COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY AND AUGUST 2010

Review was granted in the following cases during the months of July and August 2010:

Secretary of Labor, MSHA v. Spartan Mining Company, Docket No. WEVA 2009-403. (Judge Miller, June 23, 2010)

Secretary of Labor, MSHA v. Manalapan Mining Company, Docket No. KENT 2008-737.(Judge Feldman, June 30, 2010)

Secretary of Labor, MSHA v. Performance Coal Company, Docket No. WEVA 2010-1190-R. (Unpublished order, July 8, 2010, of Judge Miller denying application for Temporary relief)

Review was denied in the following cases during the months of July and August 2010:

Secretary of Labor, MSHA on behalf of Ricky Lee Campbell v. Marfork Coal Company, Docket No. WEVA 2010-1030-D. (Judge Gill, June 11, 2010)

Secretary of Labor, MSHA on behalf of Douglas Pilon v. ISP Minerals, Inc., Docket No. LAKE 2010-766-D. (Judge Rae, July 2, 2010)

Secretary of Labor, MSHA v. Independence Coal Company, Docket No. WEVA 2009-1067. (Judge Miller, June 17, 2010)

Secretary of Labor, MSHA v. Brody Mining, LLC, Docket No. WEVA 2009-1445. (Unpublished order, April 9, 2010, by Chief Administrative Law Judge Robert Lesnick, Denying Brody's motion to Dismiss)

Secretary of Labor, MSHA v. Eureka Rock, LLC., Docket No. WEST 2009-137-M. (Judge Melick, July 21, 2010)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 2, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LAWRENCE L. PENDLEY	:	Docket No. KENT 2007-265-D
v.	:	
HIGHLAND MINING COMPANY, LLC	:	

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

ORDER ON TEMPORARY REINSTATEMENT

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). Under section 105(c)(2) of the Mine Act, "if the Secretary [of Labor] finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). On May 30, 2007, Administrative Law Judge David Barbour issued an order temporarily reinstating Lawrence L. Pendley to employment with Highland Mining Company, LLC ("Highland"). 29 FMSHRC 424, 428 (May 2007) (ALJ). Pendley had been suspended by Highland on March 21, 2007, and terminated five days later. *Id.* at 427.

A complaint of discrimination regarding Pendley's discharge was brought by the Secretary pursuant to section 105(c)(2) and was heard by the judge in a separate proceeding. The judge subsequently ruled that Highland did not discriminate against Pendley when it terminated his employment with the company. *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 29 FMSHRC 459, 494-96 (May 2008) (ALJ) (Docket KENT 2007-383-D). Pendley's right to reinstatement continued, as the Commission reviewed the judge's discrimination decision.[1]

[1] While review was pending, the judge, at the request of the parties, modified the order of reinstatement to reflect that Pendley was to be economically reinstated going forward.

A Commission majority later upheld the judge's decision. 31 FMSHRC 61, 75-80 (Jan. 2009). The order of temporary reinstatement was subsequently dissolved.

The Secretary of Labor did not appeal the Commission's decision, but Pendley, through private counsel, did. In *Pendley v. FMSHRC*, 601 F.3d 417, 429 (6th Cir. 2010), the court granted Pendley's petition for review in part, and denied it in part. Consequently, the Commission's order affirming the judge's decision was reversed and the matter remanded to the Commission for further proceedings consistent with the opinion issued by the court. *Id.*

The mandate of the court issued on May 28, 2010. On June 3, 2010, the Secretary filed a motion to revive temporary reinstatement with Judge Barbour in this docket. On June 15, Highland filed a response to that motion, and on June 18 the Secretary filed a reply.

The court of appeals decision has returned the discrimination docket to the Commission for further proceedings. Because the motion to revive before the judge in the temporary reinstatement docket is contingent upon the status of the discrimination docket that has been remanded to the Commission, the Commission will rule upon the motion to revive. *Cf. Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 21 FMSHRC 947 (Sept. 1999). On this date, the Commission is also issuing a briefing order in the discrimination docket.

The Secretary argues that Pendley again has a right to reinstatement because his previous right to reinstatement was only extinguished by the finality of the Commission's decision in the discrimination docket, and with the remand to the Commission in that docket there no longer is a "final" order in that docket. We agree.

In *Bernardyn*, the Commission held that "the language of the Mine Act *requires* that a temporary reinstatement order remain in effect while the Commission reviews the judge's decision" on the complaint of discrimination. 21 FMSHRC at 949 (emphasis added). Because the discrimination docket has been remanded so that the Commission can conduct further review of the judge's decision that Pendley's discharge was not discriminatory, we hold that Pendley must be reinstated during the further course of the discrimination proceedings before the Commission with respect to that discharge.

Highland objects to a Commission order reviving Pendley's reinstatement on a number of grounds. The first is that the court remanded the discrimination case to the Commission for a limited purpose, and thus the Commission is without authority to go beyond that and order that Pendley be again temporarily reinstated. H. Resp. at 3-4.

We do not interpret the court's opinion to so constrain the Commission on remand. First of all, the issue of Pendley's right to temporary reinstatement was not before the court because, while that right had coincided with the Commission's resolution of the discrimination proceeding

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Unpublished Order (Aug. 14, 2008).

that was the subject of court review, Pendley's temporary reinstatement was the subject of an entirely separate proceeding. Pendley's temporary reinstatement ended with the issuance of the Commission's decision upholding the judge in the discrimination docket. In that decision the Commission did not even mention that Pendley's temporary reinstatement would thus end, so it is hardly surprising that the court would not address the issue of temporary reinstatement in its decision remanding the discrimination case.

Secondly, while the court remanded the discrimination proceeding to the Commission for specific purposes, it also reversed the Commission's decision upholding the judge. 601 F.3d at 429. Prior to the issuance of the Commission's discrimination decision, Pendley had a right to temporary reinstatement. Because the discrimination proceeding is back before the Commission, that right is revived.

Finally, Highland would have us deny the Secretary's motion because only Pendley, and not the Secretary, continued to pursue Pendley's discrimination complaint in the court of appeals. According to Highland, the Secretary thus lacks standing to seek to revive Pendley's right to temporary reinstatement. H. Resp. at 5. We do not view the Secretary's litigation decision in the court of appeals as having a bearing on the miner's right to temporary reinstatement in this instance. It is undisputed that the pendency of the complaint brought by the Secretary was the basis for Pendley's original right to temporary reinstatement, and it is that complaint that is back before the Commission. Under the terms of the Mine Act, we fail to see the relevancy of the Secretary's decision not to pursue that complaint beyond the "final order on the complaint" that the Commission issued.[2]

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[2] The question of the Secretary's standing to seek review of a judge's order dissolving temporary reinstatement, upon the Secretary's notice that she will not further pursue before the Commission a discrimination complaint under section 105(c)(2), is presently at issue in another Commission case. *See Sec'y on behalf of Gray v. North Fork Coal Corp.*, Docket No. KENT 2009-1429-D, Unpublished Order, at 2 (Jan. 8, 2010). In this case, however, the Secretary has given every indication that she intends to continue to participate in the section 105(c)(2) proceeding that is back before the Commission. Consequently, our action here has no bearing on the issues raised in *North Fork*.

Accordingly, we order that Pendley be reinstated immediately, with back pay retroactive to May 28, 2010, the date of the court's mandate,[3] and until such time as the Commission issues a final order upon remand in the discrimination proceeding. Jurisdiction over his reinstatement will otherwise rest with the judge. *See Sec'y on behalf of York v. BR&D Enter., Inc.*, 23 FMSHRC 386, 389 (Apr. 2001).

Mary Lu Jordan, Chairman

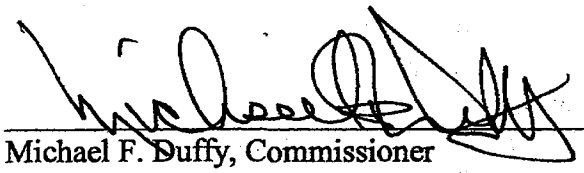
Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

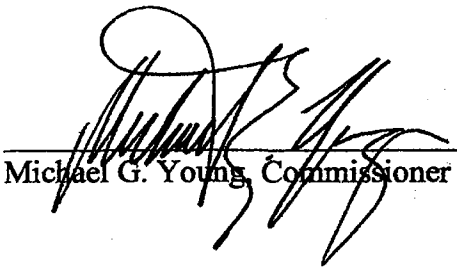
[3] In the event that the operator claims an offset should apply against Pendley's retroactive compensation between May 28, 2010 and the date of this order, the operator may raise this matter before the judge.

Commissioners Duffy and Young, dissenting in part:

While we agree with our colleagues that, with the discrimination proceeding back before the Commission, the miner's right to reinstatement in this case is revived, the issue is one of first impression. Accordingly, we believe the order of reinstatement here should have prospective effect only, and would thus order reinstatement to take effect as of the date of the order.[1]



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner

[1] Significantly, the Secretary, in moving to revive reinstatement, did not request any sort of retroactive relief for Mr. Pendley.

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July 14, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2010-51
v.	:	A.C. No. 44-07025-179671
C.S. & S. COAL CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 3, 2009, the Commission received from C.S. & S. Coal Corporation 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). On December 1, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 14, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-197
v.	:	A.C. No. 15-18335-193080
DODGE HILL MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 10, 2009, the Commission received from Dodge Hill Mining Company, LLC ("Dodge Hill") a motion 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On August 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000193080 to Dodge Hill for 16 citations MSHA had issued to the operator in June of that year. Dodge Hill states that it intended to contest six of the proposed penalties, but because of a "clerical error" it failed to return the contest form to MSHA. The Secretary of Labor states that she does not oppose the motion.

Having reviewed Dodge Hill's request and the Secretary's response, we conclude that Dodge Hill has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Dodge Hill's explanation that it failed to file a timely contest due to a "clerical error," without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. Accordingly, we deny without prejudice Dodge Hill's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by Dodge Hill to reopen Assessment No. 000193080 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 19, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2010-308-M A.C. No. 04-01763-199053
UNITED ROCK PRODUCTS, CORP.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On December 7, 2009, the Commission received from United Rock Products, Corp. ("United Rock") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On October 1, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000199053 to United Rock, proposing civil penalties for eleven citations. United Rock maintains that the employee who received the assessment and was in charge of distributing the assessment to management was terminated as a result of a reduction in force before she brought the assessment to the attention of management. United Rock further submits that it did not learn of the delinquency until another employee assumed the responsibilities of the former employee and brought the matter to the company's attention. At that point, United Rock allegedly attempted to contest the penalty assessment with MSHA. When its contest was rejected as untimely, it promptly sought reopening with the Commission.

The Secretary does not oppose United Rock's request to reopen the proposed penalty assessment. However, she urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner.

Having reviewed United Rock's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-757-M
v.	:	A.C. No. 29-02269-189806
MAINLINE ROCK AND BALLAST, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On August 21, 2009, the Commission received from Mainline Rock and Ballast, Inc. ("Mainline") a motion by counsel to reopen the penalty assessment for Citation No. 7885927 that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On September 8, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen the assessment for Citation No. 7885927 and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R.§ 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2010-173-M
ADMINISTRATION (MSHA)	:	A.C. No. 40-00098-179839
	:	
v.	:	Docket No. SE 2010-174-M
	:	A.C. No. 40-2871-179844
VULCAN CONSTRUCTION	:	
MATERIALS, LP	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 24, 2009, the Commission received from Vulcan Construction Materials, LP ("Vulcan") motions by counsel 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).[1] On December 16, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

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).

We have held, however, 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-173-M and SE 2010-174-M, both captioned *Vulcan Construction Materials, LP* and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, Vulcan's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 22, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 2010-158-M
ADMINISTRATION (MSHA)	:	A.C. No. 33-00125-193422
	:	
v.	:	Docket No. LAKE 2010-159-M
	:	A.C. No. 33-00127-193423
NATIONAL LIME & STONE COMPANY	:	

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 17, 2009, the Commission received from National Lime & Stone Company ("National Lime") letters from its safety compliance officer 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).[1] On December 14, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers LAKE 2010-158-M and LAKE 2010-159-M, both captioned *National Lime & Stone Company*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2009-1098-M A.C. No. 24-01467-182351
GENESIS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On July 13, 2009, the Commission received from Genesis, Inc. ("Genesis") a motion by counsel seeking to reopen a penalty assessments 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On April 15, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000182351 to Genesis. Genesis states that prior to receiving the proposed assessment, it requested a safety and health conference on the underlying citations in a phone conversation with an MSHA conference and litigation representative. Genesis states that it was informed to submit its request in writing and that the conference might be delayed until penalties were proposed. Genesis also states that, after receiving the proposed assessment, it subsequently submitted a letter to MSHA's Regional Office in Denver, Colorado, indicating that it wished to contest the citations and requesting a conference. Genesis states that its safety director believed that this was adequate to contest the proposed assessment as well, based on his conversation with MSHA. Genesis further states that on June 5, 2009, its accounting department submitted the proposed assessment to MSHA with payment for the violations it did not wish to contest. The Secretary wrote Genesis on June 24, 2009, and notified the operator that its hearing request of June 5, 2009 was untimely. Genesis explains that it only realized that it had not successfully contested the proposed assessment when it received this letter from MSHA on or after July 1, 2009.

The Secretary opposes reopening the proposed penalty assessment, maintaining that the operator provides no reason why the fact that it requested a conference should excuse its failure to contest the proposed assessment in a proper and timely manner. The Secretary points to MSHA's regulations, the Commission's procedural rules, the Mine Act and the proposed assessment as unequivocally indicating that an operator is required to contest the proposed assessment within 30 days of receipt.

The Commission finds that Genesis has established that, although its formal contest of the proposed assessment on June 5, 2005 was late by approximately two weeks, the failure resulted from inadvertence or mistake. Genesis believed that its previous, very detailed, letter of May 14, 2009 was sufficient to affect the contest. Moreover, Genesis acted very promptly in submitting its request to reopen the assessment.

Having reviewed Genesis' request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 22, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 2009-750-M A.C. No. 40-00031-179837
DUNLAP STONE, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On July 13, 2009, the Commission received from Dunlap Stone, Inc. ("Dunlap") a letter from the company 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000179837 to Dunlap on March 19, 2009. Dunlap alleges that previously it had contacted MSHA's field office in Birmingham, Alabama, to inquire about its conference request with regard to the citations involved and was informed that it needed to file a contest of the proposed assessment when it received that proposed assessment. Dunlap contends that it submitted the contest as instructed. However, Dunlap does not indicate which proposed penalties it intended to contest. It alleges that it inquired with MSHA's field office a few weeks later to check on the status of its request and was told that there was no information yet on its case. Dunlap contends that it then received a letter from MSHA on June 10, 2009 informing it that the penalties were delinquent. The Secretary does not oppose Dunlap's request to reopen.

Having reviewed the facts and circumstances of this case, Dunlap's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Within 30 days of the date of this order, Dunlap must notify the Secretary as to which citations it wishes to contest on Proposed Assessment No. 000179837. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of notification by the operator. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-151-M
v.	:	A.C. No. 34-01905-154656 H094
PAN AMERICAN ELECTRIC, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 18, 2009, the Commission received from contractor Pan American Electric, Inc. ("Pan American") a letter 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On June 24, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000154656 to Pan American. The record indicates that the assessment was returned undelivered, as was a later delinquency notice sent by MSHA. Pan American states that it only learned of the assessment when it was contacted by a collection agency on November 13, 2009. The Secretary states that she does not oppose the reopening of the proposed penalty assessment, but stresses that contractors are obligated to keep their addresses of record current with MSHA. She also notes that soon after filing its request to reopen, the contractor submitted an address change.

Having reviewed Pan American's request and the Secretary's response, we conclude that Assessment No. 000154656 has not become a final order of the Commission because it was never received by Pan American. Accordingly, we deny the request to reopen as moot and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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July 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 2010-338-M A.C. No. 44-00045-208036
MARTIN MARIETTA MATERIALS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On April 9, 2010, the Commission received from Martin Marietta Materials, Inc., a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On May 17, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 2010-390-M
ADMINISTRATION (MSHA)	:	A.C. No. 13-01701-198586
	:	
v.	:	Docket No. CENT 2010-391-M
	:	A.C. No. 13-02173-195121
BMC AGGREGATES LC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On January 21, 2010, the Commission received from BMC Aggregates LC 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).[1] On February 2, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect.

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-390-M and CENT 2010-391-M, both captioned *BMC Aggregates LC*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-226-M
v.	:	A.C. No. 30-03688-208182-02
TOWN OF BETHEL	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On April 26, 2010, the Commission received from the Town of Bethel a request 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). On May 7, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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July 29, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2009-848-M
v.	:	A.C. No. 32-00793-188600
PINKY'S AGGREGATES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On September 22, 2009, the Commission received from Pinky's Aggregates, Inc. ("PA") 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). On January 12, 2010, the Commission denied the motion without prejudice. *Pinky's Aggregates, Inc.*, 32 FMSHRC 1, 3 (Jan. 2010). On January 27, the Commission received a second request to reopen the penalty assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On June 18, 2009, the Department of Labor's Mine Safety and Health Administration ('MSHA") issued Proposed Assessment No. 000188600 to PA, which listed proposed civil penalties for three citations. PA failed to contest the penalties as required by section 105(a) of the Mine Act. As a result, the proposed penalties were deemed final orders of the Commission.

On September 22, 2009, the operator filed a request to reopen the final orders with the Commission. The operator stated that it failed to contest the proposed assessment in a timely manner because the assessment was "misplaced." The operator attached to its request a delinquency notice from MSHA dated September 10, 2009, and copies of the citations. The Secretary did not oppose PA's request to reopen the proposed assessment.

On January 12, 2010, the Commission issued an order denying PA's request without prejudice because PA had not provided a sufficiently detailed explanation for its failure to time contest the proposed penalty assessment. 31 FMSHRC at 3. The Commission explained that the operator's statement that it failed to contest the proposed penalties because the proposed assessment was misplaced did not provide the Commission with an adequate basis to reopen without further elaboration. *Id.* It further stated that if PA submitted another request to reopen, it must establish good cause for not timely contesting the citations and proposed penalties and include a full description of the facts supporting its claim and submit any supporting documentation. *Id.* at 3 n.1.

On January 27, 2010, the operator resubmitted a copy of the September 10 delinquency notice that it had received from MSHA. The delinquency notice has hand-written notations apparently indicating that a petition to reopen had been filed with the Commission, but the notations do not provide any additional explanation for the operator's failure to timely contest the proposed assessment. A copy of an MSHA civil penalty collection report was attached which indicates that the penalties have not been paid.

In its January 27 submission, PA failed to set forth a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. PA has again failed to fully explain the circumstances involving its misplacement of the proposed penalty assessment, and how those circumstances prevented PA from timely contesting the proposed penalty. Accordingly, PA's request to reopen is denied. *See Left Fork Mining Co.*, 30 FMSHRC 8, 11 (Jan. 2009).

Mary Lu Jordan, Chairman

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Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 29, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2010-392-M A.C. No. 13-02381-197853 H8Y
BASIC MATERIALS CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On January 21, 2010, the Commission received from Basic Materials Corporation ("Basic") 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On September 22, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000197853 to Basic, proposing a civil penalty for Citation No 6494830. The safety director of BMC Aggregates LC ("BMC")[1] explains that after BMC received the proposed assessment on September 29, 2009, he sent a contest of the proposed penalty to an MSHA district office rather than to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. After discovering the error, BMC promptly filed a request to reopen. The Secretary does not oppose the request to reopen.

[1] The request to reopen was filed by Kurt J. Behrens, who identifies himself as an engineer/safety director of BMC. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which includes parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Behrens satisfied the requirements of Rule 3 when he filed the request on behalf of Basic. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Behrens may represent Basic only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, Basic must be represented by an attorney or by an owner, partner, officer, or employee.

Having reviewed Basic's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 29, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-138-M
v.	:	A.C. No. 25-01052-191502
	:	
DOLEZAL SAND & GRAVEL	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 10, 2009, the Commission received from Dolezal Sand & Gravel ("Dolezal") a letter 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).

The Secretary submits that upon reviewing the records in this proceeding, she has discovered that the proposed penalty was timely contested and is the subject of an active civil penalty proceeding (Docket No. CENT 2010-142-M). In that proceeding, the Secretary has filed a penalty petition, and the operator has filed an answer.

Having reviewed Dolezal's request and the Secretary's response, we find the request to reopen to be moot. Dolezal has properly contested the proposed penalty assessment and therefore it did not become a final order of the Commission. Accordingly, the request to reopen is dismissed as moot.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 29, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-448-M
v.	:	A.C. No. 23-01597-201871
QUIKRETE COMPANIES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On February 10, 2010, the Commission received from Quikrete Companies, Inc. ("Quikrete") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On November 4, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000201871 to Quikcrete proposing penalties for two citations that had been issued to the operator on September 21, 2009. According to Quikcrete, it had planned to contest both proposed penalties, but because of the absence of, and misunderstanding between, key decision makers, it failed to do so. The Secretary opposes the request to reopen the ground that Quikrcrete's explanation for the failure to file a timely contest is conclusory and thus insufficient to establish grounds for reopening the assessment.

Having reviewed Quikcrete's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Without further elaboration, the operator's explanation has not provided the Commission with an adequate basis to reopen. Accordingly, we hereby deny the request for relief without prejudice. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007). The words "without prejudice" mean that Quikcrete may submit another request to reopen Assessment No. 000201871 so that it can contest the two proposed penalties.

At a minimum, the operator must provide an explanation of how it normally decides to contest proposed penalties and specific information regarding why that process did not work in this instance. Any amended or renewed request by Quikcrete to reopen Assessment No. 000201871 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 3, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-177-M
v.	:	A.C. No. 23-01325-193369
CRAWFORD LIME AND MATERIAL, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On December 1, 2009, the Commission received from Crawford Lime and Materials, Inc. ("Crawford Lime") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On December 24, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 13, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-516-M
v.	:	A.C. No. 26-02300-197930
J.S. REDPATH CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On January 14, 2010, the Commission received a request from J.S. Redpath Corporation ("Redpath") 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000197930 to Redpath on September 22, 2009, proposing civil penalties for nine citations that had been issued to Redpath in August 2009. Redpath contested the penalties but sent the penalty contest and a conference request to the MSHA district office rather than to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. The operator explains that it made a similar error in Docket No. WEST 2010-93-M, but that it was not informed of its error until it had already made the same mistake in the subject proceeding. The operator discovered that it had made the same mistake as it had in Docket No. WEST 2010-93-M after it received a delinquency notice from MSHA, and promptly submitted its request to reopen.

The Secretary of Labor opposes reopening in this instance on the basis that the operator has made no showing of circumstances that warrant reopening. She points out that both the proposed assessment form and the letter Redpath received from the regional MSHA district office, acknowledging a conference request, specified that any contest of a proposed penalty is to be sent to MSHA's Arlington office.

Having reviewed Redpath's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See J.S. Redpath Corp.*, 32 FMSHRC 15, 17 (Jan. 2010). Redpath sent its contest to the regional MSHA district office within the 30-day period for contests, fully explained and documented its error, and promptly filed its request for relief upon discovering the error. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 17, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2010-1190-R
PERFORMANCE COAL COMPANY	:	

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

DIRECTION FOR REVIEW AND ORDER

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 21, 2010, Performance Coal Company ("Performance") filed with the Commission a petition for review which the company styled as an "Emergency Petition for Expedited Discretionary Review." On August 2, 2010, the Secretary filed an opposition to Performance's petition. In its petition, Performance seeks review of Commission Administrative Law Judge Margaret A. Miller's unpublished order dated July 8, 2010, denying the company's application for temporary relief.[1] Unpublished Order (July 8,

[1] Temporary relief is available under section 105(b)(2) of the Mine Act, which states as follows:

> An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if —
>
> (A) a hearing has been held in which all parties were given an opportunity to be heard;
>
> (B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the

2010). (As explained in section II.A, *infra*, Performance has sought review on several other issues which concern interlocutory rulings made by the judge that are not appropriate for review at this time.) Performance had sought temporary relief from an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 103(k) of the Mine Act,[2] 30 U.S.C. § 813(k), under which MSHA established protocols governing the investigation of the mine accident at Performance's Upper Big Branch Mine that occurred on April 5, 2010, and which resulted in the deaths of 29 miners. We grant in part the petition for discretionary review filed by Performance. We grant review only as to the issue of whether temporary relief may be sought under section 105(b)(2) from the modification or termination of an order issued by the Secretary pursuant to section 103(k) of the Mine Act. For the reasons that follow, we affirm the judge's decision denying Performance's application.

I.

Factual and Procedural Background

Performance operates the Upper Big Branch Mine-South near Montcoal, West Virginia. The explosion at the mine that occurred on April 5, 2010, is still under investigation by MSHA

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applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

30 U.S.C. § 815(b)(2).

[2] Section 103(k) states as follows:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

and State authorities, who have not yet determined a cause. As the Secretary explains in her opposition to Performance's petition, "[t]he investigation remains ongoing," and "MSHA continues to confront safety issues at the mine." Sec'y Opp. at 3. Under its section 103(k) order, MSHA has allowed representatives from Performance to accompany investigation teams entering the mine, but has limited the number of persons doing so and the nature of their participation on safety grounds. *Id.* at 3-4.

On June 28, 2010, Performance filed an application for temporary relief seeking modifications to MSHA's control order. On July 8, 2010, the judge denied Performance's application on the grounds that under Commission precedent, "section 104 [is] the only section [of the Mine Act] under which temporary relief may be sought pursuant to [section] 105(b)(2)." Unpublished Order at 2 (July 8, 2010) (citing *Utah Power and Light Co.*, 11 FMSHRC 953, 956 (June 1989) ("*UP&L*")).

II.

Disposition

Performance maintains that the plain language of section 105(b)(2) supports its position. According to the company, the language of that section stating that an applicant may request that the Commission grant temporary relief "from any modification or termination of any order" necessarily includes relief from a modification of a section 103(k) order. In her opposition to Performance's petition, the Secretary contends primarily that the issues raised in the petition, including whether the company may seek temporary relief from the section 103(k) order, should be subject only to interlocutory review under the requirements of Commission Procedural Rule 76, 29 C.F.R. § 2700.76. She maintains further that Performance has failed to demonstrate that the requirements for interlocutory review have been met.

In a motion to dismiss for lack of jurisdiction filed with the judge on July 2, 2010, however, the Secretary argued that the language of section 105(b)(2) should be read to foreclose the Commission from granting temporary relief from a modification to a section 103(k) order. She argued that the phrase "issued under section 104" modifies the entire phrase "any modification or termination of any order or from any order." Mot. Dismiss at 7-8. The Secretary further contended that her interpretation of the statute was reasonable and thus entitled to deference by the Commission, as well as consistent with Commission precedent. *Id.* at 9-10 (citing *UP&L*, 11 FMSHRC at 956).

A. The Propriety of Appellate Review

Before turning to the merits of Performance's petition, we must address the threshold question of whether a judge's decision denying or granting temporary relief in a proceeding under section 105(b)(2) is properly the subject of a petition for discretionary review. We conclude that it is.

In section 105(b)(2), Congress clearly gave the Commission jurisdiction to consider applications for temporary relief from the issuance, modification, or termination of certain orders issued by the Secretary. We have explicitly recognized that section 105(b)(2) is one of the Mine Act provisions which "grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission judicially presides." *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988). Because Congress created a specific right to seek temporary relief in section 105(b)(2), it follows that any party should have the corresponding right to seek Commission review of an adverse, conclusive decision issued by a judge in a section 105(b)(2) proceeding. Moreover, because the right to request temporary relief under section 105(b)(2) is specifically granted in the statute, the appropriate procedural vehicle for obtaining review of an adverse decision is a petition for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i) ("Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision").

Because we conclude that a party may seek Commission review of a section 105(b)(2) decision by filing a petition for discretionary review, it follows that Performance's petition in the instant proceedings need not satisfy the requirements for interlocutory review set forth in Commission Rule 76. In particular, Performance need not show that the matter "involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). It is sufficient that the petition seek review of an adverse decision denying or granting temporary relief in a section 105(b)(2) proceeding. We thus conclude that it is well within our discretion to consider the petition for discretionary review filed by Performance in this matter.

However, this is true only as to the proceedings before the judge related to Performance's application for temporary relief. In its petition, Performance enumerates several other issues, including whether the judge constructively denied the company's motion for an expedited hearing, and erred in holding that the Commissioner is not authorized by law to modify section 103(k) orders, granting the Secretary's motion to dismiss before providing the company an opportunity to respond, holding that the company did not sufficiently present a challenge to the section 103(k) order at issue, and granting a motion to strike made by the Secretary. Performance Pet. at 13-14. All of these issues relate to interlocutory rulings made by the judge which were not properly preserved for appellate review on an interlocutory basis, i.e., through a request to the judge to certify to the Commission that any one ruling "involves a controlling question of law and that . . . immediate review will materially advance the final disposition of the proceeding," or, if the judge denies a motion to certify, through the filing of a petition for interlocutory review. 29 C.F.R. § 2700.76. We thus do not reach any of them. We note that these issues may be properly raised in an appeal from the judge's final order.

B. The Scope of Relief Available under Section 105(b)(2) of the Mine Act

Based on our review of the statutory language and legislative history of section 105(b)(2), we conclude that Congress did not intend for temporary relief to be available from a modification to or termination of a section 103(k) order. The statute provides that temporary relief is available from "any modification or termination of any order or from any order issued under section 104." 30 U.S.C. § 815(b)(2). Performance argues that in the phrase "any modification or termination of any order," the words "any order" mean literally *any* order. This reading of the statute treats the two phrases "any modification or termination of any order" and "any order issued under section 104" as independent clauses, an interpretation that implicitly places a comma after the first clause ("any modification or termination of any order[,] or from any order issued under section 104").

In this case, we construe the qualifying phrase "under section 104" in section 105(b)(2) as modifying the entire phrase "modification or termination of any order or from any order." In other words, we conclude that a grant of temporary relief is only available for orders issued under section 104, whether one is seeking temporary relief from the modification, termination or issuance of the order. This construction avoids the anomalous result of allowing a party to seek temporary relief from the modification or termination of any order the party would not have been able to challenge when it was issued.

We recognize that a qualifying word or phrase usually applies to the provision or clause immediately preceding it. This construct is commonly referred to as the "last antecedent" principle of statutory construction. However, where the sense of the entire statute requires that a qualifying word or phrase apply to several preceding clauses, the word or phrase will not be restricted to its immediate antecedent. 2A Singer, *Sutherland Statutory Construction* § 47.33 (7th ed. 2008). Here, although application of the "last antecedent" principle might suggest that the phrase "issued under section 104" modifies only the phrase immediately preceding it, i.e., "from any order," this leads to the anomalous result mentioned above. Moreover, it would permit temporary relief in situations Congress did not intend.

For example, under the construction urged by Performance, an operator could seek temporary relief from the modification of an imminent danger order. If an MSHA inspector issues an imminent danger order requiring the withdrawal of miners from a section of the mine but subsequently concludes that the danger is greater in scope than first determined, the inspector would modify the order to require withdrawal of miners from the entire mine. Under the construction urged by Performance, it could seek temporary relief from the inspector's decision to withdraw miners from the additional area, although the company was precluded from seeking temporary relief from the initial withdrawal order.[3] Statutes should be construed to avoid such loopholes which here would undermine the purposes of the Mine Act.

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[3] Congress specifically prohibited the grant of temporary relief from the issuance of an imminent danger order in section 107(e) of the Mine Act. 30 U.S.C. § 817(e)(1).

Similarly, section 103(k) of the Mine Act provides that where a mine accident has occurred, such as that at the Upper Big Branch mine, the authorized representative of the Secretary "may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C. § 813(k). The scope of the Secretary's authority under section 103(k) is reflected in the Senate report, which states:

> The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) ("*Legis. Hist.*"). The scene of a mine accident is similar to an area from which miners have been withdrawn because of an imminent danger. In fact, a mine that has experienced a major explosion can be far more dangerous than an operating mine because of, for example, interruptions in ventilation. As a mine is recovered after an accident, conditions in the mine are ever changing as recovery proceeds. Under such dynamic circumstances, an initial control order must be repeatedly modified to take into account changes in the mine. Yet under Performance's interpretation of section 105(b)(2), we are met with the same anomaly with regards to section 103(k) as with section 107(a) – that Performance could seek temporary relief from MSHA's decision to modify a section 103(k) order in response to ever changing conditions, although the company would be precluded from seeking temporary relief from the initial withdrawal order.

Moreover, if Performance could seek temporary relief from protocols adopted after the initial issuance of a section 103(k) order, this would be inconsistent with the "plenary power" section 103(k) gives MSHA "to make post-accident orders for the protection and safety of all persons." *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). For the Commission to attempt in any way to micro-manage section 103(k) orders in a temporary relief proceeding would in our view be ill-advised, especially given that parties can obtain review of such orders after the fact in contest proceedings. *See American Coal Co. v. Dep't of Labor*, 639 F.2d 659, 661 (10th Cir. 1981); *Eastern Associated Coal Co.*, 2 FMSHRC 2467, 2469-71 (Sept. 1980).

We are particularly unwilling to extend the scope of temporary relief to include pre-contest litigation over MSHA's discretion to respond – as it deems appropriate – in the aftermath of a major mine disaster. We reject the interpretation of the Mine Act offered by Performance because such a reading would interfere with the flexibility Congress intended the

Secretary to have when she responds to disasters of such enormity as the explosion at Performance's Upper Big Branch Mine.

We also find Performance's reading of section 105(b)(2) to be at odds with that section's textual history. The predecessor to section 105(b)(2) was section 105(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815(d) (1976) ("Coal Act"). It provided that temporary relief was available "(1) from any modification or termination of any order, or (2) from any order issued under section 104 of this title." The two explicit provisions were modified by the clause: "Pending completion of the investigation required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief." The "investigation" to which this clause referred was mandated under section 105(a)(1), which provided that an operator could apply to the Secretary for review of an order issued "*pursuant to the provisions of section 104.*" (Emphasis added.) Section 105(a)(1) went on to provide: "Upon receipt of such application, the Secretary shall cause *such investigation* to be made as he deems appropriate." (Emphasis added.) In other words, by its plain terms, the temporary relief afforded mine operators under the Coal Act was limited to orders issued "pursuant to the provisions of section 104" of that Act. When Congress enacted section 105(b)(2) of the Mine Act, it did not intend to depart from the scope of temporary relief afforded under the Coal Act. In conference, the scope of temporary relief was limited to "all the situations encompassed by the House amendment," which in turn were situations drawn from section 104 of the Coal Act – which did not include accident control orders. *See* S. Conf. Rep. No. 95-461, at 51 (1977), *reprinted in Legis. Hist.* at 1329.

