from such incidents. *Id.* at 33, 34. Congress did nothing of the sort. Although, as we acknowledged in our joint opinion, the standards articulated in the Senate Report could appear confusing, *id.* at 17-18, it is clear to us that they were not written as our colleagues imply. In the general introductory section of the Senate Report on “Breathable air,” the Senate Committee did indeed state that “with regard to an entrapment, the act requires that emergency plans analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary.” S. Rep. at 6. However, in the sole paragraph devoted to Subpart (I) of the legislation (regarding breathable air for trapped miners), the Report states that “the committee believes an emergency plan should address possible incidents and the attendant need for sufficient breathable air.” *Id.* We fail to see how the introductory language can be cobbled together with the relevant language in the section analyzing Subpart (I) of the breathable air provisions to somehow create the two-step process put forth by our colleagues. Slip op. at 33.

B. Whether the Judge Erred in Granting the Secretary's Motion *In Limine*

The final issue involves Twentymile's challenge to the judge's decision in granting the Secretary's motion *in limine*. Prior to the hearing, the Secretary filed a motion to prevent Twentymile from presenting evidence relating to the approval of ERPs with post-accident breathable air provisions for main entries in at least six other MSHA districts. Mot. at 1; T. Resp. at 1-2. The Secretary argued that the other plans were of "no relevance" to this proceeding and further noted that each ERP "must 'account for the specific physical characteristics of the mine.'" *Id.* at 2, quoting 30 U.S.C. § 876(b)(2)(C)(iii). The judge granted the Secretary's motion at trial. Tr. 80-81. Twentymile's counsel made an offer of proof, indicating that the ERPs that he sought to put into evidence would show that other MSHA districts had ERPs for large longwall mines without refuge chambers with breathable air where there were multiple ways out of the mine. *Id.* at 82. See R. Ex. 70-75.

In his decision, the judge affirmed his trial ruling, reiterating that the scope of the proceeding was whether the District Manager's rejection of the ERP was arbitrary and capricious and that the evidence Twentymile sought to introduce would be of little probative value.⁸ 29 FMSHRC at 860. The judge concluded, "Even if two mines were similar, the only issue in the present case would be whether District Manager Davis acted reasonably." *Id.*

Before the Commission, Twentymile's primary argument is that the rejected evidence would demonstrate that the Secretary acted improperly in requiring Twentymile to have a refuge chamber in the main entries.⁹ T. Br. 11-14. In response to Twentymile, the Secretary argues that

⁸ Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). The judge's reference to the rejected exhibits as not being "probative" is essentially the same standard as the relevance standard in Rule 63(a). Moreover, as one noted commentator has explained "relevance does not ensure admissibility." 1 Kenneth S. Broun, McCormick on Evidence § 185 (6th ed. 2006). Much evidence is excluded on the ground that the costs outweigh the benefits, such as when "the evidence offered and the counterproof could consume an inordinate amount of time." *Id.*

At oral argument, counsel for Twentymile indicated he would "actually want to depose all nine district managers and the like" because if he could "provide some evidence of inconsistency . . . that's appropriate for the judge to hear." Oral Arg. Tr. 16. He agreed, in response to comments from the bench, that to present this issue fully ("to do it right") would involve extensive testimony about the similarities and differences in each of the mines that counsel wished to compare to Twentymile and could require an additional week of trial. *Id.* at 16-17. Clearly the judge could appropriately decide that the costs of this evidence would outweigh its benefit.

⁹ We find no merit to Twentymile's equal protection argument that it contends would be supported by the evidence excluded by the motion *in limine*. Our conclusion that the District

e District Manager's plan approval is largely based on mine specific factors and the "substance and timing" of the negotiating process. S. Br. at 44 (citation omitted).

When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial." *Marfork Coal Co., Inc.*, 29 FMSHRC 626, 634 (Aug. 2007) (citation omitted). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero*, 22 FMSHRC at 1366 (citations omitted).

Applying this standard to the judge's denial of the admission of these other plans into evidence (and the related examination that would accompany their admission), we conclude that the judge did not abuse his discretion in denying their admission. We agree with the judge that the excluded evidence would not have been probative in showing whether the District Manager acted reasonably. 29 FMSHRC at 860. The judge correctly noted that, in approaching the approval of breathable air provisions at individual mines, it is unlikely that two underground coal mines would present exactly the same factual situation." *Id.* The location and method of providing breathable air in an ERP is based ultimately on mine specific circumstances. Indeed, the legislative history of the MINER Act and the portion of the breathable air provisions for trapped miners in section 316 states, "The projected need [for breathable air] is obviously fact specific." *S. Rep.* at 6.

Our colleagues suggest that the proffered evidence was admissible because Reitze admitted that when reviewing Twentymile's plan, members of the District 9 office looked to see what other districts were approving and were aware of approved plans without supplies of breathable air in mines with multiple ways out." Slip op. at 44. While this is a correct statement, it is incomplete. Reitze also testified that he was aware of such approved plans only where miners would have to walk distances of less than 20,000 feet. Tr. 73. Significantly, in his offer of proof, counsel for Twentymile did not indicate that any of the approved plans which he was seeking to introduce in evidence involved a mine in which miners would have to travel a distance comparable to the 20,000 feet between the portals of the Foidel Creek Mine and the 6 MN air shaft. Tr. 82.

Moreover, we are concerned about where such evidence would lead. District Managers are individuals. Like baseball umpires, they each have a slightly different strike zone. Additionally,

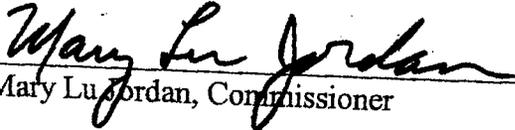
Manager's refuge chamber requirement in the ERP was not arbitrary and capricious largely militates against a determination that the same conduct violated principles of equal protection. See *Emerald Coal*, 29 FMSHRC at 972 n.19. With regard to Twentymile's due process argument, in *Emerald Coal* the Commission rejected a similar due process argument because the operators there had actual notice of the Secretary's position on the breathable air provisions in the MINER Act through extended negotiations. *Id.* at 971. We see no discernible difference between Twentymile's position in this proceeding and the position taken by the operators in *Emerald Coal*.

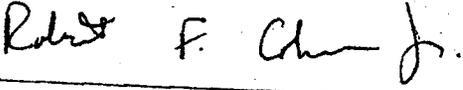
there are differences from mine to mine, and the ERP for each mine must be considered on its own merits. If we tell administrative law judges that, in weighing whether a particular District Manager acted in an arbitrary and capricious manner, they should consider what other District Managers do in allegedly comparable situations, it would encourage a race to the bottom. That is, a District Manager would necessarily have to be looking over his or her shoulder to consider whether his or her decision would eventually be found arbitrary and capricious because it was more stringent than the decision of another District Manager. A District Manager in this situation would have an inducement to shade the requirements of the law in an operator's favor so as to avoid unfavorable comparison with other District Managers. This would lead to the standard essentially being set by the most lenient District Manager, a process which would be detrimental to mine safety.

In light of the foregoing, the judge did not err in granting the Secretary's motion *in limine*.¹⁰

C. Conclusion

For the foregoing reasons, we would affirm the judge's determination that Twentymile include a refuge chamber near the midpoint between the portals and the 6 MN intake air shaft, as required by the MSHA 9 District Manager.


Mary Lu Jordan, Commissioner


Robert F. Cohen, Jr., Commissioner

¹⁰ We do not hold that evidence of the provisions of other approved ERPs would never be admissible in an ERP dispute proceeding. Rather, we conclude only that the judge did not abuse his discretion in excluding such evidence in this case.

Chairman Duffy and Commissioner Young, in favor of reversing the decision of the administrative law judge:

A. Whether the District Manager's Action in Refusing to Approve Twentymile's ERP without a Provision for a Refuge Chamber in the Main Entry Was Arbitrary and Capricious

At the outset, we recognize that the Secretary and MSHA were and are under strong public and Congressional pressure to implement the provisions of the MINER Act as expeditiously as possible. We further note that Congressional guidance on implementing many of the provisions of the MINER Act is limited. Terse though it may be, the legislative history of the MINER Act, nevertheless, does set forth certain principles for determining how ERPs should be developed, reviewed, and implemented. Slip op. at 12-14.

As discussed above, *id.* at 17-18, we have upheld the Secretary's use of a "reasonable possibility" test to determine the possible occurrence of an event giving rise to a mine emergency and the "attendant need for sufficient breathable air." *S. Rep.* at 6. However, our inquiry cannot stop there in this proceeding. In reviewing the District Manager's decision to disapprove the ERP, we must further examine whether additional breathable air was needed in the mains, *beyond the additional caches of SCSRs already required by the Act and the ERP*, in the event of a mine emergency. Moreover, the scope of our review under the "arbitrary and capricious" standard encompasses the question of whether legal and/or factual errors occurred in the District Manager's analysis of the relevant factors in this case. *See cases cited, slip op. at 14 & n.6.*

As explained below, we conclude that the District Manager's decision was "arbitrary and capricious" because it contained both legal and factual errors. In particular, the District Manager failed to consider relevant mine-specific factors in this case contrary to congressional intent or to explain why those factors need not be considered. In addition, the legal approach utilized by the District Manager and supported by the Secretary contravened Congress's directive that the Secretary base her decision regarding whether additional breathable air beyond the increased numbers of SCSRs be based on a risk analysis considering mine-specific factors. Finally, the judge's conclusion that the District Manager did properly consider all relevant factors is clearly not supported by substantial evidence.

1. Legal Errors

Congress made clear that ERPs would be based on the "plan" model used in other parts of the Mine Act. In its overall guidance regarding the ERP development and approval process, the committee report accompanying the passage of the MINER Act states:

The individual plan model contemplates that safety solutions and risk-management plans will be designed and reviewed by those who are “on the ground,” and therefore most familiar with the unique circumstances and most practical approaches.

S. Rep. at 4. Thus, Congress intended that, in the development, review, and approval of ERPs, local MSHA representatives would carefully weigh potential risks and then determine appropriate measures based on the conditions and capabilities in each individual mine, i.e., mine-specific factors.

The central question in this case is whether Twentymile’s ERP must provide breathable air beyond the increased numbers of SCSRs (i.e., whether it must require a refuge chamber) in the outby areas in the main sections. The answer to this question turns on two separate inquiries. First, whether as an initial matter the breathable air requirement for mine emergencies in section 316(b)(2)(E)(iii) of the Mine Act is triggered in the outby areas in this case. Second, whether, if the requirement is triggered, the ERP must provide for breathable air *beyond* SCSRs.¹

With regard to the first question, the committee report states that MSHA and the operator must address the need for breathable air to enable all miners to exit the mine “under emergency circumstances.” *S. Rep.* at 7. More particularly, Congress called on MSHA to first address the “possible incidents” that would trigger “the attendant need for sufficient breathable air.” *Id.* at 6.

The Secretary in her brief stated that she interpreted the MINER Act as providing for the use of a “reasonable possibility” test to determine whether the breathable air requirement in section 316(b)(2)(E)(iii) is triggered in a particular area of a mine. *S. Br.* at 20-28. As discussed above, we agree that the Secretary’s “reasonable possibility” test is a permissible reading of the statute

¹ Section 316(b)(2)(E)(iii) states that with regard to “post-accident breathable air” an ERP shall provide for:

- (I) emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time;
- (II) in addition to the 2 hours of breathable air per miner required . . . under the emergency temporary standard . . . caches of self-rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes. . . .

30 U.S.C. § 876(b)(2)(E)(iii)(I) and (II).

under a *Chevron II* analysis.² Thus, based on mine-specific factors, the Secretary, acting through the District Manager, was to determine whether the breathable air requirement was triggered in the outby area of the Foidel Creek Mine. Our examination of the record indicates that there was a reasonable possibility that the breathable air requirement would be triggered. See 29 FMSHRC at 859.

With regard to the second question – whether the ERP must provide for breathable air beyond that which will be provided by SCSRs – the initial issue is what test is to be applied to determine whether such additional breathable air is necessary. We conclude that Congress directly spoke to that issue under *Chevron I*. The Senate committee report explained that the MINER Act increases the amount of breathable air required, through a greater number of SCSRs stored underground “both in the event of escape and entrapment.” *S. Rep.* at 6. However, to address the further possibility of entrapment, Congress expressly stated that ERPs must also analyze “likely risks” to determine the extent to which additional breathable air is necessary:

In addition, with regard to an entrapment, the [MINER] [A]ct requires that emergency plans analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary; and, if so, by what means can the goal be attained.

*Id.*³ Congress further recognized that there will be “diverse . . . means by which a goal of additional breathable air can be achieved,” including the “use of additional caches of SCSRs . . . [or] secure refuge areas” *Id.* at 7.

Thus, Congress clearly stated that, if MSHA determines that the breathable air requirement is triggered in a particular situation, MSHA must then conduct an analysis of “likely risks” affecting miners in an emergency to ascertain whether additional breathable air beyond SCSRs,

² However, we disagree that the “reasonable possibility” test governs the analysis of all successive events following a fire, explosion, or roof fall, such as miner injuries, the use of escapeways, and the failure of fire suppression systems. As we show below, such an approach ignores the risk analysis mandated by Congress.

³ Our colleagues question our use of the quoted portions of the committee report, which appears under the heading “Breathable Air.” Slip op. at 28. By its own language, the committee report plainly addresses the need for breathable air in the circumstance of entrapment along with the accompanying risk analysis. There is nothing to suggest that the language does not mean what it says. In addition, our colleagues state that the “reasonable possibility” test is limited in application to trapped miners. *Id.* Once again, the committee report is clear in addressing the needs of *all* miners for breathable air in light of the possibility of a mine accident: “The [MINER] [A]ct increases the quantity of [SCSRs] . . . and thus, increases the amount of breathable air available to underground personnel both in the event of escape and entrapment.” *S. Rep.* at 6.

e.g., a refuge chamber, must be required by the particular ERP.⁴ In other words, Congress envisioned a two-step process in determining whether breathable air beyond SCSRs is required in an ERP: a consideration of “possible incidents” at a mine and, if the breathable air requirement is triggered, an analysis of “likely risks” to miners from such incidents based on mine-specific factors.

Our colleagues apparently misunderstand the two-step process for determining how an ERP is to address the question of how much breathable air is necessary in a particular mine area. They contend that the first step of the two-step test “is a given, mandated by the statute in every ERP” and therefore is supposedly meaningless. Slip op. at 27. We recognize that in subparagraph (II) of section 316(b)(2)(E)(iii) Congress provided that a required number of SCSRs must be placed in every mine, but this requirement is clearly independent from the breathable air requirement in subparagraph (I). Thus, the inquiry that arises under subparagraph (I) is whether additional breathable air is necessary, how much is needed, and how should it be provided. Congress made clear that, to address those questions, MSHA is to first look at “possible incidents” that might require sufficient breathable air (which can be based on a “reasonable possibility test”). *S. Rep.* at 6. Once those incidents are identified, Congress explicitly called for an analysis of “likely risks” based on mine-specific conditions so that MSHA and the operator could ascertain whether and how much additional breathable air is necessary and how it should be provided, e.g., through additional SCSRs, through refuge chambers, or through some other means. *Id.*

We note that the Secretary did not offer an interpretation of the statute that addresses the test to be used in specifically determining whether breathable air beyond SCSRs is required.⁵ Rather, the Secretary’s interpretation in her brief addresses only the initial question of whether the breathable air requirement is triggered, *not whether breathable air beyond SCSRs is required*. In particular, the Secretary states: “Applying the language of the MINER Act, its legislative history, and its safety purpose, the Secretary required that Twentymile’s ERP provide breathable air where miner entrapment is a reasonable possibility” (emphasis in original). *S. Br.* at 20. In any event,

⁴ We do not believe that Congress intended that the risk analysis would be extremely detailed or extensive or that it should impose a substantial burden on MSHA. Rather, in conducting the risk analysis, the District Manager should simply consider all the relevant mine-specific factors that would affect miners’ ability to escape in a serious mine emergency and explain how those factors impact on the need for breathable air beyond SCSRs. These factors would include such considerations as the placement and number of SCSRs, alternative means of escape, distances to be traveled, safety measures that are present at the mine, and any unusual safety hazards at the mine.

⁵ Moreover, the Secretary’s approach to the breathable air requirement in section 316(b)(2)(E) offers no assistance to her District Managers (or mine operators) in reconciling the dual requirements for additional SCSRs to evacuating miners, who may be unable to exit a mine (and may then be “trapped”), and providing additional air to trapped miners who must be sustained underground until rescue.

because Congress has directly spoken to the question, there is no reason to remand the issue to the Secretary. Under *Chevron I*, the reasonableness of the Secretary's interpretation is to be considered only when Congress has not directly spoken to the question involved. *Chevron*, 467 U.S. at 843-44.

Rather than analyzing "likely risks" and mine-specific factors to determine whether breathable air beyond SCSRs is required, the Secretary has essentially directed District Managers to base their decisions regarding the requirement for additional breathable air in outby areas solely upon the distance over which miners would have to travel. In other words, the Secretary has effectively established a binding norm to govern all ERPs regardless of mine-specific conditions.⁶ In "Breathable Air Questions and Answers," which were attached to the PIB that addressed breathable air for trapped miners, the Secretary requires that "outby miners" be provided breathable air "within an inflatable chamber, barricade or other alternative that isolates miners from contaminated environments."⁷ 29 FMSHRC at 860, quoting R. Ex. 57 at 1. Further, the Secretary

⁶ Our colleagues rely upon *Emerald Coal*, 29 FMSHRC at 970, in attempting to show that notice-and comment-rulemaking was not required to implement ERP requirements and therefore that the Secretary could proceed to require refuge chambers based on certain statements contained in the question and answer documents discussed, *infra*. Slip op. at 21. However, the situation in *Emerald* was very different. In that case, operators were given various options in deciding how to comply with breathable air requirements and the issue before the Commission was only a timing issue, i.e., when should operators be required to commit in their ERPs to following the refuge chamber option they had freely chosen. In this case, the Secretary has effectively established a firm requirement to use a refuge chamber in an outby area based on nothing more than the distance to be traveled by miners, and the District Manager has not meaningfully considered relevant mine-specific factors.

⁷ The only guidance that the Secretary issued with regard to breathable air primarily addressed trapped miners in working sections. Thus, the PIB, which MSHA issued to provide guidance on the breathable air provisions of the MINER Act, dealt with the location and quantity of breathable air located within 2000 feet of the *working section*, not in outby areas such as those involved here. See PIB P07-03 at 1-2. This is also consistent with the Secretary's approach in the Program Policy Letters ("PPL"), which were issued prior to the PIB. See PPL No. P06-V-8 at 2-3 (7/21/06); PPL No. P06-V-9 at 2-3 (8/04/06); and PPL No. P06-V-10 at 3-4, 5 (10/24/06). In the PPLs, the Secretary addressed the needs of miners in outby areas of mines by requiring increased numbers of SCSRs for evacuation. *Id.*

The Secretary further addressed the breathable air requirement for outby miners only in the "Breathable Air Questions and Answers," a multi-paged document attached to the PIB that contained 73 questions and answers. R. Ex. 57. There, the Secretary for the first time stated that "refuge areas" should be provided at "every other cache of SCSRs (1 hour intervals)." *Id.* at 1. This distance-driven requirement became the "norm" for the District Manager, who refused to

states that “District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other” so that miners “would not need to travel more than 30 minutes in either direction to reach a refuge area.” *Id.* At the local level, Hillary Smith, a representative of the MSHA District Manager, told Twentymile that, based on the questions and answers attached to the PIB, “she did not think that the [District Manager] would accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet.” Stip. 32 at 8. The plan was, in fact, subsequently rejected on that basis.⁸

In affirming the MSHA District Manager’s refusal to approve Twentymile’s ERP, the judge also relied on the breathable-air questions and answers. 29 FMSHRC at 860. The judge stated that “the [D]istrict [M]anager’s insistence on the establishment of a refuge area in the mains between the portal and 6 MN is consistent with this guideline.” *Id.* However, the judge did not address the issue of whether use of the questions and answers was consistent with Congress’ approach in section 316(b)(2)(E).

The Secretary’s policy for outby miners effectively ignores the individualized approach to ERPs and miner safety that is directed in the MINER Act and the committee report that accompanied it. *S. Rep.* at 3, 4. *Compare Peabody I*, 15 FMSHRC at 386-87 (substantial evidence supported judge’s finding that deep cut ventilation provision was mine-specific because of mines’ high methane liberation rate). Further, by simply assuming the presence of adverse conditions that would make it impossible to evacuate, the Secretary has failed to implement the risk analysis mandated by the MINER Act to determine the amount of breathable air that would be needed for miners who face the possibility of a mine emergency and may be evacuating the mine or trapped. Thus, once the District Manager concluded that there was a “reasonable possibility” of a fire in the mine that could block miners from exiting through the portals, he then had to “analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary.” *S. Rep.* at 6. This he failed to do. Instead, the District Manager only considered the distance that outby miners

approve Twentymile’s ERP because it failed to provide for refuge chambers in the main sections for outby miners.

⁸ Our colleagues assert that the “Breathable Air Questions and Answers” attached to the Secretary’s PIB is a “red herring.” Slip op. at 25. However, that statement is not borne out by the record, which indicates (in stipulations agreed to by the Secretary) that the questions and answers were the basis for the District Manager’s requiring Twentymile to provide for breathable air beyond the SCSRs in the mains. 29 FMSHRC at 847-48; Stip. 32 at 8. Moreover, as the judge held, after quoting from the questions and answers in the PIB, “The [D]istrict [M]anager’s insistence on the establishment of a refuge area in the mains . . . is consistent with this guideline.” 29 FMSHRC at 860.

would have to travel to evacuate, rather than specific mine conditions.⁹ This approach is contrary to Congressional intent in drafting the MINER Act. Therefore, we conclude that the Secretary's approach was erroneous as a matter of law.

Finally, as we have stated, we agree with the Secretary's reading of "trapped" in the MINER Act in light of a mine emergency. However, the application of that term, without more, does not require an operator to provide a refuge chamber with breathable air for all miners who face the possibility of a mine emergency, such as a fire, irrespirable air, or a roof fall. To mechanically require, as the Secretary did here, a refuge chamber in the event that outby miners have to travel more than one hour to reach a mine exit or evacuation point fails to undertake the risk analysis required by the MINER Act and avoids consideration of individual mine conditions, contrary to the intent of Congress.

As we further show below, the record shows that the District Manager failed to properly analyze the specific conditions at the Foidel Creek Mine and the need for breathable air beyond SCSRs. Moreover, the District Manager ignored that miners who may be unable to exit a mine through the portals may still be evacuating the mine through emergency exits, such as the 6 MN intake air shaft. In that scenario, the breathable air requirement could be satisfied by increased numbers of SCSRs rather than a refuge chamber.

2. Substantial Evidence

Based on our review of the record, we conclude that the District Manager failed to consider the specific conditions at the Foidel Creek Mine and failed to provide an explanation for why he did not do so. Where, as here, the Secretary has determined to proceed by issuing PPLs, a PIB, and informal questions and answers, rather than by notice-and-comment rulemaking, it is incumbent on District Managers to clearly explain their rationale for the imposition of district-wide or agency-wide standards in ERPs and how all relevant mine-specific factors were considered in reaching a final decision. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (In deciding relevant issues before it, an administrative agency must establish that it "has taken a hard look at the issues with the use of reasons and standards."). As the D.C. Circuit has explained:

[The arbitrary and capricious standard] requires an agency to
"examine the relevant data and articulate a satisfactory explanation

⁹ The Secretary incorrectly asserts that any foreseeable circumstance – e.g., fatigue, injury, irrespirable air, or limited visibility – would constitute grounds for assuming that escape would be impossible. S. Br. at 37, 40-41. Rather, those are circumstances that would make escape difficult but nevertheless possible – particularly in light of new requirements of the MINER Act relating to increased deployment of SCSRs, lifelines, and increased training of miners, as well as measures taken by the operator beyond those required by the MINER Act. *See* 71 Fed. Reg. at 71,430-431.

for its action including a ‘rational connection between the facts found and the choice made.’” The “agency must cogently explain why it has exercised its discretion in a given manner,” and that explanation must be “sufficient to enable us to conclude that the agency’s action was the product of reasoned decisionmaking.”

Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006) (subsequent history omitted), *quoting Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983) (citations omitted).

As discussed below, we disagree with the judge’s determination that the District Manager “considered the specific conditions present in the outby areas of the mine.” 29 FMSHRC at 859. More particularly, it is not apparent that the District Manager considered at all the availability of vehicles in the outby areas of the mine to use to evacuate miners during mine emergencies.

At the outset, it is important to recognize that the District Manager is the decisionmaker in this case and that it is his written decision that must supply the rationale for MSHA’s action in disapproving the ERP. In this regard, our examination of the approval process must properly focus in the first instance on the actions of the District Manager, not the judge. *See Emerald*, 29 FMSHRC at 968 (“In determining whether MSHA’s determinations were arbitrary and capricious, we examine the circumstances before the MSHA District Manager when he considered the Operators’ final revised ERPs”); *see also State Farm*, 463 U.S. at 43 (“The reviewing court should not attempt itself to make up for such deficiencies [in the agency’s decision]; we may not supply a reasoned basis for the agency’s action that the agency itself has not given.” *citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Although the testimony provided at a hearing on an ERP may be useful in determining whether factual assertions made by the District Manager are accurate and whether his conclusions are reasonable, the testimony cannot supply post hoc rationales that are absent from the District Manager’s decision.¹⁰

On June 14, 2007, Twentymile submitted a revised ERP in which it responded to the District Manager’s concern about providing for breathable air in the main entries. Twentymile’s proposed ERP provided, “The main entries are outfitted with two separate intake escapeways, each travelable with diesel pickup mantrips, each containing caches [of over 1500 SCSRs] sufficiently spaced for individuals walking and for the number of personnel working inby that point.” 29 FMSHRC at 849, *quoting* R. Ex. 10 at 4. In his response, the District Manager rejected

¹⁰ Our colleagues discuss at great length testimony provided at the hearing in order to support their position regarding whether there is a reasonable possibility of miners being trapped. We note that the testimony cannot supply a legal or factual rationale for the District Manager’s decision that may be missing from the decision itself. In addition, we note that, when the Secretary’s witnesses were asked about the probability of specific emergency scenarios that MSHA considered at the Foidel Creek mine, they consistently admitted that the scenarios were not likely to occur. *See* Tr. 30, 57, 70, 139-140, 142-143.

Twentymile's plan, noting that with regard to the main entries the distance of 10,000 to 15,000 feet was too great not to maintain post-accident breathable air and that two isolated escapeways "do not provide the same amount of protection as breathable air." 29 FMSHRC at 849-50, quoting R. Ex. 11 at 2.

Without any explanation whatsoever, the District Manager apparently concluded that diesel equipment and pickup trucks could not be driven during any type of mine emergency. See 29 FMSHRC at 849-50. Similarly, the judge did not consider the use of motorized vehicles when he reviewed the distances that miners would have to walk. *Id.* at 859. In its brief, Twentymile notes that dense smoke would make it more difficult to walk, thereby making it more expeditious to drive. T. Br. at 27-28 & n.10.¹¹ Miners in the main sections generally traveled in pairs with a vehicle. Tr. 160-61. In addition, there were emergency vehicles parked at locations inby the 6 MN shaft. Tr. 61-62. The availability of vehicles to transport injured or fatigued miners during a mine emergency would address a primary concern of the District Manager in requiring refuge chambers. In short, notwithstanding the widespread availability of vehicles to transport miners in the main sections, the District Manager did not address the use of vehicles in evacuating the mine.¹²

In light of this, we can only conclude that there is no evidence, let alone substantial evidence, to support the judge's conclusion that the District Manager "considered the specific conditions present in the outby areas," 29 FMSHRC at 859,¹³ when he rejected the breathable air provisions in Twentymile's proposed ERP. In particular, there is absolutely no evidence to support the judge's statement that the District Manager "took into consideration . . . the availability of vehicles in the entries." *Id.* at 860. That fact alone mandates that the decision below be overturned.

¹¹ In this regard, on cross-examination, Twentymile's safety coordinator noted that driving in heavy smoke would be like "driving in a fog," and could be "difficult." Tr. at 167-68.

¹² Our colleagues state that "Reitze, who helped evaluate Twentymile's ERP . . . was aware that vehicles were potentially available to be used to escape from the mine." Slip op. at 23. However, there is no evidence in the plan decision indicating that the District Manager considered this fact. Therefore, what Reitze was aware of is not probative of what the District Manager considered in rejecting Twentymile's draft plan and its reliance on vehicles to evacuate the mine.

¹³ In concluding "that the [D]istrict [M]anager did consider the specific conditions," the judge tersely referenced the District Manager's consideration of "the distances involved and the possibility of a belt fire, an equipment fire, or another unexpected event near the portal." 29 FMSHRC at 859. However, as we have shown above, the MINER Act requires not only an analysis of the "possible incidents," such as a fire, explosion, or roof fall, and the need for breathable air, but also an analysis of the further "likely risks," such as miner injury and fatigue and the use of vehicles to evacuate the mine, "to determine if breathable air beyond increased stores of SCSRs is necessary." *S. Rep.* at 6. This the District Manager failed to do.

In addition to the District Manager's failure to consider vehicles to evacuate the mine, we also conclude that, without further explanation and record support, it was arbitrary and capricious for the District Manager to require a refuge chamber in the outby area while at the same time approving Twentymile's plan for the longwall section without requiring a refuge chamber in that section. 29 FMSHRC at 859. Based solely on trial testimony, the judge concluded that it was "reasonable" for the District Manager to approve Twentymile's ERP and its provision for breathable air in the longwall section, while refusing to approve a similar provision for the outby section. *Id.* The judge further stated that "[t]he Secretary believes that a single event could contaminate both intake airways in the mains but that a single event could not contaminate both air courses in the longwall section." *Id.* However, the trial testimony regarding the basis for the decision not to require a refuge chamber in the longwall section was neither lengthy nor particularly helpful. At the hearing, witnesses explained that the two escapeways in the longwall section have air that travels in opposite directions, while air in the two escapeways in the main entries travels in the same direction even though air comes from two separate sources outside the mine. Tr. 61, 87-88.

Before the Commission, Twentymile contends that it is more significant that the escapeways in the main sections are isolated with independent sources of air. T. Br. at 25-26. The fact that the escapeways in the main sections are independently sourced is significant because a fire near the source of the air in one escapeway would not contaminate the air in the other escapeway. Contamination of the air in two escapeways in the main sections of the mine could occur only if a fire simultaneously compromised the stoppings in *both* escapeways. As Twentymile's safety coordinator testified, if one of the escapeways was contaminated, the other one would "most likely" be available. Tr. 159. Thus, a proper risk analysis by the District Manager would first consider the possibility of a fire and the blocking of the portals, and then consider the additional need for breathable air in the context of evacuation and further "likely risks," including the potential for events that could contaminate the air in both escapeways.

There are several other issues that arise because of the apparent inconsistency between the District Manager's treatment of the outby area and the longwall section which make it difficult to discern the District Manager's rationale in treating the two areas differently. For example, Twentymile argues that the main entries had additional escapeways that the longwall section did not have.¹⁴ T. Br. at 26. *See* Jt. Ex. 7. The District Manager failed to acknowledge that, in the outby areas, the ten miners in the main entries had available for evacuation, mantrips in the main escapeway and pickup trucks parked at various locations for emergency situations in the alternate escapeway. Tr. 61-62, 160-61. Over 1500 SCSRs were located in caches in the main entries, in addition to the SCSRs on the miners and stored in the vehicles. T. Br. at 29 n.11, *citing* Jt. Ex. 4 at

¹⁴ The committee report accompanying the passage of the MINER Act states that "[t]he projected need [for breathable air] is obviously fact-specific" and notes that a mine that is "accessible from alternative entries" presents a different set of circumstances than "a single entry mine." *S. Rep.* at 6-7.

4 and Jt. Ex. 7. Further, MSHA's main concern with emergency evacuations in the main entries was with a belt fire in the No. 1 or No. 2 MN that would prevent miners from exiting through the portals and require them to walk to the No. 6 intake air shaft. Tr. 27-30. *However, it is highly significant that MSHA supervisor Donald Gibson himself testified that walking inby would be "downhill" and that it would be "relatively easy."* Tr. 111. In addition, the entries in the mains are 18 to 20 feet wide and eight to nine feet high. Tr. 32.

Finally, the inadequacy of the District Manager's analysis of Twentymile's ERP is borne out by the Secretary's questions and answers on breathable air. Question No. 59 describes a mine strikingly similar to the Foidel Creek Mine:

One operator has a unique escapeway plan that utilizes dual intake airways for the section primary and alternate paths from active sections (sic). Both escapeways are accessible by driving for most if not all the distance. The active longwall panel and when connected, the set-up location for the next longwall panel are provided intake airways from two opposite directions. This condition should be considered in review of the breathable air requirement. If one of the escapeways is not travelable because of an incident, the other would be intact. Therefore, those individuals on the sections would not be trapped as described in PIB 07-03. How should this be considered in reviewing the plan?

R. Ex. 57 at 10. In the response, MSHA rejected the notion that an operator's ERP would not have to provide for breathable air for trapped miners. *Id.* However, MSHA further responded that "unique mine conditions and the emergency preparedness of the operator may affect a miner's *risk* of entrapment as well as the *risk* that such an entrapment will be lengthy." *Id.* (emphasis added). MSHA concluded its response by stating, "District Managers should consider unique mine conditions and proposals that provide equivalent protection." *Id.* It is apparent to us that the District Manager reviewing the Twentymile ERP failed to do that.¹⁵

Based on our review of the record and the legal and factual errors, we conclude that the Secretary failed to meet her burden of showing that the District Manager's determination was not

¹⁵ We note that, among other special precautions taken by Twentymile to enhance miner safety, there were sophisticated carbon dioxide monitoring along the belts, fire suppression systems on the belt drives, fire extinguishers and fire suppression systems on diesel equipment, separation of the belt entry from the escapeways with continuous stoppings, monitoring devices on conveyor belts to check for belt alignment, and exceptionally wide entries. As the judge noted, these and other safety features at the Foidel Creek Mine made Twentymile "an exemplary underground coal mine operator . . . interested in the safety of its employees." 29 FMSHRC at 859.

arbitrary and capricious. The District Manager clearly failed to consider all relevant mine-specific factors and failed to explain why he did not do so.

B. Whether the Judge Erred in Granting the Secretary's Motion *in Limine*

Twentymile also challenges the judge's decision to grant the Secretary's motion *in limine*. T. Br. at 11-14; T. Reply Br. at 5-6. Below, Twentymile sought to introduce evidence of other mines' approved ERPs to show that other MSHA District Managers had approved plans with provisions similar to Twentymile's rejected provision on breathable air in outby areas to support its contention that the District Manager's action here was arbitrary and capricious. 29 FMSHRC at 860; Tr. 75-80, 82. At the hearing, Twentymile's counsel made an offer of proof, indicating that the ERPs that he sought to put into evidence would show that other MSHA districts approved ERPs for longwall mines without refuge chambers where there were multiple ways out of the mine. Tr. 73, 82.