We thus affirm the judge's denial of Performance's application for temporary relief.[4] Because we conclude that the judge was correct in concluding that temporary relief was not available to Performance as a matter of law, we need not consider what relief may have been appropriate if the company could have pursued such relief.

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[4] In reaching this conclusion, we note that it is in accord with the Secretary's views expressed in her motion to dismiss made to the judge. On review, however, the Secretary has not requested that we accord deference to her interpretation of section 105(b)(2). Thus, although we are in accord with the Secretary, we do not reach the question of whether deference is due to the Secretary's interpretation. *See United Mine Workers Local 1248 v. Maple Creek Mining Co.*, 29 FMSHRC 583, 591 & n.1 (July 2007) (concluding that the Commission "need not defer to another agency's interpretation of the statutory language at issue" where "the Secretary has not requested that [the Commission] accord deference to her interpretation").

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision denying Performance's application for temporary relief.

Mary Lu Jordan, Chairman

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioners Duffy and Young, dissenting:

We agree with the majority's position that Performance Coal Company's appeal of the judge's decision denying its request for temporary relief is the appropriate subject of a petition for discretionary review and join our colleagues in granting Performance's petition. We also agree that the other issues raised by Performance in its petition are interlocutory in nature and decline to consider those issues at this time. However, we depart with the majority on the issue of whether section 105(b)(2) permits temporary relief of a modification or termination of a section 103(k) order. We conclude that it does.

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 Resources 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 ascertaining the plain meaning of the 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. *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 I*" 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).

Section 105(b)(2) reads as follows:

> An applicant may file with the Commission a written request that the Commission grant temporary relief *from any modification or termination of any order or from any order issued under section 104* together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if—
>
> (A) a hearing has been held in which all parties were given an opportunity to be heard;
>
> (B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

30 U.S.C. § 815(b)(2) (emphasis added).

Based on our review of the statutory language and legislative history, we conclude that Congress intended that parties could seek temporary relief from a modification or termination of a section 103(k) order pursuant to section 105(b)(2). This is an instance where Congress "has directly spoken to the issue" under Step 1 of the test set forth in *Chevron*, 467 U.S. at 842. As stated above, the key language in section 105(b)(2) is "the Commission [may] grant temporary relief from any modification or termination of any order *or* from any order issued under section 104." 30 U.S.C. § 815(b)(2) (emphasis added). The most natural reading of that language is that the phrase before the disjunctive "or" (in italics) is parallel to, and distinct from, the phrase after that disjunctive "or." In other words, an applicant may seek relief "from any modification or termination of any order" or it may seek relief "from any order issued under section 104." If Congress had wanted the words "issued under section 104" to apply to both of these phrases, it could certainly have indicated so.

Indeed, both the majority and the Secretary concede that the "last antecedent" principle of statutory construction[1] would lead to the conclusion that the words "issued under section 104" modify only the second phrase. Slip op. at 5; S. Opp'n. to Emergency Appl. & Memo to Support Mot. to Dismiss at 8. However, the majority attempts to show that Congress would not have intended such a result by relying on the structure of the Mine Act as a whole. We find their reasoning unpersuasive.

First, section 105(b)(2) is a marvel of Congressional clarity: brief, clear, direct and susceptible to harmonization with other provisions in the Act. If our colleagues were to assume for argument's sake that Congress intended to include within the scope of the subsection "any order," we must ask how it might otherwise have secured that objective without using this term, as it has, here? Divining Congressional intent from cloudy or uncertain language in the Mine Act is sometimes necessary. It is not necessary or proper in this instance, unless one wishes to conclude that Congress did not mean what it precisely and unequivocally said.

The plain meaning of plain language in subsection (b)(2) is further buttressed by the express exclusion of some orders from its scope. This further evinces the directness and clarity

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[1] *See, e.g.*, 2A Singer, *Sutherland Statutory Construction* § 47.33 (7th ed. 2008).

of the provision. Had Congress intended to further constrain the applicability of section 105(b)(2) to withdrawal orders under Section 104, it could have said so. It did not.

The majority attempts to avert the plain meaning of section 105(b)(2) by contorting the predecessor provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), to divine Congress' intent of a limited reading of section 105(b)(2), which is not in the language. Slip op. at 7. Again, the majority ignores the plain language of the relevant provision in the Coal Act. We find it persuasive that the plain language of the same provision in the Coal Act, upon which section 105(b)(2) is based, clearly supports our interpretation. Section 105(d) of the Coal Act, as enacted, stated:

> [T]he applicant may file with the Secretary a written request that the Secretary grant temporary relief (1) from any modification or termination of any order, or (2) from any order issued under section 104 . . . .

30 U.S.C. § 815(d) (1976). Thus, the relevant language in both the Coal Act and the Mine Act is nearly identical. However, it is very significant that section 105(d) of the Coal Act contained the numbers "(1)" and "(2)" before the two phrases in question. The inclusion of the two numbers leaves no doubt as to Congress' intent: the two phrases were meant to be parallel and to provide two distinct avenues of review.[2] Thus, the reference to "section 104" in the second phrase clearly does not apply to orders included within the first phrase. Congress has directly spoken to the issue, and there is no doubt that an applicant can seek temporary relief from the modification or termination of an order that is not issued under section 104, i.e., a section 103(k) order.

The majority notes that section 104 is, indeed, mentioned in section 105 of the Coal Act, and relies on this to foreclose temporary relief for other orders. Slip op. at 7. However, what the majority ignores is that the design of the statute clearly provides for broader relief from orders issued under section 104 – which may have punitive or deterrent purposes in addition to protective ones – to include amendments or terminations of other orders more closely associated with direct protection of miners. Thus, operators may not seek temporary relief from orders that require abatement of hazardous conditions pursuant to subsections (a) and (f), because the statute says so, clearly and directly. 30 U.S.C. § 815(b)(2).

Yet some orders, including those issued under section 103(k), 30 U.S.C. § 813(k), implicate directly the Secretary's judgments on measures needed to protect miners in a fluid situation. As those circumstances change, and orders are amended or terminated, it is important to allow not only operators but representatives of miners to challenge amendments or

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[2] The fact that the drafters of the Mine Act subsequently omitted the two numbers in section 105(b)(2) of the Mine Act does not affect our analysis. There is no absolutely no indication in the legislative history that deletion of the numbers was intended to change the clearly expressed meaning of the Coal Act provision.

terminations which change the status quo in the mine.[3] These changes or terminations may pose difficulties or may present hazards to miners sent into the environment. Allowing those thus affected to seek temporary relief from the effects of the Secretary's decisions is wholly consistent with the Mine Act's graduated, measured approach to temporary relief, as reflected in the Act's express exclusion of some orders, and we submit is the only reasonable reading of the clear and direct language of the statute.

Our colleagues also look to the legislative history of the Mine Act to further support their interpretation of section 105(b)(2). Slip op. at 6-7. We find the legislative history unavailing. What they fail to acknowledge is that the legislative history is silent on whether temporary relief under section 105(b)(2) extends to section 103(k) orders.

The majority seeks to avoid any reading of the Mine Act which results in a party being able to seek temporary relief from the modification or termination of any order the party would not have been able to challenge when it was issued, going as far as to characterize any reading which results in such as "anomalous." Slip op. at 5. Yet section 107 of the Mine Act plainly provides for such a result with respect to imminent danger orders:

> (e)(1) Any operator notified of an order under this section or any representative of miners notified of the *issuance, modification, or termination* of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. *The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).*

30 U.S.C. § 817(e)(1) (emphases added). In other words, section 107(e)(1) only prohibits the granting of temporary relief from the issuance of an imminent danger order, not the modification or termination of such an order.

Thus, while the majority touts its interpretation of section 105(b)(2) as driven by the "sense" of the entire statute (slip op. at 5), it is, in fact, flatly inconsistent with the plain language

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[3] By distorting the language of the statute, the majority prevents representatives of miners from seeking temporary relief from amendments and terminations of orders under subsection 103(k). We need not address the parameters of such challenges in this decision, but foreclosing them altogether may significantly and adversely affect miners' advocacy on behalf of their own safety.

of other sections of the Mine Act that appear to us to have been drafted to be consistent with the plain meaning of section 105(b)(2) that we have set forth. Moreover, any attempt to perfectly reconcile the language of section 105(b)(2) with the language and placement of a similar provision in the Coal Act, which is what the majority appears to be attempting (slip op. at 7), is bound to founder, because the Coal Act did not provide for imminent danger orders in a section separate from its section 104, and the Mine Act does in its section 107.[4]

We would thus find the order at issue here to be within the scope of section 105(b)(2). However, we are mindful of the Secretary's special responsibility in this area, and operators should not have an untrammeled right to seek, in effect, a preliminary injunction against the enforcement of an amended order issued under subsection 103(k). As the majority correctly notes, the Secretary's authority in command of an accident site is, and must be, plenary. Slip op. at 6. Where the Act charges her with direct responsibility for protection of miners, we must preserve that authority against challenges that may distract her from that duty.

We would therefore hold that an operator may only seek temporary relief:

1) From amendments that present a clear abuse of discretion, such as a failure to articulate a safety-related reason for the provision at issue. In those cases, the judge should presume, in the absence of compelling evidence to the contrary, that the Secretary's agents are acting in good faith to advance her duty under the law, and the burden of proving an abuse of discretion must be on the applicant; and

2) For relief of limited duration and scope to permit the operator to engage in activities necessary to protect the health and safety of miners. Again, the burden would be on the operator to establish that relief is warranted.[5]

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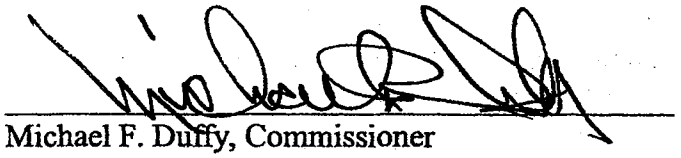
[4] The majority justifies its clearly erroneous reading of the Mine Act based on its fear that giving effect to the plain meaning of section 105(b)(2) (and, though they don't state it, section 107(e)(1)) would permit operators to challenge modifications expanding the scope of a section 107 imminent danger order. Slip op. at 5. The Mine Act can be easily read, however, to permit the Secretary to terminate an inadequate section 107 order and issue a new one when an inspection or investigation shows the area affected by the danger is more extensive. Thus, the majority's concern about "loopholes" is entirely misplaced.

[5] We would therefore hold that Performance would be permitted in this case to seek temporary relief from the modified section 103(k) order, if it could demonstrate that the modification prevents it from carrying out its obligation to conduct its own investigation pursuant to 30 C.F.R. § 50.11(b), but only if the operator can show that the refusal to permit such activities represents a clear abuse of discretion or that the grant of temporary relief is necessary to effect the purposes of the Act and will not interfere in any way with the Secretary's duty to ensure the safety of any person in the mine.

We therefore respectfully dissent and would remand this case to the judge to determine whether limited temporary relief is warranted in this instance.



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August 24, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2010-150-M A.C. No. 29-000708-148523 AB8
JAMES HAMILTON CONSTRUCTION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 17, 2009, the Commission received from James Hamilton Construction ("JHC") 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).

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 mistake, inadvertence, or excusable

neglect.[1] *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 held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.[2] *Celite Corp.*, 18 FMSHRC 105, 107 (Apr. 2006) (citations and quotations omitted).

On April 24, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000148523 to JHC. JHC states that on March 31, 2008, it had requested a conference, which MSHA denied on the grounds that the information provided was insufficient. JHC states on April 7, 2008, it again requested a conference providing additional information, but its request was denied as untimely. JHC claims it was unaware of the proposed assessment until it received a call from a collection agency. It subsequently submitted its request to reopen the proposed assessment to the Commission on November 17, 2009.

The Secretary opposes JHC's request to reopen. She states that the penalty assessment became a final Commission order on May 30, 2008, and asserts that the proposed assessment was successfully delivered by FedEx on April 30, 2008, and that a delinquency notice was mailed July 16, 2008. She also notes that this case was listed as delinquent on another proposed assessment which was subsequently issued and successfully contested by the operator. The Secretary states that because JHC filed its request more than one year after the assessment became a final order, the request should be denied.

Here, although JHC claims it was unaware of the proposed assessment until it was contacted by a collection agency for payment, it appears that the operator did receive the proposed assessment. Moreover, JHC does not identify when it was contacted by the collection

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[1] Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence . . . ;
> (3) fraud . . . ;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

[2] Rule 60(c) provides that "[a] motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c).

agency or explain the significant delay in filing its request to reopen. At the very least, it appears that JHC had several opportunities to discover the delinquent assessment, but failed to take note of it and address it in a timely fashion.

Finally, because JHC waited over a year to request relief with regard to Proposed Assessment No. 000148523, its motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny JHC's request to reopen.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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August 24, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2010-274
	:	A.C. No. 15-00003-193324
	:	
	:	Docket No. SE 2010-291-M
	:	A.C. No. 40-00059-196466
	:	
	:	Docket No. SE 2010-292-M
	:	A.C. No. 40-03148-196476
v.	:	
	:	Docket No. SE 2010-293-M
	:	A.C. No. 40-00082-196470
	:	
	:	Docket No. SE 2010-294-M
ROGERS GROUP, INC.	:	A.C. No. 40-00063-196467

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

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On November 19 and December 18, 2009, the Commission received from Rogers Group, Inc. ("Rogers Group") requests to reopen five 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).[1] On December 16, 2009 and January 8, 2010, the Commission received responses from the Secretary of Labor stating that she does not oppose the requests to reopen the assessments.

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2010-274, KENT 2010-291-M, KENT 2010-292-M, KENT 2010-293-M and KENT 2010-294-M, all captioned *Rogers Group, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's requests, and the Secretary's responses, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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August 24, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-904
v.	:	A.C. No. 46-08581-208515
BLUE HAVEN ENERGY, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On April 19, 2010, the Commission received from Blue Haven Energy, Inc. ("Blue Haven") a motion 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 January 12, 2010, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000208515 to Blue Haven, proposing penalties for two citations that had been previously issued to the operator. According to the Secretary, because of a problem with Federal Express delivery, the assessment was never received by Blue Haven and was returned undelivered. Blue Haven states that it learned of the assessment when it checked the MSHA web site sometime in March 2010. The Secretary does not oppose reopening.

Having reviewed Blue Haven's request and the Secretary's response, we conclude that Assessment No. 000208515 has not become a final order of the Commission because it was never received by Blue Haven. Accordingly, we find the request to reopen to be moot and remand this matter to the Chief Administrative Law Judge for further proceedings pursuant to the

Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. If the operator has not already done so, it should submit the proposed assessment form to MSHA within 30 days of the date of this order. *See* 29 C.F.R. § 2700.26.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2010-178-M
v.	:	A.C. No. 08-01308-194693 2UV
	:	
ARDAMAN & ASSOCIATES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 30, 2009, the Commission received from Ardaman & Associates, Inc., 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). On December 14, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the contractor's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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August 26, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-108
v.	:	A.C. No. 36-06905-193165
AMERIKOHL MINING INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 12, 2009, the Commission received from Amerikohl Mining Inc. 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). On December 2, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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August 26, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-698-M
v.	:	A.C. No. 44-05772-175611
ONSITE KRUSHING COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On February 23, 2010, the Commission received from Onsite Krushing Company ("OK") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000175611 to OK on February 4, 2009, proposing penalties for 15 citations that had been issued to the operator. OK states that it never received the proposed assessment and alleges that it was sent to an incorrect address. The Secretary of Labor does not oppose reopening, but states that because it sends assessments to the Address of Record on an operator's Legal Identity Report, it is incumbent upon operators to update MSHA when that address changes.

Having reviewed OK's request and the Secretary's response, we conclude that because OK apparently never received the proposed assessment there is no final order and therefore that OK's request to reopen is moot.[1] Accordingly, this matter is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[1] Nevertheless, as the Secretary states, it is OK's responsibility to keep MSHA informed of changes in its Address of Record on its Legal Identity Report.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-1122
v.	:	A.C. No. 15-17587-215176
OHIO COUNTY COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On June1, 2010, the Commission received from Ohio County Coal Company, LLC, 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). On June 16, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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August 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. SE 2010-151-M A.C. No. 09-01108-193876
v.	:	Docket No. SE 2010-359-M A.C. No. 09-01164-196903
CARBO CERAMICS, INC.	:	Docket No. SE 2010-889-M A.C. No. 09-01164-200122

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 18, 2009, the Commission received from Carbo Ceramics, Inc. ("Carbo") a letter seeking to reopen a penalty assessment issued to the operator that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 12, 2010, the Commission received a request from Carbo seeking to reopen two more such assessments.[1]

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).

We have held, however, 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-151-M, SE 2010-359-M, and SE 2010-889-M, all captioned *Carbo Ceramics, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

On August 11, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000193876 to Carbo for eight citations MSHA had previously issued to the operator. Carbo states in its November 18 request that it mailed the form indicating that it intended to contest three of the citations along with its payment of the other five penalties to MSHA's St. Louis address for such payments, not to MSHA's Civil Penalty Compliance Office as it should have. The Secretary of Labor does not oppose Carbo's request to reopen, but urges the operator to make sure that it sends notices of contest to MSHA's Civil Penalty Compliance Office in Arlington, VA.

In its January 12 request, Carbo states that it intended to contest four citations in Proposed Assessment No. 000196903, issued by MSHA on September 15, 2009, and one citation in Proposed Assessment No. 000200122, issued by MSHA on October 13, 2009, but that the assessment sheets marked for contest were not "included with the final payments that were sent to the Treasurer due to an Accounting Department oversight." The Secretary opposes these requests to reopen on the ground that Carbo's statement does not explain why the contests were not filed on a timely basis.

Having reviewed the facts and circumstances with respect to Proposed Assessment No. 000193876, the operator's November 18 request, and the Secretary's response, we hereby reopen the assessment and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

With regard to the other two proposed penalty assessments, however, we conclude that the operator has not provided a sufficiently detailed explanation for its failures to timely contest the assessments. The operator's statement that it failed to include its contests with the "final payments that were sent to the Treasurer due to an Accounting Department oversight" does not provide the Commission with an adequate basis to reopen without further elaboration regarding when these internal mistakes occurred, and how Carbo's Treasurer and Accounting Department were involved in the operator's process for filing notices of contest. Accordingly, we hereby deny without prejudice Carbo's January 12 request as to the two assessments. *See Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC

569, 570 (July 2007). The words "without prejudice" mean Carbo may submit another request to reopen the cases so that it can contest the citations and penalty assessments.[2]

Any amended or renewed request by Carbo to reopen Assessment Nos. 000196903 and 000200122 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[2] If Carbo submits another request to reopen, it must 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 neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Carbo should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Carbo from responding within the time limits provided in the Mine Act, as part of its request to reopen. Carbo should also include copies of all documents supporting its request to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 30, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2010-696-M
ADMINISTRATION (MSHA)	:	A.C. No. 26-02286-205417
	:	
v.	:	Docket No. WEST 2010-697-M
	:	A.C. No. 26-02286-196384
BARRICK TURQUOISE RIDGE, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On February 23, 2010, the Commission received from Barrick Turquoise Ridge, Inc. ("BTR") motions made 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).[1]

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).

We have held, however, 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

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-696-M and WEST 2010-697-M, both captioned *Barrick Turquoise Ridge, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *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).

According to the motions, BTR's failures to file notice of contests with respect to the assessments were attributable to miscommunications between counsel and BTR in both instances. Proposed Assessment No. 000196384 was issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") in September 2009. At that time, BTR's then safety director was out of the office for weeks due to emergency surgery, so a member of his staff requested that counsel look at the 37 citations covered by the assessment. Only later did counsel learn that he was also supposed to file the notice of contest for the assessment. Counsel states that he learned of the delinquency regarding the assessment from the MSHA web site on February 22, 2010, and that BTR never received a delinquency notice from MSHA.

By December 2009 the Safety Director had returned. When Assessment No. 000205417 was issued by MSHA, he and counsel spoke regarding BTR's intention to contest the penalties associated with two of the 23 citations included in the assessment. Counsel was left with the impression the BTR would filed the notice of contest, but it was never filed. Counsel also learned of this delinquency from the MSHA web site.

The Secretary of Labor states that she does not oppose the reopening of either of the proposed penalty assessments.

Having reviewed BTR's requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-1389-M
v.	:	A.C. No. 44-00063-217180
NASELLE ROCK & ASPHALT CO.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On June 16, 2010, the Commission received from Naselle Rock & Asphalt Co., 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). On July 9, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the contractor's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-1152
v.	:	A.C. No. 46-06263-213326
BROOKS RUN MINING COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On June 14, 2010, the Commission received from Brooks Run Mining Company, LLC, a motion from 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). On June 30, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-71-M
v.	:	A.C. No. 27-00386-172927
ROME CONSTRUCTION, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 17, 2009, the Commission received a request from counsel for Rome Construction, Inc., 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). On December 22, 2009, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001
August 31, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2010-346-M
	:	A.C. No. 41-04474-187306
v.	:	
	:	Docket No. CENT 2010-347-M
	:	A.C. No. 41-04474-196142
LONE STAR AGGREGATES ACQUISITION, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On January 5, 2010, the Commission received requests to reopen two penalty assessments issued to Lone Star Aggregates Acquisition, LLC ("Lone Star") that became final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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).

We have held, however, 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

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers CENT 2010-346-M and CENT 2010-347-M, both captioned *Lone Star Aggregates Acquisition, LLC*, and involving similar factual and procedural issues. 29 C.F.R. § 2700.12.

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 mistake, inadvertence, or excusable neglect. *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).

On April 16, and July 14, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation Nos. 6470620 and 6470664, respectively, to Lone Star. On June 9, and September 8, 2009, MSHA issued Proposed Assessment Nos. 000187306 and 000196142, respectively, to Lone Star, which proposed civil penalties for Citation Nos. 6470620 and 6470664, and other citations. Lone Star states that at around the time of the issuance of the citations, Fred Weber, Inc. ("Weber") had recently acquired the mine property. The vice president for safety of Lone Star and Weber states that, at the time, the sharing and forwarding of information and recordkeeping and the replacement of the workforce was ongoing and, consequently, he was not aware of the proposed assessments. The operator states that on December 16, 2009, it received a delinquency notice regarding Proposed Assessment No. 000196142. It explains that on approximately December 21, 2009, the operator called MSHA and was informed for the first time by return call on December 28, that the proposed penalty assessments related to both citations had become final orders.

The Secretary opposes Lone Star's request to reopen. She explains that according to MSHA's records, Weber took over the mine on February 6, 2009, four and seven months before the proposed assessments were delivered. The Secretary states that by the time that the proposed assessments were delivered, the operator should have had adequate procedures in place for processing the proposed assessments. The Secretary also notes that, contrary to the operator's assertion that it learned of the final orders for the first time on December 28, a delinquency notice was sent to the operator on September 3, 2009 (Proposed Assessment No. 000187306) and December 9, 2009 (Proposed Assessment No. 000196142).

Having reviewed Lone Star's request to reopen and the Secretary's response thereto, we agree that Lone Star has failed to provide an adequate basis for the Commission to reopen the penalty assessment. Lone Star has failed to adequately explain its failure to timely contest the proposed assessments when the change in ownership occurred four and seven months before it received the proposed assessments. Furthermore, Lone Star has failed to explain the circumstances surrounding its receipt of the September delinquency notice.[2]

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[2] In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009).

Accordingly, we hereby deny without prejudice Lone Star's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that Lone Star may submit another request to reopen the assessments. Any amended or renewed request by Lone Star to reopen Assessment Nos .000187306 and 000196142 must be filed within 30 days of this order. Any such request filed after that time wil be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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[3] If Lone Star submits another request to reopen, it must establish good cause for not contesting the proposed penalties within 30 days from the date it received the assessment 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 neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Lone Star should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented it from responding within the time limits provided in the Mine Act, as part of its request to reopen. Lone Star should also submit copies of supporting documents with its request to reopen and specify which proposed penalties it is contesting.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 31, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2010-714
v.	:	A.C. No. 11-03141-0201809
MACH MINING, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On May 7, 2010, the Commission received from Mach Mining, LLC ("Mach Mining") a motion 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On September 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citations Nos. 6680550 and 6680551 to Mach Mining, alleging violations of a ventilation plan. The citations were issued because MSHA alleged deficiencies in the operator's plan, and the parties had reached an impasse. Mach timely contested the citations, and the matter proceeded to hearing before Administrative Law Judge Margaret Miller on November 3 through November 5, 2009, in Docket Nos. LAKE 2010-1-R and LAKE 2010-2-R. The Judge issued her decision in the contest proceeding on January 28, 2010, upholding the citations. 32 FMSHRC 149, 168 (Jan. 2010). Mach Mining then filed a Petition for Discretionary Review, which was granted by the Commission on March 5, 2010.

Meanwhile, on November 4, 2009, MSHA issued Proposed Assessment No. 000201809 to Mach Mining, proposing civil penalties for violations associated with 16 unrelated citations, including Citations Nos. 6680550 and 6680551. On November 30, 2009, Mach Mining paid the penalties for ten of the citations, including Citations Nos. 6680550 and 6680551. Mach Mining states that it inadvertently overlooked the fact that these two citations were the subject of the ventilation plan dispute before Judge Miller, and that payment had been authorized by mistake. The operator's mine manager explains in an affidavit that he was preoccupied during the month of November with the hearing and resolving the ventilation plan impasse with MSHA. Mach Mining states that its counsel first became aware that the penalties had been paid on April 30, 2010, when counsel for MSHA informed the operator's counsel. The operator then promptly filed the subject motion to reopen.

The Secretary opposes Mach Mining's request to reopen. She explains that the operator has not shown the extraordinary circumstances that warrant reopening. The Secretary states in part that, given the hearing, Mach Mining should have been acutely aware of any developments related to the case.[1]

[1] We note that the Secretary did not inform Judge Miller of the status of developments in the case, such as informing her during the hearing that the penalties for Citation Nos. 6680550 and 6680551 had been proposed, or that the operator had paid the penalties after the hearing but before the Judge issued her decision.

Having reviewed Mach Mining's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to Judge Miller for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order.[2] *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[2] The Judge's January 28, 2010, decision remains in effect as of the date of its issuance.

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Administrative Law Judge Margaret Miller
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 31, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2010-149-M
ADMINISTRATION (MSHA)	:	A.C. No. 24-02265-196647
	:	
v.	:	Docket No. WEST 2010-150-M
	:	A.C. No. 24-02386-196648
E.S. STONE AND STRUCTURE, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 2, 2009, the Commission received from E.S. Stone and Structure, Inc. ("E.S. Stone") two motions by counsel to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect.

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[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2010-149-M and WEST 2010-150-M, both captioned *E.S. Stone and Structure, Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

E.S. Stone seeks to reopen Proposed Assessment Nos. 000196647 and 000196648, each issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on September 10, 2009. The operator states that, in July 2009, when it received from MSHA the 21 citations at issue in the two assessments, it immediately faxed the citations to counsel, expecting them to be contested. It further states that, consequently, when it received the two assessments, it did not believe it had the additional obligation to contest the proposed penalties. The failure to file any contests was discovered in late October 2009, and the motions to reopen were filed soon thereafter. The Secretary of Labor states that she does not oppose the motions.

Having reviewed E.S. Stone's requests and the Secretary's responses, we conclude that E.S. Stone has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessments. Its motions explain that the citations were faxed to counsel, but do not address why counsel never contested the citations as the operator expected. They also do not explain what happened to the proposed assessment forms when they were received by E.S. Stone. Accordingly, we deny without prejudice E.S. Stone's requests. *See, e.g., Eastern Assoc. Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).

Any amended or renewed request by E.S. Stone to reopen the two assessments must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 31, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-542-M
v.	:	A.C. No. 02-00144-198040-02
BONITA STEEL BUILDERS, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On January 19, 2010, the Commission received from Bonita Steel Builders, Inc. ("Bonita") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 29, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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 the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.[1] Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[1] We reopen Proposed Assessment No. 000198040 only as to Citation No. 6453780 and its associated penalty.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-637-M
v.	:	A.C. No. 26-02246-198651
BARRICK GOLDSTRIKE MINES, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On February 5, 2010, the Commission received from Barrick Goldstrike Mines, Inc. ("Barrick") 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).

However, 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 mistake, inadvertence, or excusable neglect. *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).

On September 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198651 for 19 citations and an order issued to Barrick in August 2009. In its original motion, Barrick stated that a member of its staff attempted to fax the assessment to Barrick's counsel, and thought she had done so, but failed to notice the "undelivered" notation on the confirmation sheet. The operator further states that it learned that it was delinquent with respect to the assessment when it checked the MSHA web site, and its counsel soon thereafter filed its request to reopen.

The Secretary of Labor filed a response in opposition to Barrick's initial request. The Secretary states that the operator made no showing of circumstances that warrant reopening, and points to a relatively recent instance in which fax communication problems between Barrick and its counsel resulted in an assessment becoming a final order. *See Barrick Goldstrike Mines, Inc.*, 31 FMSHRC 1013 (Sept. 2009).

In reply to the Secretary's response in opposition, Barrick filed a modified request to reopen, by which it is only requesting reopening of the assessment as to Citation No. 6477873, Order No. 6477875, and the penalties associated with that citation and that order. The citation and order are each the subject of a pending notice of contest. The Secretary did not respond to Barrick's modified request to reopen.

Having reviewed Barrick's request, the Secretary's response, and Barrick's modified request, in the interests of justice, we hereby grant Barrick's modified request, reopen the penalty assessments in Citation No. 6477873 and Order No. 6477875, and remand the case to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 2, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of DOUGLAS A. PILON, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. LAKE 2010-766-D NC-MD-10-03
v.	:	
ISP MINERALS, INC., Respondent.	:	Mine ID: Kremlin Plant

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Travis W. Gosselin, Esq., U.S. Department Of Labor, Office of the Solicitor, Chicago, Illinois, for the Complainant;
Brent I. Clark Esq. and Meagan Noel Newman, Esq., Seyfarth Shaw LLP, Chicago, Illinois, for the Respondent.

Before: Judge Rae

This matter, heard on June 28, 2010, in Green Bay, Wisconsin, is before me based on an application for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(2), against ISP Minerals, Inc., on behalf of Douglas Pilon. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations, or who have engaged in other safety related protected activity. Section 105(c)(2) of the Mine Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of a miner pending the full resolution of the merits of his discrimination complaint. The parties' briefs, filed on June 4, 2010, and June 14, 2010, have been considered. The Secretary found that the discrimination complaint was not frivolously brought and filed her petition on behalf of Pilon.

For the reasons that follow, **I GRANT** the application and order Douglas Pilon's temporary reinstatement.

Statement of the Case

This temporary reinstatement proceeding is analogous to a preliminary hearing. Unlike a discrimination complaint that is tried on the merits where the Secretary bears the burden of proof by the preponderance of the evidence, the scope in a temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Courts and the Commission have concluded that the "not frivolously brought" standard of section 105(c) is satisfied when there is a "reasonable cause to believe" that the discrimination complaint "appears to have merit." *Centralia Mining Company*, 22 FMSHRC 153, 157 (Feb. 2000) (citations omitted).

The Secretary filed a Motion *in Limine* to exclude evidence that the Claimant made threats to mine employees as set forth in Respondent's responsive pleadings to the Petition for Reinstatement.[1] In his written motion, Respondent stated that the alleged threats were made "subsequent to his termination" and argued that a change in circumstances post-termination could make reinstatement inappropriate. I granted the motion by Order issued on June 25, 2010.

Respondent filed a Motion for Reconsideration and, in the alternative, certification for interlocutory review. In his written motion for reconsideration, counsel stated that the alleged threats were made at some unknown time but only made known to the investigator after termination. The motion was argued by counsel at the hearing on June 28, 2010. Respondent asserted that my ruling on the motion in limine was incorrect as a matter of law as it was based upon the timing of the threats being prior to termination. They also asserted that I abused my discretion when failing to consider changes in circumstances, particularly post-termination conditions, that may render temporary reinstatement inappropriate. This argument was asserted in the first written motion in which they stated that the threats were made after termination. Counsel cited three cases as controlling: *Secretary of Labor o/b/o Robert Gatlin v Kenamerican Resources, Inc.* 31 FMSHRC 1050 (October 8, 2009); *Chadrick Casebolt v. Falcon Coal Company, Inc.* 6 FMSHRC 485 (February 29, 1984); and, *Robert Simpson v. Kenta Energy, Inc. and Roy Dan Jackson,* 11 FMSHRC 770 (May 11, 1989). In the alternative, Respondent requested certification for interlocutory review under 29 C.F.R. § 2700.76. During the testimony, counsel attempted to introduce evidence of these threats made by the claimant now allegedly made prior to termination. I excluded this evidence.

I denied the request to reconsider my order on the motion *in limine* for the reasons set forth in my order of June 25, 2010, and further set forth my this decision. As stated in my order, citing *Secretary of Labor ex rel Pasula v Consolidation Coal Co.*, 2 FMSHRC 2796 (1980), that the employee engaged in various acts and/or omissions or that he deserved to be fired does not

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[1] Respondent also moved to dismiss the petition for failure to state a claim upon which relief could be granted or otherwise depriving him of due process. I denied that motion by Order dated June 17, 2010.

overcome a finding of a causal connection between the protected activity (the safety complaint) and the termination. Whether he engaged in misconduct *during or after* this employment is not relevant to a finding that the complaint was not frivolously brought. (*emphasis added.*) Further, such evidence is only relevant on the merits of the discrimination complaint, not at a temporary reinstatement hearing. While counsel alleges differing accounts of when these alleged threats were made, he has misinterpreted the basis for my order as resting only upon the alleged threats being made after termination. Regardless of whether they were made, or when, they are not relevant to these proceedings. This evidence, in fact, invites the necessity for a resolution of conflicts in testimony or entertainment of rebuttal or affirmative defenses not properly before me at a preliminary stage of proceedings, *Secretary of Labor o/b/o Williamson v. CAM Mining LLC*, 31 FMSHRC ____, slip op at 7 (Oct. 2009). Furthermore, the cases counsel provided in support of his argument that a change in circumstances post-termination can render reinstatement inappropriate all involve one narrow issue of fact. That is, whether economic impossibility would render an order to reinstate inappropriate when the job to which the miner would be returned has been eliminated through a reduction in force or other similar economic crisis. These cases, are clearly off point and wholly inapplicable to this case. I further find that interlocutory review cannot be granted on a matter such as this prior to a hearing under 29 C.R.F. §2700.76 as Respondent seeks. The appropriate remedy available in temporary reinstatement proceedings is found at 29 C.F.R. § 2700.45(f).

Summary of the Evidence

The parties stipulated that ISP is an operator of a mine within the meaning of the Mine Act, that the Kremlin Plant is a mine subject to the jurisdiction of the Mine Act, that this matter comes under the jurisdiction of the Mine Act sections 105 and 113, that Douglas Pilon was a miner under the Mine Act at all relevant times, and that on February 25, 2010, an accident report was submitted on behalf of Douglas Pilon.