The judge granted the Secretary's motion *in limine* to exclude such evidence. 29 FMSHRC at 860; Tr. 80-81. He determined that the scope of the proceeding was limited to whether the Secretary's rejection of the disputed plan provision was arbitrary and capricious and held that the evidence was of little probative value. 29 FMSHRC at 860; Tr. 80-81. The judge explained that it was unlikely that two underground coal mines would present exactly the same factual situation. 29 FMSHRC at 860; Tr. 80-81.

When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Id.* (citations omitted).

Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Although the Commission has not defined "relevant evidence," it is defined in Rule 401 of the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The federal courts have viewed Rule 401 as having "a low threshold of relevancy." *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782-83 (3d Cir. 1994); *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109-10 (3rd Cir. 1999) ("Rule 401 does not raise a high standard.").

While it is true that each mine is unique, we disagree with the judge's conclusion that evidence of a similarly situated mine's ERP containing a provision for breathable air in outby areas of its mine would be of little relevance here, especially in the absence of clearly articulated standards for implementation of the breathable air requirement by MSHA. In excluding the evidence, the judge used an overly narrow relevancy standard requiring that other mines be exactly identical to Twentymile in order for their approved ERPs to be of any relevance to the question of breathable air in outby areas of a large longwall mine with multiple escapes. Evidence of other approved ERPs that contained provisions that are similar to Twentymile's proposed provision with

respect to breathable air in outby areas is relevant to the consideration of whether the District Manager acted arbitrarily in refusing to approve the same or a similar provision in Twentymile's plan. Although not determinative of whether Twentymile is required to provide a refuge chamber in the outby section of its longwall mine, a comparison of its plan with the approved plans of other mines with similar conditions would show whether, in applying the breathable air provision of the MINER Act, MSHA was consistent in implementing this requirement. By highlighting the differences and similarities between similarly situated mines, MSHA could provide the necessary basis to validate the District Manager's position in this case. This is especially true where the District Manager's decision failed to take into consideration relevant facts mitigating the need for a refuge chamber and provided no justification for such requirement other than the distance between the portal and the 6MN intake shaft.

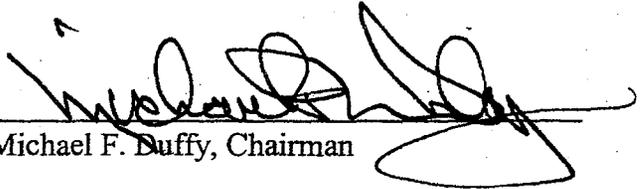
Moreover, MSHA's consideration of other mines and ERPs when reviewing Twentymile's plan makes such evidence relevant in this proceeding. At the hearing, William Reitze, MSHA's supervisory mining engineer for District 9, admitted that when reviewing Twentymile's plan, members of the District 9 office looked to see what other districts were approving and were aware of approved plans without supplies of breathable air in mines with multiple ways out. Tr. 73. We agree with Twentymile that consideration of the actions of other District Managers provides a reference point for determining whether the District Manager here acted arbitrarily, particularly under the circumstances in this case, where no definite standards exist for the breathable air provision. T. Br. at 12.

We acknowledge the time constraints that the parties and the judge face given the expedited nature of emergency response plan proceedings. However, this dispute did not arise overnight. The parties were in discussions and negotiations from August 2006 until September 2007, over a year, prior to the initiation of this proceeding. It would seem that during that time, MSHA could have considered Twentymile's contentions regarding other approved plans and reviewed its policy on the issue to develop some consistency in its implementation of the breathable air provision. Moreover, Twentymile sought to introduce only six ERPs, Tr. 82, not over 400 plans as the Secretary alleged it would have to review to contend with Twentymile's allegations, Tr. 77-79. This hardly seems like an impossible feat for the parties and the judge to address within the scope of this proceeding. Hence, the probative value of such evidence far outweighs any allegation of potential prejudice or harm advanced by the Secretary. Tr. 77-79; S. Br. at 45-46.

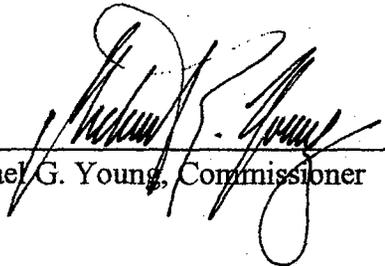
Accordingly, we conclude that the judge erred in granting the Secretary's motion *in limine*. Nevertheless, given our conclusion that the District Manager's disapproval of Twentymile's ERP was arbitrary and capricious, as discussed previously, we conclude that the judge's error in excluding such evidence was harmless.

C. Conclusion

For all the foregoing reasons, we would reverse the judge's decision.



Michael F. Duffy, Chairman



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
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July 3, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-63
Petitioner	:	A.C. No. 15-18505-99179
v.	:	
	:	
CONSOL OF KENTUCKY, INC.	:	Beaver Gap E-3 Mine
Respondent	:	

DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
David Hardy, Esq., Allen Guthrie McHugh & Thomas, PLLC, Charleston, West Virginia, 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 Consol of Kentucky, Inc. (Consol) with two violations of mandatory standards and seeking civil penalties of \$78,000.00 for those violations. The general issue before me is whether Consol violated the cited standards as alleged, and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

There is no dispute that on December 31, 2005, at about 6:30 a.m., Dustin Wright, a third shift electrician at Consol's Beaver Gap E-3 mine, received a severe electrical shock while working in the high-voltage compartment of the underground 001 Section power center. It appears that on the shift before the accident, the maintenance crew had removed a conveyor belt head drive, a power center and a section of the 13,200-volt cable supplying the section. The section power center was moved six crosscuts outby and power was restored at about 4:30 a.m.

The day-shift production crew arrived on the section at about 6:00 a.m. to begin their normal shift. Several members of the maintenance crew, including Dustin Wright and another electrician, Brian Lucas, were still on the section when the production crew arrived. At this time Wright became aware that the phase rotation on the 13,200-volt line supplying power to the 001 Section was incorrect. Wright then told Lucas to go to the vacuum switch (located near the No. 4

Head Drive) and deenergize and lock out the circuit supplying power to the section. Wright stated that he would go to the section power center and switch the phase leads to remedy the problem. Wright and Lucas then proceeded to their respective destinations. Lucas maintained in an out-of-court statement that the accident occurred before he was able to deenergize the vacuum switch.

According to Wright's out-of-court statement, when he arrived at the power center, he pushed the emergency stop switch located on the high-voltage end of the power center. This deenergized the incoming power. He then removed the lid covering the disconnect switch and tested for voltage. The voltage detector indicated that the power was deenergized. In that same statement Wright claimed that he tossed a chain across the phase leads to bleed the charge off the cable before touching the leads.

According to his statement, Wright removed the right phase lead from the termination point (as viewed from the high-voltage end of the power center facing the inby direction). He then realized that the middle phase lead was not long enough to reach the right termination point, so he reconnected the phase lead in its original position. He removed the left and middle phase leads and then connected the middle phase lead to the left termination point. He picked up the left phase lead and started bending it so it could be easily attached to the middle termination point. At this point Winford Taylor, section foreman, and Tony Thomas, another electrician, arrived at the power center.

As Taylor and Thomas approached the power center, the phase lead in Wright's hand became energized and Wright collapsed against the frame of the power center. Thomas picked up a rubber mat lying next to the power center and, apparently while standing on the mat, pulled Wright away from the power source. As a result of the accident Wright suffered, and was hospitalized for treatment of, burns on his right arm.

Citation No. 7558347

Citation No. 7558347 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.511 and charges as follows:

On December 31, 2005, a mine electrician performed electrical work in the high voltage compartment of the 001 Section power center without first personally de-energizing, locking out, and tagging the appropriate disconnect device. While attempting to change the configuration of the high voltage input leads, the electrician received a severe electrical shock.

The cited standard provides as follows:

No electrical work shall be performed on low-, medium-, or high-voltage distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a

qualified person. Disconnecting devices shall be locked out and suitably tagged by the persons who perform such work, except that in cases where locking out is not possible, such devices shall be opened and suitably tagged by such persons. Locks or tags shall be removed only by the persons who installed them or, if such persons are unavailable, by person authorized by the operator or his agent.

Consol does not dispute that the violation occurred and that it was "significant and substantial". There is therefore no dispute that the violation was also of high gravity. The evidence of record also clearly establishes that the violation was reasonably likely to cause death by electrocution. Consol argues in this case only that the violation was not the result of its high negligence and that no civil penalty should be assessed.

In her brief, the Secretary observes that the cited standard requires that disconnecting devices must be "locked out and suitably tagged by the persons who perform [electrical] work" on high voltage circuits or equipment. The Secretary also notes that there is no dispute that Wright was performing electrical work when he was injured and that he did not lock out and tag the circuit or equipment he was working on. The Secretary further observes, and it is undisputed, that Consol had a practice and policy that permitted Wright to perform his electrical work without first personally locking out and tagging the disconnect device. Indeed, it may also reasonably be inferred that Wimp Taylor, one of Consol's foreman, also knew that Wright would perform the electrical work at issue without first locking out and tagging the disconnect device because Taylor gave Wright a ride to the power center to perform the work while co-worker Lucas traveled to the splitter to lock out the disconnect device. The Secretary accordingly argues that Consol, through its agents, not only knew that Wright would violate the cited standard, but that it affirmatively encouraged electricians to violate the standard as a matter of company policy.

While admitting that it had a long-term policy of allowing two certified electricians to work together, with direct telephone or radio communication, in deenergizing lines, locking and tagging the power source and performing repairs, Consol maintains that it reasonably believed this policy to be in full compliance with applicable federal law and equally safe. More specifically, the policy required that phone or radio instruction be direct between the person who removes the power, locks and tags, and the person performing the repairs. The policy further required that when the repair was completed, the order to unground and restore power again be a direct communication repeated at least three times between the two electricians.

As noted, Consol argues that it should not be found negligent because it maintains that it reasonably and in good faith believed its policy to be safe and compliant with applicable law. In this regard Consol presented testimony of witnesses experienced in the mining industry who had "always seen the procedures described in the Consol policy followed in circumstances such as those presented in this case", had never seen such procedures questioned by anyone including MSHA inspectors, were unaware that citations had ever been issued as a result of the subject policy, and who believed the procedures were as safe as those required by the cited standard.

I do not however find Consol's claims - - that it reasonably believed that its two-person lock and tag policy was consistent with the cited standard - - to be credible. The plain language of the standard requires disconnecting devices to be locked out and tagged "by the persons who perform" the electrical work on high voltage, distribution circuits or equipment. The standard does not in any way suggest that the person performing the electrical work may have someone else lock out and tag the disconnecting device, or that the disconnecting device may be locked out and tagged by only one of the persons performing that work if there is more than one.

Consol's policy is also inconsistent with the purpose of the standard. As the Secretary notes, the standard implements the statutory provision 30 U.S.C. § 865(f), and Congress, in explaining the comparable provision in the Federal Coal Mine Health and Safety Act of 1969, described the purpose of requiring switches to be locked in an open position where the power is disconnected is to prevent accidental reclosing and that the person performing the work must retain possession of the key to guard against such reclosing. H.R.Rep.No.91-563, at 1078(1969). Congress intended that the person who locks out the equipment be the person who is going to perform the work. See *Badger Coal Company* 6 FMSHRC 874, 902(April 1984)(ALJ). It does not take a rocket scientist to recognize that the only way for a person to assure against the accidental reclosing of the circuit is to place their own lock on the disconnect device and retain possession of the key. By retaining the key to the lock, that person is thereby assured that power will not accidentally be engaged. Allowing an electrician to rely on someone else to lock the disconnect device adds an unnecessary human element that increases the likelihood of mistake and mis-communication. Under the circumstances, I find that the violation herein was the result of Consol's high negligence.

In reaching these conclusions I have not disregarded Consol's claim that it reasonably and in good faith believed its policy to be in compliance with the cited standard, because of its reliance on an interpretive policy issued by a former Consol employee then employed by the West Virginia Office of Miners Health Safety and Training(Respondent's Exhibit No.2). However, since the policy was not adopted by this state agency until almost two years after the violation charged in this case, it could not have been relied upon by Consol for a good faith belief that it was in compliance two years earlier with the West Virginia policy. In any event, an interpretation by a state agency of its own regulation when that interpretation is contrary to the plain meaning of the Federal standard provides but little support for Consol's position herein. The potential for conflicting interests of a former Consol official rendering assistance to Consol also certainly raises issues of credibility.

Citation No. 7558348

Citation No. 7558348 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.705 and charges as follows:

On December 31, 2005, a mine electrician performed electrical work in the high voltage compartment of the 001 Section power center without first personally ensuring that the

power source was de-energized and grounded. While attempting to change the configuration of the high voltage input leads, the electrician received a severe electrical shock.

The cited standard provides as follows:

High-voltage lines, both on the surface and underground, shall be deenergized and grounded before work is performed on them, except that repairs may be permitted, in the case of energized surface high-voltage lines, if such repairs are made by a qualified person in accordance with procedures and safeguards, including, but not limited to, a requirement that the operator of such mine provide, test, and maintain protective devices in making such repairs, to be prescribed by the Secretary prior to March 30, 1970.

30 C.F.R. § 75.705-1 explains what is meant by the phrase “deenergized and grounded”:

No high-voltage line, either on the surface or underground, shall be regarded as deenergized for the purpose of performing work on it, until it has been determined by a qualified person (as provided in § 75.153) that such high-voltage line has been deenergized and grounded. Such qualified person shall by visual observation (1) determine that the disconnecting devices on the high-voltage circuit are in open position and (2) ensure that each ungrounded conductor of the high-voltage circuit upon which work is to be done is properly connected to the system-grounding medium.

It is undisputed that Mr. Wright was performing work on a high-voltage line in the power center and that the high-voltage circuit could not be deenergized and grounded at the power center. It is also clear that in order to deenergize and ground the high-voltage circuit, one would have had to travel to the splitter. The splitter was about 1,500 feet away from the power center. Wright sent Lucas to the splitter to deenergize and ground the circuit. However Lucas stated that he had just arrived at the splitter when he heard about the accident, and had not yet made any changes at the splitter. Power was obviously reaching the high voltage lines Wright was working on when he suffered his electrical burns. In addition, when MSHA inspector Cook observed the splitter after the accident the visual disconnect was closed, indicating that it would not have prevented power from going to the power center. On the basis of these undisputed facts it is clear that Wright performed work on a high-voltage line that had not been deenergized and grounded. The Secretary has therefore met her burden of proving a violation of the cited standard.

In reaching this conclusion I have not disregarded Consol's contention that the two citations herein are duplicative. Citations are not duplicative, however, if the standards cited impose separate and distinct duties and the alleged violations are based upon two separate and specific omissions. See *Secretary v. Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). Within this framework of law, I find that the violations of 30 C.F.R. § 75.511 and 30 C.F.R. § 75.705 charged herein are in fact not duplicative because the standards impose

separate and distinct duties and the distinct duties and the violations are based on two separate and specific omissions. Section 75.705 requires high-voltage lines to be deenergized and grounded before work is performed on them, while section 75.511 requires the disconnect device for the circuit or equipment to be locked out and suitably tagged. It is possible to comply with the former requirement and fail to comply with the latter. See also *Blue Diamond Coal Co. v. Secretary*, 26 FMSHRC 570, 583 (July 2004) (ALJ) in which Judge Zielinski found that the requirement to deenergize and the requirement to lock and tag are, indeed, separate and distinct duties and that charges that the operator failed to meet each requirement are not duplicative.

The violation was also "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

Clearly, having a person work on high-voltage lines that have not been deenergized and grounded exposes that person to the hazard of contact with high voltage, and the likelihood of suffering burns, electric shock and electrocution. Indeed the hazard contributed to by the violation herein actually resulted in a serious permanently disabling injury. The violation was accordingly "significant and substantial" and of high gravity.

The Secretary argues that the violation was also the result of Consol's moderate negligence. She argues that while Consol's two-person lock-out policy may not have been violative of section 75.705 it nevertheless invited violations of section 75.705 by encouraging persons who perform electrical work on high-voltage lines to rely on others to deenergize and ground the circuit. She argues that Consol's policy increases the likelihood for miscommunication and for mistakes due to inattention or carelessness and, thus, the likelihood of

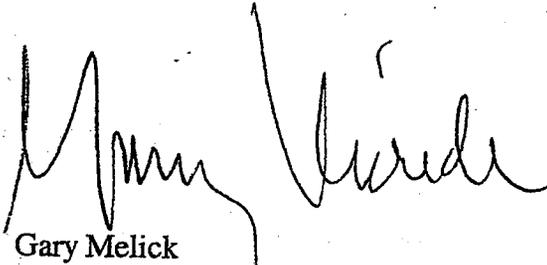
injury. I find, however, that the Secretary's argument is so highly speculative as to be without probative value. Accordingly, I must reject her findings of moderate negligence based on that argument. In the absence of other evidence of negligence I must conclude that the violation was the result of but little negligence.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would effect the operator's ability to continue in business. The record shows that Consol is a large operator and it has been stipulated that the proposed penalty would have no effect on its ability to continue in business. It has a significant violation history (Government Exhibit No.15). The gravity and negligence findings have previously been discussed. Under the circumstances, I find that penalties of \$50,000.00 for the violation charged in Citation Number 7558347 and \$1,000.00 for the violation charged in Citation Number 7558348 are appropriate.

ORDER

Citation Numbers 7558347 and 7558348 are affirmed with "significant and substantial" findings. Consol of Kentucky, Inc., is hereby directed to pay civil penalties of \$50,000.00 and \$1,000.00 respectively for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
(202) 434-9977

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 10, 2008

POWDER RIVER COAL, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2007-100-R
	:	Citation No. 7610237; 10/24/2006
v.	:	
	:	North Antelope Rochelle Mine
	:	Id. No. 48-01353
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-300
Petitioner	:	A.C. No. 48-01353-110134
	:	
v.	:	
	:	North Antelope Rochelle Mine
POWDER RIVER COAL, LLC,	:	
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Powder River Coal, LLC;
Gregory W. 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 Citation No. 7610237 issued under section 104(a) of the Mine Act. An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. THE CITATION

Powder River operates the North Antelope Rochelle Mine, a large open-pit coal mine, in Campbell County, Wyoming. MSHA Inspector Scott Markve sampled for respirable dust on several occasions over a period of 19 months. Based on this sampling, Inspector Markve issued Citation No. 7610237 on October 24, 2006, alleging a violation of 30 C.F.R. § 71.100 as follows:

The average concentration of respirable dust in the working environment of the designated work position was 3.698 mg/m³, which exceeds the 2.00 mg/m³ standard. The finding was based on the results of three valid samples collected by MSHA.

The citation was modified on November 28, 2007, to read as follows:

The average concentration of respirable dust in the working environment of the designated work position was 2.984 mg/m³, which exceeds the 2.00 mg/m³ standard. The finding was based on the results of four valid samples collected by MSHA.

This modification was made because one valid sample was “inadvertently left out of the average concentration.”

The cited health standard provides, in relevant part: “Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.” The designated work position that Inspector Markve cited was position 306 (non-shop welder), which includes all surface welders who spend at least part of their time working outside of a welding shop.

II. THE ISSUES

Powder River raised a number of defenses in this case, but its key argument is that a violation did not exist because the sampling results were seriously affected by welding fumes. It contends that much of the material deposited on the filter was not “respirable dust” but was metallic and non-metallic material from welding operations. Powder River also argues that the samples were not collected in compliance with section 71.205(b) or MSHA’s sampling protocols.

III. BACKGROUND

Inspector Markve described the process used to obtain a respirable dust sample. He testified that a non-shop welder works in various locations at the mine, including the maintenance shop or out in the field. (Tr. 17-18). The North Antelope Rochelle Mine has two shops where welding takes place.

The sampling unit was worn by each miner in the breathing zone. (Tr. 24) The inspector explained the sampling procedure to the miner and started the pump. The miner was told that he must keep the intake hole open. The inspector also instructed each miner to alert him if he changed occupations so the sample could be adjusted if necessary. The mine operator selected the miner to be sampled based on the occupation requested by the inspector. (Tr. 36).

The inspector kept a control filter with him while the miner was wearing the sampling unit. The inspector kept the filter in his pocket and sent it to the lab along with the collected samples to determine the weight gain for the environment. (Tr. 37). When a sample had been collected for eight hours, the inspector removed the unit. The pump was then shut off, the filter removed, the filter was capped, and it was placed in a Ziploc bag. It was then taken back to the MSHA office and mailed along with the required documentation to MSHA's Pittsburgh laboratory to be analyzed. A card was sent along that identifies the filter as well as the initial weight and date of sample. The control filter was sent with the sample. After the lab analyzed the sample, the results were faxed to the Gillette MSHA office. If the results indicated a dust concentration of more than 2.0, additional sampling was performed.

The subject samples were taken on February 27, 2005, June 15, 2005, December 18, 2005, and September 26, 2006. The samples were taken outside the welding hood worn by the welders. MSHA performed an "elemental analysis" on the samples that were taken in February 2005 and December 2005. This elemental analysis measured the weight of metal particulates deposited on the filter from the welding fumes. This analysis was not capable of measuring non-metallic components contained in the welding fumes.

The Secretary has defined "respirable dust" in section 71.2(k) as "dust collected with a sampling device approved by the Secretary and the Secretary of Health and Human Services in accordance with part 74 (Coal Mine Dust Personal Sampler Units) of this title." 30 C.F.R. § 71.2(k). She defines "valid respirable dust sample" as "a respirable dust sample collected and submitted as required by this part and not voided by MSHA." 30 C.F.R. § 71.2(r). It is the Secretary's position that all particles collected by the sampling unit are "respirable dust" for purposes of section 71.100 because the sampling units used were approved by the Secretary.

Powder River argues that the samples taken by MSHA are invalid because they contained welding fumes. Any samples significantly affected by welding fumes do not accurately reflect the amount of respirable dust in the miner's breathing zone and should not be the basis for a citation issued under section 71.100. The evidence establishes that the samples taken on February 2005 and December 2005 were significantly affected by exposure to welding fumes and, as a consequence, it is likely that the other samples were similarly affected. At the request of Powder River, these two samples were tested for metallic elements. MSHA's laboratory analysis shows that much of the weight gain for these samples is attributable to metallic welding fumes. This laboratory analysis did not indicate the full impact of welding fumes on the filter because it only measured metallic elements and it did not measure other non-metallic components of welding fumes. Powder River contends that its argument is corroborated by the

fact that no citations were issued as a result of respirable dust sampling of non-welders at the mine. Although welders sometimes travel to other parts of the mine, they spend most of the time in the shops where exposure to respirable dust would be minimal.

IV. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case raises the issue whether all solid particles deposited on MSHA's dust sampling filter during welding operations can be considered to be respirable dust as that term is used in the Secretary's health regulations. Powder River contends that because the solid particles emitted as a result of welding are not dust, any respirable dust samples taken by MSHA which are seriously affected by welding fumes cannot be used to establish a violation of the health standard. Powder River presented the testimony of Professor Thomas A. Hall of the University of Oklahoma's College of Public Health and Stephen Laramore, the company's safety supervisor, to support its arguments. It also relies on published textbooks and materials issued by MSHA. The Secretary argues that all particles smaller than 10 microns in diameter collected on the sampling device are, by definition, respirable dust including particles deposited on the filter as a result of welding operations. The Secretary relies on the testimony of Robert A. Thaxton, who is the Acting Chief of MSHA's Division of Health for Coal Mine Safety and Health.

The Secretary contends that the language of the health standard is clear on its face. Subject to the size limitation, any particles captured on the filter are respirable dust. She also argues that, even if the language is ambiguous, the Secretary's position is reasonable and entitled to deference. The purpose of the health standard is to prevent all occupation-related lung diseases. She notes that the Commission has recognized that she has broad authority to define what constitutes an overexposure to respirable dust. (*See, Consolidation Coal Co.*, 8 FMSHRC 890, 901 (June 1986)).

As the Commission recently stated in *The American Coal Company*, 29 FMSHRC 941, 946 (Dec. 2007):

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of her regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318,

321 (D.C. Cir. 1990) (“agency’s interpretation . . . is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’ ”) (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945) (other citations omitted)). In determining whether a standard is plain or ambiguous, the “language of a regulation . . . is the starting point for its interpretation.” *Dyer*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

I find that in the context of this case, the language of the cited health standard when read in conjunction with the Secretary’s definition of “respirable dust” is somewhat ambiguous. The Secretary’s position is that the standard clearly states that anything captured on the sampling filter with an approved sampling device that is smaller than ten microns in diameter is, by definition, respirable dust. The Secretary defines “respirable dust” as “*dust* collected with a sampling device approved by the Secretary. . . .” (emphasis added). Consequently, as discussed further below, particles collected on a sample filter must be “dust” in order to be “respirable dust.” The issue then is whether particles deposited on the sample filter from welding fumes can reasonably be construed to be “dust.”

Powder River’s principal argument is that welding fumes are not “dust,” as that term is commonly used in the industrial hygiene community. (Tr. 220-21). Powder River contends that in the absence of a specific regulatory definition, the ordinary meaning of the word “dust” as used by industrial hygiene professionals should be used. Powder River relies on definitions provided in specialized occupational safety and health materials, the testimony of its expert witness, and materials issued by MSHA officials.

Fumes generally consist of particles smaller than one micron. (Tr. 220-21, 226). They are generated in a different manner than dust because they are the product of a heating process. Fumes behave differently, acting more like a gas. (Ex. C-3). The Secretary offered a definition of fumes from a dictionary entitled *Occupational Safety and Health: Terms, Definitions, and Abbreviations* (“*Occupational Health Dictionary*”). (Ex. G-11). It defines fumes as “small, solid particles formed by the condensation of the vapors of solid materials.” In a publication entitled *Introduction to Operator Air Sampling Programs*, issued by the Health Division, Metal Nonmetal Mine Safety and Health, the term “fume” is defined as:

[A]n airborne particle formed in close proximity to a molten metal by vaporization of the metal, oxidation of the vapor, and condensation of the oxide. Fume particles usually assume rounded or smooth, irregular shapes and are generally one micron or smaller in size. Fumes may also agglomerate to form larger particles.

(Ex. C-13, p. 9).

Dust, on the other hand, is defined in the *Occupational Health Dictionary* as:

Small solid particles *created by* the break up of larger particles, such as by crushing, grinding, drilling, handling, detonation, impact, etc. Dusts in the industrial environment typically do not flocculate (join together) in air, but settle out under the influence of gravity.

(Ex. C-17) (emphasis added).¹ This definition is consistent with the definition of dust in MSHA's *Introduction to Operator Air Sampling Programs*. (Ex. C-13, p. 7). This definition states that "dust is a term used to describe airborne particles, ranging in size from 0.1 to 25 [microns], *created by* the crushing, grinding, breaking, drilling, or the general abrasive handling of solid material." (emphasis added).

These definitions make clear that dust and fumes have very different characteristics. Welding fumes are principally made up of metallic oxides, they are quite small, they are produced by heat, they are condensed vapors, and they agglomerate. Dust, including coal dust, is created by a physical process which breaks down solid material into small particles. Dust particles are coarse, irregularly shaped, and do not agglomerate. Dust and fumes behave differently in the pulmonary system, as well. (Tr. 222-27).

The Secretary has, over the years, published documents and provided instructions to coal mine operators that indicated that fumes are different from dust and should be sampled differently. For example, MSHA sent Michelle Shaper, an MSHA toxicologist, to give a presentation to coal mine operators in the Powder River Basin on the hazards presented by welding fumes. She emphasized the differences between fumes and dust. (Tr. 189-92). Until July 2006, the Secretary's Program Policy Manual ("PPM") contained the following language with reference to section 71.100:

This provision does not apply to airborne contaminants other than respirable coal mine dust. Exposures of surface shop welders (occupation code 319) to such contaminants as welding fumes, of which iron oxide is the main constituent, are governed by section 71.700.

(Ex. G-14). The language of this section was changed in 2006, but the purpose of this change is not entirely clear. It now states:

¹ Exhibits C-17 and C-18 are hereby admitted into evidence. *Fundamentals of Industrial Hygiene*, published by the National Safety Council, draws a similar distinction between dusts and fumes. (Ex. C-18).

This provision applies to respirable dust as defined by 30 CFR 71.2(k) and collected in accordance with the requirements of 30 CFR part 71. Exposures to airborne contaminants as specified in 30 CFR 71.700 will be monitored through sampling specified by 30 CFR 71.701.

Id. As stated above, MSHA's *Introduction to Operator Air Sampling Programs* recognizes the differences between fumes and respirable dust.

Dr. Hall testified that, from an industrial hygiene point of view, the Secretary's interpretation that the term "dust" includes welding fumes is unreasonable. (Tr. 227). Dr. Hall is a certified industrial hygienist. I agree with Dr. Hall's assessment and I credit his testimony in this case. Although both welding fumes and dust contain solid particles, not all particles can be classified as dust. (Tr. 220-22). The evidence clearly establishes that welding fumes are not a type of dust and the Secretary's attempt to construe her regulations to include welding fumes within the definition of respirable dust is clearly erroneous. The Secretary's definition of "respirable dust" limits its application to dust particles and her own interpretive materials have drawn a distinction between dust and fumes.² I find that it is unreasonable to interpret the term "dust" in the subject regulations to include welding fumes.

It is important to understand that MSHA's health standard at section 71.700 covers welding fumes. This standard is much stricter than the respirable dust standard at issue here. In addition, all particles are included when testing for welding fumes, not just particles that are smaller than ten microns in diameter. The sampling is conducted inside the welding hood which more accurately reflects the miner's breathing zone. The welders at Powder River are regularly sampled under the protocol set forth in 71.701.

In conclusion, I find the Secretary's interpretation of her health regulations to be plainly erroneous, unreasonable, and inconsistent with the language and purposes of the standard. It is unreasonable for the Secretary to take the position that "respirable dust" includes any and all particles less than ten microns in diameter that are deposited on a sampling filter as long as the sample was taken with an approved device.

At the request of Powder River, the samples taken in February and December 2005 were tested for metallic elements. MSHA's laboratory analysis shows that a significant part of the weight gain for these samples is a result of welding fume particles. It can be reasonably assumed that the sample taken June 2005 also contained welding fume particles. This laboratory analysis did not indicate the full impact of welding fumes on the filter because it only measured metallic elements and did not include other non-metallic components of welding fumes.

² The Secretary contends that materials published by MSHA's Metal Nonmetal Division do not apply to coal mines. I reject this argument with respect to discussions describing the characteristics of dust and fumes.

The evidence also establishes that the two welding shops were not near sources of coal dust. Most of the welding is performed in the shops, although welders will sometimes go to equipment in the field, especially welders working in the east shop. The sample taken on February 27, 2005, showed significant weight gain as a result of welding fumes. This sample was taken on a welder in the west shop who spent his day in the shop. (Tr. 184-85). The dust sample taken on December 18, 2005, was taken on a welder in the east shop. Since the temperature was about 20 degrees below zero that day, he spent the day in the shop. This sample also showed a large amount of welding fumes on the sample filter. Finally, the sample taken on September 26, 2006, was for a welder who spent his day welding in the shop on dragline rigging. (Tr. 185-87, 194). The other sample taken measured less than 2.0 mg/m³.

Other factors call in question the results in this case. Miners who are not welders have been sampled at the mine by inspectors and by the company and they have rarely been found to be overexposed to respirable coal dust. (Tr. 186-88; Ex. C-1 & C-2). Thus, it seems suspicious that welders, who primarily work a substantial distance from possible sources of respirable dust, are the miners who appear to be overexposed to respirable dust under section 71.100. In addition, the samples at issue here were taken outside of the welding hood so they do not necessarily reflect what the miner is breathing.

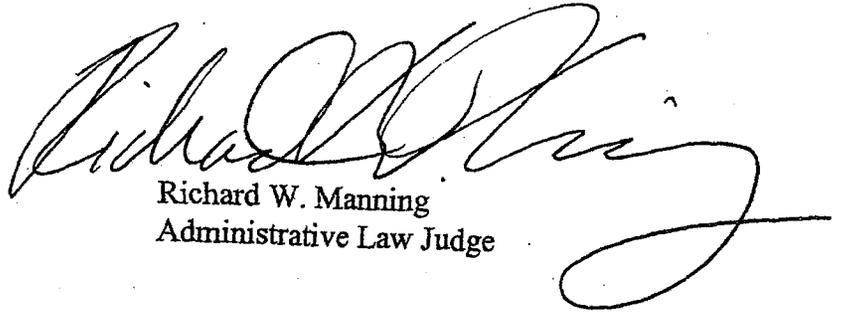
I find that the Secretary did not establish a violation of section 71.100 in this case. Although some of the samples appear to show an overexposure to respirable dust even after the results of the elemental analysis are subtracted out, I find that Powder River demonstrated that the sampling results were unreliable. It is clear that non-metallic elements contained in the welding fumes were not analyzed by MSHA. Dr. Hall testified that, by his calculations, the samples taken by MSHA were heavily contaminated by welding fumes and that the amount of respirable dust on the filters was more likely than not below the 2.0 threshold. (Tr. 214-20). His calculations throw sufficient doubt into the sampling results obtained by MSHA to make them unreliable. The Secretary bears the burden of proof and she did not meet this burden in this case.

My decision in this case is limited to the facts presented. I do not mean to imply that MSHA cannot sample welders for overexposure to respirable dust, including coal and silica dust. MSHA, however, cannot rely on samples that have been contaminated by welding fumes. MSHA may be able to improve its laboratory analysis so that the increase in the weight on the filter from welding fume particles can be subtracted out. MSHA may also be able to take respirable dust samples inside the welding hood when miners are welding to cut down on the contamination of the sample.³

³ Because I have vacated the citation for the reasons set forth above, I have not considered the other issues raised by Powder River at the hearing and in its brief.

V. ORDER

For the reasons set forth above, Citation No. 7610237 is **VACATED** and these proceedings are **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

July 10, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2007-62-M
	:	A. C. No. 02-02777-99898
	:	
v.	:	Docket No. WEST 2007-147-M
	:	A. C. No. 02-02777-102413
	:	
	:	Docket No. WEST 2007-184-M
	:	A. C. No. 02-02777-104635
	:	
AMMON ENTERPRISES, Respondent	:	Ammon-Courtland

DECISION

Appearances: Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Secretary of Labor;
Peter J. Ammon, Dragoon, Arizona, on behalf Ammon Enterprises.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege that Ammon Enterprises is liable for seventeen violations of the Secretary's Mandatory Safety and Health Standards for Surface Metal and Nonmetal Mines, and propose the imposition of civil penalties totaling \$4,130.00. A hearing was held in Tucson, Arizona, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Ammon committed fifteen violations, and impose civil penalties in the total amount of \$1,365.00.

Findings of Fact - Conclusions of Law

Ammon Enterprises is a sole proprietorship, owned by Peter Ammon, that engages in several business activities, including excavation, grading, road construction and maintenance, residential housing pad construction, and septic system installation. Ammon is also licensed to store materials and heavy equipment, rent equipment, conduct Arizona concealed weapons certifications, operate a private air strip, and resell home, automobile and ranch supplies. It owns and leases a considerable amount of mobile equipment, including five loaders and loader/backhoes, six trailers, two graders, two semi trucks, a scraper, a water trailer, and a ten-

wheeled dump truck. It also utilizes welding, trenching, steam cleaning, pipe fitting, and electric pedestal installation equipment.

Ammon's operations are conducted from two sites. Pits, from which gravel is extracted, a screening plant, a shop building, fuel tanks and a water well and pump are located on a 120-acre site six miles north of Elfrida, Arizona. Ammon's equipment is serviced, prepared for rental, refueled, maintained and repaired at the Elfrida facility. Its offices are located on a 139-acre tract in Dagoon, Arizona, which also supports the resale and equipment and material storage operations.

On August 8, 2006, Lawrence Nelson, an MSHA inspector, conducted an inspection of Ammon's Elfrida facility. He inspected the screening plant, shop, refueling area, a Case 621 loader and a CAT 613C scraper.¹ He found several conditions that, in his judgment, were violations of mandatory safety standards, and issued citations to the operator. On August 9, Nelson traveled to Ammon's offices and inspected training and other records. He initiated enforcement action with respect to deficiencies he found in the records. He also initiated enforcement action on two subsequent visits to the Elfrida facility. Ammon timely contested the civil penalties assessed for the alleged violations.

Jurisdiction

There are relatively few factual disputes with respect to most of the alleged violations. The primary thrust of Ammon's defense is that MSHA has jurisdiction only over its screening plant, which occupies approximately one-half acre of the site, and constitutes about one percent of the activity on the property. It also acknowledges that the 621 loader is part of the mining operation when the plant is running. Peter Ammon maintains that he is the sole operator of the plant and, consequently, the only miner involved in the operation. The Secretary maintains that Ammon's extraction of gravel from the pits brings its facility within the Act's definition of a mine, that its screening plant and portable screens are involved in milling, which is also within the statutory definition, and that mobile equipment used in those operations, as well as facilities and employees who are involved in them, are subject to MSHA's jurisdiction.

The "L-shaped" Elfrida site is depicted in a poorly focused overhead photograph. Ex. R-7. The pits are located at the top, North, end of the "L," and the screening plant is located about 1,300 feet to the South of the pits. The water tank, shop and fuel tanks lie near the corner of the vertical member and the base of the "L," about 1,000 feet from both the pits and the

¹ Nelson was not aware of Ammon's other businesses at the time of the inspection, and did not obtain much information about them during the course of the inspection. Tr. 93-94. He did not inspect a grader that was at the site because he did not believe that it was involved in Ammon's mining activities. He also did not inspect a CAT 988A loader because it had obviously been inoperable for a considerable period of time.

screening plant. Two portable screens, called "shaker buddies," were located near the pits.²

Peter Ammon described the material obtained from the pits as "highly unique" because it is of very good quality, approximately 55% gravel, and is able to be used in many applications without further processing, i.e., as "pit run." Tr. 380-81. Material was extracted from the pits on a weekly basis, and Ammon used the pit run material for roads, road pad build-ups, and residential house pads. Ex. P-62 at 57-58. A small percentage of the material removed from the pits was run through the screening plant, which separated it into five different-sized products. Ammon constructs septic systems and uses leach rock, 3/4 to 2 inch-sized rock, in the septic fields. Occasionally, material from the pits was also run through the shaker buddies. Tr. 291, 294, 310.

Ammon commenced screening operations at the Elfrida site in 1998. Tr. 293. It provided an "Update Notice" to MSHA, effective August 18, 1998, under Mine I.D. No. 02-02776, that it would be engaged in "gravel screening only." Ex. P-38. It purchased the screening plant and a CAT 988A loader in 2002. The 988 loader had a seven-cubic-yard bucket and was capable of moving large amounts of material. It was used, among other things, to extract material from the pits, transport it to stockpiles near the screening plant, and to feed material into the screening plant's hopper. At least for several months in 2003, the screening plant was operated on a relatively continuous basis, which resulted in the creation of large stockpiles of screened material. The plant was operated by two employees, Don Bartle, the plant manager, and Mike Gojkovich.

Ammon acknowledged that, as of 2003, it was conducting regular mining activities, and had provided appropriate training to Bartle and Gojkovich, including first aid training for Gojkovich. However, an MSHA inspection around that time resulted in the issuance of several citations that Ammon viewed as unjustified. As a result, Peter Ammon decided to substantially limit operation of the screening plant. He planned to personally operate the plant as time permitted, e.g., if he was free on a Saturday, and would be the only person involved in that operation. Bartle left Ammon's employment. Because of the extensive stockpiles, the screening

² Peter Ammon described the shaker buddies as highly efficient double-decked screens, that could be nearly as productive as the screening plant. Tr. 290-94. Ammon claims that there are a number of such machines being used by various entities, generally not considered mining companies, and that MSHA has not sought to exercise jurisdiction over them. Peter Ammon testified that his operation has been inspected over seven times and none of the MSHA inspectors looked at the shaker buddies. Ex. P-62 at 63. Nelson does not appear to have examined them when he conducted the inspection. He later considered them to be a part of Ammon's mining operation because Gojkovich told him that they were going to be incorporated into the screening plant. Tr. 285. Gojkovich did not recall stating that, and testified that he had never been under that impression. Tr. 354. Peter Ammon testified that, although the subject had been mentioned, there was no plan to add the shaker buddies to the plant, and that they were being readied for an impending deal involving a project at another site. Tr. 288.

plant was operated only occasionally, as specific material was needed.

The 621 loader has a considerably smaller bucket than the 988 loader, 2.25 cubic yards, and was not generally used to shuttle material from the pit to the stockpiles, although after the 988 loader broke down in 2004, it was the only piece of equipment on the site capable of performing that function. It was used to load trucks, to feed the screening plant and shaker buddies, to push up material, and for a variety of other purposes, both on-site and off-site. Tr. 346. About two months before the August 2006 inspection, Ammon entered into a lease agreement and acquired a "low boy" trailer and a CAT 613C scraper. However, the scraper was in very poor, "as is," condition, and Ammon had to expend considerable time and effort to make it operational. That effort included identification and repair of hydraulic leaks, replacement of the cutting edge, repairs to the transmission brake and service brakes, and replacing the batteries. In addition, the fuel injection pump had to be removed, sent out for repairs, and replaced. Some repairs, e.g., stoppage of hydraulic leaks and replacement of the scraper's cutting edge, were done before the inspection, and some were done after it. After initial repairs were done, Gojkovich operated the scraper to gain familiarity with it and identify other repair needs. He removed material from the pits and transported it to stockpiles near the screening plant and shaker buddies. Tr. 302, 346. None of the material moved with the scraper was run through the screening plant. Tr. 315. The main stockpile was located near the screening plant because the area was clean and easily accessible by Ammon's trucks. The vast majority of the material was trucked to other sites, without being milled or processed.

The shop is a 50 by 60-foot building. Equipment, spare parts, and miscellaneous supplies were kept in the shop, and certain maintenance tasks were performed there.³ If a piece of equipment was too large to fit into the shop, maintenance was performed near the shop. For example, Gojkovich worked on the scraper near the shop, and changed the 621 loader's oil in the shop. Tr. 307. The fuel tanks stored diesel fuel for use in off-road equipment, e.g., the loaders, scraper and graders, some of which were on-site at the time of the inspection. A water tank was used to supply water to several trees and, following the inspection, water was pumped to the shop and a toilet located therein.

Gojkovich has worked at Ammon for about seven years as an equipment operator and maintenance mechanic. Tr. 298-99. In 2006, he continued to work at the Elfrida site two to three days per week and, generally, was the only person at the site. Tr. 303. He operated mobile equipment on the site. He had also operated the screening plant as recently as a few weeks before the inspection, and operated the shaker buddies to screen material from the pits. Tr. 54-56, 299-300. He refueled, maintained and repaired graders, backhoes, trucks, the 621 loader, and the 613 scraper, using the shop and other facilities on-site.

³ The most common maintenance parts for the screening plant, electrical fuses, were kept in the shop. Tr. 334. A replacement bearing for one of the plant's shakers was temporarily stored in the shop. Tires for the various pieces of mobile equipment were also stored in the shop, as were, on occasion, parts for the scraper and 621 loader. Tr. 306.

Ammon is registered as an “intermittent” mining operation. However, it technically remained “open” at all times. MSHA inspectors had recommended to Peter Ammon that he close the mining operation during periods when it was not operating. However, he did not want to close the mine, and then have to transmit facsimiles to notify MSHA that he was opening the mine if he wanted to run some material on a Saturday. There was no fax machine at the Elfrida site, and the need to fax a notice that the screening plant would operate for a day, and then fax a notice that it was again closed, was viewed as unworkable. Tr. 369-70; ex. P-62 at 13. Subsequent to the August inspection, Ammon decided to take MSHA’s advice, and temporarily closed the mine on September 15, 2006. Tr. 367-68; ex. P-63.

Section 4 of the Federal Mine Safety and Health Act of 1977 provides that “[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.” 30 U.S.C. § 803. Section 3(g) of the Act provides that a “‘miner’ means any individual working in a coal or other mine,” and section 3(h) of the Act defines the term “mine,” in part, as:

h(1) “coal or other mine” means (A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, 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, or the work of preparing . . . minerals,

30 U.S.C. § 802(g), (h)(1).

The legislative history of the Act makes clear that Congress intended that the Act’s coverage provisions be interpreted broadly. The Senate Committee report emphasized that “what is considered to be a mine and to be regulated under this Act [should] be given the broadest possible interpretation, and . . . doubts [should] be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978).

The Commission and the courts have recognized that broad Congressional intent and have applied the Act’s provisions to a wide variety of mining operations, including mining and preparation facilities similar to those at Ammon’s Elfrida site. *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979) (facilities for processing of material dredged from a river bed were within the Act’s definition of the term “coal or other mine”); *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994) (sand dredging operation that included screening and separation of water from sand subject to Act’s jurisdiction); *W.J. Bokus Ind.*, 16 FMSHRC 704 (April 1994) (equipment in garage used by both operator’s sand and gravel mine and asphalt

plant is subject to Mine Act's jurisdiction);⁴ *Marshall v. Cedar Lake Sand and Gravel Co., Inc.*, 480 F.Supp. 171 (E.D. Wisc. 1979) (pit from which sand and gravel are removed falls squarely within the Act's definition of a mine); *Marshall v. Gilliam*, 462 F.Supp. 133 (E.D. Mo. 1978) (MSHA has jurisdiction over clay stockpile, loading and selling operation, including structures and machines that were used, or that had been used in connection with the extraction of clay and its preparation for loading, including a shop area and machines used to maintain mining equipment). In a very recent case with facts similar to those at issue here, a small, family-run gravel business was held to be a mine and MSHA's jurisdiction to inspect and enforce the Act was upheld as to a gravel pit, screening plant and equipment used, or that had been used, in the operation. *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 2008) (ALJ).

Ammon readily concedes that its screening operation, which separates material into five different products, is subject to MSHA jurisdiction, because it constitutes milling, as defined in the Act. However, it steadfastly contends that no other parts of its extensive operations are mining activities. Specifically, it argues that the removal from the pits of native material, and its transport to job sites without any processing, is the type of activity performed by thousands of other businesses licensed to excavate and remove excess material, e.g., septic system contractors and excavation contractors. "Transporting natural material without any milling, is a non Mine Act legal operation." Resp. Br. at 2-3.

While Ammon does not cite any legal authority in support of its argument, in essence, it argues that its pits are "borrow pits" that are not subject to MSHA jurisdiction. The Secretary has recognized a limited exception for operations that might otherwise fall within the broad definition of coal or other mine. It is reflected in a 1979 interagency agreement between MSHA and the Department of Labor's Occupational Safety and Health Administration ("OSHA"), specifying that borrow pits that are not on mine property or related to mining are subject to OSHA, not MSHA jurisdiction. 44 Fed. Reg. 22827 (April 17, 1979). The term "borrow pits" is defined in the agreement as:

an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earth material overlying bedrock is extracted from the surface. Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash. The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

It may be that the septic system and excavation contractors referred to by Ammon would be exempt from MSHA jurisdiction under the provisions of the agreement. However, for several

⁴ The Commission did not reach the question of whether the garage was a facility subject to Mine Act jurisdiction. However, it held that certain equipment was within the Act's coverage, in part, because defects could injure miners working in the garage. 16 FMSHRC at 708.

reasons, Ammon's pits are not borrow pits. Material from the pits is run through the screening plant and the shaker buddies, which are not "scalping screens."⁵ Large amounts of material were processed in 2003, and the screen was operated intermittently after that, most recently, a few weeks prior to the inspection. This "milling" of minerals dictates that the area qualifies as a mine, and borrow pits that are on mine property or related to mining are under MSHA jurisdiction. Moreover, material is removed from the pits, used in Ammon's various business activities and occasionally sold to others on an ongoing, not one-time or intermittent, basis. The material is also of very high quality and suited to its particular uses. It is not used more for its bulk than for its intrinsic properties, and is used over a relatively wide area at any number of locations where Ammon conducts its activities.

Ammon's extraction of gravel at the Elfrida facility cannot escape MSHA jurisdiction under the borrow pit exception. *See Drilllex, Inc.*, 16 FMSHRC 2391 (Dec. 1994); *Kerr Enterprises, Inc.*, 26 FMSHRC 953 (Order, dated Dec. 21, 2004) (ALJ); *Jeppesen Gravel, supra*.

Several aspects of Ammon's operation easily fall within the Act's definition of a mine. The removal of gravel, a mineral, from its natural deposits in the pits and transporting it to stockpiles constitutes mining, as does the processing of such material through the screening plant and the shaker buddies. Gojkovich was intimately involved with both aspects of Ammon's mining operations. He operated the 613 scraper, and used it to remove material from the pits and transport it to stockpiles, from which it was loaded into trucks. Ammon argues that none of the material removed from the pits with the scraper was ever processed through the screening plant. However, the extraction of gravel from its natural deposits constitutes mining, whether or not it was subsequently milled. Gojkovich operated the 621 loader to feed the screens, occasionally to extract material from the pits, to load trucks, and for other purposes. He maintained and repaired mining equipment, the screening plant, shaker buddies and associated mobile equipment. He was an individual working in a mine, and was clearly a miner. The shop and fuel tanks were also involved in the mining operation. The fuel tanks contained diesel fuel used by the 621 loader and the 613 scraper, both of which were serviced in or near the shop using tools and supplies stored in the shop. Parts for the screening plant, fuses and a bearing, were kept in the shop, as were tires for wheeled vehicles, including the 621 loader. Consequently, even though the shop was primarily used to support Ammon's non-mining activities, it was a facility used or to be used in its mining operations and was subject to MSHA jurisdiction. Whether specific items, such as gas cans or oxygen cylinders, were actually used in mining activities, their presence in the shop, where Gojkovich, a miner, worked mandated that they comply with MSHA's regulations. *W.J. Bokus Ind., supra; Marshall v. Gilliam, supra*.

The timing of MSHA's inspection was also appropriate. While the screening plant and shaker buddies were operated only intermittently, material was extracted from the pits on a more regular basis, and neither operation was officially shut down for any specified period. Gojkovich

⁵ Shaker buddies could be, and perhaps are, used as scalping screens. However, they were not so used at Ammon's facility, where pit run gravel was processed through them.

worked at the Elfrida site two or three days a week. Equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time. *See, e.g., Ideal Basic Ind., Cement Div.*, 3 FMSHRC 843 (April 1981) (equipment located in a normal work area and capable of being used must be in compliance with safety standards).

Ammon's challenges to jurisdiction must be rejected.⁶ MSHA was statutorily obligated to inspect all mining operations at the Elfrida site, including the pits, screening plant, shaker buddies, the shop and fueling areas, and associated mobile equipment.

Order No. 6330985

Order No. 6330985 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 46.8(a)(1), which requires that mine operators "provide each miner with no less than 8 hours of annual refresher training." Ex. P-22. In response to Nelson's inquiry, Gojkovich stated that he had not received any refresher training in several years. Nelson then issued the order, pursuant to section 104(g) of the Act, which required Gojkovich's immediate withdrawal from the mine, and prohibited his reentry until an authorized representative of the Secretary had determined that he had received the requisite training. Nelson determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$500.00 has been proposed for this violation.

Ammon does not dispute the fact that Gojkovich was not provided refresher training during the pertinent time period. Its defense to this alleged violation, and related training violations, is that Gojkovich ceased to be a miner in 2003, when Ammon drastically curtailed its "only" mining operation, i.e., the screening plant. Thereafter, Ammon contends, Peter Ammon was the "sole miner" and, as owner/operator was qualified to provide training and sign training certificates. Tr. 262-63.

As noted above, Ammon's jurisdictional arguments have been rejected, and it cannot escape the fact that Gojkovich worked as a miner. In addition, Gojkovich had not been completely excluded from Ammon's admitted mining operation. He had operated the screening plant as recently as a few weeks prior to the inspection. The definition of a miner for training purposes, as set forth in the subject regulation, includes "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations." 30 C.F.R. § 46.2(g)(1)(i). Mining operations include "extraction, milling, crushing, screening, or sizing of

⁶ It is also clear that Ammon's operations affect interstate commerce. It is well established that the Commerce Clause has been broadly construed, and that Congress may regulate highly localized commercial activities because even small scale efforts, when combined with other similar operations, can influence interstate pricing and demand. *See Harless Towing, supra*, 16 FMSHRC at 686.

minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h). Because Gojkovich was a miner, Ammon was required to provide him with annual refresher training. I find that the regulation was violated.

Significant and Substantial

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

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *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).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Generally speaking, an untrained miner is a hazard to himself and others. 30 U.S.C. § 814(g)(1). Gojkovich had not been provided annual refresher training since 2003.⁷ However, he was not “untrained.” He periodically received informal training from or through Peter Ammon, e.g., Ammon had the former owner of the scraper show him how to operate it and he, in turn, instructed Gojkovich and charged him with the task of identifying what needed to be repaired. Tr. 275-76, 278-79, 351. Gojkovich was also a highly experienced miner, who had worked at the Elfrida facility for many years, and was intimately familiar with virtually all aspects of the equipment and its operation. Nelson determined that the training plan violation, Citation No. 6330984, was unlikely to result in an injury because Ammon’s “people were experienced.” Tr. 258.

Under the limited circumstances presented here, I find that the Secretary has not carried her burden of proving that the hazard contributed to by the violation was reasonably likely to result in a reasonably serious injury. I also disagree with the Secretary’s assessment of negligence. Peter Ammon certainly was quite familiar with training requirements, as Inspector Nelson noted. However, he believed, in good faith, that he had sufficiently separated Gojkovich from the mining operation, such that he was not required to have annual refresher training. His belief was erroneous. However, it was not so unreasonable that it failed to qualify as a mitigating factor, and I find that Ammon’s negligence was moderate, rather than high.

Citation No. 6330984

Citation No. 6330984 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 46.3(a), which requires that mine operators “develop and implement a written training plan . . . that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training.” Ex. P-21. When Nelson visited Ammon’s office in Dragoon, he asked to see the training plan and was shown an MSHA form for a training plan that had virtually none of the required information filled in. Consequently, he issued the violation. He determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would result in lost work days or restricted duty, that the violation was not S&S, that two persons were affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$193.00 has

⁷ Gojkovich told Nelson that he had had no training for six years. Tr. 67. However, he had received three days of first aid training in 2003, and Peter Ammon testified at his deposition that Ammon had fulfilled all training requirements through 2003. Ex. P-62 at 48-49. The Secretary notes that Ammon did not produce records of such training. However, there were MSHA inspections in that time frame, and there is no evidence that training violations were issued. I accept Ammon’s testimony, and find that Gojkovich had received all required training through 2003.

been proposed for this violation.

Ammon's jurisdictional defense to the training violations has been discussed above. It also contends that it "had updated training records that reflected the owners signed documents." Resp. Br. at 13-14. However, such records were not shown to the inspector, were not offered into evidence, and are not part of the record. Moreover, Peter Ammon agreed that, at the time of the inspection, the training plan was incomplete. Tr. 266; ex P-62 at 47. I find that Ammon did not have a written training plan at the time of the inspection, and that the regulation was violated. I agree with the inspector's assessment of gravity and that the operator's negligence was moderate.

Citation No. 6331001

When Nelson returned to the Elfrida site on August 23, 2006, he found Gojkovich working at the site, loading trucks and cleaning up the shop area. Ex. P-24. Gojkovich confirmed that he had not received annual refresher training. Nelson issued Citation No. 6331001 alleging a violation of section 104(g)(1) of the Act, which requires that a miner who has been ordered withdrawn from the mine because of a lack of training, not reenter the mine until an authorized representative of the Secretary has determined that the requisite training has been provided. Ex. P-24. Nelson determined that there was no likelihood of injury because of the new violation, that the violation was not S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$1,000.00 has been proposed for this violation.

The analysis of this alleged violation is complicated by the fact that Ammon operates several non-mining businesses which share use of equipment and facilities used in its mining operations. The Secretary argues, in support of the violation and the high negligence assessment, that "instead of providing eight hours of training to Gojkovich, or taking action to obtain a determination of Gojkovich's status, Ammon largely ignored the withdrawal order." Sec'y. Br. at 11. However, Ammon did take steps to obtain a determination of whether it was properly cited for violations based upon Gojkovich's status as a miner. While it did not immediately contest the original order and related citations, it did contest the proposed penalties, and it temporarily closed its mining operations in September 2006. In addition, Gojkovich had been "excluded" from what Ammon considered to be the mining area, the screening plant. Tr. 279-81; ex. 62 at 51. Peter Ammon elected to keep him employed in the excavation portion of the business. Resp. Br. at 14. He loaded trucks from the stockpiles of materials and cleaned up the shop area. Gojkovich testified that he did not use the loader after the withdrawal order had been issued, except to load trucks and push weeds. Tr. 306. He also had been instructed to work on the shaker buddies when he was finished grading roads. Ammon's intent was to make them operational for an impending project at another site.

The regulations addressing training, as noted above, define a miner as a person who works at a mine and is engaged in mining operations. While the shop and other areas of the

Elfrida property fall within the broad definition of a coal or other mine, not all of the activities that take place on the site are mining activities. In light of Ammon's non-mining businesses, a reasonable interpretation of the order is that it precluded Gojkovich's performance of mining operations, such as, extraction, milling, screening, and maintaining and repairing mining equipment. It did not preclude his presence at the site, or his performance of non-mining operations.⁸

It is clear that no milling of materials was being performed, and there is no evidence that Gojkovich extracted gravel from the pits. However, he was engaged in the maintenance and repair of mining equipment, the shaker buddy. The loading of trucks from the stockpiles may also have qualified as a mining operation.⁹ In keeping with the broad interpretation of Mine Act jurisdiction discussed above, I find that Gojkovich was assigned to work at mining operations in the face of the order, and that Ammon violated section 104(g) of the Act. However, it did not ignore the order. It attempted to confine Gojkovich's activities to what it viewed as non-mining operations. Gojkovich's work on the shaker buddy, to make it ready for a project at a different site, satisfied the "engaged in mining operations" test. However, it appears that, if the shaker buddy had been removed from the site, he could have performed those tasks without running afoul of the order. Similarly, if the stockpiles were not on the mine site, loading of customer or Ammon Enterprise trucks would not come under MSHA jurisdiction. Tr. 94-98. It is highly likely that the same would have been true if Ammon had temporarily closed the mine, i.e., ceased mining activities, which it later did. Under these specific circumstances, I find that the operator's negligence was low, rather than high.

Citation No. 6330983

Citation No. 6330983 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.18010, which requires that mine operators assure that an "individual [currently trained and] capable of providing first aid shall be available on all shifts." Ex. P-20. Nelson issued the

⁸ As noted above, Ammon notified MSHA that its mining operation was temporarily closed as of September 15, 2006. In keeping with the ruling on jurisdiction, that means that it would not be extracting gravel from the pits, or milling material in the screening plant or shaker buddies. Closing of the mining operation did not force Ammon to shut down its septic system, road, and excavation businesses, or to cease loading material from the stockpiles into trucks being used in those businesses.

⁹ Nelson testified that retail sales conducted from a yard separate from a mine site would not come under MSHA jurisdiction, but that loading of customer trucks from stockpiles located at the ends of conveyor belts depositing material processed by a screening plant would be MSHA's responsibility. Tr. 95-98. Loading of truck from stockpiles separated from the screen, but still on mine property would be inspected, but could present a gray area. Tr. 95-96. It appears that if Ammon's mining operation had been closed, that the loading of trucks from the stockpiles would not be considered within MSHA's jurisdiction.

citation because he determined that Gojkovich, generally the only person at the site, did not have current first aid training. He determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of \$327.00 has been proposed for this violation.

Gojkovich, who worked at the Elfrida site two-to-three days a week, was working as a miner. Consequently, Ammon was obligated to have a person trained and capable of providing first aid on each shift that he worked. Gojkovich had been provided three days of first aid training in 2003, but his certification had expired. I find that the regulation was violated. However, the Secretary has not carried her burden of proving that any injury that might result from the violation would be permanently disabling, or that the operator's negligence was high. Since Gojkovich was typically the only person working at the site, he was the person who would have had to have been trained, and he was also the only miner who might have been injured and would have required first aid. He had been fully trained in 2003, and there is no evidence as to whether, or to what extent, he failed to retain the information and skills learned at that time. It is highly unlikely that, because his training had not been kept current, the effects of an injury could have been exacerbated to the extent that a separate injury might be said to be attributable to the violation, much less a permanently disabling one. Nelson explained that if there were a neck injury and the injured person were moved due to the absence of an individual with current first aid training, a permanent injury could result. Tr. 247. That person would have been Gojkovich, who might have moved himself. I find the likelihood of the violation resulting in a permanent injury too speculative, and that the more likely result would have been a lost work days injury. As I have found with respect to the other training violations, I find the operator's negligence to have been moderate.

Citation No. 6330970

Citation No. 6330970 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.4402, which requires that "[s]mall quantities of flammable liquids . . . shall be kept in safety cans labeled to indicate the contents." Ex. P-1. Section 56.4000 defines the term "safety can" as a "container of not over five gallons capacity that is designed to safely relieve internal pressure when exposed to heat and has a spring-closing lid and spout cover." Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation.

There were several small gasoline containers in the shop, at least one of which had a quantity of gasoline in it. Tr. 111-15, 127; ex. P-36. Peter Ammon confirmed that the containers, which met State of Arizona requirements, did not have spring-closing lids, and did not meet MSHA requirements. Tr. 118. His defense to this citation is that the shop is not

associated with his mining operation, and that no part of the mining operation uses gasoline. Ex. P-62 at 8, 16.

As noted above in the discussion of jurisdiction, the shop is part of the mining operation and it, and things located in it, must be in compliance with the Secretary's regulations. I find that the regulation was violated, and agree with the inspector's assessment of gravity, and that the operator's negligence was moderate.

Citation No. 6330971

Citation No. 6330971 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.4601, which requires that "[o]xygen cylinders shall not be stored in rooms or areas used or designated for storage of flammable or combustible liquids, including grease." Ex. P-2. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation.

There was an oxygen cylinder within a few feet of the gas cans. Ex. P-2, P-36. Nelson did not check to determine whether there was oxygen in the cylinder. Both Gojkovich and Ammon testified that it was empty. Tr. 128, 129-30. I find that the cylinder was empty. Nevertheless, I find that the regulation was violated. The plain wording of the regulation applies to all oxygen cylinders, whether full, partially full, or empty. *See Ideal Basic Ind., Cement Div.*, 2 FMSHRC 1352, 1371 (June 1980) (ALJ). The goal of the regulation, ensuring that oxygen does not exacerbate any fire that might occur involving stored combustible materials, is reasonably advanced by interpreting it to preclude the storage of any oxygen cylinder in areas where combustible materials are stored. However, the fact that the cylinder was empty dictates that there was no likelihood of an injury resulting from the violation, and the operator's negligence was low.

Citation No. 6330972

Citation No. 6330972 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.4201(a)(2), which requires that annual maintenance checks be made on fire extinguishers, including the amount of extinguishing agent and expellant, to determine that they will operate effectively. Ex. P-3. Sub-section (b) requires that the person making the inspection must certify that the inspection or test has been made, and indicate the date thereof. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$237.00 has been proposed for this violation.

Nelson found two fire extinguishers in the shop and one on the 621 loader. None of them bore any indication that they had been inspected, as required by the regulation. Tr. 131; ex. P-3, P-39, P-40, P-41. They were fully charged and in operable condition. Tr. 133; ex. P-3. Ammon's defense to this alleged violation is that none of the fire extinguishers was located in the area of the screening plant, its mining operation. Tr. 139. Ammon may have had records of inspections, but they were not produced. Tr. 139. Having rejected Ammon's jurisdictional arguments, I find that the regulation was violated. However, because the fire extinguishers were fully charged and operable, there was no likelihood of an injury resulting from the violation. I also find that Ammon's negligence was low. The maintenance checks had apparently been made, but not recorded on the fire extinguishers, which Ammon believed were not involved in mining operations.

Citation No. 6330973

Citation No. 6330973 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.12023, which requires that "[e]lectrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location." Ex. P-4. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation.

While inspecting the shop, Nelson observed a Lincoln welder/generator that did not have insulation or a guard covering the welding lead lugs. Tr. 141; ex. P-4. The condition is depicted in a photograph. Ex. P-25. Aside from its jurisdictional argument, Ammon contends that the welder was in "as manufactured" condition, and a representative of the manufacturer represented to Peter Ammon that, to his knowledge, MSHA had never issued a citation with respect to the cited condition on that type of welder. Tr. 145. Ammon introduced a standard of the National Electrical Manufacturer's Association, which provides that welding leads need not be enclosed in a case or cabinet, and that protection is usually afforded by recessing the terminal lugs behind the vertical plane of the access opening. Ex. R-19.

As depicted in the photograph, the welding lead lugs were recessed a few inches into a relatively small opening in the welder's cabinet. Under the circumstances, I find that protection was provided by the location of the lugs, and that the standard was not violated.

Citation No. 6330974

Citation No. 6330974 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14130(i), which requires that seat belts on mobile equipment be maintained in functional condition, and replaced when necessary to assure proper performance. Ex. P-6. Nelson determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was

moderate. A civil penalty in the amount of \$354.00 has been proposed for this violation.

When Nelson examined the 613 scraper, he observed that the seat belt was frayed at the edges, and had tears in it. Tr. 148-50; ex. P-6.¹⁰ The condition is depicted in photographs taken at the time of the inspection. Ex. P-42, P-43, P-60. In describing the defects, with reference to the pictures, Nelson identified a “rip.” Tr. 157-58; ex. P-42. The seat belt was four inches wide, and the rip was about 0.75 inches deep. Tr. 158-59. Nelson agreed that the seat belt was functional. Tr. 159. Nelson’s assessment of the gravity of the violation was predicated upon the seat belt failing during a serious accident, e.g., a rollover. Tr. 152; ex. P-6. Nelson did not attempt to test the strength of the belt. His determinations were based solely upon his visual examination. Tr. 160.

I find that the Secretary has failed to carry her burden of proof on this violation. While the seat belt showed obvious signs of wear, it was functional. It was not so obviously defective that Nelson noticed it before having Gojkovich operate the scraper to test the brakes.¹¹ Nelson’s descriptions of the belt’s defects were somewhat inconsistent, and the pictures do not confirm the existence of a serious defect. It is not apparent that a tear of 0.75 inches on a four-inch wide belt would so weaken it that it would pose a danger, even if the edges were somewhat frayed.

Citation No. 6330975

Citation No. 6330975 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14100(b), which requires that “[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.” Ex. P-7. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would result in lost work days or restricted duty, that the violation was not S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$178.00 has been proposed for this violation.

While inspecting the 613 scraper, Nelson observed that much of the padding on the seat was missing. Tr. 165-68; ex. P-42, P-43. When Gojkovich activated the brake lights and tail

¹⁰ Nelson erroneously referred to the scraper as an excavator in his notes and on the citation. The error is of no consequence. Ammon does not have an excavator, and it is clear that the condition cited was on the 613 scraper.

¹¹ Consistent with its position on jurisdiction, Ammon protested Nelson’s efforts to have Gojkovich, a “non-miner,” operate equipment. Its protest is reinforced with respect to the scraper, because Nelson obtained Gojkovich’s agreement to operate the scraper to test the brakes, despite his citing of the seat belt violation, which he determined to have been reasonably likely to result in a fatal injury. Nelson explained that he “believed” that he didn’t notice the seat belt problem until after the brake test had been done. Tr. 76. Ammon’s protests, at least as to this alleged violation, are well-founded.

lights, at Nelson's request, they did not function. Nelson believed that, on extended use, an operator of the equipment could suffer back or kidney injuries, and that the non-functioning lights could result in rear-end collisions when the equipment was operated in areas where other mobile equipment operated. Tr. 165-68. He determined that such injuries were unlikely to occur, because the scraper was not operated extensively, and was rarely operated in the presence of other mobile equipment. I find that the standard was violated and agree with Nelson's gravity determinations. He also determined that the operator's negligence was moderate, because it should have been realized that the defects existed and needed to be corrected. However, Ammon was in the process of attempting to bring this newly leased piece of equipment into operating condition. Considerable work had been done on the machine, and the fact that these particular defects had not yet been addressed does not indicate as high a level of negligence as if the defects had been allowed to exist on equipment that had been integrated into the everyday work process. Under the circumstances, I find the operator's negligence with respect to this violation to have been low.

Citation No. 6330976

Citation No. 6330976 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14101(a)(1), which requires that "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." Ex. P-8. Nelson determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$354.00 has been proposed for this violation.

Nelson asked Gojkovich to load the scraper and travel to a hill on the property. The service brakes would not hold the equipment on the grade. Tr. 170. Nelson believed that the scraper had been operated in that condition. However, Gojkovich told Nelson before the test, that he believed that there were no problems with the brakes because they had been worked on recently. Tr. 173-74. Even if the scraper had been operated briefly after the work had been done, the deficiency in the brakes may not have been apparent. The site is fairly flat. Gojkovich had operated the scraper for only about two hours since it had arrived at the site, and most of that time was devoted to diagnosing hydraulic leaks and other maintenance needs.

I find that the standard was violated, and that the violation was S&S. However, I find that the brakes had been worked on, and there was little reason for Ammon to believe that they were not operational. Consequently, I find the operator's negligence to have been low. I also find that the gravity was somewhat lower, in that the violation was highly unlikely to result in a fatal injury. The grader was operated at relatively low speeds on fairly level, open ground, where other mobile equipment did not normally operate. Any injury reasonably likely to result from the violation would have involved lost work days.