Mr. Pilon testified that he was fired from ISP Minerals after seven years of employment with the mine. (Tr. 12.) He worked as a kiln operator responsible for maintaining the machinery, controlling the temperature of the kiln and related other duties. (*Id.*) He was working 48 hours per week, eight of which was overtime. (Tr. 13.) His hourly rate was $23.50 per hour and he received time and one half for overtime prior to his discharge.[2] (*Id.*) On February 25, 2010, while he was checking the coolers, he walked across the catwalk and a puff of steam from a cooler blew in his face which he breathed in. (Ex. S-1; Tr. 14-15.) He believed the steam he inhaled was aluminum chloride vapor, which is a toxic gas. (*Id.*) His belief was based upon having been exposed to it in the past and suffering some injuries as a result and from the fact that the steam contained no oxygen; it was like ammonia. (*Id.*) He reported the accident that same day. (Ex. S-1; Tr. 15, 19.) The following day, he was presented with a written accident report (Secretary's Exhibit #1), prepared by Lee Schlais, foreman, dated February 26, 2010. (Ex. S-1; Tr. 15-16.) The accident

[2] In his discrimination complaint, Complainant reported he earned $22.54 per hour regular pay 40 hours per week and $33.81 per hour overtime, eight hours per week.

report later signed by Mark Coombs on March 8, 2010, indicates the determined cause of the incident was a raised slide in the air duct which pulled steam off cooler #6. (Ex. S-1.) It was noted on the report that #5 and #6 coolers had been kicking out for some time and that the employee was instructed, to wear protective gear, and to stay away from the discharge end of the cooler while it was running. "Especially" when it was using "chloride products." (*Id.*)

Mr. Pilon further testified that the report went from Lee Schlais to the supervisor, Mr. Hill. (Tr. 16.) The report was made on a Friday night. (Tr. 17.) He next reported for work on Monday night and on Tuesday, March 2, 2010, he was suspended without pay and thereafter terminated on March 15, 2010. (*Id.*; Tr. 18.) He was informed of his termination at a meeting at which Mr. Hill told him that he had demonstrated unacceptable performance. (Tr. 18.)

On cross- examination, Mr. Pilon testified that he did not receive medical treatment for the inhalation incident but believed that he had breathed in aluminum chloride based upon the nature of the gas and past experience. (Tr. 20-21.) He stated that he reported the incident because he believed that he would be in trouble if he did not do so. (Tr. 29.) He believed his report caused his termination. (*Id.*) Mr. Pilon identified Respondent's Exhibit R-1, page 1, as the letter presented to him upon his termination, on March 15, 2010. He also identified the letter, dated August 28, 2009, relating to a suspension for misconduct.[3] (Tr. 32-33, 40-41; Ex-R-1.)

Counsel for Respondent called Messrs. Dan Gedazlinski, Tyler Hill and Mark Coombs as witnesses to testify to various alleged acts of misconduct and/or poor performance exhibited by Mr. Pilon and to say that it was their decision to fire Mr. Pilon solely for misconduct, not for the filing of the accident report.[4] (*See* Tr. 50-59, 63-69, 70-75.) Mr. Coombs acknowledged that he signed the accident report on March 8, 2010. (Tr. 74.) Mr. Gedazlinski acknowledged that in the process of running the kiln and coloring the materials for roofing shingles, various chemicals, including chlorides are regularly used. (Tr. 48.)

Application of the Law

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

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[3]. Respondent did not offer previously marked exhibits R-1 pages 2, 4, 5, and 6 or R-2 through 4 to be entered into evidence and they are, therefore, not part of this record.

[4] Counsel for the Secretary objected to the testimony of these witnesses as being outside the scope of the temporary reinstatement hearing.

of 1977, at 623 (1978).

Unlike a trial on the merits of a discrimination complaint brought by the Secretary where the Secretary bears the burden of proof by the preponderance of the evidence, the scope of this temporary reinstatement proceeding is limited by statute. Section 105(c) of the Mine Act, as well as Commission Rule 45(d), 29 C.F.R. § 2700.45(d), limit the issue in an application for temporary reinstatement to whether the subject discrimination complaint has been "frivolously brought." Rule 45(d) provides:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is not frivolously brought. In support of his application for temporary reinstatement the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint is frivolously brought.

29 C.F.R. § 2700.45(d)

In its decision in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), the Court noted the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court stated:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' - an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous.*'

920 F.2d at 747 (emphasis in original) (citations omitted).

While the Secretary is not required to present a *prima facie* case of discrimination to prevail in a temporary reinstatement proceeding, it is helpful to review the elements of a discrimination claim to determine if the evidence at this stage satisfies the "not frivolously brought" standard. As a general proposition, to demonstrate a *prima facie* case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant participated in safety related activity protected by the Mine Act, and, that the adverse action complained of was motivated, in some part, by that protected activity. *See Secretary on behalf of*

David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (Oct. 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinetter v. United Castle Coal Co.*, 3 FMSHRC 803, 817-818 (Apr. 1981).

It is not the judge's duty to resolve conflicts in testimony or to entertain the operator's rebuttal or affirmative defenses at the preliminary stage of the proceedings. *Secretary of Labor o/b/o Albu v. Chicopee Coal Co.*, 21 FMSHRC 717 (July 1999). It is sufficient to find the Complainant engaged in protected activity, the respondent had knowledge of that activity and there was a coincidence in time between the protected activity and adverse action. *CAM Mining LLC, supra.*

Respondent argues that: 1) there was no protected activity involved in this case and, 2) that the history of disciplinary action as recently as March 2, 2010, is relevant and admissible because it negates the "temporal proximity" nexus between any protected activity engaged in by the Claimant and his termination two working days later. The Respondent cites no controlling case law on point.[5]

The evidence at the hearing was clear that Mr. Pilon believed he inhaled noxious steam from the cooler while walking across the catwalk. Whether he suffered injuries necessitating medical treatment is immaterial. He knew from past experience that he was supposed to report such an incident and did so in a timely fashion. The report was reduced to an accident form by the foreman and signed off by Mr. Coombs, (Exhibit S-#1). The report prepared by management indicates that it was known for at least some period of time that two coolers were kicking out presenting a need to use a respirator and stay away from the discharge end of the coolers. Mr. Gedazlinski confirmed that use of chemicals such as chlorides was ususal to color the products in the kilns. I find that this evidence confirms the very real possibility that whatever Mr. Pilon inhaled was a dangerous substance and that he had good cause to believe so, thereby necessitating the filing of a safety report. Mr. Pilon was engaged in protected activity

I also find that the evidence of Mr. Pilon's alleged past employment violations is a matter left to a later proceeding on the merits of the discrimination complaint. In order to find that the past conduct was the sole role in the termination of Mr. Pilon, it would necessary to make evidentiary findings on the affirmative defenses and to resolve conflicts in testimony between the Secretary's witness and the Respondent's witnesses. This is not the role of the Administrative Law Judge at this stage of the proceedings. Additionally, making such a finding here would be tantamount to deciding the discrimination case in chief which is not before me and would deprive the Secretary of the right to conduct discovery and present witnesses to rebut the defenses raised by this evidence.

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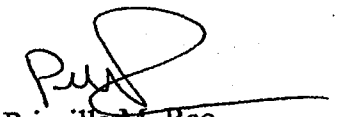
[5] Respondent did not raise this issue in the Answer to the Petition and offered no relevant case law at the hearing in support of this argument.

In summary, all elements of the analytical framework discussed above are satisfied to the level required by the relevant statutes, rules and case law precedents. The Secretary has carried her burden of presenting substantial evidence to support a reasonable cause to believe that Pilon engaged in protected activity, and that there was a nexus between the protected activity and the adverse action of suspension and termination. I conclude that the complaint of discrimination is not frivolously brought.

ORDER

For the reasons set forth above, ISP Minerals, Inc. is **ORDERED** to immediately reinstate Douglas Pilon to the position he held on February 25, 2010, at the rate of pay of $22.54 per hour for 40 hours per week and $33.81 per hour for eight (8) hours of overtime per week with restoration of all benefits to which he was then entitled.

Mr. Pilon's reinstatement is not open-ended. It will end upon a final order on the underlying discrimination complaint case in chief, 30 U.S.C. §815(c)(2). Therefore, the Secretary must promptly determine whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent. Otherwise, I shall entertain a motion to terminate this Order.



Priscilla M. Rae
Administrative Law Judge

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July 6, 2010

SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDINGS
ADMINISTRATION, (MSHA),	:	
Petitioner	:	Docket No. LAKE 2010-769-E
	:	Citation No. 7563769; 06/04/2010
	:	Wildcat Hills Mine-Underground
v.	:	Mine ID 11-03156
	:	
	:	Docket No. LAKE 2010-770-E
PEABODY MIDWEST MINING, LLC,	:	Citation No. 7563800; 06/04/2010
Respondent	:	Francisco Mine-Underground Pit
	:	Mine ID 12-02295

DECISION

Appearances: Lynne B. Dunbar, Esq., and Tracy B. Agyemang, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me on Referrals of Emergency Response Plan Disputes by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 876(b)(2)(G) (the "Mine Act"), as amended by the Mine Improvements and New Emergency Response Act of 2006 ("MINER Act"). At issue are two citations issued on June 4, 2010, charging Peabody Midwest Mining, LLC ("Peabody") with violations of section 316(b) of the Mine Act at the two mines. The citations allege that Peabody failed to develop, adopt, and submit emergency response plans ("ERPs") that provided electronic tracking capability sufficient to adequately protect miners on the working sections in the mines. An evidentiary hearing was held on June 21, 2010, in St. Louis, Missouri, and the parties presented closing arguments and filed post-hearing briefs.

Although the two citations were issued at different mines, they are the same in all material respects. As a consequence, I do not discuss the citations separately. Both mines utilize conventional mining techniques using continuous mining machines. Each mine has at least one "super section" in which two continuous mining machines are cutting coal in a single working section. The parties entered into stipulations prior to the hearing in which they agreed that the citations were issued after the district manager concluded that the parties had reached an impasse

following lengthy discussions. (Stip. 21). They also agreed that the parties had negotiated the issues, as set forth in the Secretary's referral, in good faith. (Stip. 27). The issue before me is whether Peabody was properly cited by MSHA for failing to submit revised ERPs for the two mines that can be approved under section 316(b)(2)(C) of the Mine Act.

I. BACKGROUND

Section 316 of the Mine Act requires underground coal mine operators to develop and submit an ERP for MSHA approval and periodic review. 30 U.S.C. § 876(b)(2)(A). The goal of an ERP is to provide for the evacuation of miners who are endangered by a mine emergency and to assure the survival of miners who are trapped underground because they are not able to evacuate the mine. Within three years of enactment of the MINER Act, each underground coal mine operator was required to develop and submit an ERP that includes, among other provisions, a system for wireless, two-way communications and the electronic tracking of miners underground. 30 U.S.C. § 876(b)(2)(E) & (F)(ii). The MINER Act also provides that if the mine operator believes that "such provisions cannot be adopted," the ERP must state the reasons why and must "set forth the operator's alternative means of compliance." 30 U.S.C. § 876(b)(2)(F)(ii). This alternative means must "approximate, as closely as possible, the degree of functional utility and safety protection provided by the wireless two-way medium and tracking system." *Id.* In order to obtain MSHA approval, any ERP submitted by an operator after June 15, 2009, must satisfy these requirements. The legislative history of this section of the MINER Act states that the intent "is for operators to use the most advanced technology available that works best in their particular mine, to provide a means for the [ERP] to be continuously adapted to changes in the mine or in the commercial technical equipment market, and to avoid the 'behave only to the letter of the standard' syndrome that stifles innovation and delays the implementation of new methods or equipment." S. REP. 109-365, at 13 (2006) ("S. REP.").

The present cases only involve the electronic tracking requirements of the MINER Act. Peabody developed a revised ERP that contained electronic tracking provisions for each mine and, after continuing discussions with MSHA, submitted several revisions of the plan. (Exs. JX-B, JX-C, JX-F, JX-G, JX-J, and JX-K). The final revised plans were submitted to MSHA on or about May 21, 2010. (Exs. JX-J, and JX-K). These plans are identical with respect to electronic tracking.

MSHA rejected these final plans and issued the subject citations on June 4. In letters dated June 4, 2010, Hubert Payne, District Manager for MSHA District 8, stated that Peabody's ERPs failed to provide that its "tracking system will be installed in such a manner such that it effectively can be used to assist miners on the working section during an emergency." (Exs. JX-L and JX-M). Peabody proposed to use a tracking system at each mine that would be capable of identifying the miners who are on a working section, but the system would not be installed in such a manner that surface personnel would be able to determine the location of the miners on a working section "with an acceptable degree of precision." *Id.* The letters go on to state that the ERPs fail to set forth valid reasons for not providing "acceptable tracking capability on the

working sections." *Id.* Most importantly, Payne stated in each of these letters that District 8 representatives "have discussed the ERP's electronic tracking provisions with Peabody representatives, explained the deficiency in the ERP, and explained [his] rationale for believing that the capability to track miners to within 200 feet of their actual locations on the working sections is necessary to adequately protect miners and rescuers given mine-specific conditions and circumstances likely to exist in an emergency." It is this 200-foot guideline that is at the crux of the dispute in these cases.

The citations, which are identical, contain the same allegations. Each citation states, for example, that District 8 representatives "have discussed the ERP's electronic tracking provisions with Peabody representatives, explained the deficiency in the revised ERP, and explained the district manager's rationale for believing that the capability to track miners to within 200 feet on the working section is necessary to protect miners and rescuers given mine-specific conditions and circumstances likely to exist in an emergency." (Exs. JX-L and JX-M). Each citation goes on to state that "Peabody has refused to modify the ERP to provide such tracking capability on the working section or to provide justification for alternative tracking capability that would meet the Mine Act's electronic tracking requirement." *Id.*

The requirement that Peabody install an electronic tracking system that can track miners to within 200 feet on the working sections comes from MSHA's Program Policy Letter P09-V-01 (the "PPL"), that became effective on January 16, 2009. (Ex. G-5). This PPL is entitled "Guidance for Compliance with Post-Accident Two-Way Communications and Electronic Tracking Requirements of the Miner Improvement and New Emergency Response Act (MINER Act)." With respect to electronic tracking systems, the PPL states that "[w]hile operators and District Managers must consider mine-specific circumstances in determining an appropriate electronic tracking system, this guidance outlines features MSHA believes would provide the protection contemplated in the MINER Act in many underground coal mining environments." (Ex. G-5, p. 6). The key provisions in the PPL related to tracking systems as relevant in these cases are as follows:

> 2. Performance
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> a. While the required capabilities of a particular tracking system will depend on mine-specific circumstances, an effective electronic tracking system generally should be capable of:
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> i. Determining the location of miners on a working section to within 200 feet.
>
> ii. Determining the location of miners in escapeways at intervals not exceeding 2000 feet.
>
> iii. Determining the location of miners within 200 feet of strategic areas. Strategic areas are those locations where miners are normally required to work or likely to congregate in an emergency and can include belt drives and transfer points, power centers,

loading points, SCSR caches, and other areas identified by the District Manager. . . .

iv. Determining the direction of travel at key junctions in escapeways.

v. Determining the identity of miners within 200 feet of refuge alternatives.

Id.

Peabody's ERP plans provide that its electronic tracking systems will be capable of "[d]etermining the identity of miners on each working section" and it does not represent that its system is capable of tracking miners within 200 feet of their actual location. (Ex. JX-J and JX-K). The tracking plans submitted by Peabody meet all of the other elements listed in the PPL for electronic tracking systems.

Peabody has chosen an electronic tracking and two-way communications system offered by a company called Mine Site Technologies ("MST"). This system has been approved by MSHA. The tracking system works in a manner that is not dissimilar to cell phone systems. A series of devices called nodes or sensors are attached to the mine roof at strategic locations. These nodes are connected to the surface by fiber optic cables which carry data to and from a computer system on the surface and also provide AC power to the nodes. The nodes also have rechargeable back-up batteries. Directional antennae can be attached to these nodes that provide it with greater coverage along entries and crosscuts. Each miner then wears a tag that emits a signal. The signal identifies the particular miner. The signal is picked up by one or more nodes. The computer program on the surface takes the information and attempts to determine the miner's location by comparing the signal strengths at each node that detects the miner's signal. Under the plan it submitted to MSHA, Peabody will place about three or four of these nodes in each working section. These nodes will generally be parallel to the belt feeder (tailpiece) for that section. (Ex. JX-J, pp. 20-26). In this manner, the electronic tracking system can easily determine who has entered each working section and who has left the working section. The system would not be able to determine where any particular miner is within the working section. As stated above, Peabody also proposes to place nodes at other strategic locations, such as at SCSR caches and at refuge chambers. MSHA has estimated that, in order to determine where each miner is within 200 feet in a working section, Peabody would need to install an additional eight to ten nodes per working section. These nodes are large round boxes that will be affixed to the roof of the mine in or near intersections.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor.

The Secretary argues that the district manager, after careful consideration of Peabody's position, did not act arbitrarily or capriciously in refusing to approve Peabody's ERPs for the two mines. Sec'y Br. 2-3, 9. She contends that she provided adequate notice of MSHA's expectations for the ERPs and of the Secretary's general interpretation of the MINER Act's requirements. The

Secretary argues that she notified Peabody through "letters, emails, and discussions that its revised ERPs lacked features critical to the protection of miners . . . [including] that its ERPs failed to provide electronic tracking capability sufficient to protect miners on working sections." *Id.* at 3. In spite of that notice, Peabody failed to offer alternative tracking capability or an explanation as to why MSHA's recommendations could not be adopted. *Id.*

In rejecting the ERPs submitted by Peabody, the district manager properly relied on his own extensive experience, consultations with a number of other MSHA personnel, information specific to the mines, and guidance from the PPL. *Id.* at 4-5, 9. The Secretary argues that the district manager properly applied the PPL as guidance and not as a binding rule. Further, MSHA's authority to issue the PPL may not be considered in the hearing, as such challenges must necessarily be made to a United States District Court of Appeals. *Id.* at 4.

The Secretary argues that Peabody's proposed setup of the MST tracking system fails to provide the necessary precision of the locations of miners underground. *Id.* at 6. Limited visibility, unsupported roof, post-accident fires/explosions, and lethal mixes of noxious gases are potential conditions in an underground mine environment following an emergency event. *Id.* at 6-7. Knowing the locations of miners with a greater degree of specificity helps to limit the exposure of rescuers, and facilitate quicker rescue. Additionally, it allows boreholes to be accurately drilled, through which food and water can be lowered to the miners, while at the same time providing a source of fresh air, light, and means of communication. *Id.* at 6-7. The Secretary contends that MST's tracking system, when properly manufactured, installed and maintained, is technologically feasible, MSHA approved, and not an ignition source. *Id.* at 7-8. However, Peabody's proposed ERP implementation of the MST system would not sufficiently determine the location of miners in a hazardous, post-accident, underground environment. *Id.* at 8. Further, Peabody failed to provide an explanation in response to the district manager's inquiry as to "how rescue operations could be conducted effectively and efficiently with lesser tracking capability," i.e., not following the 200-foot recommendation set forth in the PPL. *Id.* at 9.

As a result, the Secretary argues that, for the foregoing reasons, the district manager did not act arbitrarily or capriciously in refusing to approve the ERPs and, therefore, Peabody must submit compliant ERPs to the district manager.

B. Peabody.

Peabody asserts that plan approval is a unique process for creating requirements/rules for mine operators without the need for notice and comment. Peabody Br. 2-3. However, given the lack of notice and comment, limitations are placed on the Secretary. Specifically, Peabody argues that "[t]he Secretary may not unilaterally impose terms on operators when rendering approval decisions" or "impose binding norms that would apply to all mines," and instead, the Secretary must base her approval of a plan on "mine-specific factors." *Id.* at 3.

Peabody argues that MSHA impermissibly based its ERP approval decisions in these matters on the PPL and, in turn, violated the requirement that plans be mine specific. Peabody contends that MSHA will not approve an ERP without a provision in the plan that specifies that the tracking system can identify the location of miners in the working section within 200 feet. *Id.* at 5-6. Therefore, the PPL, which was not subject to notice and comment rulemaking, is being applied as a binding rule and is, therefore, "violative of the 'individualized approach to ERPs and miner safety that is directed in the MINER Act.'" *Id.* at 5 (*quoting Twentymile Coal Co.*, 30 FMSHRC 736, 771-772 (Aug. 2008) (opinion of Chairman Duffy and Commissioner Young)).

Peabody contends that the Secretary's characterization of the PPL as "not binding" is not itself dispositive, and that the "actual language and effects of her pronouncements" are of much more importance in determining whether the PPL may qualify as an exception to the Administrative Procedure Act's ("APA") notice and comment rulemaking requirements. Peabody Br. 7. Peabody believes that the PPL does not qualify as an exception, and may not be applied as a binding rule in the absence of notice and comment rulemaking. *Id.* at 7-9. By improperly applying the PPL as a binding rule, the Secretary has abused her discretion and acted in an arbitrary and capricious manner. *Id.* at 9.

Finally, Peabody argues that the Secretary has failed to satisfy her burden of proof, which requires a showing that the plan provision proposed by the operator is unsuitable for this particular mine. *Id.* at 10 (*citing Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996)). The plans submitted by Peabody took into account that "tracking readers" were potential ignition sources which should be limited and that the particular system chosen had significant problems when additional "tracking readers" were added. *Id.* at 10-11. Further, there remains some question as to the technical feasibility of MST system's ability to satisfy the PPL's 200-foot requirement. *Id.* at 12. As a result, the plans submitted by Peabody were consistent with the MINER Act's requirements, and therefore suitable for the conditions at the mines in question. Peabody asks that the citations be vacated and that MSHA be ordered to approve the plans.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The requirement that mine operators include post-accident tracking in their ERPs is contained in section 316(b)(2)(F)(ii) of the Mine Act, which states, in part:

> Not later than 3 years after the date of enactment of the [MINER Act], a plan shall, to be approved, . . . provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator's alternative means of compliance. Such alternative shall approximate, as closely as

possible, the degree of functional utility and safety protection provided by the . . . tracking system referred to in this subpart.

30 U.S.C. § 876(b)(2)(F)(ii). Section 316(b)(2)(E)(ii) describes in more detail what the tracking system should be able to achieve. This provision states:

> Consistent with commercially available technology and with the physical constraints, if any, of the mine, the plan shall provide for above ground personnel to determine the current, or immediately pre-accident, location of all underground personnel. Any system so utilized shall be functional, reliable, and calculated to remain serviceable in a post-accident setting.

30 U.S.C. § 876(b)(2)(E)(ii).

The process for approving ERPs is set forth in section 316(b)(2)(C), as follows:

> The [ERP] . . . shall be subject to review and approval by the Secretary. . . . Approved plans shall –
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> (i) afford miners a level of safety protection at least consistent with existing standards, including standards mandated by law and regulation;
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> (ii) reflect the most recent credible scientific research;
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> (iii) be technologically feasible, make use of current commercially available technology, and account for the specific physical characteristics of the mine; and
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> (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).

A. Discussion of the Evidence.

The evidence establishes that District Manager Payne rejected Peabody's ERPs because the plans did not provide that Peabody's tracking systems would be able to locate miners to within 200 feet of their actual location in the working sections. The ERPs also did not provide an alternative, except to state that Peabody's tracking systems would be able to determine who was in any given working section at the mines. As stated above, Peabody's tracking system provisions for other areas of the mines were approved by MSHA.

District Manager Payne testified that an accurate tracking system is important for a number of reasons. If, during an emergency, the tracking system proposed by Peabody showed that all of the miners passed by the tracking nodes installed at the entrance of the working section on their way out of the section, then the rescue team on the surface would know that they did not need to search the working section to find injured or incapacitated miners. (Tr. 65). Likewise, if the nodes at or near a refuge chamber showed that all of the miners who had been in the working section were at that location, the rescue team would know to rescue them at the chamber or, if that were not possible at that time, to drill a bore hole at that location to provide fresh air, water, food, and communication devices if the built-in system were no longer functioning. If, on the other hand, one or more miners were unaccounted for and the nodes at the entrance to the working section did not indicate that these miners had left the working section, the mine rescue team would not know where they were within the working section under Peabody's proposed tracking system. He testified that the area inby the belt feeder for a working section can involve over four miles of entries and crosscuts at the two subject mines depending on the areas being mined. (Tr. 64-65). On that basis, Payne testified that he could not approve the ERPs submitted by Peabody. One of the primary purposes of the tracking requirements in the MINER Act is to provide rescue teams with as much information as possible regarding the location of miners trapped underground following a mine explosion, mine fire, innundation, roof fall, or other accident ("accident").

If the tracking system survives the accident, in full or in part, the information provided to the computers on the surface can help the rescue team determine where to look for survivors and where to attempt to drill a bore hole to provide aid to trapped miners. If a mine has an array of nodes within a working section and some of them are destroyed in the accident, the remaining nodes may be able to provide important information to the rescue team in the event that not all of the miners were able to escape out of the working section. If the nodes within the working section are totally destroyed in the accident, the nodes by the refuge chamber and along the escapeway will provide information that is useful to the mine rescue team. In such a situation, if some miners are unaccounted for, the rescue team might not know where the miners are within the working section or where they moved to after the accident, but the team will know that they did not escape and will know where they were immediately before the accident.

Tracking the locations of miners serves two important functions when there has been an accident. First, it helps the mine rescue team do its job in a more efficient manner and with more precision. The team will have a better idea where to search for any trapped miners and where to drill a borehole near their location, if necessary. Second, an effective tracking system reduces the exposure of the rescue team members to the hazards found in the mine after the accident. If the team knows the approximate location of miners, the team members will not expose themselves to hazards looking in other areas of the mine. The testimony at the hearing established that miners in emergency situations often do not behave in a rational manner. They sometimes split up and go in different directions. They sometimes believe that they are in one location in the mine when, in fact, they are in a totally different area of the mine. A tracking system helps rescue efforts and reduces the exposure of team members.

District Manager Payne testified that the process of searching in the working section can be slow, especially if the area is filled with smoke or if there have been roof falls or if methane is found. Ronald Hixson, a staff assistant in MSHA District 2 with extensive mine rescue experience, testified that it can be a real "struggle to go in there and locate" injured miners. (Tr. 174). I credit this testimony.

I find that the evidence clearly establishes that the more precisely a tracking system is able to identify the location of a miner, the more likely he will be able to be rescued following an accident, assuming he is unable to travel down an escapeway and exit the mine. Knowing that the miner is still in the working section following an accident is helpful information. All other things being equal, knowing a miner's whereabouts within a working section is better than knowing that he is somewhere in the working section. I base this finding on the testimony of the Secretary's witnesses. As stated in the MINER Act and the Senate Report, the intent is that ERPs should incorporate the latest developments in mine safety while remaining technologically feasible. With respect to tracking systems, the goal is to require that mines install tracking systems that identify the location of miners as accurately as possible using current technology. Congress chose to use the plan approval process to implement the tracking requirement so that the ERP could be adapted to changes in the "commercial technical equipment market, and to avoid the 'behave only to the letter of the standard' syndrome that stifles innovation and delays the implementation of new methods or equipment." S. REP. at 13.

Juliette Hill testified for the Secretary. She is a mining engineer who works in MSHA's certification and approval center in Tridelphia, West Virginia. (Tr. 106; Ex. G-7). She currently works in the electrical safety division. She has reviewed, for approval and certification, components of post-accident communication and tracking systems. (Tr. 108). More importantly, she was a member of the emergency communications and tracking committee that was established by MSHA in 2006 (the "committee"). The first responsibility of the committee was to determine what was available in the commercial market that would be suitable for an underground coal mine. On January 25, 2006, MSHA issued a request for information ("RFI") in the Federal Register and received about 100 responses.[1] (Tr. 109). The committee chose six or seven manufacturers and had them test their equipment at an underground mine in April 2006 to see how the systems might work in an underground environment. The committee drafted a formal report on its findings. The committee then met with potential vendors of this type of equipment to learn about the capabilities of their systems and to explain MSHA's approval and certification process to them. *Id.*

Ms. Hill testified that the committee began drafting the PPL in the summer of 2008. (Tr. 109-110, 112). MSHA decided to "pursue a policy letter as opposed to rule making" because of the deadline of June 2009 imposed by the MINER Act and because of the state of technology for

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[1] Underground Mine Rescue Equipment and Technology; Proposed Rule, 71 Fed. Reg. 4223 (Jan. 25, 2006), *available at* http://www.msha.gov/regs/fedreg/proposed/2006prop/06-722.asp.

use in underground mines. (Tr. 112-113). It would have been difficult for MSHA to "pursue a rule making effort for technologies that for the most part didn't have any track record so to speak in the underground mining environment." (Tr. 113). The committee based the framework for the PPL on the underground demonstrations, the interactions with vendors, the state of technology that existed at the time, and the language of the MINER Act. *Id.* The MINER Act requires that the "above-ground personnel be able to determine the current or immediately pre-accident location of all underground personnel." (Tr. 115). When the committee reviewed the term "immediately pre-accident" in the MINER Act, it determined that Congress "meant working section; because immediately prior to an accident, most miners are going to be in the working section." *Id.* Thus, on working sections, the guidance in the PPL had to provide some definition of accuracy. The committee reasoning was that, "in a post-accident situation, you've got a much broader area to provide coverage" in a working section than in an escapeway. (Tr. 116). The committee decided that, given the state of technology, it would be difficult for mine operators to provide continuous communications throughout the working section but that it was important to provide specific guidance for tracking miners within working sections. (Tr. 117).

The committee originally had 500 feet in its draft document but it was changed when it "went around for review." (Tr. 134, 142-143). Kevin Stricklin, MSHA's Administrator for Coal Mine Safety and Health, and Richard Stickler, the former Assistant Secretary for Mine Safety and Health, attended a meeting with the committee at a facility of the National Institute of Occupational Safety and Health. The distance was changed to 200 feet at that meeting, but Ms. Hill was not in attendance. (Tr. 134-135). Hill testified that the 200 feet number was based on "recent disaster[s], mine rescue activities, and what would have helped." (Tr. 135). The recent disasters referred to are the accidents at the Sago Mine and the Crandall Canyon Mine.

On December 18, 2008, the Secretary published the PPL in the Federal Register to get feedback from interested persons.[2] The comment period ended on January 8, 2009. The Secretary issued the PPL without any change to the 200-foot guideline with an effective date of January 16, 2009. The comments received from mine operators were negative and they suggested that tracking systems should only be required to indicate who has entered or exited working sections. (Tr. 117, 147). MSHA responded to the comments received on April 29, 2009.[3] This document states that mine operators generally replied that the 200-foot tracking coverage on working

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[2] Wireless Communications and Electronic Tracking Systems Guidance, 73 Fed. Reg. 77069 (Dec. 18, 2008), *available at* http://www.msha.gov/regs/fedreg/notices/2008misc/e8-29943.asp.

[3] MINE SAFETY AND HEALTH ADMINISTRATION, RESPONSE TO COMMENTS ON THE PROGRAM POLICY LETTER (PPL) CONCERNING GUIDANCE FOR COMPLIANCE WITH POST-ACCIDENT TWO-WAY COMMUNICATIONS AND ELECTRONIC TRACKING REQUIREMENTS OF THE MINE IMPROVEMENT AND NEW EMERGENCY RESPONSE ACT (MINER ACT) OF 2006 (Apr. 29, 2009), *available at* http://www.msha.gov/regs/complian/ppls/2009/responseppl09vi.pdf (hereinafter "PPL Response").

sections is unreasonable and lacks justification. PPL Response at 7. They also questioned the reliability of "micro-tracking" in working sections.[4] *Id.* In response, MSHA stated that "[b]ased on MSHA's experience in previous mining emergencies and rescue efforts, the Agency believes that the distances in the PPL meet the intent of the MINER Act given currently available technology." *Id.* at 8. "Tracking of miners in the working section is technologically feasible and provides important information to rescuers." *Id.*

Hill also testified that the MST nodes and other devices to be used in its tracking system are intrinsically safe, which means that there is not enough energy in the circuits to ignite an explosive mixture of air and methane. (Tr. 119, 125-126). The MST system would also be safe following an accident assuming that the components were not damaged. She recommended that the nodes be protected from such damage by the mine operator. (Tr. 127). The MST system is designed to provide both communications and tracking. On working sections, the nodes can be placed at or near intersections and, by using coaxial cables with antennae attached, sensors can extend out from the nodes in four directions. (Tr. 233-235). She estimated that the nodes are about 18-inches square with a height of about 6 inches. (Tr. 122). The tags that the miners carry send out a signal that the nodes pick up. Any phones in use on the section also communicate through the nodes and their locations can be identified on the surface. Hill testified that MST representatives told her that, if configured appropriately, the system could identify miners to withing 200 feet of their actual location. (Tr. 130). MST has installed systems at mines outside the United States, but she had no information as to how accurately these systems can track individual miners. MSHA enforcement personnel have tested other systems at underground coal mines in this country and have said that they seem to work. (Tr. 132, 146).

Hill testified that Peabody, in order to meet the 200-foot guideline in the PPL, would need to install eight to ten additional nodes in each working section beyond those shown in the ERPs for the two mines. (Tr. 139). The nodes would have to be moved when the belt is moved up. (Tr. 139-140). This would require moving the optic cables, the coaxial cables, and the antennae.

David Beerbower, Peabody Energy's Vice President of Safety, testified at the hearing. He stated that Peabody wants to use advanced technology that can serve as both a communications system and a tracking system. (Tr. 182, 186). Based on his review of MST's system, he believes that it will be the most reliable and effective. He also testified that if part of the system is damaged, the communications and tracking system can be reactivated by dropping a node down a borehole. (Tr. 196). He doubts that this system, or any other system, is capable of tracking miners within 200 feet of their actual location in a working section. He communicated his concerns to MSHA. (Tr. 201-202). Up to 14 miners work in the mines' working sections during a shift. Beerbower does not believe that the tracking system could accurately identify the location of these people if an array of nodes was installed in the working section as required by the citation. Each tag for each miner would be picked up by three of four nodes and the system would

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[4] Copies of all the comments filed can be found at http://www.msha.gov/REGS/Comments/E8-29943/twowaycommo.asp.

communicate this information to the computers on the surface. As a consequence, people looking at the computer monitors on the surface would likely see this miner at multiple locations or his location would be vague. (Tr. 194-95). With 14 people on the section walking around and operating mobile equipment, as well as the presence of stoppings and other impediments, the location of miners presented on the computer screens would be hazy at best. (Tr. 195). Beerbower is also concerned about placing all of these electrical components in the working section. The nodes are easily damaged by shuttle cars and, during an accident, it is likely that some of the nodes would be damaged. (Tr. 202). Beerbower testified that the MST chief executive officer told him that he cannot guarantee that a node could not become an ignition source if it were damaged. *Id.* Lithium batteries can also be an ignition source.

Beerbower believes that the "picket fence" system it proposes to use would accurately track the location of miners and provide the level of protection mandated by the MINER Act. (Tr. 203-204). This system would not place as many nodes in the working section, would be easy to maintain and move, and would be less likely to become damaged. It would accurately and affirmatively tell those on the surface who is on a particular working section and who has left that working section. When he discussed the ERP with District 8 personnel, he was told that the plan had to locate miners within 200 feet on working sections. (Tr. 204). They exhibited no flexibility with regard to this requirement. He also talked to MSHA personnel at MSHA headquarters in Arlington, Virginia. They made some suggestions concerning how to better cover rooms in working sections that are off the main entries, but they were inflexible about the 200 feet requirement. (Tr. 207; Ex. P-1). Beerbower testified that he was also told that if he put 200 feet into the plan then "we'll work with you." (Tr. 209). This gave him the impression that this 200-foot requirement was being imposed by Arlington and that it was "chiseled in concrete." (Tr. 210). Beerbower testified that he did not feel comfortable putting any specific distance in the ERPs because he would not know if it could be met until it was installed.

Peabody takes the position that knowing whether miners are still in the working section after an accident or whether they safely left the working section is all the information that a mine rescue team needs. Beerbower testified that once a rescue team reaches the working section of a mine, it only takes 15 to 20 minutes to search all the entries and crosscuts to see if there are any injured or incapacitated miners. (Tr. 219).

B. <u>Analysis of the Issues</u>.

The framework for resolution of ERP disputes has been established by the Commission. *Emerald Coal Res. L.P.*, 29 FMSHRC 956, 965 (Dec. 2007); *Twentymile Coal Co.*, 30 FMSHRC 736, 747 (Aug. 2008).

> 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).
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> While the contents of a plan are based on consultations between the Secretary and the 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).

Emerald, 29 FMSHRC at 965.

The Secretary must show that the district manager did not abuse his discretion when he determined that Peabody's tracking systems must be able to locate every miner on each working section within 200 feet of their actual location and display that information at the computer center on the surface. The Secretary must establish that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plans.

District Manager Payne relied upon the PPL when insisting on this 200-foot requirement. Payne had never been in either of the two mines at issue in these cases. Indeed, he only became the district manager on or about May 17, 2010, less than three weeks before he rejected Peabody's ERPs. (Tr. 57, 61). Prior to becoming district manager, he worked in a different MSHA district. He testified that he "sought information from coal mine inspectors who were at the mine the previous quarter" as well as other MSHA employees. (Tr. 72). Based on his review of the conditions in the mines, he concluded that Peabody's tracking system must have the capability to track miners to within 200 feet of their actual locations on working sections. He stated that he used the PPL for guidance only, but he admitted that he "has always enforced 200 feet." (Tr. 74-

76). He believes that 200 feet is an appropriate number but he does not "know how [MSHA] got to that number." (Tr. 76).

The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of the district manager were arbitrary and capricious:

> 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 the 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 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.

30 FMSHRC at 754-755, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

1. <u>The PPL as Rulemaking.</u>

As stated above, Peabody contends that the Secretary is applying the 200-foot tracking guideline in the PPL as a binding norm and that she was required by the APA and section 101 of the Mine Act to go through notice and comment rulemaking. The Secretary argues that she is not using the PPL to circumvent notice and comment rulemaking requirements because she is not applying the PPL as a binding norm. She also contends that this issue is not before me in this expedited proceeding.

The Secretary correctly states that, pursuant to Commission Procedural Rule 24(e)(2)(iii), 29 C.F.R. § 2700.24(e)(2)(iii), "the scope of [an ERP dispute] hearing is limited to the disputed plan provision or provisions." Relying on that language, as well as two Commission cases, the Secretary argues that the authority to issue a PPL may not be considered in this matter and, therefore, Peabody may not challenge the PPL as an illegal act taken by MSHA in violation of the obligation to conduct notice and comment rulemaking. In essence, the Secretary asserts that the Commission does not have jurisdiction to hear the issue.

While I find no legitimate support for the Secretary's argument in either of the cases cited, I agree that the courts of appeals have exclusive subject matter jurisdiction over challenges to

mandatory standards.[5] 30 U.S.C. § 811(d). However, the question whether the PPL is a mandatory standard, and the subsequent potential challenge of such, need not be addressed in this matter. For the reasons discussed below, I find that the PPL itself is not at issue; rather, this case turns on the actions of the district manager in making his decision regarding the ERPs at issue.

National Mining Association v. Sec'y of Labor, 589 F.3d 1368 (11th Cir. 2009) is instructive. In that case the court addressed whether a Procedural Instruction Letter ("PIL") issued by MSHA functioned as a mandatory standard and, if so, whether MSHA violated the APA and the Mine Act by not following standard notice and comment procedures. *Id.* at 1371. In the decision, the court stated:

> We have previously delineated the difference between a legislative rule, to which notice and comment requirements apply, and a general statement of policy, to which they do not:
>
> > Generally, whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. The key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case, or on the other hand, whether the policy so fills out the statutory scheme that upon application one need only to determine whether a given case is within the rule's criterion. As long as the agency remains free to consider the individual facts in the various cases that arise, then the agency in question has not established a binding norm.
>
> *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983) (quotation marks and internal citations omitted). Additionally, in determining whether an agency has issued a binding norm or a policy statement, courts have looked at : (1) the agency's expressed intentions as reflected by its characterization of the statement, (2) whether the statement was published in the Federal Register or the Code of Federal Regulations, and (3)

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[5] In *Emerald*, the Commission acknowledged that there was no requirement in the MINER Act that mandated the use of notice and comment rulemaking in the particular matter that was at issue. 29 FMSHRC at 970 (Dec. 2007). Further, the Commission cited with approval that courts have granted broad discretion to administrative agencies in deciding whether to address issues through either rulemaking or adjudication. *Id.*

> whether the action has binding effects on private parties. *Center for Auto safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).

Id. The court, in finding that the PPL was not a binding norm or mandatory standard, relied heavily on the "advisory and permissive language" of the document, as well as the fact that any action taken pursuant to the PIL was contingent on facts particular to each case. *Id.*

All the Secretary's witnesses denied that the 200-foot tracking guideline is an absolute rule. In addition, the Secretary presented the declarations of Kevin Stricklin and Charles Thomas, the Acting Deputy Administrator for Coal Mine Safety and Health, who both stated that adhering to the guidance in the PPL is not a condition for approving any operator's ERP. (Exs. G-9 and G-10). Peabody argues that the characterization of the document by the Secretary, as well as the Secretary's view of the nature of her actions, should not be accorded as much weight as the actual language and effect of the Secretary's pronouncements. *Brock v. Cathedral Bluffs Oil Shale Co.*, 796 F.2d 533 (D.C. Cir. 1986).

The PPL states that its purpose is to be a "general statement of policy that provides mine operators guidance in implementing . . . electronic tracking systems, . . . [as] required by the MINER Act." (Ex. G-5 at 1). The PPL goes on to state that "[w]hile the required capabilities of a particular tracking system will depend on mine-specific circumstances, an effective electronic tracking system generally should be capable of . . . [d]etermining the location of miners on a working section within 200 feet. *Id.* at 6. The district manager is free to exercise his discretion to follow or not follow the guidance in a particular case and, more importantly, he is instructed to make his decision based on the specific circumstances at each mine. The PPL does not require the district manager to apply the guideline to every underground coal mine in his district.

On April 29, 2009, MSHA issued an informational bulletin on the PPL, which is in question and answer format. (Ex. G-6). This bulletin, which was issued to provide information to mine operators, seems to advise operators that they should expect district managers to follow the PPL. For example, Question 22 states: "Would it be acceptable to install a reader [node] at the loading point, inby the loading point in any entry, or at the load center for each entry, to track the location of miners?" *Id.* at 3. In response, MSHA stated, in part: "Yes, if the electronic system determines a miner's location within 200 feet on the working section." *Id.* at 4. Another question asked whether the 200-foot tracking provision applies to a longwall face, to which MSHA replied in the affirmative. *Id.*

I find that MSHA, acting through its district managers, remains free to consider individual circumstances at a mine and to approve ERPs that do not include a 200-foot tracking capability in working sections. Although district managers may, as a matter of practice, rarely approve such plans, they remain free to do so in individual situations. Although the PPL was published in the Federal Register, this was done to give notice to interested persons and to provide a very brief comment period.

I find that, although the Secretary will likely require that the vast majority of ERPs include a provision for 200-foot tracking in working sections, district managers have the authority under the PPL to allow for tracking systems that do not have that capability. As a consequence, I hold that the 200-foot tracking guideline in the PPL is not a binding norm that is necessarily applicable to all underground coal mines and formal rulemaking under the APA was not required. Although I personally believe that notice and comment rulemaking would have been more appropriate and effective than issuing a PPL given the complexity of communication and tracking systems, I cannot order the Secretary to engage in a rulemaking. In a rulemaking, the regulated community, as well as other interested parties, would have had the opportunity to more formally participate in the process and to provide meaningful suggestions on how best to implement the MINER Act's tracking requirements. The MINER Act gave the Secretary three years to implement the communication and tracking provisions of the Act, which was sufficient time for notice and comment rulemaking. That decision, however, is committed to agency discretion.

2. Abuse of Discretion.

Based on the evidence presented at the hearing, I find that the 200-foot guideline contained in the PPL for tracking miners in the working sections was treated as a binding norm by the district manager in these cases. I find that the district manager abused his discretion when he imposed a 200-foot tracking requirement in the working sections of both mines based on the PPL because he mechanically applied the PPL to the two mines. His decision was arbitrary because he based that requirement, not on any particular conditions present at the mines, but on the language of the PPL. He did not know where the 200-foot tracking guideline originated or why that particular figure was used in the PPL. As discussed below, he stated that he always enforces the 200-foot tracking guideline. He had only been the district manager at District 8 for a few weeks and his knowledge of the conditions at the mines was based on a few discussions with MSHA inspectors and staff. The record establishes District Manager Payne has extensive experience in all facets of coal mine safety issues and that he has wide-ranging knowledge and experience in mine rescue. He reviewed the information provided to him but he simply concluded that a tracking system capable of locating miners within 200 feet of their actual location should be installed in all conventional mines with "square sets and square blocks." (Tr. 75).

It is important to understand that no explanation was provided at the hearing as to how the Secretary decided that tracking systems should generally have the capability to track miners to within 200 feet of their actual locations on working sections. District Manager Payne did not know where the number came from but he testified that he "has always enforced 200 feet." (Tr. 76). Ms. Hill testified that the committee started with 500 feet as a placeholder, and that upon subsequent review the 200-foot guideline was substituted. (Tr. 134, 142-143). Ms. Hill was not at the committee meeting when the change was made, but Mr. Stricklin and Mr. Stickler were present. She testified that the 200-foot figure was based on the Sago and Crandall Canyon disasters and what would have helped in the recovery efforts at those mines. (Tr. 135). The "Notice of Availability of Program Policy Letter" that MSHA published in the Federal Register on December 18, 2008, did not provide any explanation for the 200-foot guideline and MSHA's

response to the comments filed did not explain why that figure was used either. MSHA simply stated,

> Based on MSHA's experience in previous mining emergencies and rescue efforts, the Agency believes that the distances in the PPL meet the intent of the MINER Act given currently available technology. Tracking of miners in the working section is technologically feasible and provides important information to rescuers.

(PPL Response at 8). MSHA's response just sets forth its conclusion, but it does not provide the regulated community with any information as to how it reached this conclusion.

It is important to recognize that providing a tracking system that is capable of locating miners within 200 feet of their actual location in a working section is an extremely complex endeavor. Such a tracking system would also be very difficult to maintain in good order given the conditions that exist in underground coal mines. The nodes are rather large and, in the case of the two Peabody mines, it has been estimated that approximately 12 to 14 nodes will need to be installed in each working section. Optic cables will serve the nodes and coaxial cable will connect antennae to the nodes. When the belt feeder is moved forward as mining progresses, the network of nodes, cables, and antennae will need to be repositioned or reconfigured. Evidence of the frequency that the network will need to be repositioned was not presented at the hearing. During retreat mining, the network will also need to be repositioned as the pillars are mined. It is safe to say that a communication and tracking system will be one of the most complex and difficult installations to establish and maintain in underground coal mines. Determining whether such a tracking system should be required in a working section requires a comprehensive review of the specific physical characteristics of that mine and should take into consideration the type of tracking system being installed.

Peabody does not believe that the 200-foot tracking system that MSHA wants to require is necessary or suitable for its mines. It has raised questions as to whether such a tracking system will function correctly and whether it can be maintained in working order given the conditions in underground mines. The regulated community also raised these issues when commenting on the PPL. Peabody is concerned about adding so many electrically-powered components into the working sections of its mines. It is concerned that nodes will be damaged during an accident and these damaged nodes could ignite methane that is liberated. Beerbower stated that other operators have had difficulty keeping the nodes from being damaged by mobile equipment during normal operations.

Despite the complexity of these tracking systems, the district manager chose to simply require Peabody to amend its ERP to include a 200-foot tracking system in its working sections. An administrative agency must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choices

made.' " *Twentymile Coal* at 754. The district manager did not do this in the present cases. His statement that he always enforces the 200-foot guideline confirms that he only superficially considers the specific conditions in the mines in his district, if at all, when reviewing ERPs.

It is important to understand the limits of my ruling. I am not holding that Peabody may implement the ERPs it submitted as if they have been approved by MSHA. I am not holding that the district manager cannot seek to establish tracking distances for working sections in Peabody's underground coal mines through negotiations with the operator. Because these cases involve mine plans, the parties must adopt ERPs that account for the specific physical characteristics of each mine. I am simply holding that the district manager cannot mechanically apply to Peabody's mines the 200-foot tracking guideline contained in the PPL. The parties are still obligated to negotiate and develop ERPs that are tailored to the conditions at the mines The district manager must be able to establish that, given the specific conditions present at the mines and the current state of technology, Peabody should be required to install tracking systems that can track miners within the working section with an acceptable degree of precision. The degree of accuracy must be negotiated between the parties. The district manager is not prohibited from considering the PPL, but he must explain to Peabody why the particular tracking distance he wants to include in the ERP is appropriate for these particular mines and he must seriously consider any objections or comments given by Peabody. "Use of a guideline does not *per se* make it suitable or unsuitable to a plan, nor does 'across the board' use of a policy automatically make it unsuitable for this particular mine." *Prairie State Generating Co.*, 32 FMSHRC ____, slip op. at 8 (May 21, 2010) (ALJ) (*Pet. for disc. rev. granted by Comm., June 30, 2010*).

My holding in this case is consistent with the Commission's decision in *Carbon County Coal Co.*, 7 FMSHRC 1367 (Sept. 1985). In that decision, the Commission determined that MSHA's insistence on a particular ventilation plan provision was "the result of a *rote application* of the . . . guideline and . . . was not based upon particular conditions at the . . . [m]ine." *Id.* at 1373 (emphasis added). The Commission stated that its decision was not based "upon the merits of the [ventilation provisions]," but rather upon the fact that MSHA was using the plan approval process to impose general rules applicable to all mines instead of provisions "based on particular circumstances at the . . . [m]ine." *Id.* at 1375. The Commission qualified its holding by stating that:

> This does not mean that the . . . [disputed provision at issue] may not be applied at the . . . [m]ine. If negotiations on the ventilation plan resume, MSHA may determine, and may be able to establish, that particular conditions at the mine warrant the inclusion of the . . . [disputed provision at issue] in the ventilation plan.

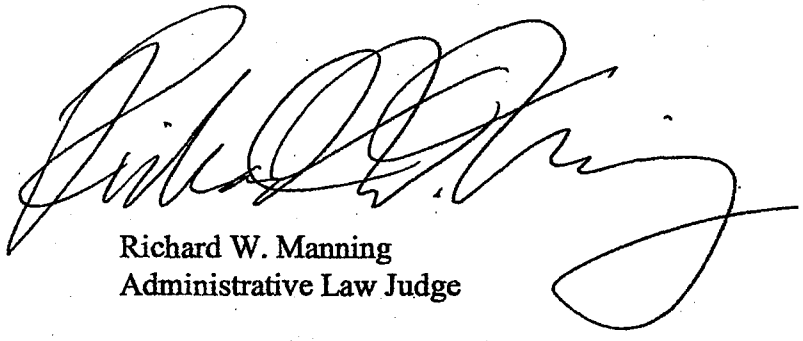
Id.

Based on the foregoing findings and conclusions, I find that the Secretary, acting through her district manager, abused her discretion and acted in an arbitrary and capricious manner, when

she, in rejecting Peabody's ERPs, demanded that the ERPs include a 200-foot tracking guideline without seriously considering the specific condition in the mines and the capabilities of the mines' chosen tracking systems. Whether this 200-foot tracking guideline should be required in the working sections of Peabody's mines has not been established. The two citations at issue in these proceedings were issued because the ERPs failed to include a 200-foot tracking provision. As a consequence, the citations are vacated.

IV. ORDER

For the reasons set forth above, Citation Nos. 7563769 and 7563800 are **VACATED** and these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 7, 2010

KNIFE RIVER CORPORATION, NORTHWEST,	:	CONTEST PROCEEDING
Contestant,	:	Docket No. WEST 2010-1319-RM
	:	Citation No. 8559470; 0602/2010
v.	:	
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Coffee Lake Pond
ADMINISTRATION (MSHA),	:	Mine ID 35-03022
Respondent	:	

DECISION

Appearances by Brief: Jeannie Gorman, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of the Respondent
Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Contestant

Before: Judge Rae

Finding of Facts and Procedural History

On April 2-3, 2010, Inspector Richard Roethle of the Mine Safety and Health Administration's ("MSHA") conducted an inspection of KRC's Coffee Lake Pond Mine ("Coffee Lake"). Coffee Lake is a surface sand and gravel operation in Salem, Oregon, and is a mine, as defined by the Mine Act. On April 2, 2010, Inspector Roethle issued Citation Number 8559470 having found:

> [T]he existing rubrail on the truck scales were not mid-axle height to the dump trucks using them. This condition could allow trucks to cross over the rail and drop down to the front axles. The existing 5 inch diameter rubrail was 12 foot wide, 80 feet long and 9 inches above the scale deck. This is a manufactured scale with a rubrail. The truck scales are used daily to weight trucks in and out. If a person were to drop an axle off the scale they could be seriously injured.

(Cit. 8559470.)

Roethle found the gravity level of the alleged violation to be "unlikely" to cause injury or illness and that the injury could result in "lost workdays or restricted duty." (Res- Exh. 2.) The negligence level was found to be "moderate." (*Id.*)

The two truck scales' platforms are approximately 80 to 100 feet long and 12 feet wide and 36" above the ground at the highest point. They have the manufacturer-installed rub rails along the length of their inner and outer edges. (Con- Exh. D; Res- Exh. 2.) The rub rails are approximately 5 inches thick and 9 inches high and the distance from the truck scale deck to the pavement is approximately 26 to 36 inches. (*Id.*; Con. Brief, at 2; Res.-1-a) To meet MSHA's demands, the rub rail would have to be 20 inches high. (C - Exhibit D; Res.- Declaration of Breland, at 2; Res.- Exh.1-a.) This is determined by subtracting by half the wheel height of the largest truck which usually travels the roadway. (*Id.*) In this case, the height of the wheel of the largest truck that uses the scales is 40-inches high. (*Id.*)

The two truck scales in question have been in operation since March of 1998. (C - Exh. B; C.- Exh. C.) Between then and May of 2010 the scales have weighed approximately 9.630 million tons of aggregate. (Con.- Exh. E.) Based on the approximation that each truck can carry 23 tons per load, on average 33,496 trucks (excluding light weights) cross the scales per year and approximately 401,952 trucks have passed over the scales since they have been in operation. (*Id.*)

When trucks are approaching the scales they are guided by a set of traffic lights that require the trucks to come to a complete stop before entering and exiting the scale. Also, trucks must stop when on the scale to be weighed and again to pick up a weigh ticket after they have moved off the scale. (Con.- Exh. G.) When entering and exciting the scales the trucks travel at approximately 4-5 mph. (*Id.*) MSHA regulations and KRC's company policy requires that occupants of the trucks wear seatbelts while the trucks are in operation. 30 C.F.R.§§ 56.14130 and 56.14131, (Con.- Exhibit H; C- Exhibit Y.) There have been no seatbelt violations at Coffee Lake while the scales have been in operation. (Con.- Exh. O.) The scales are adjacent to two main traffic routes within the facility, but they are not part of any main artery. (Con.- Exh. Q.) The scales, and the roads that travel directly to them from the main arteries, are only accessed to weigh trucks and are not intended to by used as a thoroughfare. (*Id.*; C.- Exhibit E.)

Coffee Lake has been inspected by MSHA 43 times since 1998 and during that time the scales have not been cited for deficient guardrails. (Con.- Exh. S.) The manufacturer, UniBridge Systems, is also not aware of any accidents in which a truck has gone off the side of this particular type of scale, (Con.-Exh. P.), nor are any of the management personnel at the mine. (Con.- Exh. D and E.) Two other KRC operations in Oregon have been cited because of similar circumstances where guardrails were found by MSHA to not meet the required height, however, the Solicitor's brief does not specify whether these citations involved scales or other roadways. (Res.- Brief at 3.) KRS requested additional time to comply with MSHA's requirement that they raise the guardrails and it was granted. (Res.- Brief, at 2.) KRC has since requested estimates from outside contractors to determine the cost of retrofitting the scales with guardrails 20 inches high or higher. (Con.- Exh. V.) According to these estimates, the cost would be $38,418 per scale. (Con.- Exh. V.) In addition to the two scales at Coffee Lake, KRC has a number of other facilities throughout the country that use similarly-configured scales with the original manufacturer's guardrail. (Con. Brief, at 5.) KRC estimated that it would cost $1.3 million in order to retrofit their 34 operational scales. (*Id.*)

On June 8, 2010, the Commission received, through their representative, KRS's motion for an expedited proceeding. In a telephone call with the parties on June 16, 2010, I granted the

Contestant's request for an expedited proceeding. The parities stipulated that in lieu of an in-person hearing, they would submit briefs and exhibits. On June 18, 2010, I issued an Order reiterating that the expedited proceeding was granted and that the briefs would be submitted by June 28, 2010.

Argument and Application of Law

30 C.F.R. §56.9300(a) states that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." 30 C.F.R. § 56.9300(a). 30 C.F.R. § 56.9300(b) states that these "berms or guardrails" need to be "at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." 30 C.F.R. § 56.9300(b).

Contestant asserts two reasons for its request to dismiss the citation issued by MSHA. First, that the cited standard does not apply to the operation because the truck scales cannot be considered a roadway or, alternatively, because there is neither a grade nor elevation that would require a berm or guardrail. Secondly, the operator was not given fair notice that the cited standard applies to the scales at Coffee Lake as they had never been cited before.

Having considered counsels' briefs and exhibits I find that the Contestant's argument that the scales are not roadways or that they have been deprived of fair notice are not meritorious.

Contestant asserted that trucks traverse the scales at a rate of 5 mph, and stop on either end of the scales and to be weighed, and then continue onto the roadway to exit the mine. Only the dump trucks being weighed use the scales; other vehicles use the adjacent roadway to enter and exit the mine without the necessity of crossing the scales. Relying on the definition of a "roadway" from *Merrian-Webster Online* and *dictionary reference.com*, Coffee Lake contends that a roadway is the same as a road which is used for travel to or from a destination. The scales, to the contrary, are for the purpose of selling the mined material and are equipment. (Res. Motion for Summary Decision 8-9). Moreover, Respondent contends that there is a dissimilar purpose for regulating scales as opposed to mine roads. Additionally, the manufacturer opined that should the scales be used as roadways, their precision would be diminished. (Con-Exh. P).

I do not find Respondent's argument persuasive. While there is a roadway adjacent to the scales which can be used by vehicles, by Respondent's own admission, all trucks carrying the products from the mine must cross the scales in order to sell the material to the end user. Approximately 33,496 trucks cross the scales each year (almost 100 per day). The scales are an integral part of the road used by the trucks and are an essential part of the commercial trek from the pit to the consumer. I find Judge Weisberger's opinion that the common meaning of the term roadway is the entire route traveled by the trucks including the scales. The assertion that scales are merely equipment because travel across them is limited to 5 mph, stopping in route, is too narrow an interpretation of the word. *Secretary of Labor v. APAC - Mississippi, Inc.*, (October 2004). I also note the decision by Judge Manning, *Secretary of Labor v. Carder, Inc.*, 27 FMSHRC 839 (November 2005), which found that scales fit within the scope of the standard under §56.9300.

The Contestant's assertion that they have been deprived of fair notice because they have never been cited for the scales before or specifically notified of the application of the standard to the scales is also not persuasive. An operator is deprived of fair notice of the applicability of a standard when it is "so incomplete, vague, indeterminate or uncertain that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Secretary of Labor v. Ideal Cement Co.,* (November, 1990) quoting *Alabama By-Products Corp.,* 4 FMSHRC 2128, 2129 (December 1988). Explicit notice to the operator is not required. Put another way, "when the language of a regulatory provision is clear, that terms of the provision must be enforced as they are written unless the regulation clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results," *Secretary of Labor v. Lode Star Energy Inc.,* 24 FMSHRC 689 (July 2002), citing *Dyer v. United States,* 832 F. 2d 1062 (9th Cir. 1987).

The standard for requiring a berm is sufficiently clear and the language is meant to apply to a variety of circumstances, *Ideal Cement Co., supra; Alabama By-Products Corp., supra; Secretary of Labor v. IMCO Services,* 5 FMSHRC 1 (January, 1983).

I do find, however, that the Secretary has failed to meet her burden of proving by a preponderance of the evidence that the scales are of a depth and/or grade that would trigger the application of the standard.

Respondent addresses the issue of whether the scales are considered to be a roadway in her brief as well as whether Coffee Lake has been deprived of fair notice of the application of the standard to these scales. However, the determination that the scales are a roadway is only one prong of the standard triggering the need for a guardrail. She has not addressed the depth and grade issue.

While the operator's argument that there has never been an accident on the scales is irrelevant as the Mine Act demands strict compliance once the standard is found applicable, there is no evidence provided in this case upon which to find the standard applies to these particular scales. The Secretary alleges that the scales are 36" at their highest point and nothing further. (Contestant alleges that the scales are only 26 ½" from the scale's deck to the pavement in her brief at page 3). Lacking is an expert's statement, case law or any other authoritative guidance as to how or why a 26 ½" to 36" elevation for some undetermined distance on the scales is of sufficient depth as to pose a danger of a vehicle overturning or endangering persons in equipment.

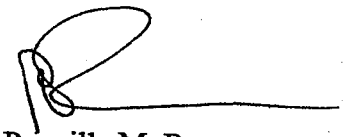
The inspector who issued the citation found merely that a truck could drop an axle resulting in injuries but that it was unlikely. (Res. Exh. 2.) The statement of Supervisor Brad Breland indicates that he is considering amending the citation to read "reasonably likely" to occur with "permanently disabling" results (Res.-Brief Declaration of Breland). However, Mr. Breland gives his reasons for these contemplated changes as his familiarizing himself with the conditions without giving any underlying factual basis for this statement. His statement is silent on information regarding how the height or grade of the scales considering all other relevant factors such as their width, size of the trucks and the like would trigger the standard. The Secretary has also provided photographs of the scales, however, it would be inappropriate for me to draw inferences from photographs alone without some authority upon which to rely in finding

that they depict an elevation or grade sufficient to cause a truck to overturn or endanger persons in the trucks. I have also reviewed case law and find nothing that sets a standard or minimum height at which the standard would apply.

Having provided no case law setting a precedent, any authority or expert opinion, I find that the Secretary has not met her burden of proof by a preponderance of the evidence as required, *Secretary of Labor v. United States Steel Corp.*, 5 FMSRC 3(January 1983); *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F3d 1096 (11th Cir. 1998); *Ormet Primary Aluminum Corp.*, 23 FMSHRC 1330 (December 2001).

ORDER

It is **ORDERED** that Citation No. 8559470 be DISMISSED.



Priscilla M. Rae
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

July 16, 2010

EUGENE BADONIE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2009-1342-D
	:	Case No. DENV-CD-2009-15
v.	:	
	:	Mine Name: Kayenta Mine
PEABODY WESTERN COAL CO.,	:	Mine ID: 02-001195
Respondent	:	

DECISION

Appearances: Eugene Badonie, Kayenta Arizona *pro se*;
Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak, Stewart, P.C., Washington DC on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint of Mr. Eugene Badonie pursuant to Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 *et seq.*, the "Act", alleging that on May 1, 2009 he was transferred by the Peabody Western Coal Company (Peabody) from a position as a day shift (first shift) supervisor to the "undesirable" position as a midnight shift (third shift) supervisor in violation of Section 105(c)(1) of the Act. [1] Mr. Badonie acknowledges that he suffered no loss of pay, benefits or seniority as a result of the transfer. He had since been transferred to the second shift but wants to be returned permanently to the first shift.

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[1] Section 105(c)(1)of the Act provides, in relevant part, 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.....

In order to establish a *prima facie* case of a violation of Section 105(c)(1) of the Act, the complainant must prove that he engaged in an activity protected by that section and that the adverse action complained of was motivated in any part by that activity. See *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), rev'd on other grounds, *sub nom. Consolidation Coal Co. v. Marshall* 663 F. 2d 1211 (3rd Cir. 1981); *Secretary Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981)

It is undisputed that Mr. Badonie engaged in protected activities on April 30, 2009[2].On that date, Badonie was working the third (midnight) shift filling in for the absent regular supervisor. The truck drivers were complaining to him about "the perpendicular angle at the push". According to Badonie, the drivers were "not being permitted to be perpendicular to the dump" at the J-28 stockpile causing them to operate in a "rough" area. More particularly, it appears that the trucks were being driven over four-foot-high windrows and the drivers were complaining, as a result, that some were suffering back pains . Mr. Badonie then filed "a safety alert-life threatening notification" by way of a "BD02" (a form of electronic messaging) complaint regarding this matter to corporate headquarters around 7:18 a.m (Exhibit C-11). Badonie designated the condition as "life threatening" and, under the DB02 system, such a report results in an automatic E-mail back to mine management informing them of the complaint. It is clear therefore that all senior managers were aware of Badonie's "life threatening notification" by 7:18 a.m. on April 30, 2009, (Exhibit C-11). The records indeed show that Senior Production Manager Barry Grass was already responding to the complaint by 8:43 a.m. (Exhibit C-11).

Around 5:00 or 6:00 a.m. on May 1, 2009, Barry's brother, Jonas Grass, called Badonie into his office and told him that he had been called by Barry thirty minutes before and was told to inform him that he had been transferred to the third shift. According to Badonie, Jonas provided no reason for the transfer. Badonie testified that he considered resigning over the weekend but the following Monday he met with Scott Williams who was in a superior position to the Grass brothers and was told only that "moving men around was a tradition at the company". At some point in time Badonie also asked Barry Grass why he had been reassigned and Barry told him that he had been replaced with Norman Sneddy because he had never before evaluated Sneddy and wanted to move him to day shift to evaluate him. There is no dispute that the first shift supervisor is considered the lead-supervisor for all three shifts and has greater responsibilities for assigning work on all three shifts.

---

[2] At hearings, Mr. Badonie also claimed six other alleged protected activities. I find however that the two safety grievances filed on behalf of another employee when Badonie was a union representative (and before he was promoted to management) in January 1998, and letters to Mr. Grass in January and April 2008 complaining about equipment being returned from the maintenance shop without the correction of certain safety defects, were too remote in time and of a nature to be expected in the ordinary course of his duties to have been a motivating factor in his shift change in May 2009. I further find that a grievance filed in December 2001 on behalf of an employee initially denied family leave and a complaint of alleged sexual harassment in February 2004 were not protected under the Act.

At the conclusion of the Complainant's case at trial, I found that he had engaged in protected activity and that he had met his initial burden of showing that his transfer to the third (night) shift was motivated at least in part by that protected activity. Here, not only was there clearly knowledge of Badonie's protected activities on the part of Barry Grass, the official who recommended the transfer of Badonie, but the transfer was made less than a day after his April 30, 2009, protected activity.

The operator may rebut the *prima facie* case by showing either that no protected activity occurred, or that he adverse action was in no part motivated by protected activity. See *Robinette*, 3 FMSHRC at 818 n. 20. While acknowledging Badonie's protected activities, Peabody maintains that it made the decision to transfer Badonie in late April 2009, prior to his April 30th safety complaint and that, accordingly, the transfer was not, and could not have been, motivated by that protected activity. In this regard, Peabody presented credible evidence that Badonie's assignment to the third shift was part of an overall reorganization of management and supervisory responsibilities at the mine to be effective May 1, 2009. (Exhibits. R-1, R-2 and R-3).

The reorganization was the result of a company-wide initiative called "Center of Excellence" (COE) which entails reviews by a team of managers studying organization and procedures at an operation and making recommendations for improvement. The COE at the Kayenta Mine was completed on April 17, 2009. According to the undisputed evidence it was recommended in the review that management of the operating pits be divided so that one set of managers would be in charge of one pit and a separate set of managers would be in charge of the other pit. This was deemed necessary because of the mine's large size (one hundred square miles of permitted property) and because the two main operating pits are located 14 miles apart. Previously, one set of managers and supervisors would work both pits, which involved excess travel time between the pits.

In the reorganization, Barry Grass and Randall Hendrix (in an equivalent position to Grass) were made production managers overseeing the supervisors at the separate pits: Grass was over the J19 and J21 and Hendrix over the N9 pits (Exhibit R-2). They were each to have their own respective sets of supervisors (Exhibit R-2). In the reorganization, Norman Sneddy was placed on first shift as pit supervisor in the J19 and J21 pit area, Lewis Pavinyama was in that position on the second shift and Badonie was placed in that position on the third shift. This is the pit area under Barry Grass. The pit supervisors manage the dump truck and backhoe operations at their assigned pit.

Badonie's position before the reorganization involved supervising reclamation activities and managing the dozers. In the reorganization, that position was eliminated and the supervision of the dozers was placed under the pit supervisors for each respective pit. According to the credible evidence, Sneddy was placed on first shift rather than Badonie because Barry Grass wanted to directly supervise Sneddy to evaluate him. In the first shift position, Sneddy would be given more responsibility than the pit supervisors on the other shifts, because the first shift supervisor is the lead supervisor responsible for planning the work on all three shifts. Since Barry Grass works on the day shift, Sneddy would have to work on the first shift in order for Grass to be able to directly supervise Sneddy. Before this, Sneddy had been working on the third shift for a long time . He had not been a lead shift supervisor before and had not worked directly for Barry Grass before.