Citation No. 6330977

Citation No. 6330977 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14132(a), which requires that “[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.” Ex. P-9. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$237.00 has been proposed for this violation.

The horn was tested while Gojkovich was operating the scraper, and it did not work. I find that the standard was violated, and agree that an injury was unlikely to result. However, for the reasons discussed with respect to Citation No. 6330975, I find that the operator’s negligence was low, and that the violation would more likely have resulted in lost work days, rather than permanent disability.

Citation No. 6330979

Citation No. 6330979 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14101(a)(2), which requires that “[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels.” Ex. P-12. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$291.00 has been proposed for this violation.

At Nelson’s request, Gojkovich parked the 621 loader on an 8% grade, with a load in the bucket, set the parking brake and released the service brake. The parking brake could not hold the loader, which rolled down the grade. Tr. 197-98; ex. P-12. The only grades of consequence on the property were on a ramp to facilitate loading of the screening plant and in the pit area. The loader was rarely used in the pit area, and was parked, unloaded, on flat ground with the bucket down. Ex. P-12. There is no indication that it was, or ever would have been, parked on a grade, much less the 8% grade that it was tested on. There is also no evidence as to how effective the parking brake was, e.g., whether it could hold the loader on a lesser grade, or on the 8% grade if it were not loaded. Under the circumstances, I find that the standard was violated, and that there was no possibility of an injury occurring due to the violation. Nelson determined that Ammon’s negligence was moderate because it should have conducted a proper test of the parking brake and discovered the deficiency. I agree with Nelson’s determination of negligence.

Citation No. 6330978

Citation No. 6330978 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.12002, which requires that switches on electrical circuits “shall be of approved design and

construction and shall be properly installed.” Ex. P-10. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation.

While inspecting the screening plant, Nelson observed an electrical switch box on the control panel that had two openings in it. One was a hole on the side of the box that he estimated to be two inches in diameter. The other was an open rigid conduit leading from the bottom of the box, a few inches down into another box that was uncovered. Nelson believed, from his discussions with Gojkovich, that power was provided to the box at 480 volts. Tr. 178-82; ex. P10, P-34, P-35. He felt that electrical connections inside the box could be “damaged by moisture, dust or nesting insects,” such that the box itself could become energized, exposing persons in the area to “potential shock or burn injuries from leaking 480 volts.” Tr. 187; ex. P-10.

Peter Ammon testified that the box was energized with 110 volts, not 480 volts, and that no electrical connectors were visible through the small hole in the side of the box, which was plugged with a one-inch fitting to terminate the citation. Tr. 191-93; ex. P-62 at 33-34. Nelson confirmed that the box and the electrical panel were grounded, and that Ammon’s grounding and continuity testing were up-to-date. Tr. 188. Nelson was unable to explain how the grounded box could become energized with power “leaking” from the electrical connections inside it. He stated “[m]y understanding of why we cite it is because if it bypassed the grounding system into the metal enclosure and stuff.” Tr. 188. Ammon also pointed out that electrical equipment, such as the box, is not required to be weather-proof, that moisture, dust and nesting insects could get into the box, even in the absence of the hole, and that the conduit leading from the bottom of the box provided drainage. Tr. 185-86.

Ammon contends that the box was properly installed by an electrician, and that it had been inspected several times at the Elfrida site and never cited. Tr. 191. I agree with the Secretary that a properly installed switch box would not have openings that were left unplugged. Consequently, I find that the regulation was violated. However, there was no possibility of inadvertent contact with energized conductors inside the box and, because of the grounding system, no possibility of the box becoming energized. I find that no injury could be expected to result from the violation. The unexplained possibility that the grounding system could somehow be bypassed is not sufficient to increase the gravity beyond that level. I also find that the operator’s negligence was low. The defect was very minor, and had existed for a considerable period of time. Ammon had relied upon the expertise of the electrician that it had retained to rebuild the screening plant at its Elfrida site.

Citation No. 6330980

Citation No. 6330980 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.4430(a)(3), which requires that storage tanks for flammable or combustible liquids shall be

“[i]solated or separated from ignition sources to prevent fire or explosion.” Ex. P-13. Nelson determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$99.00 has been proposed for this violation.

There are two fuel storage tanks located approximately 200 feet north of the shop. One was elevated approximately four feet, and one was on the ground. They are depicted in photographs taken by Nelson. Ex. P-26, P-27, P-28. There was a small patch of dried tumbleweed underneath the elevated tank and alongside one end of the lower tank. There were also some “plyboards” and a ladder on the ground next to the lower tank. Tr. 205-06. Peter Ammon testified, without contradiction, that the ladder was made of aluminum, not wood. Tr. 216, 219-20. Nelson viewed those combustibles as ignition sources which could, in turn, be ignited by discarded smoking materials, lightning, vehicle exhaust, or a spark from a fire in the area. Tr. 208-12. He did not see any signs of smoking in the area, and Ammon has a non-smoking policy. Tr. 211, 219. Nelson also believed that any fuel spillage on the ground could contribute to the hazard, although he did not identify any spillage, and vehicle refueling is done at the south end of the long tank on the ground, which was not adjacent to the combustible materials. Tr. 214, 218.

The presence of combustible materials in close proximity to the fuel tanks establishes the violation. However, it does not appear reasonably likely that any of the materials would be ignited in the normal course of continued mining activities, or that any fire that might result would cause one of the tanks to explode or cause an injury to persons, who were rarely in the area. The weeds might burn intensely, as Nelson claimed. However, that extremely small quantity of weeds would burn for a very short period of time, and would be highly unlikely to threaten the tanks.

I find that the regulation was violated, but that the violation was not S&S, and that no injury would be expected as a result. I also find that the operator’s negligence was moderate.

Citation No. 6330981

Citation No. 6330981 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.4101, which requires that “[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.” Ex. P-15. Nelson determined that it was unlikely that the violation would result in an injury, but if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation.

There was a faded “No Smoking” sign on the lower tank that Nelson did not notice during the inspection. Tr. 226-27; ex. R-13. The sign is barely readable, and Peter Ammon

noted that it was faded and not in good condition during his deposition. Ex. P-62 at 41. I find that the faded sign was not "readily visible," as required, and that the regulation was violated. I also find that the violation was unlikely to result in an injury. Any injury that would be expected to result from the violation would be a burn that would most likely result in lost work days, rather than permanent disability. I agree that the operator's negligence was moderate.

Citation No. 6330982

Citation No. 6330982 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.12008, which requires that "[p]ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires other than cables pass through metal frames, the holes shall be substantially bushed with insulated bushings." Ex. P-18. Nelson determined that it was unlikely that the violation would result in an injury but, if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation.

A water tank, installed on a concrete pad, was located about 200 feet north of the shop. An electrical switch box was located adjacent to the pad, and wires ran from it to a water pump and a diesel fuel pump. The wire running to the water pump entered an opening in the box that had no bushing. The insulation on the inner conductors was intact and in good condition. The condition is depicted in photographs taken by Nelson. Ex. P-30, P-31. The water system supplied by the pump was primarily associated with the shop and a toilet located therein. Running water was supplied to the shop following the inspection, but was shut down after the pipes froze during the following winter.

Ammon's defense to this violation is based on its jurisdictional argument, i.e., that no water was used in the screening operation. Resp. Br. at 20. As depicted in the photographs, there was no bushing or proper fitting where the wire passed into the box. I find that the regulation was violated, and agree that a fatal injury was unlikely and that the operator's negligence was moderate.

The Appropriate Civil Penalties

Ammon Enterprises is a very small mine operator, with no larger controlling entity. The vast majority of the material extracted from its pits is used in its other business enterprises. A small amount of gravel is sold to local consumers. It has no violations that were paid or otherwise became final within the 24-month period preceding the issuance of the subject order and citations. Although Ammon claims to have had negative income in 2005, it does not claim that imposition of the proposed penalties would affect its ability to remain in business. Several of the alleged violations were not timely abated, which was taken into account in the penalty assessment process. With one exception, Ammon's defense to those violations was based upon

its jurisdictional arguments, and no further enforcement action was taken, apparently because of Ammon's temporary closure of its mining operations in September of 2006. Under the normal penalty assessment formula in effect at the time, failure to abate a violation resulted in ten additional penalty points and no application of the 30% reduction factor for good faith. 30 C.F.R. § 100.3(f) (2006). In view of the temporary closure, full imposition of both enhancement factors is not entirely warranted, except as to Citation No. 6330979, the violation related to the 621 loader's parking brake. The gravity and negligence associated with the violations have been discussed above.

Order No. 6330985 is affirmed. However, the violation is found to have been non-S&S and the operator's negligence moderate, rather than high. A specially assessed civil penalty in the amount of \$500.00 has been proposed for this violation. Rejection of the S&S designation and lowering of the negligence designation justify a lowering of the civil penalty. I impose a penalty in the amount of \$150.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330984 is affirmed. A civil penalty in the amount of \$193.00 has been proposed for this violation. Upon consideration of the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty of \$120.00.

Citation No. 6331001 is affirmed. However, the operator's negligence is found to have been low, rather than high. A specially assessed civil penalty in the amount of \$1,000.00 has been proposed for this violation. The lowering of the negligence designation justifies a lowering of the civil penalty. I impose a penalty in the amount of \$250.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330983 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than permanent disability, and the operator's negligence moderate, rather than high. A civil penalty in the amount of \$327.00 has been proposed for this violation. Reductions in the severity of possible injury and the negligence designations justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of \$125.00.

Citation No. 6330970 is affirmed. A civil penalty in the amount of \$60.00 has been proposed for this violation. Upon consideration of the factors enumerated in section 110(i) of the Act, I impose a penalty of \$60.00.

Citation No. 6330971 is affirmed. However, it is found that no injury was likely because of the violation and the operator's negligence was low, rather than moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation. The absence of a possible injury and lower negligence rating justify a reduction to the civil penalty. I impose a penalty in the amount

of \$30.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330972 is affirmed. However, it is found that no injury could have been expected and the operator's negligence was low, rather than moderate. A civil penalty in the amount of \$237.00 has been proposed for this violation. The lowering of the gravity and negligence determinations justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of \$70.00.

Citation No. 6330975 is affirmed. However, the operator's negligence is found to have been low, rather than moderate. A civil penalty in the amount of \$178.00 was proposed for this violation. The lowering of the negligence designation justifies a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of \$80.00.

Citation No. 6330976 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than a fatality, and the operator's negligence low, rather than moderate. A civil penalty in the amount of \$354.00 has been proposed for this violation. Reductions in the severity of possible injury and operator's negligence justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of \$100.00.

Citation No. 6330977 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than permanent disability, and the operator's negligence low, rather than moderate. A civil penalty in the amount of \$237.00 has been proposed for this violation. Reductions in the severity of possible injury and operator's negligence justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of \$80.00.

Citation No. 6330978 is affirmed. However, it is found that no injury was expected to result from the violation, and the operator's negligence was low, rather than moderate. A civil penalty in the amount of \$60.00 has been proposed for this violation. Reductions in the severity of possible injury and operator's negligence justify a lowering of the civil penalty. I impose a penalty in the amount of \$30.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330979 is affirmed. However, it is found that no injury was expected to result from the violation. A civil penalty in the amount of \$291.00 has been proposed for this violation. Lowering of the gravity justifies a lowering of the civil penalty. I impose a penalty in

the amount of \$110.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330980 is affirmed. However, the violation is found to have been non-S&S, and no injury was expected to result from it. A civil penalty in the amount of \$99.00 has been proposed for this violation. Rejection of the S&S designation justifies a lowering of the civil penalty. I impose a penalty in the amount of \$60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330981 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than permanent disability. A civil penalty in the amount of \$60.00 has been proposed for this violation. Lowering of the gravity of the violation justifies a modest reduction to the civil penalty. I impose a penalty in the amount of \$40.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330982 is affirmed. A civil penalty in the amount of \$60.00 has been proposed for this violation. Upon consideration of the factors enumerated in section 110(i) of the Act, I impose a penalty of \$60.00.

ORDER

Citation Nos. 6330970, 6330984 and 6330982 are **AFFIRMED**; Order No. 6330985 and Citation Nos. 6331001, 6330983, 6330971, 6330972, 6330975, 6330976, 6330977, 6330978, 6330979, 6330980 and 6330981 are **AFFIRMED, as modified**; Citation Nos. 6330973 and 6330974 are **VACATED**; and, Respondent is directed to pay a civil penalty of \$1,365.00 within 45 days.



Michael E. Zielinski
Administrative Law Judge

Distribution (Certified Mail):

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Peter J. Ammon, Ammon Enterprises, P.O. Box 176, Dragoon, AZ 85609

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

July 11, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-114
Petitioner	:	A.C. No. 15-07475-128085 -01
v.	:	
	:	
SOLID ENERGY MINING COMPANY,	:	Mine #1
Respondent	:	

DECISION

Appearances: Donna E Sonner, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, Anthony Burke, Conference and Litigation Representative, U.S. Department of Labor, Pikeville, Kentucky, and Rodney Ingram, Conference and Litigation Representative, U.S. Department of Labor, Pikeville, Kentucky, on behalf of the Petitioner;
Carol Ann Marunich, Esq, Dinsmore and Shohl, LLC, Morgantown, West Virginia, 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 Solid Energy Mining, (Solid Energy) with two violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Solid Energy violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation Number 6645303

This citation, issued August 14, 2007, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.400 and charges as follows:

Combustible float coal dust is present in the 3-B coal conveyor belt entry from #3 belt drive thru break #8. The combustible float coal dust is present on the mine floor, belt structure, waterline and coal ribs. The combustible float coal dust is dark to black in color on previously rock dusted surfaces and float coal dust is dry.

The cited standard provides that "[c]oal dust, including float coal dust deposited on rock dusted surfaces, loose coal and other combustible materials, shall be cleaned up and not be

permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.”

Roger Workman, an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) testified that he observed float coal dust “black and dark in color” in the 3-B coal conveyor belt entry from the number 3 belt drive through break number 8. He noted that the float coal dust was “dry textured” and that the mine was under a “Section 103(i)” 15 day spot inspection required of mines liberating more than 250,000 cubic feet per minute of methane in a 24-hour period. He found that the float coal dust was deposited on the mine floor, on the belt structure and on the water lines and extended over approximately 642 feet.¹ Workman observed that there were omega block seals in the area sealing off mined-out areas in which he surmised methane was present. He testified that such seals “could possibly” collapse in the event of an explosion behind the seals. Workman speculated that if there was an intake of methane and an explosion occurred such an explosion could be further propagated by the suspension of the coal dust with burns and smoke inhalation and “possible entrapment” resulting. Workman further observed that only a mine examiner once each shift would be in the exposed area. He therefore opined that only one person would be affected by any explosion but concluded that if an injury occurred it would likely be serious. Workman concluded that the condition had existed several shifts “based on my experience”.

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12

¹ The transcript incorrectly reads that the coal dust was on “wire lines” rather than on “waterlines”.

(January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

While I find that the Secretary has sustained her burden of proving the existence of the violation I do not find that she has met her burden of proving the violation was either “significant and substantial” or of high gravity. The Secretary presented nothing more than speculative testimony regarding any possible ignition source for the cited coal dust. Workman first acknowledged that there was no loose coal found and that the float coal dust was paper thin in depth. He did not test for combustibility and based his conclusion regarding the explosive nature of the dust only upon its color. Workman further acknowledged that he observed no ignition sources in the vicinity of the coal dust and had been told that the area had been rock dusted earlier in the shift. He found no methane outside the sealed area and did not know the methane level behind the seals as of the date of the alleged violation. Moreover, the issuing inspector failed to provide a responsive answer to establishing the third element of the *Mathies* formula i.e. whether there was a reasonable likelihood that the hazard would result in an event in which there was an injury (Tr. 24, lines 16-20).

In addition, mine foreman David Jude testified that he accompanied Inspector Workman on the inspection at issue. According to Jude, they traveled the entire length of the 3,500-foot 3-B belt. Jude felt that overall the belt was pretty good and the area cited by Workman had only about 1/16 of an inch of coal dust. Jude testified that the belt is dusted regularly and that the mine had about six to eight miles of beltline to maintain. According to Jude, they tried to rock dust every night on the third shift and they had fire bosses who walked the belt line and had authority to order rock dusting where needed. In Jude’s expert opinion, the dust cited by Workman was unlikely to have been combustible. He also noted that the belt at issue was fire retardant and should not burn. Furthermore, Jude noted that the mine had no history of ignitions. Under all the circumstances, then, I do not find that the Secretary has met her burden of proving that the violation was “significant and substantial” or of significant gravity. I find, however, that the Secretary has established that the violative condition was the result of Solid Energy’s moderate negligence. It may reasonably be inferred- -from the fact that over four shifts (beginning with the first shift on August 13, 2007, through the second shift on August 14, 2007), it was reported by a mine examiner that the cited 3-B belt needed additional rock dusting and that no corrective action was reported to have been taken- -that the operator knew or should have known of the existence of the cited condition (Gov’t Exh. No. 7).

Citation Number 6645306

This citation, issued on August 20, 2008, alleges a “significant and substantial” violation of the standard at 30 C.F.R. § 75.1725(a) and charges as follows:

The Fairchild scoop (Serial No. T339-128) located at the 3-B coal conveyor belt drive, in the track entry is not being maintained in a safe condition. The breaker on the scoop could not be reset from the operating compartment as required. When the breaker was reset with the pump motor in the on position the scoop would tram without turning the

controls to the off position first. The operator immediately removed the scoop from service.

The cited standard provides that “[mobile] and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.”

It is undisputed that the cited scoop had been designed to have a lever in its cab which was connected mechanically by a cable to the circuit breaker. Inspector Workman was of the belief that the cable was either broken or disconnected but was told that a new cable had been utilized to abate the condition. According to Workman, the circuit breaker on the scoop could not be reset from the operator’s compartment but the breaker had to be reset outside the compartment and with the pump motor in the “on” position the scoop would tram without first turning the controls to the “off” position. According to Workman, the scoop could therefore run over a person or trap a person in its path. He felt the violation was “significant and substantial” because he believed there was a likelihood of a person being struck by the trammed scoop to suffer broken bones, crushing injuries and death. According to Workman, only one person, i.e. the machine operator, would be affected by the alleged defect. Workman charged the operator with moderate negligence because the equipment is required to be examined on a weekly basis. He admitted however that he did not know whether anyone knew of the alleged defect.

Mine foremen David Jude testified that the cited scoop was an “outby” scoop used only if something broke down and for miscellaneous work. It was used not on a regular basis. When the citation was issued, the scoop was being charged. He admitted that the cable was broken from the breaker switch and could not be reset from the cab but only from the outside. Jude testified, however, that the tram motor and the pump motor are separate on this equipment and that the breaker controlled only the pump motor. Therefore, according to Jude, the scoop could not move if the breaker was switched “on” unless someone was in the operator’s compartment pressing the peddle that would tram the equipment.

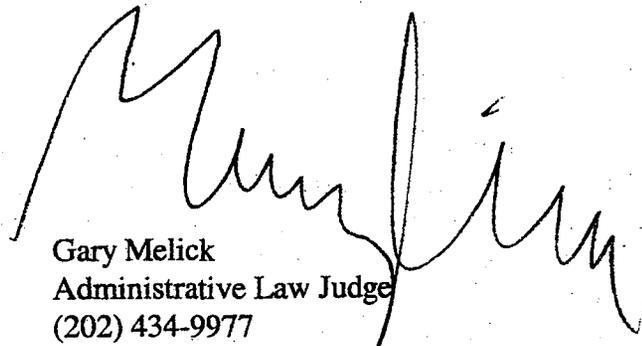
Considering Jude’s greater familiarity with the cited equipment, I give his testimony the greater weight and find that the cited defect presented only a minimal hazard and not the hazard described by Inspector Workman. It is apparent that while someone might be resetting the breaker switch outside the operator’s compartment, the operator could inadvertently begin trampling the scoop before that person was clear of the scoop thereby possibly sustaining injuries. Under the circumstances, I find that the violation is proven as charged but is of minimal gravity and lessened negligence. The violation certainly does not meet the criteria for a “significant and substantial” violation since, based on the credible expert testimony of mine Foreman Jude, the scoop could only have been trammed with its operator in the compartment. I find that injuries to the scoop operator were not reasonably likely since he would, of necessity, be in the operator’s compartment when the scoop would tram.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator's ability to continue in business. The record shows that the subject mine is a large mine and has a significant history of violations. The record indicates that the violative conditions herein were abated in a timely manner. There is no evidence that the penalties imposed herein would affect the operators ability to continue in business. The gravity and negligence findings have previously been discussed. Under the circumstances, I find that penalties of \$500.00 for Citation Number 6645303 and \$100.00 for Citation Number 6645306 are appropriate.

ORDER

Citation numbers 6645303 and 6645306 are affirmed but without "significant and substantial" findings. Solid Energy Mining Company is hereby directed to pay civil penalties of \$500.00 and \$100.00 respectively for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

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/lh

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 25, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-439
Petitioner	:	A. C. No. 15-18956-93047
v.	:	
	:	
NATIONAL COAL CORPORATION,	:	Miles Branch Mine
Respondent	:	
	:	

DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Charles W. Kite, Esq., General Counsel, National Coal Corporation, Knoxville, Tennessee, 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 National Coal Corporation, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of \$625.00. A hearing was held in Maryville, Tennessee. For the reasons set forth below, I vacate the citation.

Background

National Coal Corporation (NCC) operates the Straight Creek #2 Mine, a surface coal mine, in Bell and Harlan counties, Kentucky. On Friday, March 17, 2006, the highwall at the mine collapsed in the late afternoon or early evening. Two pieces of equipment, a highwall miner and a front-end loader, were damaged in the collapse. Don McDaniel, NCC's Safety Director, notified MSHA of the incident at around 6:00 p.m.

At about 7:30 a.m. the next day, McDaniel, Charles Asbury, NCC General Manager, and Bill Snodgrass, NCC Chief Operating Officer, among others, went to the mine to recover the damaged equipment. After a safety plan was developed and written up, the company began working.

MSHA Inspector Marvin Hoskins was directed by his supervisor to investigate the collapse on the morning of March 18. It took him awhile to find the mine and he did not arrive at the site until sometime after 2:00 p.m. As he drove up to the area of the highwall, it appeared to him that the company's excavator was operating within range of an unsupported highwall which had not been secured. After getting out of his car, he got his camera from the charger and met with Snodgrass, who had walked to meet him. The inspector walked over the grounds and took numerous pictures. As a result of his investigation, he issued the 104(d)(1) citation, 30 U.S.C. § 814(d)(1), being contested in this proceeding.¹

Findings of Fact and Conclusions of Law

This case is all about perspective. In the company's view, they were safely attempting to remove equipment damaged in the highwall collapse and committed no violation. From the Secretary's vantage point, NCC was removing equipment from within the potential falling distance of the remaining unstable portion of the highwall and, therefore, was working under a dangerous highwall. However, it the inspector's conclusions as he arrived on the scene which govern the outcome, and I find that his slanted perspective caused him to reach the wrong conclusions.

Inspector Hoskins issued Citation No. 7525907, alleging a violation of section 77.1006(a), 30 C.F.R. § 77.1006(a), because:

The mine experienced a failure of the highwall and miners were working under the highwall that was broken loose and had not fallen. The miners were not correcting the condition, they were recovering equipment that was damaged by the highwall failure. They used a bull dozer to remove the damaged forklift. They were also observed using an excavator[] to remove[] rock from the highwall miner beam and head.

(Govt. Ex. 3.) Section 77.1006(a) requires that: "Men, other than those necessary to correct unsafe conditions shall not work near or under dangerous highwalls or banks."

When McDaniel, who had been an MSHA inspector from 1975 through 2006, and Asbury arrived at the mine on Saturday morning, they drew up a written safety plan for removing the damaged equipment. (Tr. 80, 100-101, 117.) The plan provided that no one would work on the left side of the damaged highwall miner, that miners would be posted at different locations around the pit to watch for activity from the highwall and to warn the miners performing the

¹ Section 104(d)(1) of the Act assigns more severe sanctions for any violation that is "of such nature as could significantly and substantially contribute to the cause and effect of a . . . safety or health hazard" and is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

recovery work of such activity, that the front-end loader would be recovered first and that the miner head would be disconnected from the highwall miner. (Resp. Ex. 2, Tr. 81, 101, 117-118.) The reason no one was to work on the left side of the miner was that the remaining unstable highwall was to the left of the miner. (Tr. 94-95.) The road coming into the mine from the left was blocked off. (Tr. 83.) Before beginning any work, NCC held a meeting with all miners to inform them that no one was allowed to be on the left side of the miner. (Tr. 88.)

The front-end loader (also referred to as a forklift by witnesses), which was on the right side of the highwall miner, was pulled from under the fallen rock by the boom of an excavator.² (Tr. 106.) After the front-end loader had been pulled out, it was hooked to a bulldozer and towed completely out of the way. (Tr. 106.) Then, the excavator cleaned the fallen rock off of the front of the highwall miner and the miner was started up and backed out of the area under its own power. (Tr. 95, 106.) After that, the only equipment remaining was the miner head which had broken off from the miner and was under a pile of fallen rock. (Tr. 106.)

The excavator was pulling the rock off of the miner head when McDaniel left the area at 2:10 p.m. (Tr. 86.) Once the rock was removed from the miner head, the plan was to pull the miner head out with the excavator. (Tr. 110-11.)

The excavator was still removing rock from the miner head when Inspector Hoskins arrived at around 2:30 p.m. (Tr. 107-8.) As he pulled up, Snodgrass went over to meet him. (Tr. 120.) The inspector testified that:

[A]s I was pulling up that I could see through the windshield clearly that there was an excavator was [*sic*] digging at a rock pile at the base of the highwall and there was [*sic*] some people on the right-hand side. I noticed a person distinctly had on a white hard hat was standing on the right-hand side. I could see him. As I pulled up I clearly saw him make a hand motion and he started proceeding walking towards me. And at that point I was calling my supervisor to let him know that I had found the operation

(Tr. 15-16.) Snodgrass arrived while he was still on the phone. (Tr. 16.) Inspector Hoskins got out of the car and told Snodgrass why he was there. (Tr. 16.) Then he got his hard hat out of the car and put it on, got his camera battery off of the charger and got his camera out of the car and the two men proceeded toward the pit area. (Tr. 17.) The inspector began taking pictures as he was walking toward the pit. (Tr. 17.)

Inspector Hoskins testified that he issued the citation because he believed miners were

² An excavator is a backhoe on tracks. It has a boom with a reach of approximately 40 feet and a bucket on the end of the boom which is pulled back toward the excavator by the boom. (Tr. 75-76.)

working under a highwall which had broken loose, but had not fallen and

[t]he miners were not correcting the condition. They were recovering equipment that was damaged by the highwall failure. They used a bulldozer to remove the damaged forklift, and that is per discussion with them on Saturday. And they were observed using an excavator to remove rock from the highwall miner and the head, and that's what I observed them doing when I arrived.

(Tr. 40.) He went on to state that: "The operator was not supporting the highwall. He was actually destabilizing the highwall by prying loose rubble loose from the base of it. And that made it a very hazardous condition . . ." (Tr. 41.) In fact, the inspector did not see either the front-end loader or the highwall miner removed. (Tr. 55-57, 65-66.)

More importantly, although Inspector Hoskins took numerous photographs during his investigation, 12 of which were put in evidence, there is no photograph of the excavator, either in operation or at rest. That is because when the inspector met Snodgrass, he told Snodgrass that the excavator should not be in the pit and Snodgrass signaled for it to be removed. (Tr. 52, 121.) Nonetheless, the inspector testified, and indicated on one picture, that the excavator was located to the left of the miner head. (Govt. Ex. 7, Tr. 22.)

I find that Inspector Hoskins was mistaken in his location of the excavator. In the first place, all of the company witnesses testified that the excavator was operating well to the right of the miner head. (Tr. 81-82, 102-03, 123.) While their relationship with NCC could provide a motive for not telling the truth, the facts corroborate them. The safety plan, drawn up before any work began, specifically provided that all work would be done to the right of the highwall miner. Further, the sole purpose of the work being performed was to recover the damaged equipment and there was no damaged equipment to the left of the miner head. There was no reason for the excavator or any part of it to be to the left of the miner head. Finally, the company's stake in this case is not significant enough to justify inducing its employees to contrive evidence.

On the other hand, the only view that Inspector Hoskins got of the excavator was obtained while he was driving his car on a dirt road into the pit, parking his car, calling his supervisor, getting out of his car, putting on his hard hat, getting back in his car to get his camera battery and camera, and meeting Snodgrass. It is apparent from the first picture he took, another he took from the other side of the pit which shows the location of his red van and one from behind his van, that at best he was viewing the scene from a 30 degree angle. (Govt. Exs. 5, 14 & 15, Tr. 32.) From that perspective, it would difficult to place the excavator in its exact location. Indeed, the inspector admitted as much on cross examination:

Q. Let's look back at Seven. Can you testify with absolute certainty that that excavator was on the left-hand rather than the right-hand side of that beam that's clearly visible in Exhibit Seven?

A. What I can testify to is that I saw the excavator bucket touching rock. Now, whether it was on the left side of the beam or on the right side of the beam is irrelevant due to the height of the highwall, that it could have reaching from the left-hand side or the right-hand side of that beam.

(Govt. Ex. 7, Tr. 54.)

The location of the excavator is relevant, however. As the head-on picture of the miner head (also referred to as a beam) and highwall clearly shows, the head is several yards to the right of the unstable portion of the highwall that had not fallen. (Govt. Ex. 7.) There was no dangerous highwall to the right of the miner head.

Accordingly, I find that the excavator was not working under a dangerous highwall. Nor was it prying loose rubble from the base of the unstable highwall. Furthermore, I find the opinions of McDaniel, Asbury and Snodgrass, that if the remaining unstable highwall, which was leaning back against the wall from which it had become disconnected, did collapse, it would slide straight down the wall, more persuasive than the inspector's assumption that it would fall forward from the top. (Tr. 42, 85, 91, 105, 124.) Consequently, I find that the excavator was not working under an unstable highwall.

Further, the evidence does not support Inspector Hoskins' conclusion that the front-end loader was removed from under the unstable highwall. The Secretary's brief does not address this issue in its Conclusions of Law. (Sec. Br. 15-18.) Moreover, as previously noted, the inspector did not observe the removal, but based the charge on "the basis of the testimony that they had walked in there on foot. And the exact location of the forklift, I could not have determined at that time." (Tr. 56-57.) None of the miners who provided this information to the inspector testified at the trial. Even so, he placed the loader "between the highwall and the highwall miner on the right-hand side of the highwall." (Tr. 56.) This conforms to the testimony of McDaniel and Asbury that the front-end loader was well to the right of the hazardous highwall when it was removed. (Tr. 88, 106.) Therefore, I find that the loader was not removed from under a highwall that was broken loose and had not fallen.

In summary, the Secretary has not proven that NCC violated section 77.1006(a). The company reported the highwall collapse to MSHA as soon as it happened. Company employees arrived at the mine the next morning to begin cleaning up. They first drew up a safety plan to insure that no work was done under the remaining unstable highwall. As an additional safety measure, spotters were posted around the pit to sound the alarm in case the highwall started moving. They then began removing the damaged equipment and were almost finished when the inspector finally arrived on the scene. Based on a quick glimpse of the scene as he drove up, he concluded that work was being performed under an unstable highwall. However, his view was

made from a bad perspective and, thus, his conclusions were also bad. None of the other evidence supports his assumptions. Accordingly, I conclude that the Secretary has not met her burden of proof and the citation must be vacated.

Order

In view of the above, it is **ORDERED** that Citation No. 7525907 is **VACATED** and this proceeding is **DISMISSED**.



T. Todd Hodgdon
Administrative Law Judge

Distribution:

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/sr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 25, 2008

JIM WALTER RESOURCES, INC., : CONTEST PROCEEDING
Contestant :
 :
 : Docket No. SE 2006-141-R
v. : Citation No. 7686228; 02/15/2006
 :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : No. 7 Mine
Respondent : Mine ID 01-01401
 :
 :
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. SE 2007-08
Petitioner : A.C. No. 01-01401-87100
v. :
 :
 :
JIM WALTER RESOURCES, INC. :
Respondent : No. 7 Mine

DECISION

Appearances: Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;
Guy W. Hensley, Esq., Jim Walter Resources, Brookland, Alabama, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Notice of Contest filed by Jim Walter Resources (“Jim Walter”), challenging the issuance of a citation which alleges a violation of 30 C.F.R. § 75.400. Also at issue is a Petition for Assessment of Penalty filed by the Secretary of Labor seeking the imposition of a penalty for the alleged violation.

Subsequent to notice, the case was heard in Birmingham, Alabama on January 15 and 16, 2007. Jim Walter filed proposed findings of fact and conclusions of law on April 28, 2008. The Secretary filed a “letter brief” on April 29, 2008. On May 12, 2008, Jim Walter filed a brief in

response to the Secretary's "letter brief."¹

I. Introduction

Jim Walter operates the No. 7 Mine, an underground coal mine. On February 15, 2006, MSHA inspector John Smoot inspected the North A belt (also known as the North Main belt) located in an intake air entry. The belt transported coal from the working face outby to the belt header.

Smoot observed float coal dust on the roof, ribs, belt frame, and floor from crosscut three inby to crosscut ten, a distance of approximately 867 linear feet. He described the float coal dust as being black in color, and lying on top of rock dust. Smoot indicated that the accumulated coal dust presented a hazard of a fire or explosion due to the presence of various ignition sources in the entry. Smoot stated that in order to abate the violative conditions, he required that the area be adequately rock dusted to dilute the float coal dust to a non-combustible state.

In addition, according to Smoot, coal fines were located in horizontal layers, between strata of rock dust. The fines extended throughout the belt area from the north header to crosscut eleven, a linear distance of approximately 1,451 feet. He indicated that in one area he poked his four foot aluminum walking stick through the material, and the pole went down approximately forty-eight inches. Smoot testified that at three or four locations, he used the claws at the bottom of the walking stick to open a vertical hole, four by twelve to fifteen inches, that extended from the top of the material to a maximum depth of one foot. According to Smoot, he looked down the vertical holes and observed layers of coal fines between strata of rock dust.

Smith opined that the fines were still hazardous even though they had accumulated over a significant period of time. According to Smoot, should the coal dust in the area propagate a larger fire or explosion, the strata of rock dust on top and below the coal fines could be blown off exposing the coal fines. He opined that accordingly they could enlarge a fire started by the ignition of coal dust in the area. In order to abate the accumulation of coal fines, Smoot required Jim Walter to physically remove them by shoveling, a task that took 5,730 man-hours.

¹ Subsequent to the hearing, on June 9, 2008, Jim Walter filed Defendant's Exhibits 9, 10 and 11 that had been marked but not admitted as they were considered voluminous. Jim Walter was told to select only the relevant pages and offer them post-hearing. The latter filed these exhibits in their entirety. A showing has not been made that the exhibits are entirely relevant. Accordingly, only the day shift entry for February 14, 2006, and the owl shift report for February 15, are admitted as Defendant's Exhibits 9. The balance of the offered Defendant Exhibit 9 and Defendant's Exhibits 10 and 11 are not admitted, as they are not relevant to these proceedings.

II. Discussion

A. Violation of 30 C.F.R. § 75.400

Section 75.400, provides, as pertinent, that “[c]oal dust, including float coal dust deposited on rock-dusted surfaces . . . and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings. . . .”

According to Smoot, he observed float coal dust “[o]n the roof, the ribs, the belt frame, and the mine floor in an area from crosscut number three . . . to the belt drive at crosscut number ten” (Tr. 31-32), a distance of 876 feet. He noted the presence in the area of ignition sources such as cables, electrical motors, switches and rollers.

Larry Taft, who, at the time of the trial was a state mine inspector, was the only person to travel with Smoot on the day of the latter’s inspection. Taft testified that the cited dust was grey in color “the best that I can remember.” (Tr. 285) In later testimony, he indicated that based on his experience, float coal dust is “dark grey-- dark medium grey to black.” (Tr. 289) He was asked whether he formed an opinion as to whether the cited coal dust created a violative condition, and he responded as follows: “I don’t remember, you know best I can remember . . . - it didn’t look that bad. But then again, like I said, that’s the best I can remember. We’re talking two years ago.” (Tr. 286)

I find that Taft did not contradict Smoot’s testimony regarding the location of the coal dust on the roof, ribs, belt frame, and main floor, and that these accumulations extended 876 feet. Also, he did not contradict Smoot’s testimony regarding the presence of ignition sources in the area.

I find, based on the uncontradicted testimony of Smoot, that the quantity of float coal dust that had accumulated was such that it could have ignited. *See Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980).² Thus, I conclude that the Secretary has established that Jim Walter was not in compliance with Section 75.400.³

² I note that Smoot did not measure the depth of the accumulations, nor did he test for their combustibility. However, in establishing a violation, the absence of evidence of depth is not, in and of itself, a cause for vacating a Section 75.400 violation. *See Old Ben Coal Co.*, 2 FMSHRC at 2807. Further, Section 75.400 does not by its terms require testing to determine the percentage of combustible materials present. *See Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1290 (Dec. 1998).

³ Jim Walter challenges the finding in the citation at issue as well as the testimony of Smoot regarding the existence of layered coal fines in an approximately four foot high vertical wall throughout the length of the entry from the header inby to crosscut eleven. However, inasmuch as a violation of Section 75.400 has been established predicated upon the existence of

B. Significant and Substantial

1. Case law

A “significant and substantial” violation is described in Section 104(d)(1) of the Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial “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 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.

Id. at 3–4.

extensive float coal dust accumulations, it is not necessary, for purposes of establishing a violation under Section 75.400, to also establish the existence of accumulations of layered coal fines.

At the trial, Jim Walter also attempted to challenge the method of abatement required by MSHA, i.e. shoveling of the accumulation of coal fines. Since it is not necessary to decide the issue of the existence of accumulated coal fines, *a fortiori*, it is not necessary to discuss their abatement. In addition, Jim Walter has not addressed this issue in its Post Hearing Brief. Accordingly, it appears that Jim Walter has abandoned this argument. Further, there is not any provision in Section 105 of the Federal Mine Safety and Health Act of 1977 (“The Act”) that grants an operator an opportunity to challenge before the Commission the reasonableness of the method of abatement required by the inspector, i.e. the removal of the fines by shoveling.

2. Smoot's testimony

Smoot testified that the hazard associated with float coal dust along a belt line is “[t]he hazard of fire or explosion.” (Tr. 34–35) When asked to elaborate, he stated that “[b]elt rollers [located every ten feet] can go bad at any given time on the belt. If you have electrical equipment in the area. If there happened to spark or arc from the equipment, you could ignite the float coal dust. [sic]” *Id.* (Emphasis added). In this connection, he noted the presence in the cited area of “electrical belt motors,” “cables going to the drive,” and “an electrical control line running down the length of the belt. Which at various areas are switches to start and stop the belt. [sic]” (Tr. 35)

Smoot explained that a hazardous condition would result “[i]f a rock was to fall and cut one of the cables, you could get an arc out of a cable. Something’s happening to one of the motor casings, have an opening in one of the casings, you could get an arc igniting the float coal dust. [sic]” (Tr. 36)

He testified further as follows:

At various times the bearings either seize, or go bad in the bearing, or in the rollers, which could cause friction, heat. I have seen at times before sparks flying off the end of the rollers where the bearings were bad.⁴ Shaft can break on one end of the roller, or the roller fall down against the frame causing sparks from turning metal on metal. Creating heat again. . . . It could possibly cause a fire. [sic]

(Tr. 37) (Emphasis added).

3. Discussion

The record clearly establishes the first element set forth above, i.e., that Jim Walter did violate a mandatory standard, i.e., Section 75.400. Also, based on the testimony of Smoot, I find that the violation contributed to the risk of a hazardous condition, i.e., a potential ignition. The issue presented herein relates to the third element in the *Mathies* criteria, the existence of a reasonable likelihood that the hazard contributed to will result in an injury-producing event. In order to establish this element, the Secretary must prove that there was a reasonable likelihood of an ignition.

In this connection, Smoot’s direct testimony referred to the “happen[ing]” of sparking or

⁴ Smoot indicated that this is “[n]ot really” an “uncommon” occurrence. (Tr. 39)

arcing from electrical motors, switches, or cables, which “could” ignite the float coal dust. (Tr. 35) However, Smoot in his testimony, did not express any opinion as to the likelihood of the occurrence of sparking or arcing or a resulting ignition. Although his inspection notes contain a statement that an ignition was “reasonably likely due to energized electrical equipment in the affected area” (Government Exhibit 3, p. 3), there was not any evidence adduced at the hearing that would tend to establish that it was reasonably likely that the equipment would produce an electrical arc or spark resulting in ignition. Specifically, there was not any evidence adduced with regard to the existence of any physical condition that would make it reasonably likely that any equipment in the area would produce a spark or an arc. In this connection, Smoot admitted on cross-examination that he did not find any non-compliance problems with the electrical equipment. In the same fashion, whereas Smoot testified that a cable could produce an arc if a rock were to fall and cut it, he admitted on cross-examination that there had not been any roof falls in the cited area, nor were there any problem with the roof.

Similarly, whereas he testified that “at various times” bearing seize, or a roller shaft “can” break (Tr. 35), or fall against the belt frame causing friction, heat, or sparks, there was not any evidence adduced regarding the existence of any physical conditions that would tend to establish that these ignition-causing events were reasonably likely to occur. Indeed, Smoot indicated on cross-examination that there were not any “bad roller[s],” rollers turning in coal, cutting into “anything,” or “smoking.” (Tr. 99) Nor was the belt misaligned.

Based on all of the above, I find that the Secretary’s evidence is insufficient to establish that there was a reasonable likelihood of an ignition. Therefore, I find that the third element set forth in *Mathies*, 6 FMSHRC 1, was not established, and thus the violation was not significant and substantial.

C. Penalty

I find, for the reasons set forth above, II(B), *infra*, that the accumulated float coal dust could have resulted in a fire or explosion. Further, according to the uncontradicted testimony of Smoot, this hazard could cause burns or smoke inhalation. The citation at issue alleges that lost workdays or restricted duty could be expected. Jim Walter did not rebut this allegation. I thus find that the level of gravity of the violation was moderate.

Evidence was not adduced regarding the length of time the specific violative conditions had been in existence. However, I note that on February 2, 2006, Jim Walter was cited for the existence of float coal dust accumulations on the roof, rib and floor of the belt entry in question between crosscuts nine and seven for approximately 200 feet, the violative conditions were removed, and the cited areas were rock dusted the following day. It thus might be inferred that at least on February 2, 2006 an MSHA inspector did not observe float coal dust in any other areas in the entry in question aside from between crosscuts seven to nine. Thus, an inference might be

raised that the accumulations observed and cited by Smoot on February 15, had occurred sometime subsequent to February 3, 2006, and thus, at the maximum, had been in existence for a maximum of twelve days prior to being cited on February 15.

Jim Walter did not adduce any evidence that the accumulations had occurred just prior to Smoot's inspection.⁵ Indeed, the extent of the accumulations, running approximately 867 linear feet, would indicate that they had been in existence for some significant time prior to February 15, 2006. Due to the extent of the accumulations, and the lack of evidence adduced by Jim Walter that it did not have either notice or knowledge of the extensive accumulations,⁶ and for all the reasons set forth above, I find that the level of negligence was moderate.

The parties stipulated that the assessed penalty will not impair Jim Walter's ability to remain in business. The parties further stipulated that Jim Walter demonstrated good faith abatement. There was not any evidence adduced that the penalty sought would not be appropriate to the size of Jim Walter.

Considering all of the above factors as set forth in Section 110(i) of the Act including the operator's history of previous violations⁷ in the two year period prior to February 15, 2006, I find that a penalty of \$250.00 is appropriate for the violation found herein.

⁵ In its brief, Jim Walter refers to the Belt Crew Report for the day shift July 14, 2006 which contains the following notation: "1 cleaned N.M. T/V-3." Not much weight was accorded this entry as it is not clear whether the cleaning was performed in the cited area. Indeed, Jim Walter failed to produce any witness who either made this entry or who performed the cleaning.

⁶ Jim Walter cites the lack of any entry for the owl shift February 15, 2006, relating to the need for further work in the North Main belt area as support for an inference that it surveyed the entry, and determined it did not need additional cleaning and rock dusting. Inasmuch as Jim Walter did not adduce any direct evidence relating to conditions observed on the owl shift on February 15, any finding that the entry did not need additional cleaning would be mere conjecture.

⁷ Jim Walter argues, in essence, that the history of violations should not be accorded any weight because the Secretary did not establish the number of citations that related only to the mine at issue. Also Jim Walter argues that the data therein was inflated, as it lists citations issued to all its mines, and includes citations other than those that were paid or were finally adjudicated. Jim Walter bases the latter argument on limitations imposed at 30 C.F.R. § 100.3, which sets forth criteria to be considered by MSHA in proposing a penalty. In contrast, in the instant *de novo* proceeding the Commission and its Judge must consider Section 110(i) of the Act, which sets forth that one of the criteria to be considered is the operator's "history of violations." *Id.* It is significant that the phrase is not qualified, nor does it provide for any limitations, in contrast with Section 100.3.

ORDER

It is **Ordered** that the Notice of Contest, Docket Number SE 2006-141-R, shall be **Dismissed**. It is further **Ordered**, that, within thirty days of this decision, Jim Walter shall pay a civil penalty of \$250.00 for the violation of Section 75.400 found herein.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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August 7, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2007-62-M
Petitioner	:	A.C. No. 14-01597-100791
	:	
v.	:	
	:	Plant 4
NELSON QUARRIES, INC.,	:	
Respondent	:	

DECISION BASED ON SUPPLEMENTED RECORD

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 in this case. The motion stated that there were no issues to be resolved at a hearing and the Secretary was entitled to summary decision as a matter of law. Nelson Quarries opposed the motion on the grounds that there are several material facts in dispute.

By order dated April 9, 2008, I denied the Secretary's motion, in part. Although I held that the Secretary was entitled to summary decision on the merits of the violation, I held that there were issues of fact remaining with respect to the gravity and negligence criteria. The parties have been unable to settle the case but they asked that I issue my final decision on the merits based on the existing record. The record includes affidavits, responses to discovery, photographs, and other documents. I agreed to rule on all remaining issues in a written decision. As a consequence, Respondent's previously filed motion for settlement of case, dated June 16, 2008, is **DENIED**.

On May 31, 2006, MSHA Inspector Richard Tedesco issued Citation No. 6332035 alleging a violation of section 56.9200(d). The citation provides, in part, as follows:

Miners were being transported on the back of the 988F front-end loader c/n 016 while the loader was in motion. There were no provisions made on this loader to transport anyone except the loader operator.

The inspector issued an imminent danger order in conjunction with this citation. The safety

standard provides that “persons shall not be transported . . . outside cabs, equipment operators’ stations, and beds of mobile equipment, except when necessary for maintenance, testing or training purposes, and provisions are made for secure travel.” The inspector determined that a fatal injury was highly likely, that the violation was significant and substantial (“S&S”), and that the company’s negligence was moderate. The Secretary proposed a penalty of \$1,100.00 under her special assessment regulation at 30 C.F.R. §100.5.

While conducting an inspection at Plant 4, Inspector Tedesco observed a miner driving a loader with two employees riding on the back of the loader. The employees were not in the cab and were sitting behind the cab. There were no seats or seatbelts provided for these employees. Inspector Tedesco issued a verbal imminent danger order and instructed the miners to get off the loader. The miners riding on the back of the loader were not engaged in testing or training activities and, in any event, there were no suitable provisions made for secure travel. Inspector Tedesco determined that the violation was S&S and that the company’s negligence was moderate because it had instructed miners not to ride on the back of equipment.

As I stated in my summary decision order, I find that the Secretary established a violation of 56.9200(d). Nelson Quarries conceded as much given that the Mine Act has been construed as a strict liability statute. The remaining issues are the gravity, including the S&S designation, and negligence criteria.

I. GRAVITY OF THE VIOLATION

Nelson Quarries contends that the violation was neither serious nor S&S because the loader was traveling over smooth terrain, there was little change in elevation on the route traveled by the loader, the loader was traveling at a slow speed for a short distance, and the miners were behind the railing on the back of the loader. The Secretary argues that “the danger of riding on equipment, outside the loader’s cab, poses a significant and substantial hazard regardless of the nature of the terrain upon which the vehicle travels” or other site-specific factors. (S. Reply to Resp. Opposition to Sum. Dec.). I denied the motion for summary decision because I determined that the environmental factors cited by Nelson Quarries are directly related to the gravity criterion. I rejected the Secretary’ argument that the violation should automatically be classified as S&S.

In his affidavit, Inspector Tedesco testified that the two employees were about nine feet above the ground and about three and a half feet above the top of the loader’s rear tires. Affidavit ¶ 4. He stated that the men were “sitting behind [the handrails on the loader] and were therefore not afforded any protection by the rails.” *Id.* The men were sitting on the engine cover for the loader. There were no seatbelts or other restraining devices provided. The inspector also testified that “the terrain they were traveling at the time I observed them was bumpy and rutted with elevation changes of approximately 15 feet.” *Id.* at ¶ 6. He said that he designated the citation as S&S because “a fall from such elevation under such conditions was reasonably likely to occur and could lead to a serious and/or fatal injuries.” *Id.*

Nelson Quarries submitted the affidavit of Eugene Andres, who accompanied Tedesco during the inspection. He testified that Nelson Quarries was in the process of assembling the plant at the time of the inspection. Affidavit ¶ 4. He further testified that the miners were "riding behind the cab of the loader, seated on the engine hood, with their feet on the loader platform." *Id.* at ¶ 10. The miners were "hanging onto the platform railing and facing forward." *Id.* at ¶ 11. The loader was "moving very slowly, in low gear, coming out of the water." *Id.* at ¶ 12. The pit had about two feet of water in it at the time of the violation and the loader was returning from a water pump installed to remove the water. *Id.* at ¶ 9. The miners had been checking fluid levels and performing maintenance on the pump. *Id.* at ¶ 16. They were returning at the time the citation was issued. Miners are required to ride in trucks when moving about the plant but "the water was too deep for the pickup to travel to the pump." *Id.* at ¶ 15. The miners told Andres that they considered riding in the loader bucket but "because of safety concerns, thought it better to climb up on the loader platform where it would be safe." *Id.* at ¶ 17. The miners rode "a distance of 200 feet to the pump and 200 feet away from the pump over fairly smooth terrain and at a low speed." *Id.* at ¶ 18. "They did not cross ground that was bumpy and rutted and involved a 15 foot change in elevation as stated in the Inspector's affidavit." *Id.*

The evidence conflicts in several respects. The parties disagree as to the condition of the terrain. It is not entirely clear where Inspector Tedesco was looking when he determined that the terrain was bumpy and rutted. Nelson Quarries submitted several photographs of the area where the citation was issued. (Attachment to Nelson's Response to Motion for Summary Decision). It is not entirely clear when the photos were taken, but it is clear that the water had been mostly drained. The photos reveal that the entire area is mostly smooth with only a slight grade. I credit the testimony of Mr. Andres on this issue. Based on his affidavit testimony and the photographs, I find that the terrain was mostly smooth. I also find that the loader was traveling at a low rate of speed and there was only a slight elevation change. The two miners were sitting on the engine hood behind the cab and their feet were on the platform. They were holding onto the platform railing. Photographs provided by Nelson Quarries show the loader hood, platform, and the railings. *Id.*

A violation is classified as S&S "if based upon the 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." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 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 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June

1996).

I find that although the Secretary established the first, second, and fourth element of the *Mathies* S&S test, the third element was not established. The preponderance of the credible evidence convinces me that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. Simply put, it was highly unlikely that any of the miners riding outside the cab of the loader would fall off the loader or would otherwise injure themselves while they were on the loader. The terrain was relatively smooth, the loader was traveling at a low rate of speed, and the distance traveled was less than a tenth of a mile. Consequently, the inspector's S&S determination is vacated. In addition, the inspector's gravity determinations are modified as follows: the likelihood of an injury is modified to "unlikely," the type of injury that reasonably could be expected if there were an accident is reduced to "lost workdays or restricted duty." Given the environmental factors discussed above, it is unlikely that anyone would suffer a fatal injury as a result of this violation.

II. NEGLIGENCE OF THE MINE OPERATOR

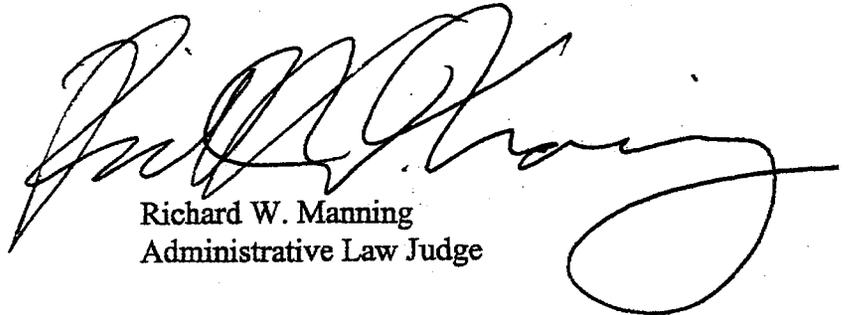
Nelson Quarries argues that its negligence should be reduced to low because the two employees violated a written company policy. It claims that it did everything it could do to let its employees know that they "were not permitted to engage in this cited behavior." (Nelson Response to Sec'y Motion for Summary Decision at 2). The Secretary contends that the inspector's designation of moderate negligence was appropriate because Nelson Quarries knew or should have known of the violation but there were some mitigating circumstances.

I affirm the inspector's moderate negligence determination. The company's written policy states that "[u]nder no circumstances shall any person ride in a loader bucket or on the loader while it is moving." (Attachment to Nelson's Motion for Settlement of Case). Nevertheless, the operator apparently did not have any means for the three employees to reach the pump for servicing except to have two of them ride outside the cab of the loader. These two employees believed that, under these circumstances, the safest way for them to reach the pump was to ride on the outside of the loader. The employees had little choice but to violate the policy. This constitutes moderate negligence on the part of Nelson Quarries.

III. APPROPRIATE CIVIL PENALTIES AND ORDER

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Plant 4 had a history of about 30 violations in the two years prior to May 31, 2006, based on my two decisions following the June 2007 hearing. Most of these previous violations were non-S&S. Nelson Quarries is a rather small operator and its quarries are small. The violation was abated in good faith. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalty of \$150.00 is appropriate for this citation.

Accordingly, Citation No. 6332035 is **MODIFIED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$150.00 within 40 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, D.C. 20001

August 20, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2007-293
Petitioner	:	A.C. No. 46-08798-111222
	:	
v.	:	
	:	
IO COAL COMPANY,	:	Europa Mine
Respondent	:	

DECISION

Appearances: Benjamin Chachkin, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Petitioner
David J. Hardy, Esq., Spilman, Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent

Before: Judge Barbour

In this civil penalty proceeding brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act or Act") (30 U.S.C. §§ 815, 820), the Secretary of Labor ("Secretary"), on behalf of her Mine Safety and Health Administration ("MSHA"), petitioned for the assessment of civil penalties for two alleged violations of 30 C.F.R. § 75.220(a), a mandatory safety standard for underground coal mines requiring a mine operator to develop and follow a roof control plan suitable for its mine and the conditions therein. The alleged violations were set forth in a citation and an order issued pursuant to section 104(d)(1) of the Act. 30 U.S.C. § 814(d)(1).

In a letter received prior to trial, counsels advised me they had settled their differences regarding all allegations relating to the citation and the only issues remaining to be resolved were those relating to the order. I approved the settlement at the hearing. Tr. 19-20. The settlement's terms are reiterated at the end of this decision.

In issuing the order for the alleged violation of section 75.220(a)(1), the inspector found the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of IO Coal Company's (IO's) unwarrantable failure to comply with its roof control plan. Therefore, in addition to the fact of violation, the inspector's S&S and unwarrantable findings were at issue, as was the appropriateness of the Secretary's proposed civil penalty of

\$6,900 for the alleged violation. The hearing was conducted in Charleston, West Virginia. Testimonial and documentary evidence were offered by both sides. Subsequently, counsels submitted helpful briefs.

STIPULATIONS

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction . . . [over] these . . . proceedings pursuant to Section 105 [(30 U.S.C. § 815)] of the . . . [Act].
2. IO . . . is the operator of the Europa Mine.
3. [O]perations of the Europa Mine are subject to the jurisdiction of the Act.
4. [T]he maximum penalty that [can] be assessed for [the violation] will not affect the ability of IO . . . to remain in business.
5. MSHA inspector Jack Hatfield and MSHA field [office] supervisor Terry Price . . . were acting in [their] official capacities and as authorized representatives of the Secretary . . . when the . . . [order] involved in this proceeding [was] issued.
6. [A t]rue cop[y] of . . . the . . . [order] at issue in this proceeding . . . [was] served on IO . . . as required by the Act.
7. Government Exhibit [1] is an authentic copy of [O]rder [No.] 7252442 . . . and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the [authenticity] of any statements asserted therein.

* * *

13. Government Exhibit [No. 6] is an authentic copy of page six of the roof control plan in effect at the . . . [m]ine at the time of the issuance of [Order No.]

7252422.

14. Government Exhibit [No. 8] is an authentic copy of page six of the [roof] control . . . plan in effect at the . . . [m]ine on August [16], 2007.
15. Government Exhibit [7] is an authentic copy of Respondent's Answers to Interrogatories pages two through six.
16. [T]he [violation] involved in this matter [was] abated in good faith.
17. Government Exhibit 10, the violat[ion] data sheet[,] may be admitted into evidence.
18. Government Exhibit 11, the narrative findings for special assessment[,] sets forth 6 criteria . . . [found in] 30 C.F.R. § 100.3(a) and other information available to the [O]ffice of [A]ssessments [in calculating the proposed penalty of] \$6,900 [for the violation charged in] [O]rder [N]o. 7252422.
19. Government Exhibit 12, the assessed violation history report[,] . . . accurately sets forth the history of violations at the . . . [m]ine for the time period specified and may be admitted into evidence and used in determining civil penalty assessments for the alleged violations in this case.
20. Government Exhibit [9] is . . . an accurate copy of the . . . diagram marked at . . . [the] deposition [of mine foreman Fred Thomas] .
21. IO . . . may be considered a large mine operator for purposes of 30 U.S.C. [§] 820(i) and . . . [the mine] can be considered a large mine.

Tr. 12-16.¹

¹After the stipulations were read into the record, counsel for IO stated the company was withdrawing from stipulations 8 through 12, which concerned citations other than the order at

THE INSPECTOR AND THE ORDER

MSHA Inspector Hatfield began working in underground coal mines upon graduating from high school in 1970. He was employed by several different companies and held various positions, including section boss, mine foreman, safety engineer, and safety director. In October 2004, he started working for MSHA as a coal mine inspector. Tr. 31-33. In April 2006, he was assigned to inspect IO's Europa Mine. Tr. 98. On the morning of June 12, 2006, Hatfield conducted an inspection of the mine in which he found one of its working sections (the 005 MMU section) contained adverse roof conditions in the form of "multiple inadequately supported kettle bottoms and unsupported surface cracks." Gov't Exh. 1. In Hatfield's opinion, the conditions violated Safety Precaution No. 7 of the mine's roof control plan, which stated:

When adverse roof conditions are encountered[,]
such as horsebacks, slicken-sided slip formations, clay
veins, kettle bottoms, surface cracks, mud streaks or
similar types of conditions in the mine roof, supplemental
roof supports shall be installed in addition to primary
roof support as appropriate in the affected area.²

Gov't Exh. 6.

As a result, Hatfield issued Order No. 7252422, charging the company with a violation of its approved and adopted roof control plan.

PRIOR CITATIONS, SURFACE CRACKS, AND KETTLE BOTTOMS

Before testifying about the order, Hatfield was asked about prior citations alleging violations of section 75.220(a)(1). He stated the first such alleged violation was set forth in Citation No. 7252337, issued on May 1, 2006. Gov't Exh. 2. The citation was issued for specified "[a]dverse roof conditions" on the 004 MMU section of the mine and for the lack of "effective supplemental support." Gov't Exh. 2. According to Hatfield, the "adverse roof conditions" included "surface cracks, kettle bottoms, [and] mud streaks" at several locations. Tr. 34; Gov't Exh. 2.

Hatfield was familiar with surface cracks. He had worked in mines whose roofs exhibited them. Tr. 97. Hatfield described the cracks as those that "make their way to the surface." Tr. 35. He stated they are revealed when coal is extracted. Tr. 129. Usually, they are

issue. Tr.17-18.

²In addition to requiring supplemental roof supports, the plan contained a list of the permissible types of supplemental supports. Resp. Exh. 10.

discolored (they can be yellow or orange). Sometimes they have a pronounced gap. Frequently they exhibit mud streaks and/or exude water. A surface crack can be a single crack extending from the coal seam through the overburden to the surface. Tr. 34-35; *see also* Tr. 207, 236-237 (testimony of mine foreman Frederick (“Fred”) Thomas). Or, a surface crack can be a series of cracks that intersect with one another and lead from the mine roof to the surface. Tr. 35. (“[I]t may come up and adjoin another crack, intersect with another crack and then go to the surface.” *Id.*) Hatfield offered an explanation of how a person on the surface can determine if a mine below has surface cracks: “If you go out on a . . . cold morning and . . . you look across the field . . . you’ll see warm air coming out [of the crack].”³ Tr. 35-36.

One hazard associated with surface cracks that particularly concerned Hatfield was “boxing out.” Tr. 38. The surface cracks “box out” when they interconnect above the roof and create a “chunk of rock” that is likely to fall if it was not supported. Tr. 39. In Hatfield’s opinion, roof bolts do not necessarily offer adequate support for a “boxed out” area because the surface cracks can connect above the roof bolts. Unless a strap is installed on the surface of the roof to hold the boxed out area in place, the area can fall despite the presence of the roof bolts. *Id.*

Hatfield also was familiar with “kettle bottoms.” He stated, “I’ve seen them since I started at the mine. [G]enerally, a kettle bottom is a piece of petrified heavy rock strata that is circular . . . it may be a little oval or oblong and . . . have . . . coal encrusted around . . . [its] circumference.”⁴ Tr. 37-38. Hatfield explained kettle bottoms can be very heavy. In addition, the visible portion of a kettle bottom is not necessarily an indication of the kettle bottom’s size. For example, a kettle bottom with an exposed diameter of two feet can have an unexposed diameter of four feet. Tr. 38. The kettle bottom can “funnel out” above the roof. *Id.*

³Terry Price, an MSHA field office coal mine inspection supervisor and Hatfield’s boss, essentially shared Hatfield’s understanding of surface cracks. He stated:

A surface crack usually is in the roof down through the ribs Sometimes a surface crack will have particles of mud, sometimes it will have particles of rock; sometimes it will just be a crack without particles. The main characteristic has been the presence of water. Generally [the water produces] a stain

Tr. 163-164.

⁴Price described kettle bottoms more succinctly. They are “basically . . . petrified tree trunk[s] surrounded by a thin layer of coal.” Tr. 164. The size of a kettle bottom depends on “how big the tree trunk was.” *Id.*

On May 17, 2006, Hatfield issued another citation at the mine – Citation No. 7252378. Hatfield gave the citation to mine foreman Thomas. Tr. 44. The citation concerned roof conditions on the 006 MMU section. Gov't Exh. 3; Tr. 43. According to Hatfield, there were “surface cracks running parallel and perpendicular with . . . [an] entry” and unsupported kettle bottoms. *Id.* After he issued the citation, Hatfield stated he reviewed the roof control plan, particularly Safety Precaution No. 7, with Thomas. Tr. 45. The company abated the condition by installing supplemental roof support in the form of T-3 or T-5 straps.⁵ *Id.*; Tr. 148.

On June 5, 2006, Hatfield issued another citation to Thomas, Citation No. 7252411. Gov't Exh. 4; Tr. 45-46. The citation concerned roof conditions, also located on the 006 MMU. Tr. 46. As Hatfield recalled, he found “an unsupported kettle bottom in the . . . roof about 60 feet outby the last open crosscut, number five entry.” *Id.* Hatfield measured the kettle bottom. It was circular and about two feet in diameter. The kettle bottom had “coal edging,” which Hatfield believed made it more “likely to fall.” *Id.* Hatfield feared the falling kettle bottom would hit and injure or kill a miner. Tr. 46-47. After issuing the citation, Hatfield testified he discussed kettle bottoms with company officials in order to “make them understand what I classed as a kettle bottom.” Tr. 47. He told them they should pay more attention to the problem. *Id.*

On June 8, 2006, Hatfield issued Citation No. 7252417 to Thomas. Gov't Exh. 5; Tr.47. Once more the citation concerned kettle bottoms on the 006 MMU section. Tr. 46. Hatfield explained he issued the citation for an unsupported kettle bottom located in the roof of the last open crosscut between the number one and number two entries. Tr. 47-48. The kettle bottom was approximately two feet in diameter and had a “coal and slicken-sided edging.” Tr. 48; *see* Gov't Exh. 5. Because the kettle bottom lacked supplemental support, Hatfield believed it presented a hazard to miners who traveled on foot through the area on all shifts. Tr. 48. He noted the 006 MMU section had been cited for the same condition previously on two occasions. *Id.* As with the previous citations, Hatfield testified he showed management officials a copy of the roof control plan, including Safety Precaution No. 7.⁶ Tr. 48.

⁵Several different types of metal straps had been used at the mine as supplemental roof support. The least substantial were “bacon strips,” thin, short metal straps anchored at the ends with roof bolts and roof bolt plates. The bacon strips were approximately five feet long and 22 inches wide. Tr. 124-125. They often were used to support small kettle bottoms or small rocks that could not be pulled or scaled down. Tr. 40. The company stopped using the strips a year or two before Hatfield issued the contested order. Tr. 370. They were replaced by “T-3” and “T-5” metal straps. The T-3 and T-5 straps were thicker and longer than the bacon strips. They could hold more weight and cover greater areas. Tr. 40.

⁶ However, Thomas asserted he and Hatfield did not discuss the plan and the precaution (Tr. 251), and Thomas strongly disagreed with Hatfield’s assessment as to the existence of the supposed kettle bottoms. He stated, “I never knew what . . . Hatfield was going to do from one time to the next. He’d call anything a kettle bottom. In my professional opinion . . . Hatfield did

THE ORDER

The stage was now set for the issuance of the contested order. On June 11, 2006, Timothy ("Tim") Beckner, the mine superintendent, was at the mine. He traveled to the 005 MMU section. Beckner was "impressed" by what he saw. Tr. 365. He described the section as "good and clean." *Id.* The roof appeared well supported. There were, he testified, T-5 metal straps "in every entry and every crosscut." Tr. 368.

The next day Hatfield had a very different impression of the section. He arrived around mid-morning and traveled to the 005 MMU section. Thomas was with him. Section foreman Michael ("Mike") Jefferson was also included in the group at various times.⁷

Hatfield first checked the section for imminent dangers. As he did, he testified he noticed the roof on the section contained surface cracks and other kinds of cracks, as well as unsupported kettle bottoms. In fact, according to Hatfield, there were more kettle bottoms on the section than on any other areas of the mine he had inspected. Tr. 52. Asked about the number of kettle bottoms, Hatfield stated, there were "quite a few . . . more than a dozen." *Id.* He described them as "pretty obvious." *Id.* Hatfield agreed there were "some straps" installed as roof support, but he could not remember where they were, how many there were, and whether they were T-3 or T-5 straps. Tr. 99, 104. As Hatfield began pointing out the cracks and kettle bottoms, Thomas stated he became "really frustrated" with Hatfield. Tr. 200.

The men walked up the number 4 entry and then walked to the number 1 entry and across the face, at which point Hatfield traveled back to the number 7 entry. Tr. 190. After seeing the section's roof with what he believed were inadequately supported and unsupported surface cracks and kettle bottoms, Hatfield concluded the company was not complying with its roof control plan. Hatfield believed he had warned IO officials before about the need for roof control plan compliance. Therefore, Hatfield told Thomas he was issuing a section 104(d)(1) order, closing the section. 30 U.S.C. § 814(d)(1). Tr. 51-52. Thomas was "very upset." Tr. 205.

Hatfield maintained, prior to issuing the order when he pointed out the conditions to Thomas and/or to Jefferson, "they never said anything." Tr. 114. While not specifically denying this, Thomas asserted Jefferson tried to talk to Hatfield, and Hatfield "absolutely would not talk to him."⁸ Tr. 204. Although they might not have said anything directly to Hatfield, Thomas was adamant he and Jefferson disagreed with Hatfield's assessment of the area. *Id.*

not understand the word." Tr. 252.

⁷Jefferson began working as a section foreman at the mine in 2003. Eight miners worked under his direction. Tr. 304-305.

⁸Beckner described Hatfield as "arrogant" and "overbearing." Tr. 388. He added, "[Y]ou just can't talk to him." *Id.*

IO'S PHOTOGRAPHIC EVIDENCE-KETTLE BOTTOMS AND SURFACE CRACKS

At the hearing, the company introduced into evidence several photographs of the section's roof. According to Thomas, although the photographs did not depict every condition the inspector pointed out, they represented the types of conditions Hatfield observed. Tr. 206, 219, 222 The photographs were taken by Michael ("Mike") McMullen, who was in charge of the engineers working at the mine.

Thomas testified the area depicted in Respondent's Exhibit 1 (an area located in the No. 7 entry (Tr. 226, 259)) was thought by Hatfield to be an inadequately supported kettle bottom, but in Thomas's view the area did not "look anything like a kettle bottom." Tr. 201. Jefferson agreed. He thought the photograph showed "just slate, [a] sloughed area." Tr. 315, *see also* Tr. 349. According to Jefferson, the photograph was a good example of the type of areas Hatfield thought were kettle bottoms, but in fact were not. *Id.* Tim Beckner also agreed the photograph did not depict a kettle bottom. Rather, it showed "an indentation in the top." Tr. 380. Like Jefferson, Beckner felt the photograph was a good illustration of the kind of formation Hatfield mistakenly thought was a kettle bottom. Tr. 380-381.