According to the credible evidence, the details on job responsibilities and assignments in the reorganization were completed in various meetings involving the director of production, Gregg Kitchen, Randall Hendrix, Barry Grass and Renee Lorents, the senior manager of human resources. These meetings began around Monday, April 20th and the final decision on the new job assignments was made by April 24th.

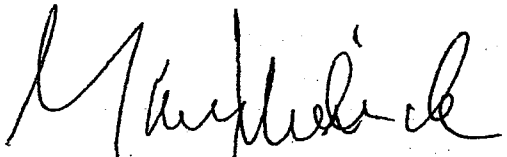
In one of the meetings that week, the reorganization was diagramed out on a "white board" and the resulting chart and notes were printed out directly from the "white board" using its internal printer. (Exhibit R-3). That chart shows that Badonie was to be made a pit supervisor on the third shift in the reorganization and that the change would be effective May 1st (Exhibit R-3). That chart was brought to Lorents by the end of the week of April 20th for her to use in preparing the final organization chart for the reorganization. Gregg Kitchen made the final decision on the reorganization, including Badonie's new position on the third shift, prior to Badonie's April 30th complaint and was based on recommendations from Barry Grass and Randall Hendrix.

It is undisputed that it had been, and is, standard practice for the company to move people around. Indeed, prior to the transfer at issue in this case, Badonie had been moved approximately every twelve months to a different supervisory job or to a different shift and Badonie acknowledged that he was aware that the company moves supervisors to different positions and different shifts due to promotions, reorganizations and other operational reasons. In fact, Badonie had previously been assigned to the first and second shifts and had filled in for others on the third shift. As of May 1st, Badonie had already been working the third shift for three months, while the regular third shift supervisor was on leave.

Within this framework of credible evidence, I find that, indeed, the decision by Peabody to transfer Badonie to the third shift had been finalized by April 24, 2009, six days before his protected safety complaint on April 30, 2009. Accordingly, the decision to transfer him was not motivated by that safety complaint and this proceeding must be dismissed.

ORDER

Discrimination proceeding Docket No., West 2009-1342-D is hereby dismissed.



Gary Melick
Administrative Law Judge
(202) 434-9977

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Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 2400 N Street NW, 5th Floor, Washington, DC 20037

/to

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

July 21, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2009-137-M
Petitioner	:	A.C. No. 02-02683-163944
v.	:	
	:	
EUREKA ROCK, LLC,	:	Mine: Eureka Portable Screening Plant
Respondent	:	

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Petitioner;
Thomas Mattics, President, Eureka Rock, LLC, Ashfork, Arizona, 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 Eureka Rock, LLC, (Eureka) with multiple violations of the standard at 30 C.F.R. § 50.30(a) and proposing civil penalties $448.00 for those violations. The general issue before me is whether Eureka Rock violated the cited standards as charged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted.

Eureka first argues that the operations and products of its mine do not affect interstate commerce and that therefore its mine is not subject to the Act. Section 4 of the Act provides that "each 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." In *D.A.S. Sand and Gravel Inc. v. Chao.* 386 F.3d 460 (2nd Cir. 2004), the Circuit Court, relying on the language of section 4 of the Act, held that Congress unambiguously expressed its intent to regulate mines to the full extent of its power under the Commerce Clause. The Court of Appeals in that case further noted that the Supreme Court has long held that "the Commerce Clause does not preclude Congress from regulating the activities of an economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential to affect an interstate market the regulation of which is within Congress' power". 386 F.3d at 463.

It is undisputed that the Eureka mine crushes volcanic rock (although the crusher has been inoperative since 2004) and screens that product for sizing to use in the local region primarily for landscaping and as a base for driveways. Eureka also produces a sand product for use as a bedding

material around outside water tanks and gas and sewer lines to protect them from rocks. There is no evidence that Eureka directly gives or sells any mine product out of the State of Arizona. Within this framework of evidence and consistent with prior decisions, however I find that interstate commerce was nevertheless affected in this case because of the "cumulative effect small scale operators can have on interstate pricing and demand. See *United States v. Lake*, 985 F.2d 265 (6th Cir. 1993); *Tide Creek Rock, Inc.*, 24FMSHRC 201 (February 2002)(ALJ); *Darwin Stratton and Son, Inc.*, 24 FMSHRC 403 (January 2002)(ALJ).

It is further undisputed that in his business, Mr. Mattics, Eureka's president, uses a Verizon cell phone and the U.S. Postal Service and a post office box. He also obtains diesel fuel for his screen and utilizes a Hough front end loader manufactured by International Harvester in his mining activities. It may reasonably be inferred that the diesel fuel was obtained from an out- of- state source and that the manufacturer of his front end loader was located out of state. These factors are indicia of interstate commerce. *U.S. v Dye Construction Co.*, 510 F.2d 17, 83, (10th Cir. 1975)

Eureka next argues that owner/operators, having no employees cannot be a "mine" within the purview of the Act. I find no such exclusion in the mine Act and indeed Federal Courts have agreed. See *Marshall vs. Conway,* 491F. Supp. 1123 (D.C. PA 1980).

The Alleged Violations

Citation number 6416594 alleges a violation of the standard at 30 C.F.R. § 50.30(a) and charges as follows:

> The operator did not report total hours worked on MSHA Form 7000-2 for the second quarter of 2007. The operator acknowledges hours worked during this quarter but refuses to report the hours. Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA Form 7000-2 in accordance with the instructions and criteria in Sec. 50.30-1 and submit the original to the MSHA Office of Injury and Employment Information, P.O. Box 25367, Denver Federal Center, Denver, CO 80225, within 15 days after the end of each calendar quarter.

Citations Number 6416595, 6416596 and 6416597 allege the same violation of 30 C.F.R. § 50.30(a) but with respect to the third quarter of 2007, the fourth quarter of 2007 and the first quarter of 2008, respectively.

The cited standard, 30 C.F.R. 50.30(a), requires, in essence, that each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA form 7000-2 in accordance with instructions and criteria in Section 50.30-1 and submit the original to the MSHA Office of Injury and Employment Information within 15 days after the end of each calendar quarter.

30 C.F.R. § 50.30-1(g)(3) provides, in relevant part, as follows:

> Total employee-hours worked during the quarter: show the total hours worked by all employees during the quarter covered.

MSHA form 7000-2 also provides a space for the mine operator to report "total employee hours worked during the quarter". (Exhibit G-1A)

Eureka argues that since Mr. Mattics is the owner of Eureka and has no "employees" it is in full compliance with both the cited standard and the instructions on form 7000-2 in not reporting the number of "employees". It therefore argues that it is not in violation as charged and the citations should be vacated. In reading the language of 30 C.F.R §50.30-1(g)(3) and applying the ordinary definition of the term "employees" Eureka's interpretation is understandable .

The Secretary notes however that the term "employees" is defined in another subsection of the cited standard as including "all classes of employees (supervisory, professional, technical, proprietors, owners, operators, partners, and service personnel) on your payroll full or part time." See 30 C.F.R. § 50.30-1(g)(2). The Secretary argues therefore that under the rules of regulatory construction, that definition applies as well to the term "employees" used in 30 C.F.R §50.30-1(g)(3) The Secretary is clearly correct in this regard. Administrative regulations are generally subject to the same principles of construction as statutes. *Miller v. United States,* 294 U.S. 435, 442 (1935). In analyzing the rules of statutory construction, the Supreme Court of the United States has stated that the established canon of construction is that similar language contained within the same section of a statute must be accorded a consistent meaning". *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.,* 522 U.S. 479, 501 (1998). The Supreme Court has further held that "there is a natural presumption that identical words used in different parts of the same acts are intended to have the same meaning. *Atlantic Cleaners & Dryers, Inc. v United States,* 286 U.S. 427 (1932). Furthermore, in *Morton Int'l Inc.,* 18 FMSHRC 533 (Apr 1996), this Commission held that "regulations should be read as a whole giving comprehensive, harmonious meaning to all provisions". Id at 536.

Therefore, as a matter of law, the definition of the term "employees" found in 30 C.F.R § 50.30- 1(g)(2) is applicable to the term "employees" found in 30C.F.R. § 50.30-1(g)(3) and, accordingly, Mr. Mattics as owner/operator of Eureka is required to report his own hours as an " employee" on MSHA Form 7000-2. His failure to do so constitutes a violation of 30 C.F.R § 50.30 (a) as charged.

Civil Penalties

Under section, 110(i) of the Act, in assessing civil monetary penalties the Commission and its judges must consider the operator's history of previous violations, the appropriateness of a 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

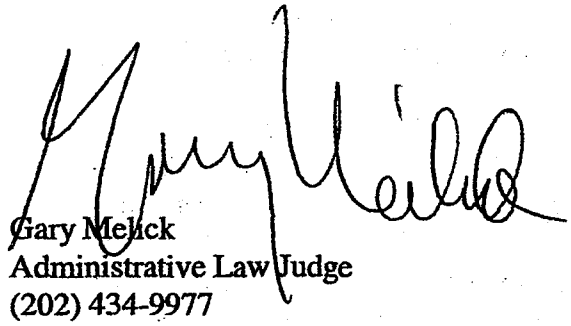
faith of the person charged in attempting to achieve rapid compliance after notification of the violation. No evidence of the operator's history of "final" violations was presented at the hearings nor was clear evidence of abatement. It is likely that the violation was not "abated" because Mr. Mattics continued to maintain that he was not an employee. The Secretary has alleged that the violations were of low gravity and I cannot disagree. Eureka is also a small business and there is no evidence that the proposed penalties would affect its ability to stay in business. The Secretary also alleges that the violations were the result of Eureka's high negligence on the grounds that it is undisputed that Eureka's owner, Mr. Mattics, has previously been cited for the same violations as those at bar and had been repeatedly warned by MSHA officials of the Secretary's alleged interpretation of the cited standard i.e. owners and operators must report themselves as "employees" under the provisions of 30 C.F.R. § 50.30-1(g)(3).

I disagree with the Secretary's position and find that Eureka is chargeable with but little negligence. A lay person, such as Mr. Mattics, cannot, without an authoritative and binding legal opinion, be expected to understand the arcane and sometimes bizarre legal concepts of regulatory construction as applied herein and that the term "employees" as used in 30 C.F.R. § 50.30.-1(g)(3) is the definition that one would not ordinarily find in common usage and in a standard dictionary. The arcane legal definition of the term "employees" found in 30 C.F.R. § 50.30.-1(g)(2) would not, to a layman, appear to be applicable to 30 C.F.R. § 50.30.-1(g)(3). In particular, considering the threats posted on the reverse of MSHA Form 7000-2 that "an individual who knowingly makes a false statement in any report shall, upon conviction, be punished by a fine of not more than $10,000.00 or imprisonment for not more than five years, or both", the failure of Mr. Mattics to have reported himself as an employee is even more understandable.(Exhibit G-1A page 2). I find therefore that Mr. Mattics was complying in good faith with the terms of the cited standard and MSHA form 7000-2. I further find that his persistent non-compliance on the unique facts of this case should not result in a finding of high negligence.. However, if Mr. Mattics does not choose to seek review before this Commission of the instant decision or, upon seeking review, this decision is affirmed by the Commission, Mr. Mattics would be on notice regarding the interpretation to be placed on the cited standard and further non- compliance would likely result in findings of high negligence in the future with commensurate higher levels of civil penalties.

Under all the circumstances, I find that civil penalties of $50.00 each for the citations at bar are appropriate.

ORDER

Citations Number 6416594, 6416595, 6416596, and 6416597 are hereby affirmed with civil penalties of $50.00 each. Eureka Rock, LLC, is hereby directed to pay civil penalties totaling $200.00 with 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
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Distribution: (Certified Mail)

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Thomas G. Mattics, Eureka Rock LLC, P.O. Box 1455, Ashfork, AZ 86320

/to/

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 22, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2007-508 A.C. No. 15-18752-123358-Y68
v.	:	
GENERAL DRILLING, Div. of GE, Respondent	: :	Mine: Lake City Quarry

ORDER OF DISMISSAL

Before: Judge McCarthy

Factual and Procedural Background

This case was assigned to me on July 12, 2010. It is before me on a Petition for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent has filed a motion to dismiss the Civil Penalty Proceeding on the basis of the Secretary's inexcusable and prejudicial delay in filing the petition. The Secretary filed an Answer to the Motion to Dismiss, with attached affidavits.

Citation No. 6110609 was issued on January 9, 2007 while General Drilling was performing contract drilling services at the Lake City Quarry mine owned by Florida Rock Industries. The violation cited involved a cracked windshield in the operator cab of a drill, creating a line of vision hazard that was reasonably likely to result in fatal injuries from high negligence and constituted an unwarrantable failure to comply with a mandatory standard set forth in 30 C.F.R. § 56.14103(b). An informal conference was held with the MSHA District Office on January 30, 2007, but no modification of the citation occurred.

On July 26, 2007, the Secretary issued a proposed assessment of penalty in the amount of $2,000.00. It is undisputed that the Respondent filed a timely contest that was received by the Secretary on August 28, 2007. Pursuant to Commission Rule 28(a), 29 C.F.R. 2700.28(a), upon receipt of the mine operator's penalty contest, the Secretary had 45 days to issue her Petition for Assessment of Civil Penalty. That is, the Petition was due on or about October 13, 2007. The Petition was not filed until on or about February 9, 2010. The Secretary gave no explanation in her Petition why it was filed 28 months late.

After receiving the Petitioner's belated filing, Respondent promptly filed its Answer and

Motion to Dismiss on February 12, 2010. Respondent argues that no adequate cause has been established for the egregious delay under Commission precedent, and that such delay is both inherently and actually prejudicial to the operator's preparation of a proper defense.

On March 23, 2010, the Secretary filed an Answer to the Motion to Dismiss, with attached affidavits. According to Petitioner's affidavits, MSHA's Civil Penalty Compliance Office prepared a contest package and transmitted it to MSHA's District Office on September 14, 2007. Petitioner concedes that the District Office never transmitted the contest package to the Solicitor's Office so that a Petition for Assessment of Civil Penalty could be filed. Rather, more than two years later, on or about November 25, 2007, the Commission informed the Solicitor's Office that no Petition had been filed. After additional investigation, the Solicitor's Office eventually mailed the Petition to Respondent on February 9, 2010. Thereafter, in June 2009, the procedure for processing contests to proposed assessments was upgraded to a web-based program.

Disposition

The Commission has held that in order to survive a motion to dismiss an untimely petition, the Secretary must first establish adequate cause for the late filing. Once adequate cause is established, the Commission then examines whether the delay has been prejudicial to the operator. *MSHA v. Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2093 (Oct. 13, 1993), *citing MSHA v. Salt Lake County Rd. Dep't*, 3 FMSHRC 1714 (July 28, 1981) *and MSHA v. Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 26, 1982).

Concededly, the Commission has permitted the filing of untimely petitions in a number of cases based on factors such as the Secretary's extraordinarily high caseload, lack of clerical personnel, and confusion of filing deadlines because of amended standards. *See, e.g., Salt Lake County*, 3 FMSHRC at 1714; *MSHA v. Lone Mountain Processing Inc.*, 17 FMSHRC 839 (May 31, 1995). In the present matter, by contrast, the Secretary does not specifically establish any such factors or make any such contention, she just cites such precedent without demonstrating that such factors played any role in the late filing. In fact, the Secretary contends and the record establishes that the filing delay occurred solely because the contest file(s) were misplaced or never received by the MSHA District Office, and no procedures were in place to catch the error. In these circumstances, the Secretary has failed to establish adequate or good cause for the stale petition. Moreover, the cases relied on to establish adequate cause for late filing involved significantly shorter delays. For example, in *Salt Lake County*, the delay was less than two months. 3 FMSHRC at 1714. In *Lone Mountain*, the delay was only 16 days. 7 FMSHRC at 839. In *Rhone-Poulenc of Wyoming Co.*, the delay was only 11 days. 15 FMSHRC at 2094. As emphasized above, in the present case, the delay was two years and four months, and only discovered after Commission inquiry.

Even assuming arguendo that good cause has been demonstrated by the Secretary on this record, I find in the alternative that dismissal is warranted because Respondent has established that the two-year, four-month delay has resulted in actual prejudice to the Respondent's ability to

defend itself in this matter. Respondent contends, and the Secretary does not dispute, that Florida Rock Industries sold the mine property to Vulcan Materials Company in November 2007, and Vulcan subsequently suspended mining at this operation. Respondent also contends, and the Secretary does not dispute, that Respondent will no longer be able to locate and subpoena those employees of Florida Rock Industries, who could support its defense to the contested citation through trial testimony. In addition, Respondent asserts that even if such witnesses can be located, their ability to recall events that occurred more than three years ago, with specificity, is questionable. Although the Secretary had adequate opportunity to respond to Respondent's arguments of actual prejudice in its Answer to Respondent's motion to dismiss, the Secretary failed to address the facts asserted or rebut the arguments presented. In these circumstances, I find that Respondent has established a sufficient factual basis to demonstrate actual prejudice in the preparation of its case based on the stale Petition.

In light of the foregoing, the Respondent's Motion to Dismiss is hereby **GRANTED** and the Petition for Assessment of Civil Penalty is **DISMISSED**.

Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

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July 23, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2009-371 A.C. No. 46-01318-168124
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	Mine: Robinson Run #95

DECISION

Appearances: Jodeen Hobbs, Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Carol Marunich, Dinsmore & Shohl, LLP, Morgantown, West Virginia, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Consolidation Coal Company, 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" or "Act"). The case initially involved nine violations assessed at $40,919.00. The parties have agreed to resolve four (4) of the violations, leaving five (5) for decision here. The five remaining violations were issued by MSHA under section 104(a) and (d) of the Mine Act at the Robinson Run #95 mine operated by Consolidation Coal Company, Inc. The parties presented testimony and documentary evidence at the hearing held in Morgantown, West Virginia on May 12, 2010.

The parties entered into certain stipulations that were accepted by the Court and entered as Exhibit 1 in the case.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Consolidation Coal Company, Inc., ("Consol") operates the Robinson Run #95 mine (the "mine"), an underground, bituminous, coal mine, in Marion County, West Virginia. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Consol is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Ct. Ex. 1. At the end of the hearing, the parties

stipulated that the operator does not contest the violations, but raises issues only as to the S&S designations and, where applicable, the unwarrantable failure findings.

In August and September, 2008, MSHA inspector Aaron Wilson conducted regular inspections at the Robinson Run #95 mine. He was accompanied during portions of his inspections by Larry Jones and Michael Jacquez, both of whom were Consol employees in the company's safety department, as well as by a representative of miners. A number of citations and orders were issued during the inspections, including the five discussed herein.

a. Order No. 6608537

On August 18, 2008, Inspector Aaron Wilson issued Order No. 6608537 to Consolidation Coal Company, Inc., for a violation of section 75.400 of the Secretary's regulations. The citation alleges that:

> [c]ombustible material in the form of loose lump coal and coal fines, wet in nature, has accumulated underneath the 14-A (091-0 mmu) coal conveyor belt at 90 block from the tail roller outby a distance of 17 feet. These accumulations are on the wide side of the belt extending underneath of the belt half way (approximately 2 ½ feet). The accumulations are up to 1 foot in height and are in contact with the belt for a short distance. These same type of accumulations are present piled up around the tail roller for a height of 20 inches on the inby side and across the length of the 64 inch tail roller. The accumulations around the tail roller are wet in nature but starting to dry out in the outer layer along the outer tight [sic] side edge. The tail roller is warm to the touch. Accumulations are present on top of the feeder in the from [sic] of fine and lump coal, dry in nature, 55 inches in length, up to 2 feet high and approximately 1 foot less than the width of the feeder. The condition of the spillage at the tail piece has been listed in the preshift record book with no corrective action since midnight shift on 8/17/08 (5 shifts).

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $6,115.00.

1. <u>The Violation</u>

Aaron Wilson is an MSHA mine inspector who has worked in mines since 2001 and has been employed by MSHA since September 2006. He has a degree and holds a number of certifications, including mine foreman papers.

Section 75.400, the cited section of the Secretary's regulations, requires 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." 30 C.F.R. § 75.400. Wilson's testimony directly reflected the facts as set forth in the citation, i.e., accumulations of loose coal, coal chunks, and coal fines existed for the distance, and in the amounts, listed in the citation. Consol's witnesses did not dispute that the violation occurred as cited.

2. Significant and Substantial Violation

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). 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:

> [i]n 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).

As discussed above, there existed a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that a discrete safety hazard existed as a result of the violation, i.e., accumulations of coal rubbing against the belt and in the feeder create a significant risk of smoke and fire in an underground mine environment. The fact that coal was drying out, and was dry around the edges, created a situation in which the accumulations could have been easily ignited.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. 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 consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *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).

I find that the hazard described, i.e., smoke and/or fire, would reasonably result in an injury which would have been of a serious or potentially fatal nature. Inspector Wilson credibly testified regarding the hazard that was created by the coal accumulations he cited. Wilson stated that the coal was dry around the edges of the tail piece and that the tail piece was warm to the touch. The coal accumulations were alongside and underneath the belt and, in some places, were in contact with the belt. Frictional heat from the belt dries and heats the accumulations and, in turn, can cause a fire. (Tr. 18-20). Additional accumulations that were drying out were also found at the tail roller. Wilson stated that if the tail roller continued to operate in the condition as he observed it, the coal would dry out, grind to smaller particles and easily ignite. While he acknowledged that the general area was wet, he described areas that had dried or were drying out. He explained that the coal accumulations would continue to heat up and become drier and drier as the tail roller continued to generate frictional heat which, in turn, would make the accumulations extremely susceptible to an ignition source, such as the heat generated from the belt. (Tr. 21, 137). Wilson testified that the cited accumulations were reasonably likely to ignite if mining operations continued. (Tr. 23-24).

Wilson suggested that, at a minimum, one would expect the hazard to result in lost work days due to the injuries caused by the smoke from accumulations and the belt. He listed two miners, who would respond to the fire, as those affected. However, if a belt fire were to occur, the smoke would be thick and black, which would in turn reduce the visibility and make it difficult for miners to breath and/or find their way out of the mine. If that were to occur, the entire crew of 13 miners would be exposed to the hazard. (Tr. 24-25). Given that the

Secretary's assessment considered only two persons affected, I find that the proposed penalty should be modified to reflect the exposure of the entire crew.

Wilson's testimony is bolstered by Richard Sandy, a safety representative from the UMWA, who was very clear about what he observed during the course of the inspection. (Tr 35, 108-109). Sandy was present when the feeder was moved for cleaning and could see that, in addition to the coal cited by Inspector Wilson, there were further coal accumulations packed underneath the feeder, which he believed indicated that the accumulation had existed for some time. (Tr. 110). Sandy observed coal around the bearing block, coal that was dry and drying out, and that the tail roller was turning in the coal. (Tr. 110). He believed that the rubbing of the belt against the frame of the belt conveyor created a "dangerous condition." (Tr. 111-112). Wilson and Sandy agreed that, although the accumulations were wet and damp in some areas, the accumulations were drying out in other areas and, therefore, smoke and fire were likely. I find that if this violation were left unabated, it would continue to worsen.

Consol argues that the S&S designation was improper given that the accumulations were, in large part, wet and that the area around the edges of the tail roller was the only one area that was drying out or dry. The mine argues that the wet nature of the coal reduced the likelihood of a fire breaking out as well as the potential of such fire to spread. Finally, the mine argues that safety measures, including rock dust, carbon monoxide monitors, and fire fighting equipment, reduced the degree of danger presented by the violative condition. (Tr. 161-162).

Larry Jones, a member of the mine's safety department, accompanied the inspector and described a much different scene than the one described by Wilson. (Tr. 139). In Jones' view, the accumulations were not extensive, were wet, and were not near the tail piece or rubbing against the rollers. I find Jones' testimony to be rehearsed and credit the testimony of Wilson and Sandy in describing the violation and its seriousness. Photos taken by Jones, which were offered into evidence, show the subject area from the side opposite of that viewed by the inspector, and at least one photo shows the coal drying out, not in the water, and against the conveyor structure. Consol. Ex. 39, photo E.

The Commission has addressed the issue of accumulations and conveyor belts a number of times. In *Amax Coal Co.,* 19 FMSHRC 846 (May 1997), the Commission upheld an ALJ's finding that a belt running on packed coal was a potential source of ignition for accumulations of loose, dry coal and float coal dust along a belt line, and that the condition presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. Further, an additional potential ignition source was present in the form

of the belt rubbing the structure, which could generate a spark. In any event, even if the coal was wet, the Commission has recognized that wet coal can dry out and ignite. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

The mine operator argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering it non-S&S. The Courts and the Commission have found to the contrary. In *Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995), the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the fact that there were other safety measures to deal with a fire does not mean that fires are not a serious safety hazard and, rather, the precautions are in place because of the "significant dangers associated with coal mine fires." While extra precautions may help to reduce some risks, they do not *de facto* make accumulations violations non-S&S.

I conclude that the preponderance of the evidence establishes that it was reasonably likely that the coal accumulations would result in injury causing events, and that the injuries would be serious or fatal. I rely primarily on the testimony of Inspector Wilson in reaching this conclusion. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S.

3. Unwarrantable Failure

The term "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.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189,194 (Feb. 1991). 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 are 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); *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). 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. *Consolidation Coal Co.*, 22 FMSHRC at 353.

The day the subject citation was issued, Wilson described the condition as extensive, obvious and as having existing for an extended period of time. When Wilson and Jones arrived in the area, Jones immediately shut down the belt. He did so because the condition was obvious

and needed to be cleaned up immediately. Sandy described the violative condition as "plain as day" when he arrived at the tail roller. (Tr. 111).

There is some dispute as to how long the conditions existed. Wilson reviewed the preshift books and found spillage listed in the preshift record beginning on Saturday, August 16th, 2010, and again on the 17th and 18th. Sec'y Ex. 41; (Tr. 36). Each time the pre-shift report failed to mention that any action was taken, leading Wilson to believe that nothing was done to correct the problem. (Tr. 29-34). Jones explained that the reports indicated that the conditions were "carried over" from Saturday and Sunday because the mine did not produce coal on Sunday and the belts were not running. However, he also testified that clean-up was often conducted on Sundays. Jones advanced the theory that the "spillage" listed on the preshift for five shifts was somehow cleaned up and the spillage cited by Wilson occurred only on that day. However, when pressed, Jones admitted that he didn't "think it was [the same], but [he didn't] know." (Tr. 151). Sandy, like other witnesses, agreed that the accumulations had been there for some time, given that when the feeder was lifted up to begin the clean-up, the belt "was packed full of coal around the rollers." (Tr. 112).

Based on the fact that the preshift reports were signed by management, Wilson believed that the mine knew of the problem and too no corrective action. He saw this as a dangerous and obvious condition that should have been corrected immediately. He indicated that the violation was the result of high negligence because the condition had been listed in the preshift book for five shifts, agents of the operator had been in the area, and no corrective action had been taken by an examiner or anyone else. In *Buck Creek Coal, Inc. v. FMSHRC* the Seventh Circuit Court of Appeals concluded that extensive accumulations that were present for at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding based on the length of time that the condition existed. 52 F.3d 133, 136 (7th Cr. 1995); *see also Windsor Coal Co.,* 21 FMSHRC 997 (Sept. 1999).

Wilson testified that, based on the numerous accumulations violations that the mine had been issued prior to this one, the mine was aware that greater efforts were necessary for compliance with accumulations. Wilson found no mitigating factors and determined that the mine did not take accumulations seriously and made no effort to clean up the area. Based on the testimony of the Secretary's witnesses that the accumulations existed from Saturday until the inspector arrived on Monday, and my finding that the conditions existed as noted in the preshift books yet nothing was done to clean up the area, I find that the mine exhibited high negligence.

Pascal Eddy, a mine foreman at Robinson Run #95, was present on the day of the issuance and arrived at the belt tailpiece shortly after Inspector Wilson. Upon his arrival, he assessed the area by determining what needed to be cleaned up and immediately began doing so. (Tr. 190). In all, he called four or five miners to clean up the accumulations. It took approximately two hours for those miners to clean the area which, I find, is a strong indication of the extensiveness of the accumulations. Eddy confirmed that coal had been mined the shift before the inspector's arrival and that the belts were running just prior to the inspector's arrival, although coal had not yet been produced on that shift. (Tr. 192-195). He testified further that the accumulations were

wet, and therefore not S&S, and that the tail piece was checked at least once each shift. (Tr. 205-209). However, he also said that he "really can't tell you when it happened." (Tr. 210).

The extensive history of assessed violations for this mine, i.e., over 100 accumulation violations in a short period of time, lends further support to its high negligence in this instance. Sec'y Exs. 43, 45, 46, 47 and 48. Furthermore, in examining an unwarrantable failure finding related to section 75.400, the Commission has recognized that:

> past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.,* 19 FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has recurring safety problem in need of correction and the violation history my be relevant in determining the operator's degrees of negligence. *Peabody,* 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMRSHR 588, 595 (June 2001).

All relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.,* 22 FMSHRC at 353. The record supports a finding that Consol was on notice of the violative condition by virtue of the mine manager's signature on the pre-shift examination reports for the five shifts in which the condition had been recorded. It has also been established that the violation posed a significant degree of danger, in that the accumulations were reasonably likely to lead to or propagate a mine fire or explosion. Therefore, I find that sufficient evidence exists to support a conclusion that the cited conditions were the result of Consol's unwarrantable failure.

b. Order No. 6608544

On August 26, 2008, Inspector Aaron Wilson issued Order No. 6608544 to Consolidation Coal Company, Inc., for a violation of section 75.370(a)(1) of the Secretary's regulations. The citation alleges that:

> The operator is not following the approved ventilation plan on the 15-A (073-0 mmu) continuous miner section. In the face of the #1 entry inby the #36 crosscut, only 2,160 cfm of air is being maintained. The approved mine ventilation plan plainly states on page 3, part 14, line D that "a minimum of 3,000 cfm will be maintained at each working place" for development of cross-cut centers of 275 feet with a maximum distance of 300 feet without an air connection when driving in excess of 200 feet. Management

was put on notice on the date of driving in excess of 200 feet. Management was put on notice on the date of 7/30/2008 after the issuance of citation #6608359 that the next time this condition was observed by this inspector stronger enforcement actions would be taken.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $15,971.00.

1. The Violation

Inspector Wilson testified that the Robinson Run #95 mine is a gassy mine and on the date in question he was there for a 5-day spot inspection. He started in the belt entry and began checking air velocities. The mine plan requires 3,000 cfm in idle places. Upon reaching the idle face of the #1 entry he used an anemometer at the end of the line curtain to determine air velocity and found only 2,160 cfm of air. As a result of the reading, he issued the order for a violation of 30 C.F.R. § 75.370(a)(1), which requires that "the operator shall develop and follow a ventilation plan approved by the district manager." (Tr. 325-326). Jones also took a reading and agreed that the area did not have the 3,000 cfm required by the ventilation plan.

The MSHA ventilation supervisor, John Hayes, testified that the ventilation plan of the mine requires that a minimum of 3,000 cfm of air be provided at the idle places. Sec'y Ex.14 ¶ 14(D). Hayes acknowledged that there are no exceptions and therefore the lack of air was a violation. The violation is admitted by Respondent and I accept the citation as issued by Wilson and find that the violation occurred as stated.

2. Significant and Substantial Violation[1]

I have found that there existed a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of methane accumulation resulting in explosion. Third, the hazard described, i.e., an accumulation of methane and subsequent ignition and explosion, will result in an injury; and fourth, that injury will be serious or even fatal. 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).

Wilson explained, and Hayes agreed, that a hazard develops where there is an accumulation of methane in an area without the requisite amount of air to dilute it. A miner, unaware that methane has accumulated, may enter the area or, as often occurs, may bring a piece of equipment into the area for use or to park temporarily. Wilson noted that this mine has a history of having

[1] The law relevant to the S&S analysis is set forth in section I(a)(2) of this decision.

impermissible equipment and he observed a roof bolting machine in the #1 entry. As Hayes described, this is an idle area and a logical place to park equipment until it is started up and used again. (Tr. 256). Further, equipment regularly operates near or passes by this area. (Tr. 255). On the day the order was issued, the mine was in the process of moving the belt. Equipment was being powered up and moved throughout the shift. At the same time, the methane level was rising and adequate air was not being provided. Wilson found methane levels at .45, however, an hour earlier the examiner had recorded .2, which indicated to Wilson that the methane level was rising. (Tr. 336-337, 344). Wilson and Hayes explained that, while miners should conduct a gas check prior to energizing equipment, the reality is that they do not do so.

Hayes, an MSHA representative who specializes in ventilation and has an engineering degree, agreed that the violation was significant and substantial. He explained that Robinson Run is a gassy mine, that the idle areas are important to ventilate, and that failure to keep adequate air movement will result in a build-up of methane and a potentially fatal explosion. He added that equipment is often used or parked in the area, and is restarted without knowledge as to whether methane has accumulated to a dangerous level. (Tr. 255-256).

Consolidation added the requirement of 3,000 cfm of air in idle places to its ventilation plan when it determined that it would benefit by taking longer cuts, resulting in fewer crosscuts. When there is no continuous miner working in the area, it is considered an idle place and subject to the 3,000 cfm requirement. If the continuous miner is in the area, a greater quantity of air is required. (Tr. 248-249). This method of extending the development means mining is faster which, necessarily, equates to greater levels of methane liberation. The methane tends to reduce over time if the area remains idle, but it could be days or weeks before the methane levels reduce significantly. (Tr. 254). In order to control methane MSHA requires a minimum amount of air in idle places, since equipment is running past the idle places and there is a tendency to park equipment in those places and restart them to move them on. (Tr. 255-256).

The mine argues that the lower air velocity serves to sufficiently dilute methane to a non-explosive level, that there was no float coal dust present and that, in its view, there were no ignition sources. Michael Rene Nestor, a safety supervisor at the mine, stated that the quantity of air present was adequately diluting the methane. Jones and Nestor both testified regarding the ventilation violations. Given their attitude and demeanor, and the fact that the majority of the testimony they provided was in response to leading questions, I give their testimony little weight. They both believed that the ventilation violations were not significant and substantial because there was still air movement, and no ignition source. They require, in essence, an imminent danger to exist in order for the violation to be significant and substantial. During continued mining operations, air movement would continue to diminish in the idle areas, and the methane would build, thereby creating an explosion hazard.