Thomas also complained that Hatfield misidentified surface roof cracks he thought needed supplemental support. In Thomas's view, the formations Hatfield thought required support were not surface cracks. Rather, they were layered roof strata, where "one layer" of rock abutted another layer. Tr. 194. Thomas testified the photograph entered into evidence as Respondent's Exhibit 3 was an example of Hatfield's errors. The photograph showed layered shale. Tr. 383, 418. In Thomas's opinion, Hatfield really did not know what a surface crack was. Thomas stated, "[H]e was calling things that [weren't] surface cracks, surface cracks. He was calling two or three different types of situations surface cracks. He would call a stress crack . . . a surface crack⁹ He was referring to layered strata as surface cracks." Tr. 229-230. In fact, Thomas testified he saw no unsupported surface cracks when he traveled the section with Hatfield. Tr. 203. Thomas was sure all of the kettle bottoms and surface cracks that were present on the section had been supported as the plan required. *Id.*; *see also* Tr. 207. He stated, "There [were] metal straps all over that section." Tr. 199. He would have been comfortable sitting under the roof anywhere on the section. *Id.* In his opinion of the Respondent's photographic exhibits, the only one that showed a surface crack was Respondent's Exhibit 6, and that crack was properly supported with T-5 straps.¹⁰ Tr. 196; Resp. Exh. 6.

After Hatfield issued the order, Thomas asked his superiors to look at the section, and

⁹Thomas maintained the photograph entered into evidence as Respondent's Exhibit 4 represented a stress crack, not a surface crack. Tr. 230.

¹⁰In fact, mining engineer Fabian Boltralik thought the crack had more support than was necessary. He termed the support, "overkill." Tr. 422.

Jefferson asked his miners to halt all work. As a result, no additional roof support was installed until the section was seen by higher mine management officials.

THE CITED CONDITIONS AND THE DIAGRAM

Prior to the hearing, Thomas prepared a diagram (Gov't Exh. 9) depicting the cited areas of the 005 MMU section. *See* Stip. 20. Thomas's diagram lacked four outby coal pillars. They were added by Hatfield at the hearing. Tr. 60; Gov't Exh. 9. As depicted on the diagram, the faces of the 005 MMU section's seven entries were toward the top of the diagram. The outby areas of the mine were toward the bottom. Tr. 57.

Hatfield marked the diagram to indicate the locations of the cited cracks and kettle bottoms. He indicated the presence of cracks by drawing "wavy" lines. He indicated the presence of kettle bottoms by drawing circles. Gov't Exh. 9. The cracks and kettle bottoms extended outby three crosscuts from the face. Tr. 59.

In marking the diagram, Hatfield did not distinguish between surface cracks and other kinds of cracks. Tr. 111. He was asked if the cracks he cited and placed on the diagram were surface cracks. He replied, "I feel like . . . I saw surface cracks, but as far as putting them in that location [on the diagram], I didn't know that it was surface cracks but they are cracks – they were cracks in the roof." Tr. 70; *see also* Tr. 151. A short time later he stated, although his notes did not reflect the presence of surface cracks, "I do know that there were unsupported surface cracks." Tr. 70; *see also* Tr. 72. He also testified the cracks about which he was concerned were "intersecting . . . were multiple in nature . . . [and] they created an exposure of the workers to a roof fall." *Id.* He explained that when a crack exists, no one can determine how far it goes up into the roof or at what direction. It is possible for the crack to "box out" other cracks and leave a wedge of self supporting roof material, a wedge that is likely to fall. Tr. 71-72. The inspector stated all of the cracks he marked on Gov't Exh. 9 and all of the cracks he mentioned in his notes were adverse roof conditions requiring supplemental support. Tr. 73.

In Hatfield's opinion, it was the section foreman who should make a judgement call as to whether supplemental support was required. Tr. 130; *see also* Tr. 176. Mine superintendent Beckner agreed. Tr. 380. Beckner stated, if the roof was cracked the section foreman should look for several things, i.e., whether there were multiple cracks, whether a crack had a rock stuck in it, whether a crack was gapped with water and mud running out of it, and whether there was any material falling out of the crack. *Id.*, Tr. 385. All of these things were indices of surface cracks.

As for the kettle bottoms, Hatfield reviewed his notes and testified he saw 15 that were unsupported in the cited area. Tr. 69. However, his notes did not reflect all of the kettle bottoms he observed on the section. Rather, his notes were a "running document" he kept as he traversed the entries and crosscuts. Tr. 70. Hatfield did not record the diameters of the kettle bottoms, and he could not include any dimensions on the diagram. Tr. 149-150.

Hatfield especially noted, in the No. 3 entry two breaks outby the last open crosscut, there was a kettle bottom and near the kettle bottom were cracks that almost touched the kettle bottom's outside edges. He believed the cracks "loosen[ed] . . . the kettle bottom and . . . [roof] strata could fall." Tr. 64.

According to Hatfield, one way to support a kettle bottom was to install a roof bolt to one side of the formation and have the plate of the roof bolt extend over part of the kettle bottom.¹¹ Tr. 120-121. There were kettle bottoms on the 005 MMU supported in this way. Tr. 121. As for mine management's contention the formations he thought were kettle bottoms were not, Hatfield was sure he was right: "I've seen a lot of kettle bottoms and I don't know how I misidentified them." Tr. 83. He pointed out on June 12, prior to issuance of the order, no one took issue with his identification of the formations, and the same was true in connection with the previous citations he issued involving kettle bottoms. Tr. 84.

Hatfield testified miners working on the section were required to travel through the cited area. Tr. 67, 75. He believed the inadequately supported and unsupported cracks and kettle bottoms were reasonably likely to result in falling roof and disabling injuries to the miners. Tr. 75-76; Gov't Exh. 1. He termed the conditions "very dangerous." Tr. 76. He also believed IO was highly negligent in allowing the conditions to exist. He emphasized that prior to June 12, he had talked to management officials about the need for supplemental support, "and it just seemed . . . [he] wasn't getting anywhere with just writing a citation." Tr. 76.

THE CITED CONDITIONS FROM MANAGEMENT'S VIEWPOINT

Jefferson could not accompany Hatfield during all of the inspection. After Jefferson left, Hatfield and Thomas continued across the section. When Jefferson learned Hatfield was issuing a withdrawal order closing the section, Jefferson was surprised. Tr. 307. He gathered the crew and sent them out of the section. Tr. 308. Jefferson then walked with Hatfield back across the section. Jefferson had a can of paint and he "paint[ed] places where [Hatfield] felt an extra bolt or strap should go." Tr. 309. Jefferson maintained the places Hatfield wanted him to mark "really didn't make sense . . . because . . . straps . . . and bolts already [were] there." *Id.* In addition, Hatfield "was pointing kettle bottoms out that [weren't] kettle bottoms." *Id.* Rather, they looked to Jefferson like "different layers of . . . slate." *Id.* While Jefferson agreed there were some kettle bottoms in the section's roof, they had all been properly supported. Tr. 310, 311. When Hatfield pointed out what he thought was an unsupported kettle bottom or unsupported crack, Hatfield would ask Jefferson if he agreed. Jefferson testified, "I never, not one time, agreed with him on anything he said." Tr. 319. (However, a close reading of Jefferson's testimony shows he did not testify he orally disagreed with Hatfield.)

Jefferson described the 005 MMU section as, "[O]ne of the best conditioned sections I've

¹¹Superintendent Beckner agreed this was a good way to provide a kettle bottom with support. Tr. 379.

had.” Tr. 320. Not only were the general roof conditions good, his crew had installed additional straps to make the roof “extra safe” because Jefferson had “preached to them every day, the mine’s only [as] safe as they make it.” *Id.* In fact, when Hatfield arrived at the 005 MMU section, the crew already had installed supplemental support in the form of T-5 straps where support was needed in the entries and cross cuts. Tr. 311, 313. Jefferson described his crew as “pretty upset” when they had to withdraw from the section. Tr. 325.

Jefferson was asked if he saw 15 unsupported kettle bottoms across the section. He answered, “No.” Tr. 311. Moreover, as was usually the case, the pre-shift report for the section had been called out to him before the day shift started. The pre-shift examiner did not mention any adverse roof conditions.¹² Tr. 324.

In the meantime, after Hatfield issued the order, Thomas called Tim Beckner and told him what had happened. Tr. 371. Beckner immediately went to the mine and traveled to the section. Hatfield was still there when Beckner arrived. Beckner asked Hatfield to walk the section with him and to point out the conditions needing supplemental support. Hatfield refused and left the mine. Beckner then traveled the section with Thomas. Beckner testified the formations pointed out to him as being unsupported kettle bottoms were not. They were “indentations in the fault, that were strapped . . . or just little rolls or bumps.”¹³ Tr. 377. Two or three times while Beckner and Thomas were traveling the section, Jefferson joined them. Jefferson expressed disbelief a withdrawal order had been issued. He said, “I thought we [were] doing a good job.” Tr. 394.

Boltralik also went to the mine after being informed of the order. Boltralik was a professional mining engineer. Tr. 403. He had been employed for approximately 29 years in underground coal mining. Tr. 405. Mike McMullen was his supervisor. Tr. 407. One of their jobs was to keep the mine’s roof control plan current and to resolve issues regarding the plan. Tr. 410.

McMullen came to the mine, and he and Boltralik went to the 005 MMU section. Tr. 268. By the time they reached the section, Hatfield was gone. Tr. 292. Boltralik, McMullen, and Thomas looked at the entire area covered by the order. Tr. 410, 430. Thomas pointed out at least a dozen areas Hatfield believed were in violation of the roof control plan. Tr. 430. Some of the areas were marked with paint and some were not. *Id.* McMullen described his general reaction to the roof on the section: “I felt . . . they were doing a good job.” Tr. 271. Tr. 272. “I did not see anything to cause me any concern.” Tr. 277-278.

¹²The written report of the pre-shift examination could not be located and was not offered into evidence.

¹³When Beckner referred to “rolls” or “bumps,” he meant “just a little dent or . . . a little lump . . . something that is round, or just a round indentation in the top . . . a formation in the rock strata.” Tr. 377-378

As Thomas showed Boltralik and McMullen roof areas Hatfield indicated were in violation of the plan, McMullen took photographs. Respondent's Exhibits 1 - 7 are several of the photographs. Tr. 269. According to McMullen, he photographed areas where Thomas said Hatfield "implied there was a crack or a kettle bottom and there wasn't." Tr. 278. Boltralik estimated the photographs represented 20 percent of the cited area. Tr. 435.

The company's witnesses generally agreed the formations pictured in the photographs did not require supplemental support and did not violate the plan. For example, McMullen termed the crack pictured in Respondent's Exhibit 4 as a "stress or tension crack," one commonly seen in mines and one not requiring supplemental support. Tr. 280; *see also* Tr. 284-285. He was not concerned about the crack because it had not "gapped." Tr. 285. Beckner stated the photograph showed "possibly a small hairline crack," nothing that would require supplemental support. Tr. 399. For his part, Jefferson did not believe Respondent's Exhibit 4 actually pictured a crack. Rather, the photograph showed "flaking." Tr. 333, 334. The area certainly did not need supplemental support. Tr. 354-355.

According to McMullen, another surface crack was shown in Respondent's Exhibit 6. He termed what was pictured as "a crack with a gap in it." Tr. 281. However, he was quick to note it had been properly supported with either a T-3 or a T-5 strap as required. Tr. 281. In fact, McMullen acknowledged there were "a lot" of surface cracks at the mine (Tr. 287-288), but none lacked requisite support. Tr. 281.

With regard to Respondent's Exhibit 3, McMullen stated he did not see any surface cracks. He thought the picture probably depicted "layers [or roof rock] that just broke up and there's no crack . . . not even a hairline crack." Tr. 281. Jefferson also did not see any unsupported cracks. Tr. 318.

Finally, McMullen did not think Respondent's Exhibit 1 showed a kettle bottom. Instead, it appeared to be a photograph of a place where a kettle bottom had been "mined out." Tr. 282.

HATFIELD'S JUNE 13 VISIT TO THE MINE

Hatfield returned to the mine around mid-morning on June 13. He was accompanied by Terry Price, his supervisor. *Id.*, Tr. 166. After they arrived, Doug Williams, the company's operations manager; Tim Beckner and Fred Thomas advised Price they disagreed with the order. They believed the 005 section should not have been shut down. Tr. 152-153. Price listened and then traveled underground to the section with Hatfield. Hatfield testified the section still contained unsupported cracks and kettle bottoms. Price described the roof on the section as containing "large cracks." Tr. 167.

Hatfield maintained he saw one particularly noticeable unsupported kettle bottom, and he asked Williams, who was traveling with him, if he would look at it. Williams did, and he then ordered the roof bolting machine operator to install a strap across it. Tr. 79. After that was done,

Price decided a part of the section could be “released” from the order and production could resume. The “release” applied to entries four through seven. The work of providing additional supplemental support continued in entries one through three. Tr. 79-80, 167-168. Later that afternoon, the order was terminated with regard to the entire section. Tr. 80.

REVISIONS OF THE PLAN

Following the termination of the order, the roof control plan was twice revised. The first revision, on June 6, 2007, added the following sentence to Safety Precaution No. 7: “When two or more cracks are encountered, the cracks will be strapped.” Resp. Exh. 9; Tr. 275-276. McMullen believed the sentence was added because of a roof fall at the mine. Tr. 276; *see also* Tr. 172. The second revision, on August 16, 2007, added the following sentence to Safety Precaution No. 7: “When two or more cracks run with the entry, crosscut or through an intersection, the cracks will be supported with roof channel (equivalent 3" x 8" wood collars) utilizing roof channel plates during the installation of primary roof support.” Resp. Exh. 8; Tr. 276-277. McMullen believed the phrase “utilizing roof channel plates” was added to officially require a practice (the use of roof channel plates) that IO already was routinely doing. Tr. 277.

RESOLUTION OF THE ISSUES

THE ALLEGED VIOLATION

The primary issue is whether the Secretary can prove IO violated section 75.220(a)(1) as alleged in the order. Echoing the standard, the Secretary notes, under section 75.220(a)(1) the operator is required: (1) to develop and follow an approved roof control plan; and (2) to take additional measures to protect persons if unusual hazards are encountered. The Secretary also notes the Commission’s holding that the “adequacy of particular roof support . . . must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to met the protection of the standards.” Sec. Br. 10 (*quoting Cannon Coal Co.*, 9 FMSHRC 667, 668 (April 1987)).

The Secretary asserts “multiple adverse roof conditions [on the applicable portions of the 005 MMU section] were either inadequately supported or completely unsupported.” Sec. Br. 10. She points to Hatfield’s testimony that he observed the adverse roof conditions and that they included surface cracks and kettle bottoms. Sec. Br. 5 (*citing* Tr. 51). She also references Hatfield’s testimony about ten areas containing either single unsupported cracks or multiple intersecting or parallel cracks that were not supported and his observation of 15 unsupported or inadequately supported kettle bottoms. Sec. Br. 6-7. She notes Hatfield, after reviewing his notes, was able to locate on the diagram (Gov’t Exh. 9) the ten areas containing cracks and “each” kettle bottom. *Id.*

In the Secretary’s opinion, Hatfield was the “only witness who presented competent and

credible testimony as to the hazardous conditions present at the time of his inspection.” Sec. Br. 11. She notes, neither section foreman Jefferson nor mine foreman Thomas was present during all of Hatfield’s inspection, and she asserts other company witnesses who testified – Beckner, Boltralick, and McMullen – did not arrive on the section until after substantial roof support was installed. *Id.* (citing Tr. 293). Therefore, according to the Secretary, “the Respondent[’s] witnesses could not testify to personal knowledge of all the hazardous conditions identified by . . . Hatfield.” *Id.*

IO responds Hatfield misidentified the cited roof conditions and the Secretary failed to carry her burden of proof. IO notes the description of the alleged violation set forth in the order is restricted to “multiple inadequately supported and unsupported surface cracks and kettle bottoms.” Resp. Br. 9 (citing Gov’t Exh. 1). Therefore, according to IO, the only evidence to be considered is that related to surface cracks and kettle bottoms. *Id.* 10-11. IO argues the Secretary failed to prove there were “multiple inadequately supported . . . surface cracks” as alleged in the order. Resp. Br. 11 (citing Gov’t Exh. 1). The company notes examples of cracks Hatfield contended were inadequately supported, and it asserts the testimony and evidence actually revealed they were properly supported. Resp. Br. 12-13 (citing Resp. Exh. 5, 6 and 7 and Tr. 176, 180, 195, 259-262 and 278, 309). The company also argues the inspector’s judgement was faulty and his testimony was not credible. Resp. Br. 13. IO points out that nowhere in the inspector’s notes was a crack described as a “surface crack.” *Id.* 17. Moreover, all of IO’s witnesses testified they saw no inadequately supported or unsupported surface cracks. *Id.* 19-22.

The company maintains, although the order specifically mentions only kettle bottoms and surface cracks, even if it is read to include instances of improperly supported non-surface cracks, the order should be vacated because the roof control plan does not require such cracks to be supported. The plan in effect when the order was cited referred only to “surface cracks” as requiring supplemental support. IO recognizes the plan required supplemental support for “adverse roof conditions . . . such as . . . surface cracks . . . or similar types of conditions in the mine roof,” but argues “non surface cracks are not another *type of condition*, but another *type of crack*.” Resp. Br. 23 (emphasis in original). Moreover, the subsequent revisions of the plan to require strapping “[w]hen two or more cracks are encountered” and when two or more cracks “[run] with the entry, crosscut or through an intersection” are significant in that they refer to cracks, not to surface cracks. “[T]here would have been no need to modify the . . . [p]lan to include conditions already covered.” Resp. Br. 24. In any event, IO asserts, if the plan and citation include “non-surface cracks,” the Secretary failed to meet her burden of showing the existence of non-surface cracks for which supplemental support was required. The company notes Hatfield agreed not all non-surface cracks require support (Resp. Br. 25 (citing Tr. 113)), and as for the non-surface cracks he believed required supplemental support, the evidence shows he was wrong. Resp. Br. 26-27.

As for the order’s allegation the 005 MMU section contained “multiple inadequately supported and unsupported . . . kettle bottoms,” the only evidence offered, aside from the order itself, was Hatfield’s testimony based on his notes, that he found the kettle bottoms at locations he

marked on the diagram of the section. IO contends the accuracy of Hatfield's identification of kettle bottoms is "highly questionable" and flawed. *See* Resp. Br. 27-30.

RESOLUTION OF THE ISSUE

A mine-specific roof control plan and its amendments establish requirements at the mine involved that are equivalent to mandatory safety standards. Once the operator has adopted a plan and the agency has approved it, the plan and its subsequent modifications must be followed by the operator. If the operator fails to comply, it may be cited for a violation of section 75.220(a)(1). When the citation is contested, either within 30 days of its issuance and/or subsequently when a penalty is proposed for the alleged violation of the plan, the burden of proof is on the Secretary to establish the violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (November 1995, *aff'd.*, *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1330, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (November 1989; *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987). The Commission has articulated the Secretary satisfies her preponderance of the evidence burden by demonstrating "that it [is] more likely than not" the cited violation occurred. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 13 (January 1997).

THE PLAN'S REQUIREMENTS

As previously noted, Precaution 7 stated:

When adverse roof conditions are encountered such as horsebacks, slicken-sided slip formations, clay veins, kettle bottoms, surface cracks, mud streaks or similar types of conditions in the mine roof, supplemental roof supports shall be installed in addition to primary roof support as appropriate in the affected area.

Gov't Exh. 6.

The wording makes clear Precaution 7 was directed at eliminating the hazard of roof fall from "adverse roof conditions." The wording also makes clear the requirement to install supplemental roof supports was not intended to be triggered solely by the enumerated conditions ("horsebacks, slicken-sided formations, clay veins, kettle bottoms, surface cracks," etc.). The words "such as" indicate the enumerated conditions were descriptive of the types of conditions encompassed by the provision. The enumerated conditions were not a complete catalogue of conditions requiring supplemental support. Thus, if a non-listed condition was "adverse," in that it made the roof more likely to a fall (the common characteristic of the listed conditions), it was governed by the provision and had to be adequately supported. In sum, under Precaution 7, conditions whose

presence made the roof more likely to fall than if they were not present, required supplemental roof support. However, alleged violations of the precaution must specify the violative conditions charged.

THE ORDER

In Order No. 7252422 Hatfield stated the way in which IO allegedly failed to follow the provision.

The 005 MMU has multiple inadequately supported and unsupported surface cracks and kettle bottoms. These conditions are in numerous locations across the entries and crosscuts from the Section Feeder and Power Center inby on the active 005 MMU. Some of the areas on the 05 MMU have intersecting surface cracks with no or inadequate support.

Gov't Exh. 1.

The order is specific. Its simple and direct language states the alleged violation is limited to "unsupported surface cracks and kettle bottoms," nothing more and nothing less. Hatfield specified no other allegedly adverse roof conditions in describing the violation and, therefore, the question is whether the Secretary proved by a preponderance of the evidence that on June 12, 2006, on the 005 MMU section, there existed "multiple inadequately supported and unsupported surface cracks and kettle bottoms" in "numerous locations across the entries and crosscuts from the Section Feeder and Power Center inby." Gov't Exh. 1.

THE SURFACE CRACKS

Hatfield described "surface cracks" as cracks that "make their way to the surface." Tr. 35. He explained surface cracks in the coal roof can be identified by one or a combination of the following visual indicators: discoloration caused by mud or minerals seeping from the overburden, mud in the cracks, a gapping of the cracks, and/or water issuing from the cracks. Tr. 34-35. Although a surface crack may be a single crack, it also may be a series of different interconnecting cracks starting at the roof and ending on the surface. Tr. 35-36. Hatfield's description did not conflict with the way surface cracks were described by IO's witnesses, and I conclude Hatfield knew what surface cracks were. However, it is not enough to know an adverse condition. The Secretary must show Hatfield sufficiently identified the "multiple unsupported and inadequately supported surface cracks" cited in the order, and it is apparent to me there are major problems with the Secretary's case in this regard. Gov't Exh. 1

The Secretary rather inexplicably offered no photographic evidence of the cited conditions. Further, Hatfield did not identify in the order the specific locations of the conditions; nor did he

describe them in any detail.¹⁴ Rather, the order speaks generally of “multiple inadequately supported and unsupported surface cracks” at “numerous locations” and of “[s]ome . . . areas” that have inadequately supported surface cracks. Gov’t Exh. 1. The order’s lack of detail regarding the precise location and description of the allegedly violative conditions does little to help the Secretary meet her burden of proof.

The Secretary totally relied on Hatfield’s markings placed on Thomas’s diagram of the pertinent part of the 005 MMU section – Hatfield’s “wavy” lines.¹⁵ After Hatfield marked the diagram, I asked, “[A]re these surface cracks that you’re referring to?” Hatfield’s reply was equivocal. “There’s surface cracks and I feel like – the best of my remembrance, I saw the surface cracks, but as far as putting them in that location, I didn’t know that it was surface cracks but they are cracks – they were cracks in the roof.” *Id.* Hatfield did not know which of the lines he placed on the diagram represented surface cracks, as the following exchange between Hatfield and the Secretary’s counsel shows:

Counsel: [Y]ou can’t say that all of these cracks you have . . . in your notes were surface cracks, according to your definition of surface cracks ?

Hatfield: No, not in these notes, but I do know that there were unsupported surface cracks.

Counsel: So does that mean that more than one, i.e. some of these cracks were unsupported surface cracks?

Hatfield: Yes.

¹⁴This is in sharp contrast to the practice of the Secretary’s inspectors when they cite violations of accumulations of combustible material. In those instances, inspectors almost always indicate the specific location of the cited accumulations, their color, dimensions and consistency.

¹⁵In the No. 7 entry, Hatfield identified an “unsupported crack.” Tr. 61. In the No. 6 entry, he identified “one crack.” *Id.* Between the No. 6 and No. 5 entries in the last open cross cut, he identified another “unsupported crack.” Tr. 62. He then identified unsupported cracks “[o]utby the last open crosscut, five to six” (Tr. 63) and two cracks in the last open crosscut between the No. 4 and No. 5 entries. (These cracks apparently had been indicated on the diagram by Thomas when he was deposed. *Id.*) He identified “two cracks” that ran over to a kettle bottom. *Id.* The cracks were located “two breaks outby the last open crosscut.” *Id.* He further identified three cracks “outby the last open crosscut number two [entry].” *Id.* Finally, he identified an “unsupported crack in number one entry inby the last open crosscut.” Tr. 65.

Counsel: Now, these other cracks that may have been surface cracks, they may not, you just don't have that in your notes, were these adverse roof conditions?

Hatfield: Yes.

Tr. 70-71.

Based on the lack of specificity regarding the location and presence of the "multiple inadequately supported and unsupported surface cracks" (Gov't Exh. 1), I conclude the Secretary did not carry her burden of proof. I reach the conclusion after noting the allegation regarding violative cracks is unequivocally restricted to "surface cracks." It is true Hatfield testified "adverse conditions" in the form of other kinds of cracks existed (Tr. 71), but he did not mention the other conditions in the order, and the order cannot be expanded via his testimony to encompass conditions to which he never referred.¹⁶

Despite knowing surface cracks had distinctive visual indicators, Hatfield was not able to use the indicators to characterize the surface cracks allegedly constituting the violation. Nor could he state which of the cracks he drew on the diagram (Gov't Exh. 9) were surface cracks. In fact, his testimony regarding the nature of the cracks on the diagram was not entirely clear, but the most reasonable interpretation of what he said is while some of the cracks indicated on the diagram – indications made through reference to his notes – were surface cracks, some were not. He could not say which were which, nor could he otherwise conclusively locate the surface cracks. See Tr. 69-71. ("I saw the surface cracks, but as far as putting them in that location, I didn't know that it was surface cracks." Tr. 70.)

There being no photographic evidence of the allegedly violative surface cracks, nor physical descriptions to distinguish them, the Secretary essentially maintains they existed somewhere in the area depicted in the diagram (Gov't Exh. 9) because Hatfield said so. This is not enough to meet her burden of proof, especially given the fact Hatfield in his notes – which were not offered into evidence – failed to distinguish between various kinds of cracks and only used the word "crack" or "cracks" as this exchange between counsel for IO and Hatfield established:

Counsel: [I]n all of the cracks . . . [you documented in your notes] you just wrote down the word crack; is that correct?

¹⁶Presumably it was possible prior to the hearing to modify the order to include the additional allegedly violative cracks other than surface cracks or other "adverse conditions," but it was not done.

Hatfield: I wrote down crack, I wrote down cracks plural.

Counsel: Right.

Hatfield: Yes, I did.

Counsel: You made no distinction at all between a hairline pressure crack and a surface crack; is that correct?

Hatfield: I don't think I wrote down hairline or surface crack.

Counsel: You made no distinction between a crack and a surface crack; did you?

Hatfield: No.

Tr. 150-151.

To summarize, with no demonstrative or testimonial evidence establishing the physical appearance of the allegedly violative cracks and with no ability to establish which of the locations Hatfield identified actually represented surface cracks, I conclude the Secretary fell short of proving “[t]he 005 MMU [section] ha[d] multiple inadequately supported and unsupported surface cracks” and “[s]ome . . . intersecting surface cracks” as alleged in the order. Gov’t Exh. 1. The evidence and testimony offered by the Secretary should have been more specific.

THE KETTLE BOTTOMS

The allegation regarding “multiple inadequately supported and unsupported . . . kettle bottoms” is another matter. Gov’t Exh. 1. Hatfield first testified there were “quite a few . . . more than a dozen” and they were “pretty obvious.” Tr. 52. Counsel for the Secretary asked Hatfield “how many separate unsupported kettle bottoms” Hatfield identified in his notes, and Hatfield responded “I think there’s 15.” Tr. 68. These kettle bottoms had “no support at all.” *Id.* Hatfield did not recall the dimensions of the 15 kettle bottoms, but he knew they were kettle bottoms. (“I don’t remember the exact dimension[s]. I didn’t note it in my notes or the violation. I observed that they were kettle bottoms.”) *Id.*; *see also* Tr. 149-150.

Mine foreman Fred Thomas conceded a few kettle bottoms were present, but they were not “real noticeable” or “real prominent” (Tr. 199-200). However, he maintained the things Hatfield pointed out were not kettle bottoms. Tr. 201, 236. There was nothing on the 005 section Thomas felt was inadequately supported. Tr. 201-202. Hatfield was “seeing things that [weren’t] there.”

Tr. 201. Jefferson agreed with Thomas that Hatfield pointed out things that were not kettle bottoms. Like Thomas, Jefferson acknowledged there were some kettle bottoms on the section, but, he maintained, they were supported. Tr. 309 - 311.

As with the alleged surface cracks, the Secretary offered no photographic evidence to support her allegation of “multiple inadequately supported and unsupported . . . kettle bottoms.” She rested her case solely on Hatfield’s testimony the kettle bottoms existed as he indicated on Government Exhibit 9. The question is whether the Secretary proved by a preponderance of the evidence “multiple inadequately supported and unsupported . . . kettle bottoms” existed in the mine on June 12, and I conclude she did.

The testimony of Hatfield as to the existence of the kettle bottoms must be balanced against the testimony of the company’s witnesses as to their non-existence. Hatfield, an inspector of long experience in underground coal mines (Tr. 31-33), clearly knew what kettle bottoms were. Tr. 37-38, 69, 83-84. Company personnel who traveled with Hatfield on the day he issued the order and who saw the section before the order was terminated also knew what they were, and they uniformly maintained Hatfield incorrectly identified as kettle bottoms formations that were not. *See* Tr. 202, 309-311, 346, 377.

None of the witnesses were, in my opinion, disingenuous. As ardently as Hatfield believed he cited actual unsupported or inadequately supported kettle bottoms, the others believed he did not. However, on balance, I credit the inspector’s testimony that the inadequately supported and unsupported kettle bottoms existed as he indicated on Gov’t Exh. 9. I find it telling, as Hatfield himself noted, that when he pointed out the inadequately supported or unsupported kettle bottoms during the course of his inspection, neither Thomas nor anyone traveling with him disagreed. Tr. 84, 114. If, in fact, Hatfield misidentified kettle bottoms, it is reasonable to expect IO personnel to have protested long and loud, then and there. They did not. *Id.* A close reading of the testimony reveals it was after he issued the order that they began to argue he misidentified the formations.

Moreover, unlike the allegation involving the surface cracks, Hatfield testified each circle he drew on the diagram represented an inadequately supported or unsupported kettle bottom. His testimony in this regard was clear and it was persuasive. This was not a situation where some of the circles represented kettle bottoms and some did not.

For these reasons, I find the inadequately supported and unsupported kettle bottoms identified by Hatfield on Gov’t Exhibit 9 existed, and IO violated its roof control plan by failing to properly support them.

S&S

A significant and substantial (S&S) violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety and health

hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *Buck Creek Coal Co., Inc.*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

The Secretary has established the violation, in that she has proven inadequately supported and unsupported kettle bottoms existed on the section as located by Hatfield on Gov’t Exh. 9. The inadequately supported and unsupported kettle bottoms posed discrete safety hazards, in that the material constituting the kettle bottoms was not part of the coal bed and the kettle bottoms could slip from the roof at any time unless adequate support was provided.¹⁷

The Secretary also established the inadequately supported and unsupported kettle bottoms were reasonably likely to result in a serious injury. When asked by his counsel why he found the violation to be reasonably likely to result in a permanently disabling injury, Hatfield responded, “I thought there was a potential . . . that there would be someone permanently disabled by falling strata.” Tr. 75. Throughout his testimony when using the word “strata” with regard to the roof, Hatfield included falling kettle bottoms. See Tr. 37-38, 64. Given the fact approximately eight miners worked and traveled under the cited kettle bottoms (Tr. 75), and given the fact the record establishes the inadequately supported and unsupported kettle bottoms could fall at any time (Tr.

¹⁷See American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms*, 2d. ed. (1996) at 297 (definition of “kettle bottom” stating a kettle bottom “may drop out of the roof of a mine without warning, sometimes causing serious injuries to miners.”)

43-44), I find the Secretary met her burden of proving the third element of the S&S criteria.

She also established the fourth element. Clearly, being struck by a falling kettle bottom subjected a miner to an injury of a reasonably serious nature or worse.

GRAVITY

The violation was serious. As I have noted, if a miner were struck by a falling kettle bottom, serious injury or death would most likely result.

UNWARRANTABLE FAILURE AND NEGLIGENCE

Hatfield found the violation was due to the unwarrantable failure of the company to comply with its roof control plan. Unwarrantable failure is "aggravated conduct constituting more than ordinary negligence by a miner operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). It is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (February 1991); *see also Rock of Ages Corp. v. Sec'y of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (approving the Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

I conclude, while the Secretary established the existence of the inadequately supported and unsupported kettle bottoms was due to ordinary negligence on IO's part, she did not prove IO's lack of care was unwarrantable. Not all kettle bottoms in the cited area of the section were inadequately supported or unsupported. Witnesses from both sides agreed some kettle bottoms in the cited area were properly supported. I infer from this that there was not a wide-spread and reckless disregard of the requirements of the roof control plan. Rather, I find Jefferson tried, but failed to meet the standard of care required of him.

There was no showing by the Secretary that Jefferson's failure was intentional. He was not as careful as he should have been in making sure all kettle bottoms in the area were properly supported, but he was not indifferent to his responsibilities. When observing the roof conditions, he simply misjudged some of the kettle bottoms. The understandable nature of Jefferson's failure was shown by the genuine and good faith disagreements between the inspector and IO personnel

as to what constituted a kettle bottom.¹⁸

Because I have found the violation was due to Jefferson's and, therefore, the company's ordinary negligence, the order cannot be sustained.

OTHER CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

The Secretary offered into evidence without objection an "Assessed Violation History Report" for the mine. Gov't Exh. 8. The report shows, in the 24 months prior to the issuance of the order in question, 317 violations had been assessed for the mine, 313 of which had been paid. Gov't Exh. 8 at 8. This is a large history.

SIZE

The parties stipulated IO is a large operator and the Europa Mine is a large mine. Stip. 21.

GOOD FAITH ABATEMENT

Following the issuance of the order, IO moved rapidly to support the cited conditions so the order could be lifted. This constituted good faith abatement on the company's part.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated any penalty assessed for the violation will not affect the ability of IO to remain in business. Stip. 4.

CIVIL PENALTY ASSESSMENT

<u>ORDER NO.</u>	<u>DATE</u>	<u>30 U.S.C. §</u>	<u>PROPOSED ASSESSMENT</u>
7252422	6/12/06	75.220(a)(1)	\$6,900

I have found the Secretary proved the violation only so far as it is based on the cited kettle bottoms. Nonetheless, even though a major part of the alleged violation was not established, the

¹⁸Moreover, Hatfield's finding of unwarrantable failure and high negligence may have been based on personal pique more than on an analysis of the standard of care IO and its employees were required to meet. When asked why he found the violation was due to IO's "high" negligence, he responded, "Because I talked to the operator on several occasions about the roof control plan and it seemed I wasn't getting anywhere with just writing a citation." Tr. 76.

part that was proven represents a serious violation. I further have found the violation was not the result of IO's unwarrantable failure to comply, but, rather, was caused by its ordinary negligence. Given these findings and the other civil penalty criteria noted above, I conclude a civil penalty of \$2,500 is appropriate.

SETTLEMENT

In Citation No. 7252931, the Secretary alleged a miner had gone inby the last row of permanent roof supports in violation of the mine's roof control plan. The Secretary maintained the violation was the result of IO's high negligence and unwarrantable failure to comply with its plan. However, counsel for the Secretary explained, while the miner had proceeded inby the roof support as alleged, it was questionable whether the Secretary could establish her negligence and unwarrantable allegations. The Secretary noted IO management had no knowledge the miner was directed to go inby the support, and she noted the person who was responsible for the incident had been asked to leave IO's employ. The Secretary, therefore, agreed to modify the citation from one issued under section 104(d)(1) of the Act (30 U.S.C. § 814(d)(1)) to one issued pursuant to section 104(a). 30 U.S.C. § 814(a). She also agreed to modify an inspector's negligence finding to "moderate." For its part, IO agreed to pay a civil penalty of \$2,500 for the violation. Tr. 19-20. I approved the settlement. *Id.*

ORDER

The S&S finding in Order No. 7252422 **IS SUSTAINED**. The finding of unwarrantable failure upon which Order No. 7252422 is in part based **IS REJECTED**, and the finding of high negligence in Order No. 7252422 **IS MODIFIED** to a finding of moderate negligence. The order itself **IS MODIFIED** from an order issued pursuant to section 104(d)(1) of the Act to a citation issued pursuant to section 104(a).

As agreed in the settlement, within 40 days of the date of this decision, the Secretary **SHALL MODIFY** the finding of high negligence in Citation No. 7252931 to a finding of moderate negligence and **SHALL MODIFY** the citation from one issued pursuant to section 104(d)(1) of the Act to one issued pursuant to section 104 (a) of the Act.

Within 40 days of the date of this decision, IO **SHALL PAY** a civil penalty of \$2,500 for the violation of section 75.220(a)(1) set forth in Citation No. 7252422 and **SHALL PAY** a civil penalty of \$2,500 for the violation of section 75.220(a)(1) set forth in Citation No. 7252931. Upon modification of Citation No. 7252931 and payment of the penalties, this proceeding **IS DISMISSED**.



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 27, 2008

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2006-295-R
v.	:	Citation No. 7684534; 07/21/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	No. 4 Mine
Respondent	:	Mine ID 01-01247
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2007-197
Petitioner	:	A.C. No. 01-01247-110958
	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	No. 4 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
David Smith, Esq., Maynard, Cooper & Gale, Birmingham, Alabama, on behalf of Jim Walter Resources, Incorporated.

Before: Judge Zielinski

These cases are before me on a Notice of Contest filed by Jim Walter Resources, Incorporated ("JWR") and a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that JWR is liable for one significant and substantial violation of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of a civil penalty in the amount of \$35,500.00. The citation alleging the violation was issued following MSHA's investigation of a fatal accident that occurred on March 29, 2006, at JWR's No. 4 mine. A hearing was held in Birmingham, Alabama, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that JWR did not commit

either of the alternatively alleged violations, and vacate the citation.¹

Findings of Fact - Conclusions of Law

JWR's No. 4 mine is located in Tuscaloosa County, Alabama, near the community of Brookwood. It provides employment for 454 persons, and operates six days per week, three shifts per day, with production on all shifts. One longwall panel and several mechanized mining units and continuous mining machine units are operated in the mine. As of March 29, 2006, the date of the accident, longwall panel N-13 had been completed, i.e., mined to its "stop point." Polypropylene mesh, reinforced with wire rope, had been installed along the roof line for the last 30 feet of the longwall advance. The mesh was fed over the tips of the longwall shields and, as the shields were advanced, roof falls in the gob anchored the mesh to the mine floor. At the stop point, the shields were advanced to within five feet of the face. JWR was in the process of installing roof bolts in that five-foot space, pinning the forward edge of the mesh to the mine roof. The roof bolts and mesh, along with wooden supports installed after the last pass of the longwall shear, were intended to provide roof support to allow removal of the shields.

Roof bolting had started on the midnight shift, and was continued on the day shift on March 29. Three crews of miners, four persons each, including a supervisor, worked to install the bolts. The Secretary's regulations require that operators of underground coal mines develop and follow a roof control plan, approved by MSHA's District Manager, that is suitable for the prevailing geological conditions and the mining system used at the mine. 30 C.F.R. § 75.220(a)(1). The regulation also provides that additional measures shall be taken to protect persons if unusual hazards are encountered. JWR's approved roof control plan required that roof bolts be a minimum of 36 inches long, have five-inch square plates, and be installed on five-foot centers. Ex. G-6. The section of the plan dealing with longwall roof control also provided:

This plan contains the minimum roof control measures to be used and is formulated for normal roof conditions in association with the mining system described. In active areas where subnormal roof conditions are encountered, the minimum roof control methods will be supplemented with longer or additional roof bolts, posts, crossbars, cribs, Propsetters, Packsetter Bags, steel mats, or wire mesh, Link-N-Lock cribs, "Cans," or cable bolts, whichever is most applicable.

Ex. G-6 at 27.

Subnormal roof conditions existed at two locations along the face of the longwall panel, near shields numbered 110 and 130. The roof at shield 130 was particularly jagged and difficult to bolt. In the area of shields 100 to 110, smooth slick joints in the rock created instability that had resulted in a roof fall during the midnight shift. The fall created a cavity ranging from one to

¹ As noted above, the Secretary was permitted to amend the citation to allege that JWR had violated either of two mandatory standards.

three feet high that ran for 30 feet along the five-foot space between the tips of the shields and the face. Tr. 230, 341. The fall had been cleaned up, and a day shift roof-bolting crew, William Hardy, Garry Jones and William Ducker, began to install bolts where the previous shift had stopped. Hardy, who had over 28 years of mining experience at JWR, took the drill, Ducker was putting resin into the bolt holes and Jones, who had over 23 years of mining experience, was preparing bolts to be installed. The crew worked from the "pan line," the steel pan along which coal cut by the shear was transported to conveyor belts that removed it from the mine. The crew's work area under the longwall shields is depicted in a drawing in MSHA's accident report. Ex. G-4 at 8. A copy of the drawing is included as an Appendix to this Decision.

Because of the subnormal roof conditions, 48-inch bolts were being used instead of the 36-inch bolts specified in the plan, six-inch square plates were being used instead of five-inch plates, and wooden "T-bars" were being installed to provide additional support. The experienced roof bolting crew also decided to install two rows of bolts in the five-foot space, and place them on centers of three and one-half to four feet. This resulted in installation of substantially more bolts than were required under the plan, the provisions of which would have been satisfied with one row of bolts on five-foot centers. At about 10:00 a.m., after Hardy had installed about 12 bolts, Jones asked to take the drill and Ducker went to eat lunch. Jones began to drill holes for the installation of bolts. Hardy retrieved some supplies, and then began to prepare bolts for installation.

The miners were using a hand-held pneumatic powered drill, operated by controls mounted on a handle attached to an arm about three feet long that rotated out from the drill body. The drill is depicted in photographs taken at the scene. Ex. G-5(a), (b), (g). The handle had a lever that applied air pressure to a cylinder rod that protruded from the bottom of the cylindrical drill. When the drill was in a vertical position, the rod rested on the mine floor, and application of air pressure forced the drill steel up against the roof. Separate controls governed drill motor rotation and the flow of water and air for flushing cuttings from the hole. Drill steels of five and six feet in length were supplied. In order to start drilling a hole for a bolt, the operator reached out to position the drill, usually at a slight angle, and activated the air pressure lever to push the drill steel up against the roof. He then swung the control arm out, stepped back further under the shield, and began to operate the drill.

Because it was difficult to see up into the cavity, the operator stood at the edge of the shield and turned at an angle of approximately 45 degrees to the face. From that position, he was able to see the point where the drill steel contacted the roof, and could position the drill to install a bolt in the correct location. The face ventilation air current flowed from the headgate to the tailgate of the longwall, i.e., from right to left as one's back was to the gob. Hardy had been working from left to right, and had closed the unbolted gap to about 19 feet. He had rotated his body in a clockwise direction, and positioned himself at about a 45 degree angle to the face. The roof directly in by his left shoulder, and closest to the face, had been bolted and was considered to be permanently supported. However, the face ventilation air current caused water and drill cuttings to blow toward him. When Jones took the drill, he rotated his body in a counter-

clockwise direction, so that the ventilation air current took the water and cuttings away from him. However, he continued to work from left to right. Consequently, the roof adjacent to his right shoulder, and closest to the face, had not yet been bolted. Any portion of the roof more than five feet away from the last-installed roof bolt was considered unsupported roof.

About 11:20 a.m., Jones was beginning to install his fifth bolt. Scratch marks on the mine roof, where he apparently attempted to start the next hole, were located three feet from the tip of the shield and four feet from the last-installed bolt. Tr. 75, 144, 152, 296-98; ex. G-5(h), G-8 at 5. Hardy was two shields away (about ten feet), assembling bolts, plates and T-bars. His back was to Jones. He heard a "crashing" noise, turned, and saw rocks and debris falling around the drill, and "coming down" the handle of the drill. Tr. 350-53. He then saw Jones bow his head forward slightly and bend his knees. Jones then straightened up, pushed away from the drill, and moved back, away from the face. His arms were flailing, as if he were trying to regain his balance, and he fell backward onto the pan line, striking his head on it. He stopped breathing, and was largely unresponsive. Several miners immediately administered first aid, and called for emergency assistance. Denver R. Cantor, the bolting crew's supervisor, who was approximately 40 feet away inspecting the bolted roof, was among the first to reach Jones. Jones was transported out of the mine and his care was turned over to emergency medical technicians, who transported him to a hospital. He died from his injuries on April 10, 2006.

MSHA was promptly notified of the accident. Raymond C. Dorton, Jr., an MSHA roof control specialist and accident investigator, arrived on the scene before most of the miners had left the mine. He issued an order pursuant to section 103(k) of the Act, preserving the accident scene. He inspected the area, took photographs and interviewed those present. When the interviews had been concluded, JWR inquired about whether the order could be lifted. Dorton was interested in identifying some steps that could be taken to prevent future similar occurrences. He and Darrell L. Loggains, JWR's longwall manager, discussed instructing miners to position themselves perpendicular to the face when starting to install bolts, and to remain under supported roof as subsequent bolts were installed. Dorton indicated that those measures would be sufficient to lift the order. Loggains typed up the measures while Dorton showered, and called them down to the miners working underground. Dorton then lifted the order. The measures were subsequently added to JWR's roof control plan at MSHA's insistence. Ex. G-6 at p. stamped "JWR-D197-000079."

After completing his investigation and leaving the mine, Dorton did not feel that JWR had violated its roof control plan or any other regulation. However, when the investigative report was issued, on July 21, 2006, it had been concluded that JWR had violated a mandatory safety standard, and Citation No. 7684534 was issued.² Ex. G-2, G-4. The citation was terminated at

² JWR argues that the investigative report is unreliable. It points to several statements that are contradicted by the record, specifically, that the mine roof in the area of the accident had not been scaled, that Hardy had taken the same drilling position that Jones had, and that a specific rock had fallen from the right and struck Jones. The first two points are of no

the same time that it was issued, because the actions taken to lift the section 103(k) order were deemed sufficient to remedy the violation, and because the area had been mined out. JWR contested the citation and the subsequently assessed civil penalty.

Citation No. 7684534, as originally issued, alleged a violation of 30 C.F.R. § 75.202(a), which provides, in pertinent part:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The "Condition or Practice" section of the citation stated:

The operator failed to support or otherwise control the roof to protect persons from hazards related to falls of the roof on the N-13 Longwall Panel. On March 29, 2006, an area of unsupported roof fell and led to a fatal injury of a miner on April 10, 2006.

Ex. G-2.

The citation was issued pursuant to section 104(a) of the Act and also alleged that the fatality occurred as a result of the violation, that it was significant and substantial ("S&S"), that one miner was affected and that the operator's negligence was moderate.

The decision to charge JWR with a violation represented the "collective" judgment of several Department of Labor personnel, including employees at MSHA and the Office of the Solicitor. It was not unanimous. Although Dorton was designated to issue the citation, he did not believe that JWR violated the regulation, and has held that opinion from the date of the accident to present. Tr. 82, 255-56. As he explained at the hearing, he disagreed with the decision to charge a violation of section 75.202(a), "[b]ecause referencing 202(a), my belief is that 202(a) says that the roof will be supported where persons work or travel. My belief is that is what they were doing. They were in the process of supporting the top in the area where persons work or travel." Tr. 82.

On October 25, 2006, Dorton executed a modification of the citation to specify a violation of section 75.220(a)(1), instead of section 75.202(a). Section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions,

consequence. As noted above, Dorton made clear that the conclusions about how the accident occurred were assumptions, and that there is no evidence that a particular rock struck Jones, or, if he was struck by a rock, where it came from.

and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The condition and practice section of the citation was changed to read:

The operator failed to take additional measures to protect persons from unusual hazards encountered on the N-13 longwall panel. The mine operator's existing procedures for installing roof bolts on the longwall face did not include provisions for safe positioning of the drill operator. An area of roof fell causing the fatal injury of a miner.

Ex. G-2.

On February 25, 2008, the citation was again modified to allege that JWR had violated either section 75.202(a) or 75.220(a)(1), and the condition or practice section was changed to read:

The operator failed to support or otherwise control the roof to protect persons from hazards related to falls of the roof on the N-13 Longwall Panel. On March 29, 2006, an area of unsupported roof fell and led to a fatal injury of a miner on April 10, 2006. The operator failed to take additional measures to protect persons from unusual hazards encountered on the N-13 Longwall Panel. The mine operator's existing procedures for installing roof bolts on the Longwall face did not include provisions for safe positioning of the drill operator. An area of roof fell causing the fatal injury of a miner.

Ex. G-2.

The Secretary subsequently filed a motion in these proceedings to amend the citation to include the alternative allegations. By Order dated March 10, 2008, the Secretary's motion was granted.³

³ Amendment of a citation or order after a notice of contest has been filed should be accomplished by motion, not on the Secretary's own initiative. *Consolidation Coal Co.*, 4 FMSHRC 1791, 1795 n. 11 (Oct. 1982). The Secretary's motion was granted, over JWR's opposition, because the alternative allegations were based upon the same facts and presented no additional abatement issues, and JWR had been put on notice of the section 75.220(a)(1) allegation shortly after the initial modification of October 25, 2006, when Dorton's first deposition was taken. *See Empire Iron Mining Partnership*, 29 FMSHRC 999, 1003-05 (Dec. 2007).

The Section 75-202(a) Violation

The Secretary's position on this alleged violation presents the unusual, perhaps unheard of, situation where the MSHA inspector who issued the violation and testified on behalf of the Secretary does not believe that the alleged violation occurred. JWR argues that where "the Secretary's authorized, designated representative cannot – or will not, based on a lack of conviction – testify that an alternatively plead standard has been violated, it is a violation of the Mine Act (and general principles of due process) to require [it] to rebut such an allegation." Resp. Br. at 7-8. JWR's argument is based upon section 104(a) of the Act, which reads, in pertinent part:

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator. . . .

30 U.S.C. § 814(a).

However, the Act specifically recognizes that the Secretary may cause a citation to be issued, if she believes, after investigation, that a violation occurred. JWR does not suggest that the Secretary's Office of the Solicitor was without authority to file the Petition for Assessment of Civil Penalty, or to pursue either of the alternative allegations. The Secretary's burden is to prove the violations and related allegations, e.g., gravity and negligence, by a preponderance of the evidence. To be sure, that burden is amplified by the absence of a witness who actually believes that the evidence establishes a violation. But, it is not impossible. If the Secretary can meet her burden, relying on all of the evidence introduced at the hearing, a violation can be established. The fact that her chief witness does not support the alleged violation is not fatal.

In *Canon Coal, Co.*, 9 FMSHRC 667, 668 (April 1987), the Commission held that:

Questions of liability for alleged violations of this broad aspect of this standard [the precursor to the present section 75.202(a)] are to be resolved by reference to whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have recognized that hazardous condition that the standard seeks to prevent. Specifically, the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard. We emphasize that the reasonably prudent person test contemplates an objective – not subjective – analysis of all the surrounding circumstances, factors, and considerations bearing on the inquiry in issue. (citations omitted)

The Secretary argues that JWR was aware of adverse roof conditions where Jones was working, but took no action to provide additional roof support to protect Jones from the roof fall. She points out that JWR's roof control plan provided a list of materials that, she contends, "could and should" have been used to protect Jones, including, posts, crossbars and cribs, and that JWR's failure to employ such measures constituted a violation of section 75.202(a) under *Canon's* reasonably prudent person test. Sec'y. Br. at 28.

The Secretary's argument is not supported by the evidence. It amounts to little more than the strict liability interpretation that was rejected in *Canon*, i.e., rock fell and caused an injury – therefore the standard was violated. There was no evidence that the roof control measures employed by JWR were inadequate or insufficient to support the roof. In fact, it appears that they were, because none of the bolts, with their plates and T-bars, failed to perform their intended function. As Dorton explained, JWR was doing what was required under the standard, i.e., installing appropriate support for the roof.

The additional measures noted by the Secretary, posts, crossbars and cribs, do not automatically pop into place with the push of a button. Like roof bolts, they must be installed by miners. There was no evidence as to whether such measures would have been appropriate, or even feasible, under the conditions presented, or whether installing them would have presented greater or lesser exposure to a hazard and risk of injury than the installation of the roof control measures actually being employed. Failure to use roof control measures other than those being installed was not mentioned, or even alluded to, in MSHA's accident investigation report, the twice-modified citation, or any of the other reports or documents associated with the incident.

The Secretary also contends that JWR's failure to have previously implemented the "additional safety practice," that was developed in order to lift the section 103(k) order, i.e., positioning of the drill operator, amounted to a violation of section 75.202(a). Whether the absence of the "practice" could be considered a failure to support or otherwise control the roof, as the regulation requires, is debatable. Assuming that it could, under *Canon*, the test to be applied is "whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." 9 FMSHRC at 668.

The safety practice at issue was not developed as a roof support or control measure to meet the protection intended by section 75.202(a). When Dorton participated in developing the practice, and approved its implementation as sufficient to lift the order, he did not believe that JWR had committed any violation, but was simply trying to identify possible preventive measures. Tr. 322. Dorton had worked at JWR's No. 4 mine for 13 years, including several years as an outby longwall foreman. As an MSHA roof control specialist from 2001-2005, he reviewed, or assisted in reviewing JWR's roof control plan at six-month intervals, and visited the

mine to check on compliance with the plan and consult on roof control issues.⁴ Although he had not personally observed installation of roof bolts at the termination of a longwall panel, he had extensive first-hand knowledge of the roof conditions in the mine, and had seen similar conditions on prior occasions. Tr. 244, 246-48, 320. JWR had been following its procedure for bolting the roof in preparation for removal of the shields for many years, and had never experienced an accident from a roof fall. Tr. 215, 262-63, 427. Over the years, there were a considerable number of persons, at both JWR and MSHA, who were very familiar with the mining industry and the protective purpose of the standard, the roof conditions at JWR's mine and JWR's procedures for bolting the area between the shields and face, none of whom suggested the practice, or sought to include it in the roof control plan for the No. 4 mine, or any other mine prior to the accident. Tr. 246-48, 263, 326-27.

Considering all of the evidence, I find that the Secretary has not proven by a preponderance of the evidence that the safety practice was a support or control that a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.

It is also far from clear that the accident could have been avoided, had the safety practice been followed. The objective of the practice is to assure that the drill operator remains under roof that is either supported by roof bolts or shields. Dorton concluded, from his investigation, that Jones was under the shields. Tr. 252, 297-99. No one knows exactly what happened to cause Jones to stumble backward and fall. Hardy saw some debris come down from the roof around the drill motor. That material most likely came from an area of supported roof, because Jones had started the hole within four feet of the last installed bolt. If Jones was struck on the hands by a rock, neither Dorton, nor anyone else knows where such a rock would have come from, i.e., whether it would have come from supported or unsupported roof. Tr. 272, 290. It is possible that Jones was startled by the debris and fell backward as he attempted to back away from it. His fatal injury was not directly caused by rock falling from the roof, and, with the possible exception of the scrape on his right hand, it is not clear that any of the injuries he suffered were so caused. As JWR argues, the accident could very well have happened even if Jones had been operating under the newly established safety practice.

The Secretary also argues that JWR failed to assign enough miners to the crew so that personnel would have been available to "watch or to assist" Jones in carrying out the drilling. Sec'y Br. at 28. Again, the evidence does not support her position, which, like her main argument on this alleged violation, does not appear in the accident investigation report or any other documentation associated with the incident. The Secretary relies upon the testimony of JWR officials. However, those officials testified that the work crews were adequate in size, and allowed for individuals to take breaks and attend to other tasks. Tr. 124-29, 182-83, 222. As JWR argues in its brief, the statements were to the effect that "safety is enhanced by having co-

⁴ Dorton's experience, education and other qualifications are detailed in his resume. Ex. G-15.

workers paying attention to the work of co-workers while they all work together. [They cannot] be fairly interpreted as recommending that roof bolting crew sizes be increased under the circumstances of this case.” Resp. Br. at 27-28. As JWR goes on to point out, no such changes were suggested or implemented in order to lift the section 103(k) order or in subsequent amendments of JWR’s roof control plan. To the extent that the Secretary’s argument could be construed as an attempt to amend the citation, which would require additional abatement efforts, it would be denied.

I find that the Secretary failed to prove, by a preponderance of the evidence, that JWR violated section 75.202(a).

The Section 75.220(a)(1) Violation

As noted previously, section 75.220(a)(1) provides:

Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

The Secretary’s regulations governing roof control plans also provide that: “No proposed roof control plan or revision to a roof control plan shall be implemented before it is approved.” 30 C.F.R. § 75.220(c).

JWR’s MSHA-approved roof control plan contains provisions specifically addressing roof support for the termination of a longwall panel and removal of mining equipment. It specifies that roof bolts be installed in the space between the face and the tips of the shields; that roof bolts have a minimum length of 36 inches; that bolts be installed on five-foot centers; and that additional rows of bolts be installed if the distance between the face and the tips of the shields exceeds five feet. The plan also specified additional measures to be used where “subnormal roof conditions” are encountered.

1. General Information

This plan contains the minimum roof control measures to be used and is formulated for the normal conditions in association with the mining system described. In active areas where subnormal roof conditions are encountered, the minimum roof control methods will be supplemented with either longer or additional roof bolts, posts, crossbars, cribs, Propsetters, Packsetter Bags, steel mats, or wire mesh, Link-N-Lock cribs, “Cans,” or cable bolts whichever is most applicable.

Ex. G-6 at 27.

The “additional measures” that the Secretary asserts that JWR failed to implement were: 1) a procedure requiring miners to “drill in the direction wherein roof support in the form of roof bolts or the longwall shield would have been overhead or in the direction from which the miners were bolting,” and 2) “having four miners assisting and watching the adverse roof for . . . ‘abnormal’ situations.” Sec’y Br. at 25. Neither of these additional measures were specified in JWR’s roof control plan at the time of the accident. The former is the safety practice that was implemented following the accident in order to secure lifting of the section 103(k) order, and was later added to the roof control plan. The latter appeared only in the post-hearing briefing of this case.

Initially, it strikes me that the Secretary is, in effect, seeking to charge JWR with a violation of provisions that were not included in its roof control plan at the time of the accident, and which, by regulation, it could not have unilaterally adopted or implemented. Dorton essentially agreed and testified that, in his opinion, JWR had not violated its roof control plan, as it existed on the day of the accident. Tr. 255-57. JWR appears to concede that where an operator is in full compliance with its approved roof control plan, the Secretary can proceed under the general “additional measures” clause of section 75.220(a)(1), citing *Wabash Mine Holding Co.*, 27 FMSHRC 672 (Oct. 2005) (ALJ). Resp. Br. at 13. However, it is not clear that *Wabash*, in fact, so holds and, in any event, it is not binding precedent. Were it necessary to decide the issue, I would hold that, where the additional measure urged by the Secretary was not specified in the operator’s roof control plan, the Secretary cannot properly allege a violation of the roof control plan regulation, section 75.220(a)(1), but may proceed under section 75.202(a), the operator’s general obligation to support or otherwise control the roof, face, and ribs of areas where persons work or travel. *So. Ohio Coal Co.*, 10 FMSHRC 138, 140-41 (Feb. 1988) (compliance with an approved roof control plan does not preclude liability for failure to comply with a generally applicable regulation requiring adequate roof support). Without reference to a specific plan provision, the last sentence of section 75.220(a)(1), requiring that additional measures be taken to protect persons if unusual hazards are presented, appears to add nothing to the operator’s general obligation to control roof conditions, as specified in section 75.202(a). The Secretary does not argue that a violation of the “additional measures” requirement of section 75.220(a)(1) should be judged by any different legal standard than that applicable to a violation of section 75.202(a).

It is not necessary to decide the legal issue identified above, because I find that the Secretary has not proven a violation of section 75.220(a)(1). I agree with the Secretary that the roof conditions where the accident occurred were “unusual hazards,” within the meaning of the regulation. However, I find that JWR employed appropriate additional measures, as specified in its roof control plan, to address them.

While JWR argues that the roof conditions in the area of the accident did not constitute unusual hazards, it is clear that they were substantially more hazardous than those typically found, especially considering the mining activity occurring at that time and location. Dorton identified adverse roof conditions in the area of the accident as slicken-sided joints, very unconsolidated material that lacked cohesion. Tr. 66-68. A roof fall had occurred in the area on

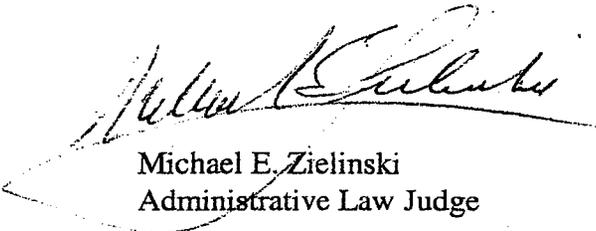
the previous shift. Cantor regarded the area as a "bad spot" presenting subnormal roof conditions. Tr. 186-88. While similar roof conditions might have been encountered in the past and were simply mined through, the area of the accident could not be mined through because panel N-13 had reached its stop point. The adverse roof conditions had to be dealt with, and made safe for miners who would be working in the area to remove the shields. I have no difficulty finding that the adverse conditions in the area of the accident were "unusual hazards" that required JWR to implement additional measures to control the roof under its roof control plan.

JWR employed several "additional measures" to control the adverse roof conditions. It used roof bolts that were 12 inches longer than required, larger bearing plates, and added T-bars. It also installed substantially more bolts, on closer spacings than specified in the plan.⁵ The Secretary has not identified any additional measure specified in the plan at the time of the accident that JWR should have implemented, but did not. The Secretary's arguments on implementation of the safety practice and crew size were rejected previously. They are no more valid under section 75.220(a)(1).

I find that the Secretary failed to prove, by a preponderance of the evidence, that JWR violated section 75.220(a)(1).

ORDER

Jim Walters Resources' contest to Citation No. 7684534 is sustained. Citation No. 7684534 is **VACATED**, and the Petition for Assessment of Civil Penalty in Docket No. SE 2007-197 is hereby **DISMISSED**.



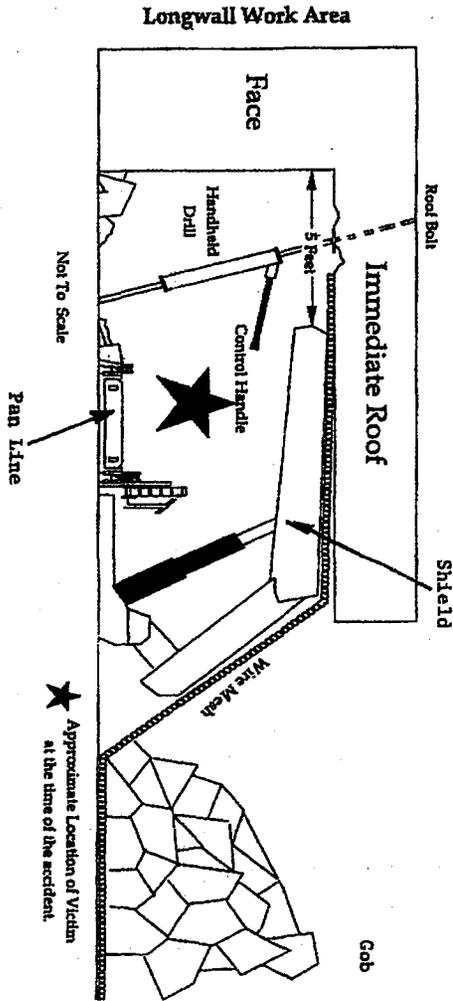
Michael E. Zielinski
Administrative Law Judge

⁵ JWR argues that, because its plan's additional measures provision is worded in the singular, that it was only obligated to use one of the specified "additional measures." Whether or not JWR's literal reading of the plan is correct, under section 75.202(a), it would have been obligated to use any measures reasonably necessary to control adverse roof conditions, regardless of whether they were specified in its roof control plan.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 27, 2008

CLIMAX MOLYBDENUM COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2007-330-RM
	:	Citation No. 6315468; 02/23/2007
v.	:	
	:	Docket No. WEST 2007-333-RM
	:	Citation No. 6315469; 02/26/2007
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Henderson Operations
ADMINISTRATION (MSHA),	:	Id. No. 05-00790
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-480-M
Petitioner	:	A.C. No. 05-00790-115261
	:	
v.	:	Docket No. WEST 2007-776-M
	:	A.C. No. 05-00790-121855
CLIMAX MOLYBDENUM COMPANY,	:	
Respondent	:	Henderson Operations

DECISION

Appearances: Timothy R. Olson, Esq., Jackson Kelly PLLC, Denver, Colorado, for Climax Molybdenum Company;
Timothy S. Williams, 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 two notices of contest filed by the Climax Molybdenum Company ("Climax") and two petitions 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"). Climax contested Citation Nos. 6315468 and 6315469. An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. THE CITATIONS

Climax is a division of Freeport-McMoRan Copper & Gold, Inc., and it operates the Henderson Mine and Mill. The mill, which is located in Grand County, Colorado, crushes and processes the ore that has been transported from the mine. MSHA inspector Rodric Breland was at the mill on February 23, 2007, when he observed conditions which he believed violated the Secretary's safety regulations. Inspector Breland issued Citation No. 6315468, under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 57.14112(b) as follows:

The inspection/maintenance cover plate was left open on the North Dry Feed conveyor. The conveyor belt was in operation and the open cover plate exposed an approximate 18 inch wide by 12 inch high opening to the head pulley. The open access measured approximately 37 inches from the working platform and the head pulley measured approximately 16 inches inside the chute/guard. With the cover plate open, a miner is exposed to an entanglement injury with the head pulley.

He determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Climax's negligence was moderate. The Secretary proposes a penalty of \$614.00 for this citation.

Inspector Breland also issued Citation No. 6315469, under section 104(d)(1) of the Mine Act, alleging a violation of 30 C.F.R. § 57.14105 as follows:

It is common practice to clean material build-up inside the head pulley guard/chute on the North Dry Feed conveyor while the conveyor is in operation. According to two different operation supervisors, Dean Schonlau and Mike Birmingham stated that the cover plate is opened and a wooden bar is used to scale build-up of material off the inside of the chute where material dumps off the conveyor. . . . Where scaling of material build-up is performed, the head pulley measures approximately 12 inches between the pulley and chute structure. This hazardous work practice is performed on an as-needed basis, the cover plate is opened and material build-up is checked for approximately six times a day. The company has engaged in aggravated conduct constituting more than ordinary negligence in that this hazardous work practice has been [accepted] and not recognized as a hazard for a great length of time. Miners have been exposed to serious injury while performing this hazardous task of cleaning material build-up inside the guard/chute

in close proximity with the head pulley while the conveyor is in operation.

He determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that the violation was the result of the company's unwarrantable failure to comply with the safety standard. Negligence was designated as high. The Secretary proposes a penalty of \$4,500.00.

II. FINDINGS OF FACT

1. Climax operates a leach plant at the Henderson Mill and the citations were issued for conditions at the north dryer feed chute in the leach plant.

2. Molybdenum material is fed onto the north dryer feed belt by a chute from the drum filter. (Tr. 8-9). It is then carried by the north dryer feed belt to the north dryer feed chute where the material drops off the belt and onto the distributor augers approximately nine feet below. (Tr. 9-11, 113). This assembly is depicted in the Secretary's first exhibit. (P-1).¹

3. There is a door on the north dryer feed chute. (Tr. 12; Ex. P-2). The dimensions of the door are 18 inches wide by 12 inches high and the bottom of the door is 37 inches from the work surface below. (Tr. 14-16; Exs. P-4, P-5, C-1). This door is what the inspector referred to as the "inspection/maintenance cover plate" in Citation No. 6315468.

4. When the door is opened the inside walls of the chute and head pulley are visible. (Ex. P-6). The head pulley is 16 inches from the door opening. (Ex. P-6). The minimum distance between the north dryer feed belt and the inside wall of the chute below the door is 12 inches. (Ex. P-7).

5. The north dryer feed belt is a slow moving belt. It travels at a rate of 3.56 feet per second or 2.4 miles per hour. (Stip. 10; Tr. 73).

6. The north dryer feed belt is 18 inches wide, which is the same width as the door opening. (Tr. 115; Ex. P-5).

7. The pulley for the north dryer feed belt is wider than the belt itself and extends at least two inches beyond the outside edge of the belt on each side. (Tr. 115-16).

8. The head pulley itself is smooth, with an exterior of half-inch machined rubber and smooth recessed sides. (Tr. 116-17). The width of the gaps between the smooth ends of the head

¹ Counsel for the Secretary designated his exhibits as "Petitioner's Exhibits," and I have used this same designation in this decision.

pulley and the inside walls of the chute are 3.75 inches on the north side and 4 inches on the south side. (Stip. 11; Exs. P-11, P-12).

9. Molybdenum can be used as a lubricant and is a powdery substance that has the consistency of graphite. (Tr. 140).

10. The head pulley, feed belt, and chute at issue in these cases are coated with molybdenum material, making all of the surfaces inside the chute smooth and slippery. (Tr. 11, 56, 116, 119).