Ann Martin, a member of the UMWA and chairman of the safety committee at Robinson Run #95, described in detail the methane problems encountered at the mine during the summer of 2008, i.e., the time the ventilation and accumulation violations herein were issued. The methane problem was encountered in the 15A section, where Inspector Wilson issued the two

ventilation violations addressed in this decision. Martin explained that she received an abnormally high number of complaints about methane liberation in the 15A section in the summer of 2008. She described complaints of miner and bolter operators that methane was increasing, the union fire boss was picking up more methane, and that the dinner hole had gassed off. Further, areas in off headings and idle places were picking up more methane than the miners were accustomed to seeing. It was a common complaint during the summer of 2008 that the roof bolters and continuous miners would "gas off" (i.e., shut down) four to five times in a cycle which, according to Martin, was unusual. (Tr. 305-307). The 15A section was the worst. As a result, she and other individuals discussed the problem with management, who had also been receiving the same complaints directly. A number of meetings were held with mine management that summer regarding the problems. (Tr. 309-310).

The miners were afraid of what would happen as a result of the high methane readings, and worried that something "bad" would occur if they didn't take care of it. At one point, a curtain was removed by a foreman and methane levels went to 7.7%, i.e., explosive range. Martin explained that removing the curtain is violative in and of itself, yet the mine continues to do it. (Tr. 311).

The presence of unusually high levels of methane during a shift, and the lack of ventilation where it was demonstrated that the methane level was rising, is a recipe for disaster when an ignition source is added to the mix. Wilson ably explained the many ignition sources available. The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Wilson certainly qualifies as an experienced MSHA inspector and I accept his assessment that the violation was significant and substantial.

3. Unwarrantable Failure[2]

Robinson Run has been issued many previous citations for ventilation plan violations and, specifically, for violations of the particular provision in the ventilation plan that is at issue in this matter. (Tr. 327-328). The mine was aware that there was heightened concern about methane during the months preceding the violation. Wilson and other inspectors had met with the mine to discuss ventilation problems prior to the issuance of the citations here. For that reason, and other reasons that follow, I find that the violation was a result of the unwarrantable failure of the mine.

Inspector Wilson and other inspectors, through communications with the mine, put the mine on notice that compliance with the ventilation plan was a problem that needed to be corrected. Wilson told management directly that he would take harsher action if it continued. (Tr. 402). He testified that "[t]he basis of [him] writing [the order] as unwarrantable failure was . . . the previous violation history, the conversation [he] had with management, and the fact that

[2] The law relevant to the unwarrantable failure analysis is set forth in section I(a)(3) of this decision.

management instituted nothing to prevent this condition, which [he had] cited multiple times, from recurring." (Tr. 402). As Martin described, it had been brought to the attention of management that this particular section of the mine was experiencing increased methane liberation around the time the order was issued. The mine however, denies that discussions took place regarding methane and the ventilation plan violations issued by Wilson.

In *AMAX Coal Co.*, an evenly divided Commission affirmed an ALJ's finding that an operator's admitted violation of its ventilation plan resulted from "unwarrantable failure" where the section foreman knew that a line curtain had not been advanced. 19 FMSHRC 1542 (Sept.1997). There, the ALJ had found that the violation was "obvious" and that the evidence showed the section foreman had been in the entry for five minutes, ignored the condition and, in so doing, miscalculated the risk involved. *Id.* The Robinson Run #95 mine is a gassy mine subject to 5-day spot checks by MSHA and was experiencing unusual levels of methane. By ignoring the violative condition, the operator ignored the risk of a methane explosion.

In *C.W. Mining Co.*, Commission ALJ Manning found that an operator unwarrantably failed to comply with its ventilation plan where previous citations had placed it on notice that it needed to do more to ensure adequate ventilation. 7 FMSHRC 138 (Feb. 2005) (ALJ). Hayes testified that, in reviewing the mine's history of violations of its ventilation plan, it was clear that this mine had been issued many, many violations under that specific provision at issue, i.e., paragraph 14(D) of the ventilation plan. He described violations of the provision that were issued on June 4, June 24, July 9 and July 30 of 2008. (Tr. 268-269). All of these violations were issued at a time when the mine was experiencing excessive methane liberation during mining. In addition, the mine was issued other ventilation violations during this time frame. *See* Sec'y Ex. 15-35. Finally, during 2007 and through 2008 up until the time this order was issued, the mine had received eleven citations and orders for not having 3,000 cfm at the idle working places as required by the plan. Further, there had been three face ignitions reported in the development sections in the eighteen months prior to this violation. As described below, Wilson issued a citation for violation of the same provision again in September. (Tr. 338-339).

The danger posed by the condition has been addressed in the S&S findings. It is unknown how long the condition existed, but it is clear from the methane readings that the methane levels were rising. The mine took no action to correct the violation and Wilson found no mitigating factors.

Todd McNair, the mine superintendent, testified on behalf of the company that he was aware that the methane liberation had increased in the face area of the 15A section. While he didn't recall any complaints, he did recall speaking to the miners working at the face and trying various changes to help allay their fears. (Tr. 481-485). He was aware that Inspector Mehaulic issued a citation on July 30, but the meeting held with him was not due to the citation; rather, it was to talk about ventilation and suggestions for controlling the methane. In essence, McNair denies that the mine had any notice that it was required to take additional steps to address the ventilation violations. McNair didn't recall talking about paragraph 14(D) of the vent plan with Mehaulic or with Wilson. Instead, he asserted that the conversations were all geared toward the

face where coal was being produced, and not the idle areas referred to in this violation issuance or the previous ones. McNair could not remember any meeting with Wilson about controlling methane in 15A section. I find McNair's testimony was almost exclusively leading and he recalled very little, therefore, I afford it little weight.

The attitude of management toward the importance of ventilation is troubling. The testimony of both McNair and Nestor, the safety supervisor, do not demonstrate any serious concern about the ventilation issues raised by MSHA. Instead, the mine management attempts to put the burden on the miners and argues that the mine addressed the methane issues as the miners sought to have them addressed. They simply don't believe it is a serious matter.

I credit the testimony of Wilson, which is contrary to both Nestor and McNair. Management demonstrated a serious lack of interest in the safety of the miners, and in following the ventilation plan. Nestor and McNair insist they did not attend a meeting with Wilson where they discussed the ventilation in the idle places. (Tr. 526). I credit Wilson's memory of the event and his notes that clearly point to the fact of the meeting. (Tr. 347). The mine obviously gave little credence to what Wilson or Mehaulic had to say about ventilation and, specifically, about ventilation in the idle faces.

The record supports a finding that Consol was on notice of the need to address the violative condition by virtue of the numerous citations issued in the months prior to this violation and the meetings with MSHA inspectors. Consol admitted that its efforts consisted of only attempting to deal with the higher than normal methane liberation and did not address this portion of the ventilation plan. It has also been established that the violation posed a significant degree of danger, and that the violation was obvious. Further, the mine, by way of the management's actions and testimony, has demonstrated an attitude that the subject section of the ventilation plan was of little importance. Therefore, I find that sufficient evidence exists to support a conclusion that the cited conditions were the result of Consol's unwarrantable failure.

c. Citation No. 6608551

On September 4, 2008, Inspector Aaron Wilson issued Citation No. 6608551 to Consolidation Coal Company, Inc., for a violation of section 75.523-3(b)(3) of the Secretary's regulations. The citation alleges that:

> [t]he automatic emergency parking brakes, when applied using the panic bar, does not engage and bring the equipment to a complete stop. During several attempts, the scoop would continue to roll up hill after the panic bar was hit, stop due to gravity or terrain, then roll back down grade. The operator removed the scoop from service.

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $1,203.00.

1. The Violation

Inspector Wilson testified that, while checking a scoop, he found that the emergency/panic bar did not engage when tested several times. When the scoop was on an incline it traveled uphill and then rolled back down. The panic bar is within easy reach of the scoop-operator, who can operate it by tapping it with his hand. The panic bar is intended to stop the scoop in an emergency but it also functions as a common way to shut down the scoop. This scoop had been used during the shift prior to the inspection to haul equipment and supplies to another area of the mine. Wilson issued a citation for a violation of 75.523-3(b)(3), which requires that "automatic emergency-parking brakes shall – safely bring the equipment when fully loaded to a complete stop on the maximum grade on which it is operated." 30 C.F.R. § 75.523(b)(3).

The parties agree that a violation did occur. The only issue before me is whether the violation is significant and substantial.

2. Significant and Substantial Violation[3]

As discussed above, there existed a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that a discrete safety hazard existed as a result of the violation, i.e., the danger of being unable to safely stop the equipment in an emergency.

As is often the case, the primary issues in the S&S analysis is whether the violation is reasonably likely to result in an injury causing event, i.e., runaway equipment injuring another miner or injuring the operator of the equipment. The Secretary maintains that the non-functioning brake would have resulted in an inability to safely stop the scoop, especially in an emergency situation where the driver would use it to avoid hitting a miner or running into the rib or other equipment.

The operator argues that a separate brake can be used to stop the scoop and it is not likely that there will be anyone or anything in the way of the machine. Further, the operator argues that there were no other safety violations for the equipment, the area was very flat and, prior to using the equipment, the next equipment operator would have conducted a check and discovered the defective brake.

[3] The law relevant to the S&S analysis is set forth in section I(a)(2) of this decision.

The subject scoop is used to haul mining equipment to and from rail-mounted cars. A spotter directs the scoop operator during loading and unloading. The panic bar is designed to be used in an emergency, but it is commonly used to shut down the equipment during everyday use. Wilson described the scoop as a heavy piece of equipment which, if its panic bar is not functioning properly, would cause crushing injuries, which would be "at least permanently disabling if not worse," to any individual that it hits. Further, in the event the scoop cannot be stopped and it slams into a rib or a rail-mounted car, the scoop operator, as well as any person in the way, would be severely injured. The inspector explained that the violation is reasonably likely to occur and result in an accident because miners expect the safety device to work. However, when the panic bar does not work, miners naturally panic and don't have enough time to stop or shut down the scoop in another way. (Tr. 57). Inspector Wilson noted that it wasn't a question of the panic bar brakes being slow or loose; rather, the issue was that the brakes never engaged. (Tr. 54). While the scoop was not operating at the time of the inspection, Jacquez testified that he "hop[ed]" that the last operator prior to the inspection had checked the panic bar brake prior to use. (Tr. 235).

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazard created by the non-functioning panic bar would contribute to an injury in the event of an emergency. I rely on the testimony of Inspector Wilson in reaching this conclusion. He believed that a miner directing the scoop or walking in the area could be crushed by the scoop if the scoop operator were not able to engage the brakes through the use of the panic bar. In addition, the operator of the scoop would be in danger if the scoop did not stop and ran into a wall or other piece of equipment. Wilson credibly testified that there were uphill slopes in the area and that the scoop operator would rely on the panic bar to stop. Further, "hoping" that a scoop operator would have checked the brake prior to operation does not convince me that an operator would have done so. I am persuaded by Wilson's argument and find that the third *Mathies* requirement is met. Also, as discussed above, I find that any injury would be a serious one, and permanently disabling at best. I therefore find that the violation was significant and substantial.

d. Citation No. 6608553

On September 4, 2008, Inspector Aaron Wilson issued Citation No. 6608553 to Consolidation Coal Company, Inc., for a violation of section 75.1002(a) of the Secretary's regulations. The citation alleges that:

> [t]he #2 bolter (serial # 83092, approval # 2G-26740-A-4) being operated on the 13-A (084-0 mmu) longwall recovery face is not being maintained in permissible condition. There is an opening of greater than 0.008" in the step flange joint in the permissible cover for the area light opposite the operator[']s compartment in front of the cable reel compartment.

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $1,304.00.

1. The Violation

Inspector Wilson testified that he issued this 104(a) citation for a roof bolter in the recovery face that was not in permissible condition. Permissible condition is vital because it prevents a possible ignition of methane as the equipment is energized. In this case, the cover that encloses the light on the roof bolter contains the flame path between the cover and the enclosure when it is permissible. That path must be .007" or less, but when Wilson measured the gap with a feeler gauge, he found it be .008". Section 75.1002(a) requires that "[e]lectric equipment must be permissible and maintained in a permissible condition when such equipment is located within 150 feet of pillar workings or longwall faces." 30 C.F.R. § 75.1002(a).

The parties agree that a violation did occur. The only issue before me is whether the violation is significant and substantial.

2. Significant and Substantial Violation[4]

I have found that there was a violation of the mandatory standard as alleged by the Secretary. Further, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger of allowing an ignition source to be available in this gassy mine.

The Secretary must demonstrate that the hazard described, that of an ignition created by the impermissible equipment, is reasonably likely to result in an injury causing event. The purpose of the regulation cited by Wilson is to prevent equipment that is exposed to methane from allowing the spark or flame path in the light to ignite the methane. As Wilson described, the electrical components of the light will likely create a spark which will ignite methane that has migrated into the area. (Tr. 61-63). Simply stated, permissibility is designed to limit the number of ignition sources in a gassy mine. Given the location of the bolter, and the fact that methane is often emitted as the bolter drills into the roof, it's highly likely that the ignition source in the light will be exposed to methane, thereby making an ignition and subsequent explosion likely to occur. When an ignition does occur it will cause a burn injury to, at a minimum, the two persons assigned to work on the roof bolter. (Tr. 66). Given that methane is emitted as a roof bolter drills into the coal, as well as the gassy nature of this particular mine, the likelihood of an explosion related to an ignition source provided by the roof bolter is greater than that of other equipment. (Tr. 64). In light of the conditions at this mine, and assuming the continued course of mining, there is a reasonable likelihood of an injury occurring as a result of the permissibility violation.

[4] The law relevant to the S&S analysis is set forth in section I(a)(2) of this decision.

Consol asserts that the permissibility violation does not create the likelihood of an explosion because there is adequate ventilation, no arcing was observed, no methane was detected and the roof bolter operator would have checked for methane before starting up the equipment. (Tr. 228). Jacquez explained his belief that, since there were no other defects in tl equipment and this type of problem would normally be detected and repaired in the weekly permissibility check, it was unlikely that the violation would have remained unabated long enough for an accident to occur. I accept Wilson's opinion as to the likelihood of the ignition occurring. .

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazard presented by the lack of a permissible light on the roof bolter would contribute to ar injury and that the injury would be permanently disabling or fatal. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as significant and substantial.

e. Citation No. 8014053

On September 17, 2008, Inspector Aaron Wilson issued Citation No. 8014053 to Consolidation Coal Company, Inc., for a violation of section 75.370(a)(1) of the Secretary's regulations. The citation alleges that:

> The operator is not following the approved ventilation plan on the 15-A (073-0 mmu) continuous miner section. 3,000 cfm of air is not being maintained in the #2 entry inby 40 cross-cut. When checked by this inspector, there was not enough air flow at the end of the line canvas to spin the wheel of an anemometer.

The inspector found that an injury was reasonably likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of low negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $7,578.00.

1. The Violation

Wilson testified that he issued the subject citation for failing to meet the requirements of paragraph 14(D) of the mine's ventilation plan, Sec'y Ex.14 ¶ 14(D). As Wilson walked to the face, the miners were moving from the #2 entry to the #1 entry and were attempting to move the auxiliary fan, which provides air to the working face, and, in so doing, caused the air to short circuit, blowing down the ventilating curtain in the #2 entry, resulting in no air movement in tha now idle face. Wilson found that the mine violated section 75.370(a)(1) which requires "the operator shall develop and follow a ventilation plan approved by the district manager." 30 C.F.R § 75.370(a)(1)

The parties agree that there was not the 3,000 cfm required by the ventilation plan in the area. The violation is admitted by Respondent and I accept the citation as issued by Wilson and find that the violation occurred as stated.

2. Significant and Substantial Violation[5]

As discussed above, there existed a violation of the mandatory safety standard as alleged by the Secretary. Further, I find that a discrete safety hazard existed as a result of the violation, i.e., the danger of respirable dust in the air as well as methane accumulation resulting in explosion. Third, the hazards described will result in an injury; and fourth, that injury will be serious or even fatal. Much of the discussion above regarding the significant and substantial violation of this same standard, and identical provision of the ventilation plan, relates here.

Inspector Wilson found that there was not enough air to move the settings on his hand-held anemometer and, therefore, the required cfm of air was not reaching the two entry face. (Tr. 355). The miners working in the area were in the process of moving the auxiliary fan that was used to ventilate the working face. As he approached the face, Wilson observed two miners struggling while attempting to hook the "baloney skin" to the back of the fan in order to direct air. When they could not successfully attach the skin, they dropped it and returned to other jobs. (Tr. 356). Their actions caused a short circuit of air which, in turn, blew down the ventilating curtain in the #2 entry. Wilson opined that this system is not a good one. He had spoken to Todd McNair, the superintendent of the mine, about the location of the fans during phases of mining, but McNair was not interested in Wilson's suggestions. (Tr. 359).

Wilson found 1% of methane and testified that, if left unabated, the methane would continue to accumulate and quickly reach explosive levels. (Tr. 361). Once it reached those levels, there were a number of ignition sources in the area, including the roof bolter that was in place and ready for service, and the energized auxiliary fan found in the last open cross cut. While the bolter and fans are required to be maintained in permissible condition, this mine is not good about doing so. (Tr. 364-365). Wilson testified that the equipment operators in this area should take a methane reading before energizing the bolter but, in his experience, the equipment operator flips the switch at the power center several cross-cuts away and then walks to the bolting machine without first going to the bolter to take a reading. As a result of the methane build-up and an ignition source, an explosion would certainly cause fatal injuries to at least the two miners working in the area. I credit Wilson's testimony that the condition created by the violation, i.e., the accumulation of methane in an area with ignition sources easily accessible, would result in an injury-causing event.

Consol argues that the methane levels were not high enough and that the possibility of an ignition was remote. The mine points to the fact that the equipment was permissible, and that the condition was created just as Wilson approached the area, and would have been corrected. Nestor testified on behalf of Consol that the violation was not S&S because the inspector did not

[5] The law relevant to the S&S analysis is set forth in section I(a)(2) of this decision.

fear for his own safety. He also testified that the mine "took care of the problem," as soon as Wilson pointed it out. 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). Nestor tried to avoid responsibility for the ventilation violations and his attitude is evident in the miners working in the area who moved a fan without regard to the consequences. Nestor also suggested the limited view that the methane problems in the face had nothing to do with the ventilation in idle places. I find that the Secretary has satisfied the four *Mathies* criteria and established the violation as S&S by a preponderance of the evidence..

3. Additional Negligence Findings

This mine has been issued a series of citations and orders for failing to comply with paragraph 14(D) of its ventilation plan. A similar violation, issued shortly before this one, is addressed *supra*. For purposes of penalty, I find that the there is far greater negligence than assessed originally. Further, given the problems at this mine with high methane levels during this time period, management had a responsibility to see that everyone was involved in following the ventilation plan. Wilson testified that he had issued a number of citations for failing to meet the 3,000 cfm required in idle places. The mine disregarded the MSHA inspector's instructions regarding adherence to this particular section of the ventilation plan and did not see that the miners were aware of the ventilation plan's requirements. .

The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *Asarco v. FMSHRC,* 868 F.2d 1195(10th Cir. 1989). "When a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id* at 1197. In the instant case, any negligence on the part of the miners who changed the ventilation by moving the fan, is attributed to the operator. Given that the mine was experiencing unusually high levels of methane, that MSHA inspectors continued to raise the issue of ventilation and had issued a number of citations for violations of the subject paragraph of the ventilation plan, along with the fact that the mine has the responsibility to ensure that all miners are aware of the plan and how to comply with such, I find the negligence to be moderate, rather than low.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R.§ 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] 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).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

The parties entered into an agreement as to four of the violations. The Secretary has filed a motion to approve settlement and has agreed to modify Citation No. 6608546 to non-S&S with a penalty of $308.00, to modify Citation No. 8014049 to fewer persons affected with a penalty of $243.00, and to modify Citation No. 6608422 to a non-S&S violation with a $308.00 penalty. Consol agrees to pay Citation No. 6607663 as issued with a penalty of $4,000.00. The original proposed assessment amount for these four citations is $8,721.00 and the proposed modified amount is $4,859.00. I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED** and Consolidation Coal, is hereby **ORDERED** to pay the Secretary of Labor the sum of $4,859.00 for these four violations.

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size, i.e., large, and ability to continue in business. The violations were abated in good faith, and no evidence has been presented to the contrary. The history shows a number of citations for ventilation violations as discussed above. I find that the following penalties are appropriate in this case, given the statutory criteria.

Order No. 6608537: I assess a penalty of $7,500.00 based upon the negligence and gravity findings discussed above, the extensive and obvious nature of the accumulation, and the fact that a fire at this location would affect everyone working in the mine.

Order No. 6608544: I assess a penalty of $16,000.00 based upon the high degree of negligence and the gravity of the violation.

Citation No. 6608551: I assess a penalty of $1,203.00 as proposed by the Secretary for the reasons set forth above.

Citation No. 6608553: I assess a penalty of 1,304.00 for the reasons set forth above.

Citation No. 8014053: I assess a penalty of $10,000.00 based upon the negligence for this violation. Although the ventilation change was made by non-management personnel, it is management's responsibility to assure that all persons are familiar with the ventilation plan and the nature of any changes made. I find that the negligence is moderate, rather than the low negligence assessed by MSHA.

A total of $36,007.00 is assessed for the violations that were heard and decided herein. The total penalty for this docket amounts to $40,866.00.

III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess a penalty of $40,866.00 for the nine violations in this docket. Consolidation Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $40,866.00 within 30 days of the date of this decision.[6]

Margaret A. Miller
Administrative Law Judge

Distribution:

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[6] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

July 26, 2010

TIMOTHY S. SHEFFER,	:	DISCRIMINATION PROCEEDING
Complainant,	:	
	:	Docket No. KENT 2010-15-D
v.	:	Case No. MADI-CD-2009-13
	:	
ADVENT MINING, LLC,	:	
Respondent	:	Mine ID 15-18547
	:	Mine: Onton #9

DECISION GRANTING RESPONDENT'S MOTION TO DISMISS
ORDER OF DISMISSAL

Before: Judge Paez

This proceeding is brought by Timothy S. Sheffer ("Sheffer" or "Complainant") against Advent Mining, LLC ("Advent" or "Respondent"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 815(c)(3), and 29 C.F.R. § 2700.40 et seq. Sheffer alleges that due to prior physical disabilities, including a crushed hand and a seizure disorder, he was discriminated against and terminated from employment at Respondent's Onton No. 9 facility. Respondent filed a motion to dismiss in which it denies Sheffer's claims of discrimination but argues that, even if they are accurate, he is not entitled to relief under the Mine Act. Sheffer filed a transcript of his discussion with a Mine Safety and Health Administration ("MSHA") investigator and a statement to support his claim.

At issue is whether Sheffer has stated a claim which, if true, would constitute discrimination under section 105(c) of the Act. Commission Procedural Rule 42 requires Sheffer to submit a short and plain statement of the facts, setting forth the alleged discrimination and a statement of the relief requested. 29 C.F.R. § 2700.42.[1] Should Sheffer's complaint fail to meet this minimal burden, the case may be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[2] Fed. R. Civ. P. 12(b)(6).

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[1] Commission Procedural Rule 42 provides as follows: "A discrimination complaint shall include a short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested." 29 C.F.R. § 2700.42.

[2] Commission Procedural Rule 1(b) directs that in the event the Mine Act does not control on a question of procedure, "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).

For the reasons discussed below, I determine that Sheffer has not stated a claim that can be granted relief under section 105(c) of the Mine Act. Accordingly, I grant Respondent's Motion to Dismiss. The facts below are either not in dispute or are facts provided by Sheffer.

I. PROCEDURAL BACKGROUND

On June 18, 2009, Sheffer filed a discrimination complaint with MSHA after Advent laid off employees, including Sheffer, during April 2009 in what Advent claims was an economically motivated reduction in its workforce. (Resp't Mot. to Dismiss at 1.) MSHA conducted an investigation, which included an interview of Sheffer, and notified Sheffer by letter dated September 15, 2009, that it had found no violation of the Mine Act. (Letter from Carl E. Boone, II to Tim Sheffer of Sept. 15, 2009; Resp't Mot. to Dismiss: Ex. B.)

After being informed that the Secretary of Labor did not intend to file a discrimination complaint on his behalf, Sheffer filed his own complaint with the Federal Mine Safety and Health Review Commission ("Commission") on October 1, 2009, pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3). (Resp't Mot. to Dismiss: Ex. C.) Sheffer retained an attorney, Kyle F. Biesecker, who entered his appearance and submitted a detailed list of the relief sought by Sheffer on November 2, 2009. (Resp't Mot. to Dismiss: Ex. E.) On November 17, 2009, Advent filed its motion to dismiss. Attorney Biesecker did not file a response to the motion. This case was assigned to me on February 1, 2010. In response to my law clerk's inquiry on the status of this case, Attorney Biesecker filed a notice on March 8, 2010, that he had withdrawn from his representation of Sheffer. (Notice of Withdrawal as Att'y.) By letter dated March 19, 2010, my law clerk provided Sheffer with a copy of the motion to dismiss and requested a response. (Letter from Shannon Fitzgerald to Tim Sheffer of Mar. 19, 2010.) Sheffer responded by facsimile on March 26, 2010, in a handwritten note that stated, "I disagree with the motion to dismiss and would like to proceed with this case."

Due to the skeletal nature[3] of Sheffer's complaint, his pro se status, and the lack of any factual statement in Sheffer's response to the motion to dismiss, I issued an Order to Show Cause why this case should not be dismissed on April 28, 2010. Specifically, I instructed Sheffer to present a short and plain statement of the facts, setting forth the alleged discrimination or discharge, in compliance with Commission Procedural Rule 42.[4] In response, Sheffer

[3] The complaint in its entirety states as follows: "I am requesting an appeal on the decision by MSHA. I have read Section 105(c) over and over and I see discrimination all through this section. If the agency can't see that there was definite discrimination in my case, or does not fall within your rules, would you please direct me to the proper authority. There is definitely a case here." (Resp't Mot. to Dismiss: Ex. C.)

[4] Sheffer was given 10 days to respond upon his receipt of the Order to Show Cause. Sheffer received the Order on May 12, 2010. On May 17, 2010, he called to ask for an extension of time, which was granted. Sheffer thus had until May 27, 2010 to respond in a timely manner, which he did.

submitted to the Commission a copy of a Freedom of Information Act ("FOIA") request. The request was for a transcript of his interview taken by MSHA on June 29, 2009, during its investigation of his case. Thereafter, Sheffer submitted a statement along with the transcript on June 17, 2010.[5] Given Sheffer's pro se status and that he was awaiting a reply from MSHA to his FOIA request, I accept these documents as Sheffer's response to my order to show cause and have considered them in my examination of this case. The facts below are those set forth by Sheffer in these collective pleadings, also referred to as "Complainant's Response."

II. STATEMENT OF FACTS

In February 2006, Sheffer began work at Advent's Onton #9 Mine. (Compl. Resp. 3.) In his more than three years with Advent, he worked underground as a roof bolter and car driver. (*Id.*) At the time of his interview with MSHA, Sheffer was 41-years old and had been working in the coal mines for ten years. (*Id.* at 3, 6.)

Sheffer has suffered throughout his adult life from a medical condition which causes him to have seizures, and he takes medication to control his attacks. (Compl. Resp. 4, 11.) While employed at the Onton #9 Mine, he suffered at least two attacks. (*Id.* at 1, 4, 11.) In addition, one of Sheffer's hands was crushed in a prior accident at another mine, a fact he brought to Advent's attention during his employment. (*Id.* at 9.) Otherwise, Sheffer has tried not to let his disabilities interfere with his work, his attitude being to "deal with it and carry on." (*Id.* at 1.)

While assigned to the position of roof bolter, Sheffer requested that he be given other work. (Compl. Resp. 14.) "I begged and pleaded you know to get me off of it. They were wearing me out." (*Id.*) Advent eventually responded by assigning him to a shuttle car after his co-worker made the request. (*Id.*) However, according to Sheffer, he and his co-worker were given inferior equipment after being assigned to a shuttle car and then were harassed for not meeting production standards. (*Id.*) "[T]he whole time they are hammering us to run coal, run coal and it was impossible. So now we've got reputations of we are no good." (*Id.*)

Sheffer alleges that during his employment less experienced miners were promoted ahead of him, and although he was "griped at" for being slow, he was a steady roof bolter yet was often reprimanded or written up for common work mistakes that were overlooked when displayed by other miners. (Compl. Resp. 2, 9-10, 12-16.) He was also frequently required to take drug tests during the course of his employment, usually after sustaining minor injuries. (*Id.* at 11.) On at least one occasion around Father's Day the year before, Sheffer communicated to a supervisor that he felt he was being singled out, and for sometime thereafter "they all left [him] alone." (*Id.* at 8.) In addition to his medical condition, Sheffer states that management's animus toward him may stem from his family's antagonistic history with one supervisor who had fired Sheffer at another mine and then was hired by Advent sometime after Sheffer began working at Advent. (*Id.* at 12-16.)

[5] On June 17, 2010, Respondent filed its Statement in Opposition to Complainant's Untimely Response to Order to Show Cause of April 28, 2010, wherein it renews its motion to dismiss.

Advent terminated Sheffer on April 25, 2009, along with about 20 other employees. (Compl. Resp. 4-5.) Three weeks prior to his termination, he suffered a seizure while underground, an event which he believes prompted Advent to fire him. (*Id.*) He takes medication for his seizures, and in the past only suffered them when he forgot to take his medication. (*Id.* at 11.) Sheffer had suffered a seizure above ground about one year after he had started with Advent, when he was taken to the hospital and underwent a drug test at that time. (*Id.*) Sheffer argues that instead of firing him, "a simpler solution would have been to give me a lesser job with lesser pay if need be." (*Id.* at 4.) He adds that he suffered harassment in the form of a "hostile" and "intimidating" workplace environment. (*Id.* at 2.) Sheffer alleges these facts constitute "obvious discrimination and can be proven." (*Id.*) In support of this contention, Sheffer lists damages, including an amount for "pain, suffering, and emotional distress" and cites to Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. (*Id.* at 1-2.)

III. PRINCIPLES OF LAW

Section 105(c) of the Mine Act

In drafting the Mine Act, Congress recognized the need to protect miners who report safety violations, arguing "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted in* 1977 U.S.C.A.A.N. 3401, 3435. Section 105(c) of the Mine Act thus prohibits discrimination against miners for exercising any protected right under the Act. 30 U.S.C. § 815(c).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec'y of Labor v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

Motion to Dismiss

When a complaint alleges facts that cannot possibly amount to a violation of any legal right, the opposing party may move to dismiss the complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, both the Supreme Court and the Commission have explicitly held that this form of dismissal is very difficult to achieve, particularly when the complainant has filed pro se. *Ribble v. T & M Dev.*, 22 FMSHRC 593 (May 2000); *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918 (Nov. 1996). In *Ribble*, the Commission quoted from its earlier decision in *Perry* regarding Rule (12)(b)(6):

> It is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." The Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Additionally, we hold the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. In cases brought by pro se complainants, motions to dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts.

Ribble, 22 FMSHRC at 594-95 (quoting *Perry*, 18 FMSHRC at 1920 (internal citations omitted)). Consequently, the threshold for dismissal under Rule 12(b)(6) is high; it must be clear that no legal relief can be granted, even after all allegations made by the complainant are assumed to be true, and all necessary inferences made in the complainant's favor. *Erikson v. Pardus*, 551 U.S. 89, 94 (2007); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

IV. ANALYSIS

Because Sheffer is a pro se complainant opposing a motion to dismiss, the entire record must be read and considered in the light most favorable to him. *Ribble*, 22 FMSHRC at 594-95. Sheffer does not need to establish his *prima facie* case at this stage, although he is obligated to meet the minimal pleading requirements of Commission Procedural Rule 42, 29 C.F.R. § 2700.42. *Id.* at 595. This means he must provide at least some fact, or set of facts, that could constitute an allegation of discrimination.

Although Sheffer lists his claims against Advent in his complaint, I have in my review also considered the claims and facts he asserts in his statement of facts and interview transcript with MSHA. (Compl. Resp. 1-20.) In these pleadings, Sheffer relates how he has coped with a number of especially difficult circumstances. If his allegations are true, they detail a lamentable state of affairs and render his frustration understandable. Nevertheless, the Mine Act was not drafted to remedy any of the inequities he describes, and as such, I am precluded from finding a possible violation of section 105(c).

Protected Activity and Work Refusal Doctrine

A finding that Advent discriminated against Sheffer would require that Sheffer (1) engaged in a protected activity and (2) suffered adverse treatment as a result of the protected activity. *Sec'y of Labor v. Consolidation Coal Co.*, 2 FMSHRC at 2797-800. In his list of allegations and throughout his interview, Sheffer claims he suffered discriminatory treatment as a result of his medical condition and injured hand. However, this cannot amount to discrimination under section 105(c) if it is not based on a protected activity. Here, no protected activity with regard to mine safety and health, real or perceived, is even alleged. Rather, Sheffer states in the MSHA transcript his belief that management's animus toward him may stem from a combination of his seizure disorder and his and his family's antagonistic history with one of his

supervisors. (Comp. Resp. 12-16.) Thus, I must examine the facts related by Sheffer to see whether a protected activity can be inferred from the record.

Under the plain language of section 105(c), it is clear that a protected activity occurs when a miner makes a safety complaint or refuses to work under dangerous conditions. 30 U.S.C. § 815(c) ("No person shall . . . discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or relating to this Act, including a complaint . . . of an alleged danger or safety or health violation."). A miner's disclosure of a pre-existing disability to his supervisors is not in and of itself a protected act. Yet, in some instances, the Commission has recognized that a miner's own physical limitation may serve as the basis for that miner's protected refusal to work. *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1417 (June 1984). Though not statutorily defined, the "work refusal doctrine" emerged as a consequence of the Senate Report on the 1977 Mine Act, which supported a miner's right to refuse "to work in conditions which are believed to be unsafe or unhealthful." *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (Aug. 1990) (quoting S. Rep. No. 95-181, at 35 (1977)). Thus, the Commission has found that a miner's refusal to work can be a protected act, when the refusal is elicited by a reasonable and good faith belief in hazardous working conditions. *Sec'y of Labor v. United Castle Coal Co.*, 3 FMSHRC 803, 812 (Apr. 1981).

The Commission has further held that a miner establishes a refusal to work when he or she engages in "some form of conduct or communication manifesting an actual refusal to work." *Sammons v. Mine Servs. Co.*, 6 FMSHRC 1391, 1397 (June 1984). The Commission found no such communication occurred in the case of a miner who, due to a medical condition aggravated by her normal work environment, requested an alternative placement. *Perando v. Mettiki Coal Corp.*, 10 FMSHRC 491, 494-95 (Apr. 1988). In *Perando*, the complainant developed bronchitis while working underground; on the advice of her doctors, she requested a transfer from her underground assignment to a surface position. *Id.* at 492. The Commission held no work refusal occurred where the complainant and her doctors only made recommendations, and not an ultimatum, regarding her job placement, and where she accepted her employer's offer of a surface position. *Id.* at 494.