11. The door on the north dryer feed chute allows Henderson leach plant employees to inspect the belt and clean molybdenum accumulations off the inside walls of the chute as needed. This cleaning occurs, on average, three times per shift or six times in a 24-hour period. (Tr. 12, 17-19, 114). Molybdenum primarily accumulates two to three feet below the elevation of the pulley. (Tr. 149, 186).

12. The practice of scraping molybdenum accumulations off the inside walls of the north dryer feed belt has been occurring at the Henderson Mill since 1976, when the mill was built. (Tr. 114). This cleaning generally occurs when the pulley is operating.

13. The door in the north dryer feed chute has been opened at least 50,000 times over a 30-year period while the pulley and belt were operating with no reports of injury as a result. (Tr. 113-14).

14. All employees are instructed to never "break the plane" of the opening of the door on the chute with any body parts. They are also told that if they need to reach into the opening, the Henderson Mill policy is that the belt is shut down and locked out. (Tr. 117).

15. When scraping molybdenum accumulations off the inside walls of the chute, Climax employees use a scaling bar made of wood or metal that is between six and eight feet in length. (Tr. 21-23, 124).

16. Climax employees have not engaged in the practice of scraping molybdenum off the belt or the head pulley. (Tr. 80, 149). Employees only scrape the sides of the chute.

17. There is a permanently affixed scraper inside the chute that removes excess molybdenum accumulations from the belt after it passes over the pulley. (Tr. 122-23).

18. The chute itself has no moving parts, except the head pulley, and there are no rollers, skirting, controls, valves, or levers inside the chute. (Tr. 74, 158, 166).

19. When a new belt is installed, recessed stainless steel splices are used. Bolts are installed at the splices and ground smooth before the belt is put into operation. (Tr. 27-28, 121).

20. Steve Schake, Dean Schonlau, and Mike Birmingham have worked at the Henderson Mill for 30, 27, and 28 years, respectively, all beginning employment in hourly positions. (Tr. 7, 103, 183). Mr. Schake is now a senior health and safety specialist at the Mill. (Tr. 103). Messrs. Schonlau and Birmingham are both operations supervisors. (Tr. 7, 183).

21. Henderson Mill supervisors have been training employees on how to inspect and clean the north dryer feed chute for over 28 years. (Tr. 113-14, 191). Schake, Birmingham, and Schonlau never believed that they were putting employees at risk or exposing them to hazards by having them inspect and scrape the inside walls of the chute. (Tr. 125, 145, 191). Birmingham and Schonlau have personally inspected and scraped the inside walls of the chute many times and they never felt that they were in danger. (Tr. 144-45, 191).

22. Schonlau testified that he performed the task of scraping the north dryer feed chute in the presence of an MSHA inspector about 25 years ago and that the inspector did not issue a citation or instruct him to discontinue the practice. (Tr. 165-66, 177).

23. On February 23, 2007, Inspector Breland was at the Henderson Mill when he observed that the door on the north dryer feed chute was open. (Tr. 162; Ex. C-9). Mr. Schonlau, who accompanied the inspector, told him that he did not know who left the door open or how long the door had been left open. (Tr. 44). It is Climax's policy to keep the door on the chute closed to keep steam from the dryers contained. (Tr. 109-10).

24. Inspector Breland discussed the cleaning process with Schonlau, but he did not issue any citation or indicate that any enforcement actions would be taken. (Tr. 162). The inspector told Schonlau that the door should be kept closed, but Schonlau testified that he was not instructed to stop performing visual inspections or stop scraping the sides of the chute with the belt operating. (Tr. 163; Ex. C-9).

25. At the hearing, Inspector Breland testified that if he had observed anyone scraping the sides of the chute while the belt was operating, he would have issued an imminent danger order. (Tr. 46, 89).

26. Inspector Breland returned to the Henderson Mill on Monday, February 26, 2007. He discussed the cleaning practice with Schake and Birmingham and he issued the two citations. Climax rapidly abated both citations by installing a guard over the door opening.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Citation No. 6315468.

Inspector Breland cited Climax for a violation of section 57.14112(b). That safety standard provides that “[g]uards shall be securely in place while machinery is being operated,

except when testing or making adjustments which cannot be performed without removal of the guard.” This safety standard is typically cited when a previously installed guard has not been replaced or is otherwise missing. In this instance a door to a chute was open. The inspector referred to this door as an “inspection/maintenance cover plate” in the citation. Climax did not consider the door to be a guard, as that term is typically used in MSHA’s safety standards. It did not really function as a guard since it could be easily opened.

The Secretary argues that Climax violated the standard every time the door was kept open while the conveyor was running. She argues that to find otherwise would defeat the purpose of the standard by allowing entry to moving parts. Climax does not contend that it was testing or making adjustments when the door was opened. The Secretary maintains that Climax’s argument that the door was not a guard is irrelevant. Whether or not the door functioned as a guard, the standard plainly requires that an opening exposing moving machinery must be guarded. It is undisputed that the opening was uncovered when Inspector Breland observed it. She contends that the door is often left open. Since no guard was securely in place and the machinery inside was operating, Climax violated section 57.14112(b).

Climax contends that the door to the chute was not a guard because it was not installed to prevent injury to miners. The opening observed by Inspector Breland did not expose miners to a reasonable possibility of injury. As a consequence, there was no requirement that the company fit the opening with a guard and there was no violation of section 57.14112(b).

The safety standard cited by the inspector does not specifically require the installation of guards and does not set forth criteria for the installation of guards. Was Climax required to install a guard at the opening to the cited chute? To answer this question, the applicability of section 57.14107, which sets forth criteria for the installation of guards, must be evaluated.

Section 56/57.14017, entitled “Moving Machine Parts” provides that “[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, coupling, shafts, fan blades; and similar moving parts that can cause injury.” The issue is whether the door on the chute is required to be kept closed under this safety standard to guard moving machine parts inside the chute.

There is no question that the head pulley in the chute is covered by 57.14107. An important case discussing when moving machine parts must be guarded is *Thompson Brothers Coal Co.*, 6 FMSHRC 2094 (Sept. 1984). That case involved section 77.400(a), which is substantially similar but not identical to section 56/57.14107. The Commission held that in order to establish a *prima facie* case, the Secretary of Labor must prove: “(1) that the cited machine part is one specifically listed in the standard or is ‘similar’ to those listed; (2) that the part was not guarded, and (3) that the unguarded part ‘may be contacted by persons’ and ‘may cause injury to persons.’ ” *Id.* at 2096. The Commission interpreted the third element of this test to “contemplate a showing of a reasonable possibility of contact and injury including contact

stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Id.* at 2097.

The safety standard must be interpreted to recognize that human behavior can be erratic and unpredictable. Guards are designed to prevent miners from being injured by moving machine parts especially at those times when they are not as focused on their jobs as they should be. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . .” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

It is clear that the head pulley and accompanying belt are covered by the standard. It is also clear that the pulley was not guarded when the door to the chute was open. What remains at issue is whether the cited condition presented a reasonable possibility of contact and injury. For the reasons discussed below, I answer that question in the affirmative.

Inspector Breland provided a number of examples of the hazards present when the door to the chute is left open. The conveyor structure sits on an elevated platform. (Tr. 56; Exs. P-2, P-9). There were low-hanging pipes around the chute as well as potential tripping hazards. (Ex. P-10). If a miner were to trip and fall in the area when the door was open, his hands and arms could enter the opening and strike the moving conveyor. Although I agree with Climax that the belt moves at a relatively slow rate of speed, the movement of the belt could cause a miner’s hand or hands to slip down. (Tr. 53). A miner’s hand could also slip up the belt due to the slippery nature of the molybdenum on the belt. In either event, the miner’s head or neck could hit the frame around the door causing an injury. If a miner were to trip and fall in the area when the door was closed, he still might injure himself. Indeed, Schonlau testified that, on more than one occasion, he has hit his head on the low pipes in the area and has fallen down. (Tr. 28-29, 159-60; Ex. C-8). He hit his head on the side of the chute when he fell on one occasion.

I find that the Secretary established that the violation was S&S. A violation is classified as S&S “if based upon the 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.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 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 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established the first two elements of the S&S test, but whether the third element was established is a closer question. Clearly, if someone were to trip and fall in front of the chute, he could be injured even if the door to the chute were closed. As stated above, I determined that, because the door on the chute was open, there was a "reasonable possibility" of contact with the belt and pulley. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury. I find that the record demonstrates that if a miner were to trip and fall while the door was open and he came in contact with the moving machine parts it is reasonably likely that he would be injured. It is also reasonably likely that the miner's injuries would be more serious than if the door were closed because his hands would likely slip on the moving conveyor which could cause his head to strike the edge of the door opening. The belt is only 16 inches from this door opening. Any injury is likely to be of a reasonably serious nature.

In reaching this conclusion, I have taken into consideration that it was company policy to keep the door closed and that it was normally kept closed except when a miner was scraping the inside walls of the chute. I have also taken into consideration the fact that no miner has ever reported an injury involving contact with the head pulley.

It is important to understand that it is not very likely that, by merely touching the belt, the miner would injure himself. Schake, Schonlau, and Birmingham all testified that the moving belt would not injure a miner if he accidentally came into contact with it, in part because it was covered with molybdenum. (Tr. 121, 157, 191). I credit this testimony as well as the testimony that the splice is relatively smooth. In addition, the pinch points were far enough from the opening that contact with them was highly unlikely. (Tr. 117-18, 124). It would also be unlikely that anyone would come in contact with the shaft (axle) for the pulley or get his hand caught between the pulley and north or south walls of the chute. Finally, I reject the inspector's testimony that a miner could get pulled into the opening of the chute or fall into this opening. The chance of that happening is remote at best. The inspector also testified that a miner's head could get caught between the conveyor as it travels around the pulley and the wall of the chute and he could then be pulled down into the chute. It is practically inconceivable that such events could occur. As a consequence, I reduce the gravity from "fatal" to "lost workdays or restricted duty." I base my S&S finding on circumstances in which a miner trips, slips, or falls by the chute while the door is open and his hand enters the door opening and slips on the moving belt.

I find that the negligence of the company was moderate. Climax has operated the leach plant in the same manner for at least 28 years. It did not consider the door to the chute to be a "guard," as that concept is set forth in the Secretary's safety standards. On the other hand, Company policy was to keep the door closed except when necessary. Although the primary purpose of this requirement was to contain the steam rising from the dryers, a reasonably prudent

person would have recognized that it was also safer to keep the door closed. Climax does not know who left the door open.²

B. Citation No. 6315469.

Inspector Breland also cited Climax for a violation of section 57.14105. That safety standard provides, in part, that “[r]epairs or maintenance on machinery or equipment shall be performed only after the power is off and the machinery or equipment is blocked against motion.” The inspector cited Climax because miners were cleaning the inside walls of the chute with a scaling bar while the conveyor was in operation. He considered the violation to be an unwarrantable failure because Climax has been using this hazardous work practice for a long period of time.

The Secretary argues that cleaning the buildup of molybdenum on the sides of the chute constitutes “repairs or maintenance” as that phrase is used in the standard. She contends that the plain language of the standard supports her position. In addition, her interpretation of the standard is reasonable and is therefore entitled to deference by the Commission.

Climax contends that the standard does not apply because scraping the sides of the chute is cleaning rather than “repairs or maintenance,” and, even if the standard applies, it was not violated because the chute does not have any moving parts that can be blocked against motion. The only moving parts were the pulley and belt. Those parts were not being repaired or maintained so the standard does not apply.

The key phrase in the standard is “repairs or maintenance.” The Commission discussed this phrase in *Walker Stone Co. Inc.*, 19 FMSHRC 48 (Jan 1997); *aff’d* 156 F.3d 1076 (10th Cir. 1998). In that decision, the Commission held:

The term "repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify" *Webster's Third New International Dictionary, Unabridged* 1923 (1986). The term "maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . ." and "[p]roper care, repair, and keeping in good order." *Id.* at 1362

² In its brief, Climax argues that the citation should be vacated because it had not been put on notice that the safety standard applied to the chute. I reject this argument. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard applied to this installation because of the presence of the head pulley.

Id. at 51. I find that scraping the sides of the chute with a bar does not fit within the definition of repair. Whether it fits within the concept of “maintenance” is a closer issue. The term maintenance is also defined as “[p]roper care, repair, and keeping in good order.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 328 (2d ed. 1997). Climax instructed its employees to clean the inside of the chute about three times a shift. Because the molybdenum drops off the end of the belt and falls down to the augers below, it tends to stick to the sides of the chute. By cleaning the sides of the chute, the employees are arguably keeping the equipment in a “state of efficiency” or “in good order.” It is clear, however, that the chute was not clogged when employees used the scaling bar to clean the chute. In addition, the belt was functioning and operating properly at all pertinent times.

In *Walker Stone*, a crusher stopped operating because it had become clogged with several large rocks that stalled the engine for the crusher. Employees made several attempts to break or remove the rocks. During this process, an employee jogged the rotor on several occasions by pressing the start button on the engine with the clutch still engaged to see whether the impeller would rotate. An employee was not in the clear one time that the rotor was jogged and he was fatally injured as a result. MSHA issued a citation alleging a violation of section 56.14105. The administrative law judge vacated the citation because breaking and removing large rocks did not constitute repairs to or maintenance of the crusher. 17 FMSHRC 600, 604-05 (April 1995). On review, the Commission reversed the judge. The Commission reasoned that “the effect of removing the rock was to eliminate the malfunctioning condition and enable the crusher to resume operation” and that the work was included in the broad phrase “repairs or maintenance of machinery or equipment.” 19 FMSHRC at 51.

As stated above, the belt and pulley in the chute were not malfunctioning in this case. As a consequence, Climax argues that the safety standard does not apply. The cleaning activities performed by Climax employees were not performed because the feed chute had ceased to operate due to a malfunction. Removal of the molybdenum that had stuck to the sides of the chute was “not necessary for the north dryer feed chute to be able to process material.” (C. Br. 16). The material is so fine that it would never clog up the chute. As a consequence, the cleaning operation was not “maintenance” as that term is used in the standard.

The Secretary argues that the language of the standard should be interpreted broadly and that the Commission recognized that fact in *Walker Stone*. The Secretary stated:

The *Walker* panel noted that actions should be considered repairs or maintenance where they are “designed to prevent [machinery] from lapsing from its existing condition or to keep [it] in good repair” or where the action “preserve[d] the ability of the” machinery to perform its function. Work is to be considered repairs or maintenance where it is “performed to keep [the machinery] in the same condition as the day before. . . .”

(S. Br. 11) (*citing* 19 FMSHRC 52). Inspector Breland believed that, if the sides of the chute were not cleaned, the accumulations would eventually build up and lessen the throughput and the efficiency of the process. (Tr. 48).

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that the reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As always, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *See, e.g., Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984). As applied to the facts presented in this case, I find that the language of the standard is not clear. On one hand, by frequently cleaning the sides of the chute, Climax was keeping the equipment in a "state of efficiency" or "in good order." On the other hand, the equipment was operating in the normal fashion and it was not malfunctioning or otherwise out of order.

The Commission must give weight to the Secretary's interpretation of a safety standard "unless it is plainly erroneous or inconsistent with the regulation." *Akzo Nobel Salt, Inc.*, 212 F.3d 1301, 1303 (D.C. Cir. 2000) (citation omitted). At least one circuit court has held that the Secretary's litigating position before the Commission is also deserving of deference. *RAG Cumberland Res. LP*, 272 F.3d 913, 920 (D.C. Cir 2001). As a consequence, the issue before me is whether the Secretary's interpretation of the standard is a reasonable one that is consistent with the standard's language and Commission precedent.

I hold that the Secretary's interpretation of the standard is reasonable and is consistent with Commission precedent. Moreover, her interpretation is "consistent with the safety promoting purposes of the Mine Act." *Walker Stone*, 156 F. 3d at 1082. Miners were instructed to scrape molybdenum material off the inside walls of the chute about three times a shift for a reason. In scraping material off the walls of the chute, the company was maintaining the chute assembly by keeping it in good order. If the sides of the chute are not cleaned periodically, the chute can get plugged up near the bottom where the auger screws pull the molybdenum into dryers. (Tr. 19-20, 153-54). When that happens, miners sometimes beat on the sides of the chute to knock material off. (Tr. 154). If it really gets plugged up, the machinery is shut down and locked out so that miners can "beat on it, poke it, [and] clean it out probably within 30, 45 [minutes], maybe an hour." (Tr. 153). The company's witnesses testified that this procedure

does not cause any production problems because Climax has a “secondary system” that can be started up. When Schonlau was asked why the system is not shut down every time the sides of the chute are scraped, he replied that it was “just a preference of the operator.” (Tr. 154). He also testified that the system could be locked out every time but that a safety hazard was not created by keeping the conveyor operating. *Id.*

I find that Climax’s practice of scraping the walls of the chute on a regular basis can reasonably be characterized as a type of maintenance. It is similar to preventive maintenance in the sense that, if the walls of the chute are kept free of accumulations, the molybdenum is less likely to become plugged up at the bottom of the chute. By regularly scraping the sides of the chute, Climax reduces the risk that it will need to spend 30 minutes to an hour cleaning out the bottom of the chute.

Climax also argues that any maintenance was being performed on the chute, not on machinery or equipment. Employees do not clean or scrape the conveyor, the pulley or any other moving parts. The Secretary argues that the chute is an important part of the conveyor system. She contends that the protection afforded by the safety standard extends to the chute between the conveyor and the auger screws. I reject Climax’s argument. The molybdenum product drops off the end of the conveyor, falls down the chute, and is picked up by the screws at the bottom of the chute. The chute is an integral part of the entire process. The Commission has held that miners removing obstructions in chutes between belts are protected by section 75.1725(c), a similar standard applicable to underground coal mines. *Jim Walter Resources, Inc.*, 28 FMSHRC 983 (Dec. 2006). In conclusion, I find that the Secretary established a violation of section 57.14105.

I find that the Secretary did not establish that the violation was S&S. Although a slight hazard was created, it was not reasonably likely that the violation would contribute to an injury. (Tr. 125). The miners used long straight rods to scrape the side of the chute. If a miner happened to touch the moving conveyor with his bar, his hands would not be pulled into the opening in the chute. It is extremely unlikely that the moving conveyor or pulley would grab the bar and pull it into the chute. (Tr.148-49). Miners have been scraping the sides of the chute while the conveyor was operating for almost 30 years without anyone reporting that they were injured or otherwise pulled into the opening. As stated above, the conveyor moves at a slow rate of speed and is slick with molybdenum. It would also be highly unlikely for the bar to get caught between the ends of the pulley and the walls of the chute because of the location of the pulley within the chute. I reject the inspector’s testimony wherein he stated that the bar could get caught within the pinch points on the sides and it could “come back and strike [the miner] in the head.” (Tr. 56-57). Although perhaps such an event is possible, it is highly unlikely, in part, because everything inside the chute is slick with molybdenum, including the pulley and the walls of the chute.

The inspector further testified that:

Also, while you are scaling, if you slipped and just kind of fell down, the pressure of the bar hitting on the lip of the opening and the bottom of the pulley would just suck the bar in, with the miner's weight on it. As humans, our reaction is to hold on as something is being yanked from us, so we also have a potential for injury there.

(Tr. 57). Again, although I am not in a position to say that such a scenario is impossible, I find that it is highly unlikely to occur given the facts in this case, as discussed above. Every potential hazard in a mine is not S&S. In conclusion, I find that an injury was unlikely and that the violation was only moderately serious.³

Finally, I also find that the Secretary did not establish that the violation was the result of the operator's unwarrantable failure to comply with the standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is true that the violation had existed for a long time but the operator had not been put on notice that greater efforts were necessary to eliminate the violation. Indeed, Mr. Schonlau testified that soon after the mill was built he scraped the sides of the chute while the belt was operating in the presence of an MSHA inspector and no citations were issued. (Tr. 165-66, 177). I find that Climax genuinely believed that its procedure for cleaning the sides of the chute complied with the Secretary's safety standards. The fact that its belief was incorrect does not establish aggravated conduct. I also conclude that the violation was not very obvious because the company thought that its practices were safe. As stated above, the violation did not contribute to a high degree of danger. Based on the above, I find that the company's negligence was low.

³ I concluded that the previous citation was S&S because, if the chute door were left open while not in use, a miner walking or working in the area could slip, trip, or fall in such a way that his hand or arms could enter the opening and strike the moving conveyor. When a miner scrapes the sides of the chute, he stands in front of the door, opens it up, and then starts scraping the sides with a rod. There is little likelihood that the miner will slip, trip, or fall in such a situation or otherwise come in contact with the moving machine parts.

IV. APPROPRIATE CIVIL PENALTIES

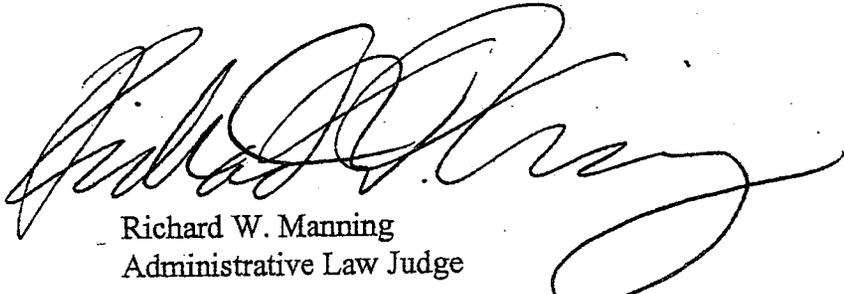
Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. Climax is a large mine operator and its parent company is also large. The record shows that the Henderson Operations was issued about 227 citations and orders in the 24 months prior to February 26, 2007. (Ex. P-17). The vast majority of these were non-S&S citations issued under section 104(a) of the Act. The two citations at issue in this case were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on the operator's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

V. 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>
WEST 2007-480-M & WEST 2007-330-RM		
6315468	57.14112(b)	\$400.00
WEST 2007-776-M & WEST 2007-333-RM		
6315469	57.14105	\$200.00

For the reasons set forth above, Citation No. 6315468 is **MODIFIED** by reducing the gravity and Citation No. 6315469 is **MODIFIED** by deleting the unwarrantable failure and the significant and substantial determinations made by the inspector so that the citation is now a section 104(a) citation with low gravity and negligence. Climax Molybdenum Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$600.00 within 30 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

August 28, 2008

GABRIEL ROBLES,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. CENT 2008-115-DM
v.	:	SC-MD-08-01
	:	
LAFARGE NORTH AMERICA, INC.,	:	Sugar Creek Plant
Respondent	:	Mine ID 23-00158

DECISION

Appearances: Gabriel M. Robles, Kansas City, Missouri, *pro se*;
Christopher Peterson, Esq., Jackson Kelly, PLLC, Denver, Colorado, on behalf of the
Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination filed by Mr. Gabriel Robles 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 that LaFarge North America, Inc. (Lafarge) terminated him purportedly in violation of Section 105(c)(1) of the Act.¹ LaFarge denies the allegations of unlawful termination and, alternatively, seeks dismissal of the complaint on the grounds that the complaint was not filed within the time limits set forth in Section 105(c)(2) of the Act. For the reasons that follow, I find that, indeed, the complaint must be dismissed for untimely filing.

¹ Section 105(c)(1) 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.

Section 105(c)(2) provides that “any miner...who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination...”. The Commission has long held, however, that this 60-day limit is not jurisdictional and a judge is required to review the facts on a case-by-case basis, taking into account the unique circumstances of each situation in order to determine whether a miner’s late filing should be excused. *Hollis v. Consolidation Coal Company*, 6 FMSHRC 21, 24(January 1984), aff’d mem. 750 F.2d 1093 (D.C. Cir. 1984).

In this case there is no dispute that Mr. Robles’ alleged protected activities occurred on February 15, 2007 and/or February 16, 2007, and that he was “walked off the job” at the subject mine thereby allegedly suffering discriminatory retaliation within one or two days thereafter. For purposes of this decision, the alleged discriminatory acts therefore occurred no later than February 18, 2008. There is also no dispute that Mr. Robles’ letter of complaint to the Department of Labor’s Mine Safety and Health Administration (MSHA) was dated September 26, 2007, or more than five months after the 60-day deadline set forth in Section 105(c)(2).²

In his letter of complaint to MSHA dated September 26, 2007, Robles explained his late filing as follows: “only because of my poverty am I only now able to relate or report this incident.” At hearings, Robles further explained that he did not file a timely complaint because he could not afford the cost of postage needed to mail the complaint to MSHA.³ Robles also testified at hearings however, that at the time his work at Lafarge ended he had been working for four days earning \$12.00 per hour plus overtime at \$18.00 per hour. He also was apparently paid for this work by his temporary agency “Labor Ready” before his next shift would have commenced at Lafarge - presumably therefore on February 18, 2008. Robles further testified that, after being out of work for a week, he got another job for about two weeks in “construction cleanup”. It is therefore clear that Robles had adequate funds to pay the postage to mail his complaint to MSHA. The credibility of his testimony in this case is further diminished by his statement that he was able to pay five or ten dollars for a telephone call at a time when he purportedly could not afford 39 or 41 cents for postage.

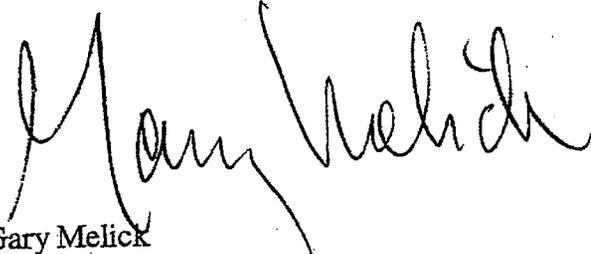
Under these circumstances, I am compelled to conclude that Robles’ testimony- - including his claim that he did not file his complaint within the statutory time period because he could not afford the postage- -is not credible. I therefore also conclude that his late filing is not excusable and that his complaint herein must be dismissed.

² MSHA Form 2000-123 shows that the complaint was filed with MSHA on September 27, 2007.

³ Administrative notice may be taken on the fact that, during February 2007, the postal rate for one ounce of first class mail was 39 cents and, as of May 14, 2007, was 41 cents.

ORDER

Discrimination Proceeding Docket Number CENT 2008-115-DM is hereby dismissed.

A handwritten signature in black ink, appearing to read "Gary Melick". The signature is written in a cursive style with a large initial "G".

Gary Melick
Administrative Law Judge
(202) 434-9977

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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

August 28, 2008

JAMES BLEVINS, Owner and MAVERICK MINING CO., LLC, Contestants	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. KENT 2006-232-R
	:	Order No. 7425414; 01/17/2006
	:	
v.	:	Docket No. KENT 2006-233-R
	:	Order No. 7425415; 01/17/2006
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine ID: 15-18674
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. KENT 2008-841
	:	A.C. No. 15-18674-143259
	:	
v.	:	
	:	
MAVERICK MINING CO., LLC, Respondent	:	Mine: #1
	:	

ORDER

The parties are advised that Docket No. KENT 2008-841 is **CONSOLIDATED** for hearing and decision with Docket Nos. KENT 2006-232-R and KENT 2006-233-R.

On January 10, 2006, a fatal accident occurred at Maverick Mining Company's #1 Mine located in Pike County, Kentucky. MSHA investigated the accident and issued Order No. 7425414 and Order No. 7425415 on January 17, 2006. The Secretary issued the final Accident Report on March 3, 2006. Thereafter, the company requested a 10-day conference which was held on March 27, 2006. The company filed Notice of Contests on March 27, 2006, contesting Order No. 7425414 (KENT 2006-232-R) and Order No. 7425415 (KENT 2006-233-R). The Secretary filed her Answers on April 12, 2006. The contest cases were assigned to me on May 19, 2006, and I stayed them pending the assessment of the civil penalties for the violation of 30 C.F.R. § 75.220(a)(1) alleged in Order No. 7425414 and the violation of 30 C.F.R. § 75.362(a)(1) alleged in Order No. 7425415. The two alleged violations were assessed civil

penalties by MSHA on March 7, 2008. The company contested the penalties on March 25, 2008, and the Secretary filed her Petition for Assessment with the Commission on May 9, 2008 (KENT 2008-841). In the petition, the Secretary proposed civil penalties of \$20,500 for each of the alleged violations.

The company now moves to dismiss the civil penalty proceeding contending the Secretary did not propose the civil penalty within a reasonable time as is required under Section 105(a) of the Mine Act.¹ The company notes approximately 24 months passed between the date of the Accident report and assessment.

As Administrative Law Judge Jerold Feldman explained in *Wabash Mine Holding Co.*, 27 FMSHRC 672, 685-686 (Oct. 2005):

The statutory scheme authorizing the Secretary's imposition of a civil penalty is a major means by which operator compliance is achieved. The purpose of section 105(a) is to encourage operator compliance through timely penalty proposals rather than to create an escape mechanism through which an operator can avoid payment. The legislative history of section 105(a) explains, there may be circumstances, although rare, when prompt proposal of a civil penalty may not be possible, and the [Senate] Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34, reprinted in Legis. Hist. at 622.

The company argues that the 24 month delay in assessing the penalty is not reasonable under section 105(a) and the penalties should be vacated. The company asserts that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005) allows the Commission the discretion to vacate penalties which have been unreasonably and unjustifiably delayed based on the individual circumstances of the case.² Company's Reply at 3; *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005).

¹ Section 105(a) of the Mine Act provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [s]he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator . . . of the civil penalty proposed. . . .

² In *Twentymile*, the Court reversed the Commission's holding a proposed penalty assessment was not issued within a reasonable time, and did not address the Secretary's position the Commission was legally barred from vacating an untimely filed penalty. The Court's conclusion the penalty assessment was not untimely was based on traditional reasonableness grounds.

I agree with the company's reading of the decision. Nor am I alone in my view. As the company notes, the Commission's Chairman has reached a similar conclusion. *See* 411 F.3d at 266. Therefore, I find the practical effect of the court's decision is to leave standing the Commission's traditional framework for resolving "timeliness" issues:

[T]he requirement in section 105(a) that the Secretary propose a penalty assessment 'within a reasonable time' does not impose a jurisdictional limitations period. Rather, in cases of delay . . . [the Commission has] examined whether adequate cause existed for the . . . delay [and] whether the delay prejudiced the operator. *Twentymile Coal Co.*, 26 FMSHRC 666, 682 (August 2004) (citations omitted).

The Secretary attributes the delay to "misunderstanding of assessment procedures and inadvertence by the Secretary's counsel." Sec's. Response at 2. The company claims to have suffered prejudice by the delay as the mine closed shortly after the accident happened in January 2006. The company states it only knows the location of one of the witnesses who was underground when the accident occurred and that after 2 ½ years after the accident witnesses will have difficulty recalling the details of the events. Company's Reply at 4. However, the Secretary argues the company has not been prejudiced. She notes the company has been represented by counsel since the proceedings began.

Thus, the questions before me are whether the Secretary established adequate cause for the delay and if so, whether the company established it has been fatally prejudiced. The contest proceedings at issue here were originally part of a group of four contests treated as a unit by the Commission. Two of the contested orders (Docket Nos. KENT 2006-230-R and KENT 2006-231-R) were issued to alleged mine operator, James Blevins, while the orders at issued in this proceeding (Order No. 7425414 and Order No. 7425415) were issued to the company. Subsequently, the Secretary moved to amend Order No. 7425414 and Order No. 7425415 to include James Blevins as an operator. I granted the motion on December 13, 2006, and I ordered the Secretary to modify the orders and serve them on Mr. Blevins. I also amended the caption in KENT 2006-232-R and KENT 2006-233-R to read: *James Blevins, Owner and Maverick Mining Co. v. Secretary of Labor, Mine Safety and Health Administration*. I further noted while counsel for Mr. Blevins and the company did not object to the motion, counsel continued to maintain that Mr. Blevins could not legally and factually be cited as an operator in the proceeding. Order (December 13, 2006).

In a letter dated January 4, 2007, counsel for the Secretary advised me the orders had been modified and served on Mr. Blevins and his counsel. Counsel for the Secretary asked that Docket Nos. KENT 2006-230-R and KENT 2006-231-R, contests filed solely by Mr. Blevins, be dismissed as moot. (The orders contested in KENT 2006-230-R and KENT 2006-231-R were based on the same allegations as the orders contested in Docket Nos. KENT 2006-232-R and KENT 2006-233-R.) I granted counsel's request on January 18, 2007 and dismissed KENT 2006-230-R and KENT 2006-231-R. Also, I stated "[T]he contests in KENT 2006-232-R and KENT 2006-233-R are deemed to have been filed by both James Blevins and Maverick Mining

Co., and James Blevins is recognized as a contestant [in Docket Nos. KENT 2006-232-R and KENT 2006-233-R.]” Severance and Dismissal (January 18, 2007).

Counsel for the Secretary states following the Secretary’s amendment of the orders to show Maverick Mining Co., as an operator and James Blevins as a co-operator, counsel “assumed . . . [MSHA’s] Office of Assessments would automatically begin the usual procedures leading to the assessment [of the violations alleged in] the two orders.” Sec’s Response, Exh. A1. Counsel states his assumption was mistaken and as a result he inadvertently failed to monitor the assessment procedures. *Id.* at 2.

Counsel for the Secretary is highly competent and conscientious. Certainly, counsel’s belief the modifications would begin the procedures leading to assessments was a reasonable one. Citations and orders alleging violations of mandatory standards and modifications of the citations and orders are routinely sent to MSHA’s assessment office by the inspectors who issue the enforcement actions or by personnel in the inspectors’ offices without input from or intervention by the Secretary’s counsel. Although this did not happen after the modification of Order No 7425414 and Order No. 7425414, it was reasonable for the Secretary’s counsel to assume it would.

Moreover, I am not persuaded by the company’s claim of prejudice. As counsel for the Secretary points out, the company has been represented by counsel from the earliest stages of MSHA’s investigations and that representation has continued to the present time. Certainly, the company had the opportunity to interview those of its employees who had knowledge of the events in question and to take their sworn statements. Moreover, the company has not shown it has actually tried to find the potential witnesses and is unable to do so.³

Therefore, the company’s Motion to Dismiss is **DENIED** and the cases will be heard as scheduled November 18, 2008, in Pikeville, Kentucky. A specific hearing site will be designated at a later date.

³ Since Mr. Blevins’ arguments regarding the validity of the orders and the inspector’s findings are identical to the company’s and because Mr. Blevins is represented by the same counsel as the company, my reasoning regarding adequate cause and lack of prejudice applies to him as well as to the company.

Counsels are asked to note this order bears the correct caption for these cases. Within 15 days of the date of this order, counsel for the Secretary is ordered to file an explanation of the Secretary's position regarding Mr. Blevins and the civil penalty proceeding that is a part of these consolidated cases. While Mr. Blevins is a contestant in Docket No. KENT 2006-232-R and KENT 2006-233-R, the Secretary never has moved to amend the civil penalty petition to include Mr. Blevins as a Respondent. Any motion the Secretary files to this effect should clearly state the facts and reasons upon which Mr. Blevins alleged penalty liability or co-liability is based.



David F. Barbour
Administrative Law Judge

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