In *Shepard v. Black Hills Bentonite*, 25 FMSHRC 129 (Mar. 2003) (ALJ), Judge Manning granted the operator's motion to dismiss after reaching a similar conclusion regarding the work refusal doctrine on facts analogous to the present case. In *Shepard*, the complainant strained his neck while lifting extremely heavy bags of clay. *Id.* at 129. The complainant and his doctor requested that he be given a less strenuous assignment, but he was told by his supervisor there was no other work available. *Id.* at 130. He thus continued with his heavy lifting assignments, even though he was in pain and believed his supervisor had found easier work for other injured employees. *Id.* He alleged he did not refuse to work because he did not know the Mine Act might protect him in such an instance. *Id.* at 131. Rather, he argued he engaged in a protected act when he told his supervisor he could not perform heavy-duty work, and suffered disparate treatment when he was not assigned a lighter-duty alternative. *Id.* Judge Manning dismissed his complaint for failure to state a claim under section 105(c), emphasizing that a request for a change in work assignments does not amount to a refusal to work. *Id.*

Here, as in *Perando* and *Shepard*, the work refusal doctrine is of no avail to Sheffer for the simple reason that Sheffer never refused to work. As a roof bolter, he claims he "begged and pleaded" to have his assignment changed. These requests were likely motivated by the discomfort he experienced while performing onerous work with an injured hand. It is possible that such work presented a hazard to his health: given his condition he may have had less control while lifting equipment, less precision while drilling, and the exertion required by such activities may have indeed caused Sheffer to honestly believe his health was at risk. However, Sheffer never suggested, much less communicated, to Advent that he would discontinue working if supervisors failed to meet his requests for reassignment. Furthermore, Advent eventually responded by moving him to a shuttle car job, and he accepted the position. Just like the complainant in *Perando*, Sheffer asked to be accommodated due to a preexisting physical condition, and his supervisors granted the request. Advent's accommodation of Sheffer went one step beyond the supervisor in *Shepard*, who claimed he was unable to provide alternative work for the complainant. Consequently, as Sheffer in no way indicated he would not perform his assigned tasks, I cannot find that he engaged in a work refusal.

Assuming *arguendo* that Sheffer refused to work and Advent failed to accommodate him, his presumptive refusal would not necessarily be protected under section 105(c). In *Shepard*, Judge Manning noted that "[s]ection 105(c) does not grant a miner the right to refuse his assigned duties because he is no longer capable of performing them as a result of an injury." *Id.* at 134. This observation is instructive in so much as it clarifies that a miner who refuses to work solely on the basis of a disability is not automatically protected under the Mine Act. Like the complainant in *Shepard*, Sheffer performed grueling manual labor in spite of a physical injury and disability that for most individuals would render the prospect of such work unimaginable. Notwithstanding the impressive resolve displayed by both men, the Mine Act was not designed to "provide continuing compensation or disability benefits for individuals who, because of certain physical impairments or injuries, would find working most jobs in the mining industry impossible." *Collette v. Boart Longyear Co.*, 17 FMSHRC 1121, 1126 (July 1995) (ALJ). In alleging that he suffered adverse treatment as a result of his disabilities, and not due to some other protected activity, Sheffer effectively brings his case outside the scope of the Act. As noted in *Collette*, "[i]t is clearly not the purpose of the Act, but rather worker's compensation, social security disability and other similar laws to provide loss of income protection under these circumstances." *Id.* Consequently, I find that no protected activity under the Mine Act is even alleged nor can be inferred from the record.

Adverse Treatment

In his list of allegations and throughout his interview, Sheffer claims he suffered discriminatory treatment as a result of his medical condition and injured hand. He claims he was passed over for promotions, harassed by management because he was not a fast worker and for common work mistakes as a roof bolter that were overlooked in other employees, and eventually fired. These claims, if true, are certainly adverse to Sheffer. However, they cannot amount to

discrimination under section 105(c) because they are not based on a protected activity. As discussed above, not only is the alleged disparate treatment not based on a protected activity, but no protected activity is even alleged or can be inferred from the record.

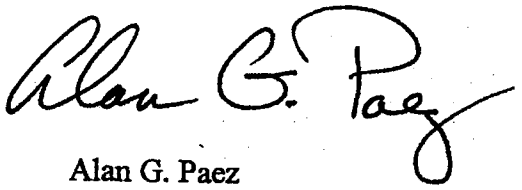
Sheffer also alleges disparate treatment that closely resembles the allegations made in *Shepard*. Both men claim they saw other similarly situated employees treated better than they were treated. The complainant in *Shepard* saw other injured workers given lighter-duty assignments, while he was told he could not be accommodated. Likewise, Sheffer saw employees less tenured than himself given better positions in the mine. In addition, Sheffer feels when he was reassigned to a shuttle car, he was given inadequate equipment. He also alleges that he was subjected to a hostile work environment because he did not work fast, was subject to more drug tests than warranted, and was being written up for common work mistakes when others were not. Lastly, he claims that he was discriminated against because Advent fired him, rather than giving him "a lesser job with lesser pay." (Compl. Resp. 4.) However unfair such claims might appear to be, none of them constitute discrimination under section 105(c) because, as in *Shepard*, Sheffer did not engage in a protected act. Rather, Sheffer's statement to MSHA reflects his belief that management's animus toward him may stem from a combination of his seizure condition and his and his family's antagonistic history with one of his supervisors, who had fired Sheffer at another mine and then was hired by Advent after Sheffer began work at the Onton #9 mine. (Comp. Resp. 12-16.) Neither allegation has a remedy under section 105(c).

Moreover, the Commission has warned against adjudication influenced by broader notions of fairness, rather than guided by the more limited purpose of the Mine Act: "the Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (internal citations omitted). The allegations raised by Sheffer in his complaint and pleadings square with the Commission's cautionary words, but do not give rise to relief under the Mine Act's anti-discrimination provisions.

Commission precedent mandates that a pleading filed by a pro se complainant be liberally construed in the complainant's favor. *Ribble*, 22 FMSHRC at 594-95. At the same time, Commission Procedural Rule 42 requires a complainant to state at least some fact or set of facts that can establish discrimination under the Mine Act, lest the case be dismissed because no violation of the law is alleged. 29 C.F.R. § 2700.42; Fed. R. Civ. P. 12(b)(6). This is one of those rare occasions, such as in *Shepard*, where it is beyond doubt that the complainant can prove no set of facts in support of his claim under the Mine Act. In reviewing the entire record that is before me, particularly Sheffer's version of the facts contained in the transcript of his MSHA investigative interview, I am unable to perceive any facts that would allow Sheffer to satisfy his burden of pleading under Commission Procedural Rule 42 and thus survive dismissal. I therefore conclude that Respondent's Motion to Dismiss must be granted.

V. ORDER

For the reasons set forth above, Advent Mining's motion to dismiss is **GRANTED** and the complaint of discrimination filed by Tim Sheffer under section 105(c) of the Mine Act is **DISMISSED.**



Alan G. Paez
Administrative Law Judge

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/jk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 4, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 2009-12 A.C. No. 36-09491-162638
v.	:	
LITTLE BUCK COAL COMPANY, Respondent	:	Bottom Split Slope

DECISION

Appearances: Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor; Edmund C. Neidlinger, Partner, Little Buck Coal Company, Pine Grove, Pennsylvania, Little Buck Coal Company.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of a 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. § 815(d). The Petition alleges that Little Buck Coal Company is liable for one violation of the Secretary's Mandatory Safety Standards for Underground Coal Mines. The violation was originally designated as "flagrant."[1] At the commencement of the hearing, counsel for the Secretary announced the withdrawal of the flagrant designation, and a specially assessed civil penalty in the amount of $6,624.00 is now proposed for the violation. A hearing was held in Reading, Pennsylvania, and the parties filed briefs following receipt of the transcript. For the reasons set forth below, I find that the Secretary failed to prove by a preponderance of the evidence that Little Buck violated the standard, and vacate the order.

Findings of Fact - Conclusions of Law

On March 4, 2008, Gregory Mehalchick, a mining engineer and ventilation and roof control specialist employed by MSHA, conducted an inspection of Little Buck Coal Company's

[1] A flagrant violation "means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2).

Bottom Split Slope Mine, located in Schuylkill County, Pennsylvania. He was accompanied by Thomas Garcia, a supervisory ventilation and roof control specialist. Both men were authorized agents of the Secretary. They generally review ventilation and roof control plans, and consult on related issues. They also periodically conduct inspections of mine facilities. They arrived at the mine around 6:00 a.m., and were accompanied by Ronald Bender, a foreman and limited partner, as he performed his preshift inspection. Mehalchick cited several violations of the Secretary's regulations establishing mandatory safety and health standards for underground coal mines. Only one of the enforcement actions is at issue in this proceeding, Order No. 7010827, charging that Little Buck failed to properly support the roof of the mine. Little Buck timely contested the Order and the assessed civil penalty.

Order No.7010827

Order No. 7010827 alleges a violation of 30 C.F.R. § 75.202(a), which requires that 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 violation was described in the "Condition and Practice" section of the Order as follows:[2]

> A slant was developed off the 6 1/2 chute approximately thirty feet above the gangway level. This slant was approximately fifteen feet deep. No roof control was installed in this slant, that being wooden props. Hitches for these props were not evident in the floor. The slant was also observed to be free of loose, broken coal. The normal mining cycle for this mine is to drill holes in the coal face, load the holes with explosives, caps and stemming, and then detonate the explosives to break approximately 7 1/2 feet of coal for removal. As the developed depth was approximately fifteen feet, all above factors indicate that miners were directed by the operator and his foreman to work under unsupported roof.
>
> The operator and his foreman engaged in aggravated conduct constituting more than ordinary negligence by allowing this to occur. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-1.

Mehalchick determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial, that one person was affected, and

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[2] Grammar and spelling errors have been corrected in quotations from documents prepared in the field.

that the operator had acted with reckless disregard. As noted above, a specially assessed civil penalty in the amount of $6,624.00 has been proposed for this violation.

The Violation

Little Buck's Bottom Slope Mine extracts anthracite coal by blasting off the solid, and is configured like a typical anthracite mine. The lowest horizontal level of the mine, the "gangway" heading, is 10 feet wide, and serves as the primary entry and the intake slope, as well as the level at which coal is loaded out of the mine. The "monkey" heading runs parallel to the gangway, approximately 30 feet above it in the coal seam. The gangway and monkey are connected by 12-foot wide "chutes," at 30-foot intervals.[3] Developments above the monkey heading, essentially extensions of the chutes, are referred to as "breasts," and are permitted to be 20 feet wide. Anthracite coal seams typically run close to vertical, e.g., 70 degrees from horizontal. The Bottom Slope Mine is somewhat unusual, in that the slope of the coal vein is only about 20 degrees from horizontal.

The mine's approved roof control plan requires the installation of timbers, or props, and lagging to support the mine roof and upper ribs.[4] Ex. G-5. Typically, two props are required every 5 feet in the gangway, and one row of props, on five-foot centers, is required in the monkey. Props in the monkey heading are required to be made of untreated hardwood, with a minimum diameter of five inches. Ex. G-5 at 8. Because of the slope of the coal seem, the high-side rib of the monkey and gangway headings are considered part of the roof. For that reason, the props in those headings are installed at the high-side ribs, and lagging or lining is required along the surface of the ribs. Ex. G-5 at 7-8.

Little Buck's normal mining cycle involved the drilling of holes approximately seven feet deep into the coal face. Seven holes were drilled in the four-by-six-foot face, four on the lower side and three on the upper side. The holes were then loaded with explosives, caps and stemming, and the explosives were detonated to break the coal for removal. Typically 7 and 1/2 feet of coal would be extracted in each cycle. In the monkey heading, the broken coal would then be washed out into the chute and down to the gangway with a high pressure water hose. Explosives were generally detonated toward the end of the work day and, after the mine atmosphere cleared, the broken coal would be washed out. Props and lagging would be installed at the beginning of the next work day. Tr. 165-66.

Mehalchick and Garcia were inspecting the area of the 6-1/2 chute and its extension, the breast directly above the monkey heading. At that location the monkey headings on each side of

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[3] The chutes were numbered in whole and half-numbers, e.g., #5, #5-1/2, #6, #6-1/2, etc.

[4] Underground coal mine operators are required to "develop and follow a roof control plan, approved by the [MSHA] District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine." 30 C.F.R. § 75.220(a)(1).

the chute were being developed at upward angles. The left side monkey heading had been developed and appropriately supported with props and lagging. The right side monkey heading had been advanced a significant distance, but no roof support had been installed, and there was no evidence that any temporary supports had been placed in the heading while it was being mined. The floor of the heading was clean and damp, from the washing out of the coal the evening before. Tr. 43, 139. Garcia used a tape and measured along the low-side rib. The distance from the edge of the chute to the face was 15 feet. That was the only measurement taken during the inspection. In response to a discovery request, Little Buck reported that the high-side rib measured 8.5 feet from the edge of the breast to the face, and that the face was six feet wide and four feet high.

About two weeks before the hearing, Mehalchick prepared a diagram of the area, using a computer program, "AutoCAD." Tr. 55-61; Ex. G-3. A copy of the diagram, an overview of the area of the six-1/2 chute and monkey heading, at a right angle to the coal seam, is attached as an appendix to this Decision. The diagram is not an exact depiction of the area, because the only dimensions used were the measurement on the low rib and Respondent's report of the length of the high rib and the width and height of the monkey heading. Mehalchick used the roof control plan's maximum allowable figures for the widths of the chute and breast, and assumed that the various elements were arranged symmetrically along a straight centerline. Tr. 54-60, 111. He also assumed that the transition from the 12-foot width of the chute to the 20-foot width of the breast occurred on "some kind of slant." Tr. 92-93, 111. When he entered the measurement from the low rib and the other dimensions into the computer program "everything tied in," that is, "all the dimensions fit," and the diagram was generated. Tr. 57-58, 111. The diagram also conformed with his recollection of his observations of the scene some two years earlier. Tr. 58, 111.

Mehalchick's and Garcia's concern was that Bender had worked under unsupported roof when he mined the second 7.5-foot cut in the heading. As shown on the diagram, the Secretary contends that the roof was not supported in a 2.3-foot wide trapezoidal area along the low-side rib, labeled "area under unsupported roof," and that Bender would have been in that area when he drilled and loaded the three holes closest to the low-side rib for the last cut. Ex. G-3.

While the Order was not written as a violation of the approved roof control plan, it is useful to consider the plan when considering whether the roof was adequately supported or otherwise controlled. Unfortunately, the roof control plan does not specifically address the situation where a monkey heading is developed at an upward angle, at the point where the allowable 12-foot width of the chute changes to the allowable 20-foot width of the breast. Also unspecified is where the first prop on the high-side rib of the monkey must be placed, i.e., at the corner, five feet inby, or somewhere in between. Mehalchick was unaware of any interpretations of the roof control plan requirements, or general roof support requirements, for headings developed at an angle. Tr. 115.

When Mehalchick and Garcia made their inspection the entire depth of the cut was open and clear, and there was no roof support of any kind. There is little question that the roof of the right-side monkey heading was not adequately supported at that time. However, no miners had traveled or worked in that area after the second cut had been blasted. Bender had washed the coal out of the heading with a high pressure hose while he was situated in the breast.[5] Tr. 167. Under Little Buck's established mining cycle, props and lagging would have been installed in the heading at the start of that morning's shift.

As noted above, the violation is alleged to have occurred on the previous shift, when the holes for the last cut were being drilled and prepared for blasting. At that time the high-side rib had been advanced only about one foot, and no props would have been required under the roof control plan. Nevertheless, Mehalchick and Garcia believed that the area within 2.3 feet of the low-side rib was not adequately supported, and that Bender had worked in that area. They believed that temporary roof support should have been installed while the holes were being drilled and prepared for blasting. Tr. 113, 158. Bender undoubtedly worked in the subject area when he drilled and prepared the three holes nearest the low-side rib. However, it is not at all clear that the roof in the area was not adequately supported.

Most significantly, the relative strength of the coal block, as compared to a single 5-inch diameter wooden prop, strongly suggests that the subject area should not have been considered unsupported. Mehalchick and Garcia agreed that the only action necessary to support the roof of the monkey, as they observed it, was the installation of one prop on the high-side rib within five feet of the breast.[6] Tr. 89-91, 156-58. Consistent with the approved roof control plan, that single prop would have rendered safe for travel the entire area of the monkey heading up to the 15-foot deep face, including the area in the diagram labeled "area under unsupported roof." Of course, at the time of the alleged violation, when the holes for the second cut were being drilled and prepared, there was no prop in that area. The last 7.5 feet of coal, shown as a cross-hatched area in the drawing and labeled "coal removed from single pull," was still in place, and the high-side rib was only one foot long.

However, if it is assumed for purposes of analysis, that at the time of the violation the monkey heading was considered to be as Mehalchick and Garcia observed it, i.e., 15 feet deep on the low-side rib, then rather than the single five-inch diameter wooden prop that they agree would have provided adequate support, the roof was supported over an area of 45 square feet by

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[5] Bender had demonstrated how the coal was washed out to Mehalchick and Garcia, who agreed that it could have been done from a safe area. Tr. 102, 141.

[6] Garcia testified that had one prop been installed five feet from the breast on the monkey's high-side rib, the roof of the monkey would have been adequately supported, and there would have been no violation. Tr. 157-58. In fact, two props were installed to terminate the order, most likely one five feet from the intersection of the high-side rib and the breast, and one at the intersection to support lagging between the props. Tr. 91.

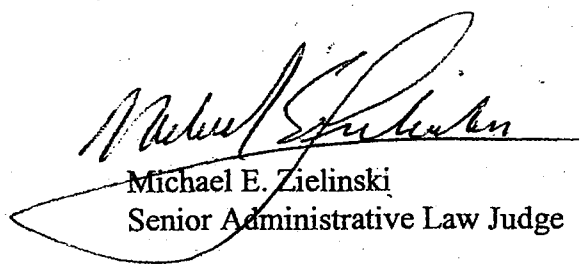
hard anthracite coal. I find it inconceivable that a single 5-inch diameter wooden prop could have provided more roof support than the solid block of coal that was in place at the time of the alleged violation. If it would have been safe to work and travel in the "area under unsupported roof," and a further 7.5 feet inby, with one wooden prop on the high-side rib, it surely would have been safe to work and travel in the subject area with the coal in place.

In addition, the Secretary's theory does not account for support provided by props that were installed in the chute and breast. While there was some disagreement on the location of props, the inspectors and Bender agreed that a prop had been installed close to the corner of the chute and the low rib, as depicted in the drawing. Tr. 59, 145, 174. The alleged unsupported area extends nearly to that prop. It appears, from the diagram, that other props are considered to have supported roof as much as five feet away, but that the prop on the lower corner of the trapezoid provided no support in the subject area. When questioned on that issue, Mehalchick stated that the prop provided support in the chute, but "nothing significant" in the monkey. Tr. 112. However, he later agreed that the prop "may" provide "a little" support in subject area. Tr. 122. Another concern is that, under the roof control plan, the 20-foot wide breast is supported by three rows of props at five-foot spacings, one down the center and one five feet from each rib. As depicted in the drawing, the row of props closest to the right rib of the breast was intact all the way down to the low-side rib of the monkey. It seems that those props may have provided adequate support in the breast up to the extension of the breast's right rib line down to the low-side rib of the monkey. A dotted line has been added to the drawing showing the extension of the rib line. If so, the area considered unsupported would have been reduced by more than fifty percent, and would have extended only about two feet from the face where the subject holes were drilled. Bender may not have been that close to the face when he drilled and prepared the holes.

It may be that the placing of temporary support while the holes were being drilled and prepared would have been prudent, or even necessary to adequately support the mine roof. While I am reluctant to reject the opinions of experienced inspectors, I find no acceptable explanation for the apparent inconsistency between what would have been acceptable roof support under the approved plan, and the conditions at the time of the alleged violation. Upon consideration of the above, I find that the Secretary has failed to prove by a preponderance of the evidence that Little buck violated the standard as alleged. Accordingly, the Order will be vacated.

ORDER

Order No. 7010827 is **VACATED.**



Michael E. Zielinski
Senior Administrative Law Judge

Distribution:

Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, Suite 630E, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

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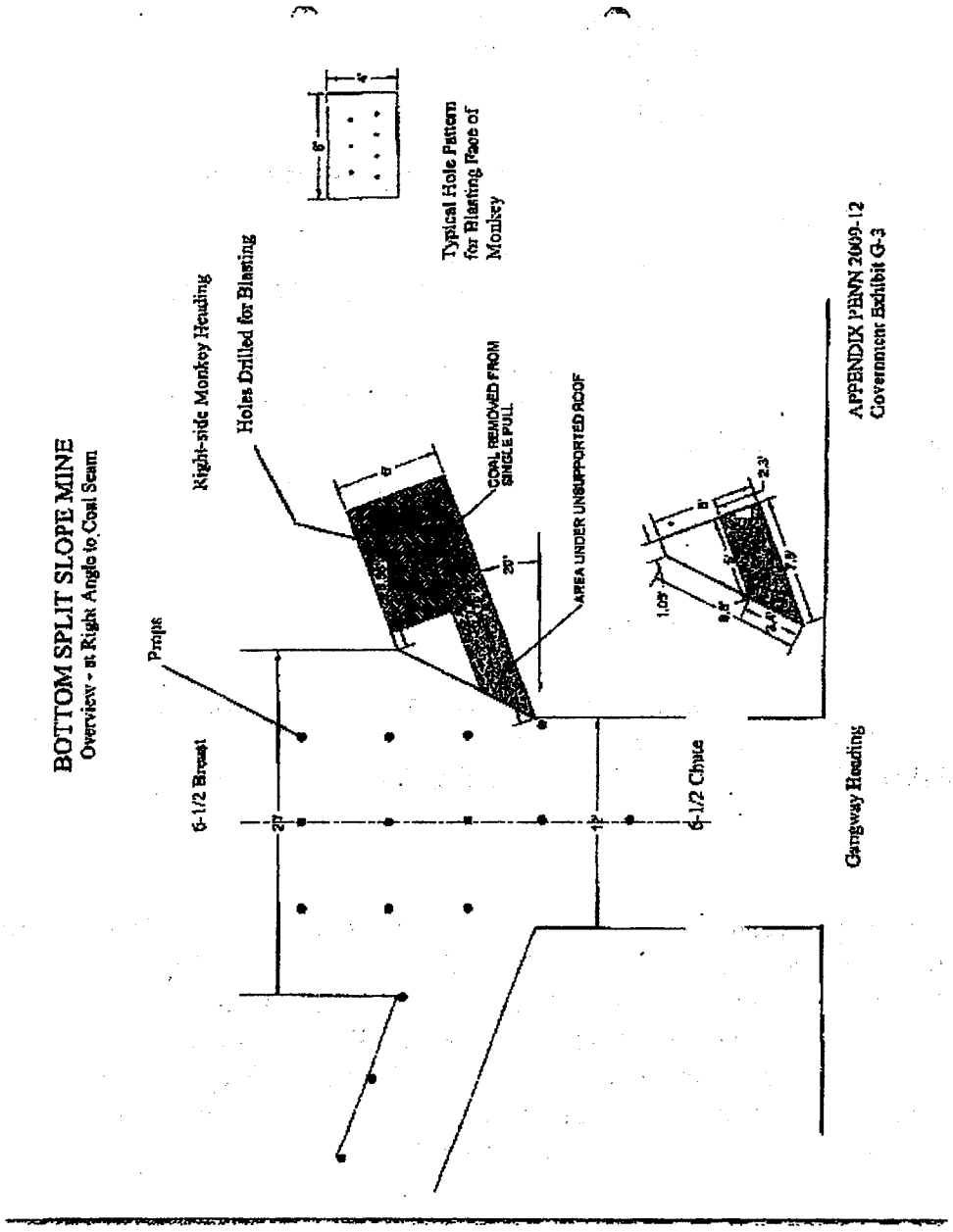
BOTTOM SPLIT SLOPE MINE
Overview - at Right Angle to Coal Seam
Right-side Monkey Heading
Holes Drilled for Blasting
Typical Hole Pattern for Blasting Face of Monkey
COAL REMOVED FROM SINGLE PULL
AREA UNDER UNSUPPORTED ROOF
Props
6-1/2 Breast
6-1/2 Chute
Gangway Heading
APPENDIX PENN 2009-12
Government Exhibit G-3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-434-9980
Telecopier No.: 202-434-9949
August 10, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-936-M
Petitioner	:	A.C. No. 35-00634-145767-01
	:	
v.	:	Docket No. WEST 2008-937-M
	:	A.C. No. 35-00634-145767-02
BAKER ROCK CRUSHING COMPANY,	:	
Respondent.	:	Mine: Farmington Pit

DECISION

Appearances: John Pereza, Conference & Litigation Representative, U.S. Department of Labor, Vacaville, CA, on behalf of the Secretary
Todd Baker, Beaverton, OR, on behalf of Baker Rock Crushing Company

Before: Judge Barbour

This is a 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"), acting through the Mine Safety and Health Administration ("MSHA"), petitions for the assessment of civil penalties totaling $376.00 for 3 alleged violations of mandatory safety standards found at 30 C.F.R. Part 56, standards applicable to surface metal and nonmetal mines. The alleged violations are set forth in citations issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. § 814(a).[1]

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[1] Section 104(a) states in pertinent part:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a . . . mine subject to this Act has violated . . . any mandatory health or safety standard . . . or regulation promulgated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

On February 12, 2008, a regular inspection of Baker Rock Crushing Company's Farmington Pit was conducted by MSHA Inspector Larry Orton.[2] (Tr. 19.) The Farmington Pit is a quarry operation consisting of primary and secondary crushing, screening, and stockpiling. Inspector Orton issued three citations based on alleged violations of section 56.2003(a), which requires workplaces to be kept clean and orderly; section 56.14112(a)(1), which requires guards preventing access to moving parts of equipment and machinery to be constructed and maintained to withstand the vibration of the shock and wear of which they are subjected during normal operation of the equipment; and section 56.12004, which requires electrical conductors to be protected if exposed to mechanical damage. After the penalties were assessed for the alleged violations, the company challenged the assessments. The matter was assigned to me by the Chief Judge and was heard in Salem, Oregon.

STIPULATIONS

The parties have agreed to the following stipulations:

1. Baker Rock Crushing, Farmington Pit, is engaged in mining in the United States, and its mining operations affect interstate commerce, and is subject to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

2. With regard to the company's history of violations, the Secretary agrees that the company's history of violations did not result in any additional penalty points.

3. With regard to timely compliance, the Secretary agrees that the conditions were abated in a timely manner.

4. For the calendar year 2008, Respondent reported 42,987 hours worked at the mine based on submitted MSHA quarterly reports.

(Joint Ex. 1.)

CONTENTIONS RELATING TO CITATION NO. 6438533

Inspector Orton testified on behalf of the Secretary of Labor and stated that he issued Citation No. 6438533 after observing a violation of mandatory safety standard section 56.2003(a), which requires workplaces and passageways to be kept clean and orderly. 30 C.F.R. § 56.2003(a).

Orton inspected the rock breaker area at the upper deck of the crushing car and observed a build up of dirt and dust throughout the rock breaker area, specifically on the hand railing, boxes

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[2] Larry Orton is a mine inspector with more than 22 years of experience inspecting and working in mines. Inspector Orton has completed sessions of electrical training, and he is a certified electrician.

and walkways. (Tr. 20-21; Gov. Ex. 1.) Inspector Orton noticed a dark discoloration on the walkway and along the beams underneath the walkway from the build-up of dirt and material. (Tr. 23.) Orton determined that some of the buildup was from a previous spill of hydraulic fluid.[3] (Tr. 20-21; Gov. Ex. 1.)

Inspector Orton concluded that the accumulation of dirt and the spillage of hydraulic oil posed a slip hazard, a health hazard, and a fire hazard. (Tr. 23.) Orton discussed the possibility that the conditions of the rock breaker area could present a slip and fall hazard if a person tracked some of the excess hydraulic oil on his or her boots and walked into a room where the flooring had a smooth surface (such as the control booth located directly next to the rock breaker area). (Tr. 25.) Orton stated he assumed the control room would be accessed every day the plant was operational. (Tr. 27.) He found that at least one person would be affected by the slip and fall hazard. *Id.*

Nevertheless, Inspector Orton believed an injury was unlikely due to the fact that the walkway was clear of tripping hazards, a hand rail was provided, the area was level, and the grating on the floor provided traction. (Tr. 25, 28.) Orton determined that moderate negligence was present because the buildup of dirt and spillage was fairly obvious and the area was traveled regularly. (Tr. 28; Gov. Ex. 2.) However, he admitted that due to the numerous safety precautions (i.e., clear pathway, hand rail and the grated flooring), the area was probably not viewed as a hazard. (Tr. 28.) Although Inspector Orton determined that an injury was unlikely, he stated that if an injury occurred, it would result in lost workdays or restricted duty. (Tr. 26.) Therefore, he found the violation was not serious. (Tr. 27.)

The citation was terminated after the rock breaker area was steam cleaned and the dirt and excess hydraulic fluid was removed. (Tr. 28.) Inspector Orton found that the steam cleaning eliminated the hazardous conditions. (Tr. 28; Gov. Ex. 3.)

David Lemen, the quarry superintendent, testified on behalf of the operator.[4] Lemen stated that the floor of the walkway in the rock breaker area was made out of expanded metal grating. He explained that the metal grating was used instead of a screen cloth to provide better traction from slipping if fluid was spilled. (Tr. 65-66.) After looking at Government Exhibit No. 1, Lemen stated he believed the dark and discolored areas were shadows, not spillage from oil. (Tr. 66; Gov. Ex. 1.) Lemen admitted that there was a buildup of dirt on the beams underneath the walkway, but stated that they were not accessible to the miners. *Id.* Lemen stated that the rock breaker is operated through remote controls that are located in the control room next to the

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[3] The Secretary states Baker Rock Crushing Company "agreed . . . that a hydraulic hose had broken at some time prior to the inspection which resulted in [Citation No. 6438533]." (Pet'r's Pre-hearing Report ¶ 2, August 4, 2009).

[4] David Lemen has worked for Baker Rock Crushing Company for 30 years and has been the superintendent for 17 years.

walkway. (Tr. 67.) He also stated that the control booth is accessed daily for inspections. *Id.*

CONTENTIONS RELATING TO CITATION NO. 6438534

Inspector Orton testified that he issued Citation No. 6438534 after observing a violation of mandatory safety standard section 56.14112(a)(1), which requires guards preventing access to moving parts of equipment and machinery to be constructed and maintained to withstand the vibration of the shock and wear of which they are subjected during normal operation of the equipment. (Tr. 30-31); 30 C.F.R. § 56.14112(a)(1).

Orton inspected the primary screen unit where larger rocks are separated and sent to be shipped, stored, or re-crushed. (Tr. 30.) Orton stated that he noticed the fly wheel on the primary screen unit was not properly guarded. He observed that the guard was leaning outward exposing approximately two inches of the back side of the fly wheel. *Id.* Inspector Orton determined that the fly wheel was exposed because the braces mounting the guard in place were worn out. (Tr. 35.) Although Inspector Orton did not see the fly wheel operating during his inspection, he did test the guard to see if it was loose and found that it wiggled back and forth approximately four to six inches. (Tr. 43-44.)

Orton described the fly wheel as having a smooth top side with spokes and bolts protruding from its lower backside. (Tr. 33-34.) He noted that the fly wheel rotates at a high rate of speed. (Tr. 33.) Orton considered the poor guarding to be a hazard because a person could be exposed to a rapid moving piece of machine equipment. (Tr. 31.) Inspector Orton stated that if a person came into contact with the back side of the fly wheel, the person could become entangled and break, rip, or lose a limb. (Tr. 34.) He further stated that if a person came into contact with the smooth outer part of the fly wheel, "the shear force of the thing spinning would probably break a wrist, a finger, or something of this nature." *Id.* Orton noted that the exposed fly wheel was less than seven feet above the walkway. (Tr. 34.) Orton acknowledged that there are handrails in the area, but stated that the handrails had no effect on a person's exposure to the guard or the fly wheel. (Tr. 36.)

Inspector Orton found the guard violated the standard because he believed the guard could not withstand the vibration of the shock or wear from operation. (Tr. 36.) He issued a citation for the violation and found that it was a significant and substantial ("S&S") contribution to a mine safety hazard. (Tr. 39.) Orton testified that the likelihood of an injury was high and reasonably likely to occur due to the fact that a person accessing the primary screen unit would have to travel passed the guard which is next to the walkway. (Tr. 37; *see* Gov. Ex. 5.) Orton explained that a person entering the walkway could slip and grab onto the guard for support and come into contact with the moving fly wheel which could leave behind "a ripping, crushing injury." (Tr. 38.) Orton admitted that the primary screen unit is not accessed on a daily basis and stated that the area is accessed for maintenance and observation of the crushing cycle. *Id.* As such, Inspector Orton estimated that at least one person would be affected by the condition of the fly wheel's guard. He also determined that the negligence was moderate because the area was

clear, the unit provided good handrails, and the toe boards were in place. (Tr. 40.) He further noted that the faulty guarding on the fly wheel was not something that would have been easily seen by others. *Id.*

The citation was terminated after Baker Rock Crushing Company remounted the guard properly and added rubber to the back of the guard to completely seal off any access to the fly wheel.[5] (Tr. 41-42.) Inspector Orton stated that after the guard was reinstalled and straightened, the potential for contact with moving machinery was eliminated. (Tr. 42.)

David Lemen, the quarry superintendent, described the fly wheel as smooth and stated that the fly wheel did not have any spokes or bolts. (Tr. 67.) Lemen stated that if a person came into contact with the fly wheel while it was operating it would result in a burn to the skin, yet admitted to the possibility that the force of the rotating fly wheel could cause a person's hand to bend backwards or break fingers. (Tr. 79.) Lemen also stated that he did not believe that a person could become entangled in the fly wheel because of its smooth surface. (Tr. 82.) Lemen explained that a person would have to reach behind the guard to make contact with the fly wheel. *Id.* Lemen further stated that he believed that the handrails in front of the guard would in fact protect a person from falling and touching the exposed fly wheel. *Id.* Lemen testified that he was not certain whether the company had actually reinstalled the guard or whether the company only added rubber to the guard. (Tr. 68.) Nevertheless, Lemen did admit the guard looked straighter after the remedial steps were taken. *Id.*

CONTENTIONS RELATING TO CITATION NO. 6438535

Orton testified that he issued Citation No. 6438535 after observing a violation of mandatory safety standard section 56.12004, which requires that electrical conductors be protected if exposed to mechanical damage. (Tr. 46); 30 C.F.R. § 56.12004.

Orton inspected the upper finish screen area and observed that the outer sheath of an electrical cord was worn through and exposed approximately three inches of the inner conductors. (Tr. 44.) Orton stated that this cable was located "off to the side on an access area" where a person could walk up to it. (Tr. 45.) He also testified that the cable was hanging off of a metal structure. *Id.* Inspector Orton determined that the damaged cable was a violation because the inner conductors were covered with insulation that was not mechanically protected. (Tr. 47.) Orton explained that vibrations and other outside conditions could easily breach the inner conductors' insulation which would lead to two metal conductors rubbing against each other. (Tr. 48.) This could result in an entire area being energized without kicking a breaker, *id.*, because all metals have the ability to conduct electricity (Tr. 55).

Inspector Orton stated the cable was a 277 volt cable that was previously used to power a

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[5] Adding rubber to the back of the guard was an additional precaution taken by the company to secure the area even more than what was required. (Tr. 41).

light. (Tr. 49-50.) Although Orton did not go to the power source site to check if the cable was connected (Tr. 58), he did ask a representative of the company who was in charge and present during the inspection whether the damaged cable was energized (Tr. 49-50). The company's representative told Inspector Orton the cable was not energized and Orton believed the cable was not energized from his own observations. (Tr. 49.) Orton did not recall whether the cable had been physically disconnected from its source. *Id.* Orton testified that he believed that the cable could and would be used in the normal course of mining operations at some time in the future. (Tr. 61.) He stated that the cable could be used to feed a motor or a pump (Tr. 62), but believed that it would most likely be used for a light (Tr. 63).

Inspector Orton found the violation was not S&S. (Tr. 52.) He further determined the alleged violation was unlikely to cause an injury, because at the time of the inspection, there was no damage to the inner conductors (no bare wire of any kind was exposed) and the cable was not energized. (Tr. 50.) Inspector Orton discussed the seriousness of electrical shock hazards and explained that although unlikely, if an injury occurred, it could reasonably be expected to be fatal. (Tr. 51.) He determined that one person could be affected by the damaged cable during the course of inspections, maintenance, or simply observing the area. *Id.* Inspector Orton found the company's negligence was low because the cable was not energized, the company did not view the condition as a problem, and the condition was not one that could be easily noticed (the insulation was worn through exposing just three inches of the inner conductors). *Id.* He further supported his reason for determining the negligence to be low by describing some of the precautionary measures taken by the company to prevent an electrical injury. (Tr. 54.) Orton stated that the company installed phase lights which are used as a monitoring device to detect a potential problem with the electrical system. Inspector Orton admitted though, that the phase lights are merely preventative and will only detect a problem, but will not trip the circuit. *Id.*

The citation was terminated after the company removed the damaged portion of the cable that was exposing the inner conductors. (Tr. 52.) Inspector Orton stated the company's actions eliminated the potential electrical shock hazard. (Tr. 53.)

David Lemen stated that the cable was originally hard-wired into a light above and went down and fed another light, one that had been taken out of service. (Tr. 70.) Although, at the time of the inspection, the company only knew the cable was disconnected at one end, Lemen testified that the cable was in fact disconnected at both ends. (Tr. 69.) As a result, Lemen explained that in order for the cable to be reconnected, it would have to be rewired with the proper connections. *Id.* Lemen testified that because there was no plug on the end of the cord, it would be impossible to use the cable without rewiring it. (Tr. 70.)

Lemen testified that he believed there was no way the wire could have become energized on its own (Tr. 71) because the cable was disconnected from the light above and also disconnected from the light to which it supplied its power (Tr. 70). Lemen also noted that the inner insulation was never breached. (Tr. 71.) Lemen admitted that the damaged cable was within five feet of the light that had been taken out of service and was eight feet from the light

that had served as the cord's power source. (Tr. 80.) Nevertheless, Lemen explained that the damaged cable would not be used because the company keeps spare cable on-site in a storage area. (Tr. 71.) Lemen further stated that the employees are aware of this fact and have knowledge of where the spare cable is stored in the event that it is needed. *Id.*

RESOLUTION OF THE ISSUES

CITATION NO. 6438533

Citation No. 6438533 states:

> The access way around the rock breaking hammer and oil pump on the upper deck of the crushing tower area was not maintained in a clean condition. A hydraulic hose had ruptured and fluid had spilled in the access area creating a slip and fall hazard. The flooring on the access way was made of expanded metal and provided with hand rails. The area is exposed to vibrating outside conditions. The hammer was controlled from inside the control booth. The only time the area was access [sic] was for maintenance on the hammer unit and hydraulics as stated by the crusher operator. If a person were to slip and fall they could be [sic] receive a lost time or restricted duty injury. The condition was not reported on the inspection of the work place.

(Gov. Ex. 2.)

Section 56.2003(a) states in pertinent part: "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." 30 C.F.R. § 56.2003(a).

THE VIOLATION

I conclude the Secretary established a violation of section 56.2003(a). The evidence clearly shows that the walkway on the upper deck of the rock breaking area was not "kept clean and orderly" as required by the standard. Inspector Orton's testimony and the Government's photographs established the existence of an accumulation of dirt, dust and hydraulic fluid spillage throughout the rock breaker area. (Gov. Ex. 1.) Moreover, I do not find Lemen's testimony that he believed the dark and discolored areas were shadows instead of dirt and excess oil spillage convincing, especially after examining the Government Exhibit No. 3 which depicts the walkway without any buildup of dirt or fluid after the rock breaker area was steam cleaned. (Gov. Ex. 3.)

GRAVITY

Inspector Orton properly believed the violation was not serious. Despite the presence of dirt, dust and hydraulic oil, I agree with Orton's determination that it was unlikely for an injury to occur because of the numerous safety precautions taken by the operator. Specifically, the

walkway had a hand rail, it was free of tripping hazards, and the metal grated flooring was level and provided adequate traction to prevent slipping. Therefore, like Orton, I conclude that the lack of a clean and orderly walkway was not a serious violation.

NEGLIGENCE

Inspector Orton believed the company was moderately negligent. (Gov. Ex. 2.) I agree with this assessment. Looking at the Government's photographs it is clear that buildup of dirt, dust and hydraulic fluid was obvious. (Gov. Exs. 1, 3, 11.) The company had a duty to keep the entire rock breaker area clean and orderly, including the walkway on the upper deck of the crushing car. Nevertheless, due to the numerous safety precautions and the unlikely chance of an injury occurring, I conclude the company was moderately negligent.

CITATION NO. 6438534

Citation No. 643854 states:

> The fly wheel on the primary screen unit was not adequately guarded. The guard had broken loose due to vibration and was leaning out to words [sic] the walk way. This condition exposed about 2 inches of the back of the fly wheel. The open is about one foot wide and about three feet high. The unit is located next the [sic] walk way next to the screen and rotates at a high speed. Guards are require [sic] to be maintained in good conditions to prevent a person from contacting moving machine parts and becoming entangled. The walk way is about 40 inches wide and exposed to vibrating out side [sic] conditions. If a person was to be entangled they could be permanently disabled or seriously injured. The condition was not reported on the inspection of the work place. The company has established a system of inspecting the screen unit and documenting the defects.

(Gov. Ex. 5.)

Section 56.14112(a)(1) states in pertinent part: "Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation." 30 C.F.R. § 56.14112(a)(1).

THE VIOLATION

I conclude the Secretary established a violation of section 56.14112(a)(1). The evidence clearly shows that the fly wheel was not properly guarded. The photograph taken by Inspector Orton shows the guard was leaning away from the fly wheel and exposing approximately two inches of the moving machinery. (Gov. Ex. 4.) Therefore, I find the guard was not adequately maintained to withstand the vibration, shock and wear it was subjected to during normal operations.

S&S & GRAVITY

Inspector Orton incorrectly believed the lack of proper guarding was serious and designated the violation as S&S. An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). 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 (April 1981). As is well recognized, in order 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 that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co.*, 52 F.3d 133, 135(7th Cir. 1995); *Austin Power Co. v, Sec'y of Labor*, 861 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.*, 7 FMSHRC 1125, 1129 (Aug. 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 (Aug. 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 (Sept. 1996).

I have found the Secretary has established a violation of section 56.14112(a)(1) presenting a safety hazard if a person were to slip and contact the moving fly wheel. However, I find the violation was neither serious nor S&S because there is insufficient evidence to establish a reasonable likelihood of an injury. It is clear from the testimony that the primary screen unit is not accessed frequently. I credit Inspector Orton's testimony that only individuals performing maintenance duties or observing the crushing cycle would be exposed to the hazard. Furthermore, the walkway is clear of any slipping or tripping hazards and the area has good handrails in front of the guard to provide support. Moreover, If a person were to slip and fall, in order to contact the moving fly wheel he would have to fall in such a way as to reach behind the guard. Thus, I find that it is unlikely that a person would slip and fall into the moving fly wheel under these circumstances.

NEGLIGENCE

Inspector Orton believed the company was moderately negligent. (Gov. Ex. 5.) I agree with this determination. The company had a duty to maintain guards to withstand the vibration, shock and wear of the rock crushing operation. After viewing the photographs of the guarding before the violation was abated, I find that the condition was not one that would be easily noticed by others. Additionally, as previously discussed, the walkway was clear and provided a handrail for support. Based on the safe conditions of the walkway and the unlikely chance of an injury occurring, I conclude the company was moderately negligent.

CITATION NO. 6438535

Citation No. 6438535 states:

> The insulation on the 277v cable feeding the lights on the upper east deck of finish [sic] screen area was worn through exposing the inner conductor to mechanical damage. The area of out [sic] insulation damaged is about three inches long. The inner conductors did not appear to be damaged. The cable was not energized. The electrical system is monitored by a ground fault detector device (phase lights). There a [sic] person in the plant area daily contacting conductive materials. These conditions create a shock and electrocution hazard. If a person was to be shocked or electrocuted they could be fatally or seriously injured. The condition was not reported on the inspection of the work place. This area is not travel [sic] daily and the condition was not easily seen.

(Gov. Ex. 8.)

Section 56.12004 states: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials. Electrical conductors exposed to mechanical damage shall be protected." 30 C.F.R. § 56.12004.

THE VIOLATION

I conclude the Secretary did not establish a violation of section 56.12004. The purpose of section 56.12004 is to eliminate electrical shock hazards by requiring that all electrical conductors be protected. The importance of this standard is paramount because, as Inspector Orton testified, if an injury occurred it could be fatal. However, although the cable was worn through exposing three inches of the inner conductors, other facts reveal that no actual safety hazard existed. Both Inspector Orton and the company's quarry superintendent, Lemen, testified that the cable was not energized. Moreover, Lemen's testimony revealed the cable was disconnected at both ends at the time of the inspection. Therefore, although the damaged cable exposed approximately three inches of the inner conductors, it would have been impossible for the wire to become energized on its own because it was disconnected from both the light and its

power source. I find it would be unlikely that the company would rewire the cable without noticing the exposed inner conductors and remedying the hazard. Furthermore, the company had a designated area on-site for storing spare cable and had set up phase lights to monitor the electrical system.

The Secretary's regulations define the term "conductor" as "a material, usually in the form of wire, cable, or bus bar, capable of carrying an electrical current." 30 C.F.R. § 56.2. The record shows that because the damaged cable had no plug on the end of the cord and was disconnected at both ends, in order for it to be used, the cable would need to be rewired with the proper connections. Therefore, the cable was not capable of carrying an electrical current at the time of the inspection. Consequently, I find the cited cable was not an electrical conductor for purposes of the safety standard set forth in section 56.12004. Because there was no possibility of an electrical shock hazard without rewiring the cable, I conclude that these circumstances did not present a safety hazard and the Secretary has not met her burden of proving a violation occurred.

REMAINING CIVIL PENALTY CRITERIA

The Act requires that I assess a civil penalty for each violation. It also requires that in doing so, I consider the statutory civil penalty criteria. 30 U.S.C. § 820(i). Several of the civil penalty criteria are equally applicable to all of the violations.

HISTORY OF PREVIOUS VIOLATIONS

The parties agree that the company's history of violations did not result in any additional penalty points. (Joint Ex. 1.) I find, based on the record in this case, the applicable history of previous violations is not an aggravating factor. Therefore, when assessing penalties I will not increase them on account of Baker Rock Crushing Company's prior history.

SIZE

The parties stipulated to the fact that there were 42,987 hours worked at the mine in 2008. (Joint Ex. 1.) This means Baker Rock Crushing Company's facility is characterized by MSHA as a small mine. *See* 30 C.F.R. § 100.3. As there is no evidence to contradict this, I find the mine to be small in size. Therefore, when assessing penalties, I will assess lesser amounts than I would for medium or large operations.

ABILITY TO CONTINUE IN BUSINESS

There is no evidence the size of any penalties assessed will adversely affect Baker Rock Crushing Company's ability to continue in business, and I find they will not. Therefore, when assessing penalties, I will neither increase nor decrease them on account of this criterion.

GOOD FAITH ABATEMENT

Finally, the parties agree that the alleged violations were abated in good faith by Baker Rock Crushing Company and in a timely manner. (Joint Ex. 1.)

CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6438533	2/12/08	56.20003(a)	$100.00

I have found the violation occurred, it was not serious, and it was due to Baker Rock Crushing Company's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its numerous safety precautions, I conclude a civil penalty of $100.00 is appropriate.

CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6438534	2/12/08	56.14112(a)(1)	$176.00

I have found the violation occurred, it was not S&S, and it was due to Baker Rock Crushing Company's moderate negligence. Given the other civil penalty criteria, especially the company's low history of prior violations and its numerous safety precautions, I conclude a civil penalty of $100.00 is appropriate.

CIVIL PENALTY ASSESSMENTS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED ASSESSMENT
6438535	2/12/08	56.12004	$100.00

I have found the Secretary did not establish a violation. The damaged cable was not energized and was disconnected at both ends. Based on the record, I conclude the cable was not capable of carrying an electrical current at the time of inspection. Thus, the conditions presented did not violate the safety standard. For the reasons set forth above, Citation No. 6438535 shall be vacated.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 6438533 **IS AFFIRMED**.

IT IS ORDERED that Citation No. 6438534 **IS MODIFIED** to reduce the likelihood of injury from "reasonably likely" to "unlikely" and to delete the significant and substantial (S&S) designation.

IT IS ORDERED that Citation No. 6438535 **IS VACATED**.

Within 40 days of the date of this decision, Respondent **IS ORDERED** to pay civil penalties totaling $200.00 for the violations found above. Upon payment of the penalties and modification of the citation and orders, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge

Distribution:

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Wendy Ortman, Baker Rock Crushing Company, 21880 SW Farmington Road, Beaverton, OR 97007

/aw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

August 12, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MISHA), on behalf of LAWRENCE PENDLEY, Complainant, v.	:	TEMPORARY REINSTATEMENT PROCEEDING Docket No. KENT 2007-265-D MISHA Case No. MADI CD 2007-05
HIGHLAND MINING COMPANY, LLC, Respondent	:	Mine ID: 15-02709 Mine: Highland No. 9 Mine

ORDER DENYING MOTION FOR PROSPECTIVE APPLICATION OF REVIVED TEMPORARY REINSTATEMENT

On July 2, 2010, a Commission majority agreed with the Secretary that Lawrence Pendley's right to temporary reinstatement was revived because the 6th Circuit Court of Appeals in *Pendley v. FMSRHC,* 601 F.3d 417, 429 (6th Cir. 2010), had divested the Commission's decision in Mr. Pendley's discrimination case of its "final" nature and had remanded the case to the Commission. The Commission stated: "While the court remanded the discrimination proceeding to the Commission for specific purposes, it also reversed the Commission's decision upholding the judge. Prior to issuance of the Commission's discrimination decision, Pendley had a right to temporary reinstatement. Because the discrimination proceeding is back before the Commission, the right is revived." 32 FMSHRC, KENT 2007-265-D (June 2, 2010) (Order On Temporary Reinstatement) at 3. The Commission then ordered that Mr. Pendley "be reinstated immediately, with back pay retroactive to May 28, 2010, the date of the court's mandate, and until such time as the Commission issues a final order upon remand in the discrimination proceeding. Jurisdiction over his reinstatement will otherwise rest with the judge." *Id.* at 4 (n. omitted).

Counsel for Highland has moved that I order the revived temporary reinstatement to be effective as of the date the Commission issued its order – July 2, 2010. Counsel argues revival of the temporary reinstatement was a matter of first impression before the Commission and because it was not dealt with by the Court in its opinion, the first notice Highland had of the Commission's interpretation of the law on the issue was on July 2, 2010, when the Commission issued its Order on Temporary Reinstatement. Because Highland had no notice of the retroactive nature of the reinstatement, the reinstatement should be effective as of the date of the Commission's order. Respondent's Mot. at 2. Highland's motion is opposed by the Secretary

and by Mr. Pendley, both of whom argue that because the Commission has reinstated Mr. Pendley "retroactive to May 28, 2010," I do not have authority to modify that part of the reinstatement. Secretary's Opposition at 2 (*quoting* Commission's July 2 Order at 4); Letter of Wes Addington to David Barbour (August 3, 2010). In addition, the Secretary asserts that even if I have jurisdiction, the concept of fair notice is inapplicable here, because the remedy of back pay has a "make whole" purpose, not a civil penalty or civil sanction purpose. Secretary's Opposition at 3-4.

Highland's motion **IS DENIED**. As both counsel for the Secretary and Mr. Pendley correctly note, the Commission ordered Mr. Pendley's reinstated "immediately, with back pay retroactive to May 28, 2010, the date of the court's mandate." Order at 4. It is true that the Commission has returned jurisdiction over the reinstatement to me, but not as to the effective date of the reinstatement. That issue has been decided by the Commission. Other than that, I may rule on matters concerning Mr. Pendley's revived reinstatement. Or, as the Commission put it, "Jurisdiction over [Mr. Pendley's] reinstatement will otherwise rest with the judge." *Id.*

David F. Barbour
Administrative Law Judge

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/sa

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 13, 2010

CHARLES SCOTT HOWARD, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 2008-736-D
v.	:	BARB CD 2007-11
CUMBERLAND RIVER COAL COMPANY, Respondent	:	Mine ID 15-18705 Band Mill No. 2 Mine

DECISION

Appearances: Tony Oppegard, Esq., Lexington, Kentucky, and Wes Addington, Esq., Appalachian Citizens Law Center, Whitesburg, Kentucky, for Complainant; Timothy M. Biddle, Esq., and Willa B. Perlmutter, Esq., Crowell & Moring LLP, Washington, D.C., for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Charles Scott Howard against Cumberland River Coal Company, pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). A trial was held in Whitesburg, Kentucky. For the reasons set forth below, I find that the Complainant was discriminated against because he engaged in activities protected by the Act.

Background

On April 20, 2007, Charles Scott Howard, an employee of Cumberland River Coal Company, took video footage of seals at Cumberland's Band Mill No. 2 Mine. A few months later, on July 12, the video was shown as part of Howard's testimony at a Mine Safety and Health Administration (MSHA) public hearing regarding an emergency temporary standard on mine seals. Almost immediately after the video was shown, MSHA inspectors visited the Band Mill No. 2 Mine. One day later, MSHA issued a citation to the company for an alleged failure to conduct a preshift examination of the seals prior to beginning work. On July 19, a second citation was issued for Cumberland's alleged failure to maintain the seals. On July 27, a written warning of disciplinary action was given to Howard for taking a non-permissible video camera underground.

Averring that the written warning was given to him for engaging in activity protected

under the Act, Howard filed a discrimination complaint with MSHA, under section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on August 3, 2007.[1] On February 12, 2008, MSHA informed him that, on the basis of a review of the information gathered during its investigation, "MSHA has determined that the facts disclosed during the investigation do not constitute a violation of Section [*sic*] 105(c)." On March 19, 2008, Howard then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3).[2]

Cumberland maintains that the written warning of disciplinary action was not an adverse action and, even if it were, it was issued solely because Howard created an unsafe condition, in violation of company policy, and not because he engaged in protected activity. I find that the warning was issued as the result of Howard's protected activity, that the warning was an adverse action and that the company's claim that it was issued only because he violated company policy is a pretext.

Findings of Fact

Cumberland River Coal Company, a division of Arch Coal, operates the Band Mill No. 2 Mine in Letcher County, Kentucky. Howard was employed by Cumberland as a "beltman" at the mine. His job responsibilities included performing preshift examinations of the beltlines and seals for hazardous conditions. (Tr. 419.) During the performance of his duties in March and April 2007, Howard noted in the examination book that numerous seals at Band Mill were "leaking water." (Comp. Ex. 8.) Howard also expressed his concern over the conditions of the seals to many mine foremen including John Scarbro, Terry Mullins, Bob Kilbourne, Ronnie Adams, and James Turner. (Tr. 420.)

Besides Howard, at least one other preshift examiner had brought the leaking seals to the attention of management. (Tr. 118.) As the water that had built up behind the seals subsided, Cumberland began to repair them. (Tr. 120.) This included a method known as "block-bonding" (plastering) over the leaks. (Tr. 478.) The repair process lasted approximately two to three months. (Tr. 120.)

On April 20, 2007, Howard took video footage of a number of seals at the mine. (Tr. 423, 445, 470.) Management had not given him permission to take a camera underground.

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[1] Section 105(c)(2) provides, in pertinent part, 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 alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

On May 22, 2007, MSHA published Sealing of Abandoned Areas, 72 Fed. Reg. 28798 (2007). A public hearing regarding this rule was held on July 12, 2007, in Lexington, Kentucky. Howard testified at the hearing and, as part of his testimony, showed the video with the audio off. (Tr. 41-43.) He did not tell the audience that the video was of the Band Mill mine. Up until this point, Howard had never shown the video to anyone other than his lawyer. (Tr. 467.)

Ronnie Biggerstaff, the Manager of Safety at Lone Mountain Processing, another facility owned by Arch Coal, attended the MSHA hearing. He observed Howard's testimony and witnessed the video of seals displaying water seepage. (Tr. 43.) Biggerstaff suspected that the video was of seals in a Cumberland River mine. (Tr. 44.)

After seeing the video, Biggerstaff called his manager at Lone Mountain, Thurman Holcomb. (Tr. 44.) Holcomb had formerly been the General Manger at Cumberland River. (Tr. 44.) Biggerstaff informed Holcomb of the video he witnessed at the public hearing and anticipated that it would probably be on the evening news. (Tr. 44-45, 47.) In response, Holcomb called the current General Manager of Cumberland River, Gaither Frazier. (Tr. 58.) Frazier left a management meeting to take Holcomb's phone call. (Tr. 58.) When he returned to the meeting, Frazier informed the other members of management that he had been advised that Howard had shown a video of leaking seals at the MSHA public hearing. (Tr. 59.) As a result, they realized that "MSHA and the state" would be coming to the property. (Tr. 59.)

Approximately thirty minutes after this phone call, MSHA inspectors arrived at the mine. (Tr. 61.) Scarbro, Superintendent at the Band Mill mine, went underground with the inspectors to check on the seals. (Tr. 61.) State and federal inspectors were frequently at the mine in the following weeks. Between July 12 and July 27 inspectors were on the property during 16 different shifts. (Tr. 66-67.) On July 13, an MSHA inspector issued Citation No. 6665554 for an alleged failure to perform preshift examinations of the seals in violation of section 75.360(b)(5), 30 C.F.R. § 75.360(b)(5). (Comp. Ex. 3.) Additionally, Citation No. 7502210 was issued by MSHA on July 19, for an alleged failure to maintain the seals for their intended purpose in violation of section 75.333(h), 30 C.F.R. § 75.333(h). (Comp. Ex. 4.)

The day after the public hearing, July 13, Frazier spoke with Scarbro, Valerie Lee, Human Resources Manager, and Leroy Mullins, Safety Manager, about disciplining Howard. (Tr. 72, 484.) Consequently, on July 27, Howard was issued a written warning of disciplinary action. The letter, which serves to put an employee on notice of the potential of further discipline, was placed in Howard's personnel file. (Tr. 485.) After one year, July 27, 2008, the letter was removed. (Tr. 232, 485.) The disciplinary letter stated:

> On April 20, 2007 you potentially created an unsafe work environment at the Band Mill # 2 mine by using a non permissible [*sic*] video camera underground. This action is not only an unsafe mining practice, but it is a violation of company policy to take photos or video tape at any active site on company property

without the prior written approval from the General Manager.

> Based on your disregard for safety precautions in a potentially hazardous situation, and violation of company policy you are hereby given a written warning of disciplinary action.

(Comp. Ex. 7.)

Cumberland's policy on photography was initially established in an e-mail authored by Holcomb. The e-mail was sent to Cumberland management personnel on August 25, 2004.[3] Approximately one year later, a letter regarding the photography policy was distributed to Cumberland employees in their pay envelopes. It stated: "No one is allowed to take photos or shoot video on any of the active sites on company property without prior, written approval from the General Manager." (Comp. Ex. 6.)

Despite Cumberland's dissemination of its policy on photography, the totality of the testimony by both employees and managers was that the photography policy was not enforced during the period relevant to this proceeding.[4] Both employees and managers testified that photographs were taken on Cumberland property and that some were even publically posted or otherwise circulated. No employee or manager testified that he or she had received written permission from the General Manager, before taking a photograph. No employee or manager, other than Howard, was disciplined for violating this policy.

Photographs taken by managers

Numerous managers for Cumberland testified that they had taken photographs without the written consent of the General Manager. Scarbro took photographs underground, using a

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[3] The e-mail stated, in pertinent part:

> In response to a recent fatality in the area, we should establish a policy regarding video or photography on the property. Effective immediately, no one is allowed to take photos or shoot video on any of the active sites on company property without **written** approval from the General Manager. In eastern Kentucky recently an employee decided to video a pillar fall underground, and he was fatally injured when the roof collapsed.

(Comp. Ex. 5.)

[4] The relevant period for this proceeding begins at the creation of the photography policy (August 25, 2004) until the issuance of the disciplinary letter for a violation of the policy on July 27, 2007.

non-permissible camera, four or five times. (Tr. 76, 79.) Although he believed that he had permission to take photographs underground, it was not written permission. (Tr. 79, 90.) Several photos were taken beyond the last open cross cut. (Tr. 91-92, 96-97, Comp. Ex. 9.) Photography beyond the last open cross cut with a non-permissible camera is against MSHA regulations. (Tr. 93.)

Keith Pinson, Load Out Plant Manager at the Preparation Load Out Facility, took photographs on Cumberland property 40 to 50 times without written permission. (Tr. 308, 310.) Lee also took photographs on company property and three were published in the mine newsletter, *Miner News,* Vol. III, No. 1. (Comp. Ex. 15 at p. CRCC 0605, Tr. 190.) She did not have written permission to take the photos. (Tr. 191.)

Mullins took about 16 photographs at various times in various location at the mine. (Comp. Ex. 18, Tr. 292-296.) Mullins had verbal rather than written approval. (Tr. 269-272.) Danny Webb, Mine Manager at Blue Ridge Surface and Highwall Miners for Cumberland River, took about 12 photographs, during the relevant period, without written permission. (Tr. 302-306.)

Holcomb was the General Manager at Band Mill from August 2004 to August 2006. (Tr. 326.) During that time he asked managers to take photographs for business related purposes. (Tr. 334-35.) According to him, managers had implied permission to take photographs and cameras were provided by the company. (Tr. 346.) He also claimed to have issued and denied permission slips in response to employees' requests to take photographs, although the only one he could remember was for Mike Yates, the Belt Portal manager. (Tr. 336, 344-45.) It turned out, however, that the incidence with Yates occurred after Howard was disciplined and a year after Holcomb had moved on to Lone Mountain. (Tr. 501.)

Photographs taken by employees

Employees of Cumberland also testified that they had taken photographs on company property without the written consent of the General Manager. For example, at Lee's request, Catina Ridings, Payroll and Human Resources Clerk, took about 20 photographs with a company camera at an awards banquet held on Cumberland property. (Tr. 141, 156.) On another occasion Pinson asked Ridings to take pictures at a retirement celebration. (Tr. 142.) The photographs were taken in the parking lot, and later published in the company newsletter. (Tr. 142-43.) She did not have written permission from the General Manager, but instead had verbal permission from her immediate boss. (Tr. 154-55.)

Terry Price, Maintenance Planner, testified that he took photographs on company property from July 2005 to July 2007. (Tr. 364, 367.). Since a camera was issued to him and taking photographs was an important part of his job, he did not believe that the policy applied to him. (Tr. 374.)

Further Findings of Fact and Conclusions of Law

Section 105(c)(1) of the Act, 30 U.S.C. § 815(c)(1), provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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 (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

In order to establish a *prima facie* case of discrimination under section 105(c)(1), a complaining miner must show: (1) That he engaged in protected activity; and (2) That the adverse action he complains of was motivated at least partially by that activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Protected Activity

Cumberland does not "dispute that [Howard] showing the video o[r] participating in the MSHA hearing was protected activity." (Tr. 26.) Instead, Cumberland maintains that the Mine Act does not protect Howard's act of videotaping underground without the General Manager's permission. (Resp. Br. at 15.) Cumberland alleges that "[t]here is a difference between communicating a complaint about an allegedly hazardous condition, which is a protected activity, and merely taking a picture of it, which is not." (Resp. Br. at 15.) Cumberland further asserts that Howard did not make the video to ensure that the leaks were fixed, because he did not show it to MSHA or the company until long after they had been repaired. (Resp. Br. at 16.)

As the courts have noted, the purpose of the Mine Act is "to protect the health and safety of miners." *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982). The anti-discrimination provision is to be interpreted expansively to effect this purpose. *See Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469, 472 (11th Cir. 1985); *Sec'y of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448, 1452 (D.C. Cir 1989). Accordingly, I find that Howard's videotaping of the condition of the seals was protected activity.

The video camera was the method Howard used to document his safety concerns. He then used the videotape to communicate those concerns to MSHA and the public at a hearing on that very topic. Cumberland's assertion that it is protected activity to observe an unsafe condition and tell someone about it, but not protected activity to take a picture of it and show it unless one has the written permission of the General Manager is disingenuous. While the failure to obtain written permission may have provided an independent basis for disciplining Howard, it does not remove his videotaping of leaking seals from being protected activity, anymore than his not wearing a hard hat while taking the video would make the videotaping unprotected. The company does not argue that videotaping can never be protected activity, only that it is not if done without written permission.

Nor is the operator's argument that Howard was not engaging in protected activity when he videotaped the leaking seals, because he did not show it to anyone, other than his attorney, until three months later, persuasive. He had already notified mine authorities of his concerns about the seals when he recorded his observations in the preshift book and spoken to his supervisors. It would make little sense for him to subsequently videotape the leaking seals if he did not still have those concerns and believe that they were not being addressed.

Consequently, I conclude that Howard engaged in protected activity when he made the videotape and when he showed the videotape at the MSHA hearing.

Adverse Action

The Commission has held that an adverse action is an act of commission or omission by the operator subjecting the affected miner to discipline or to a detriment in his employment relationship. *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984). Cumberland maintains that Howard suffered no adverse action when he was given the written warning of disciplinary action and it was placed in his personnel file. I find that the written warning of disciplinary action was adverse.

Cumberland's position is based on the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). In that case, the court held that for an action to be adverse under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, the complainant "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[5] *Id.* at 68 (citations omitted).

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[5] Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), states that:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has

Based on this, the company maintains that Howard suffered no adverse consequence because the letter in his file did not deter him from making further discrimination claims.

Interestingly, the Complainant also cites the case in support of his claim. In describing actions that were *not* materially adverse, the court said that "[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* Howard argues that the letter was not such a petty slight or minor annoyance.

At the outset, it should be noted that it is not clear whether *Burlington Northern* even applies to section 105(c) cases. The Sixth Circuit Court of Appeals specifically declined to find that the case applied to the Mine Act, holding that such "[a] fundamental change in Mine Act jurisprudence . . . ought first to be considered by the Secretary and the Commission, neither of whom is an active litigant here." *Pendley v. FMSHRC*, 601 F.3d 417, 428-29 (6th Cir. 2010). The Secretary is not a litigant in this proceeding either.

However, it is not necessary to decide whether the *Burlington Northern* definition of adverse action applies to Mine Act cases. I find that the warning of disciplinary action was adverse both under existing law or under the Supreme Court's definition.

The disciplinary letter was a discrete act of discipline, issued for an alleged violation of Cumberland's policy on photography. The issuance of a letter, rather than a verbal warning, is a more severe form of discipline at Band Mill.[6] (Tr. 485.) It served to put Howard on notice that further action could be taken. (Tr. 485.) It wasn't until one year later that the letter was removed from his personnel file. Therefore, the letter had potential consequences that remained long after its issuance.

A reasonable miner, in a similar situation, might well be apprehensive about exercising protected rights under Section 105(c) for fear of future more severe disciplinary action. The letter could have had a potential chilling effect on further documentation of hazardous conditions by Howard or by other miners aware of the disciplinary action. Thus, the fact that Howard apparently was not deterred does not mean that the action was not adverse. Accordingly, I

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fn. 5 (continued)

> opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[6] The company has a three step disciplinary process–verbal warning, written warning or discharge. (Tr. 484.)

conclude that the issuance of the disciplinary letter was an adverse action.

Motivated by Protected Activity

The pertinent question in this case is whether the "adverse action" was motivated in any part by protected activity. The Commission has recognized that direct evidence of motivation is rarely encountered; more often, the only available evidence is indirect. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and adverse action. *Id.*

Cumberland learned that Howard had shown a videotape of leaking seals in the Band Mill mine at a public hearing on seals held by MSHA on July 12. The next day, Scarbro, Frazier, Lee and Mullins began having discussions about disciplining him. (Tr. 72.) At that time, no one in management had seen the video or talked to Howard about it. (Tr. 74-75, 484.) Obviously, they were reacting to the fact that the mine's leaking seals were going to be in the news and that MSHA had already been to the mine to inspect the seals. They did not even know for sure that Howard was the one who had taken the videotape; all they knew was that he had shown it.

It is apparent that, almost immediately after gaining knowledge of the videotape showing, management decided to discipline Howard. The fact that they did not actually issue the letter until two weeks later because they were discussing the exact type of discipline and clearing the language in the letter with counsel does not diminish the close coincidence in time between the protected activity and the adverse action. Further, there can be little doubt that as a result of their displeasure with Howard's actions that subjected the mine to MSHA and public scrutiny, management decided to respond by disciplining him. Consequently, I have no trouble concluding that, at a minimum, the issuance of the written warning of discipline was motivated, in part, by Howard's protected activities.

The Operator's Affirmative Defense

Cumberland River has failed to show that no protected activity occurred or that the adverse action was in not motivated by the protected activity. It has attempted to show, however, that it also was motivated by the Howard's violation of the camera policy and would have taken the adverse action for that unprotected activity alone. I find that it has failed to establish that assertion.

In *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), the Commission enunciated several indica of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules

or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

I find that enforcement of the video policy with Howard was a pretext for disciplining him for his protected activities. Although the camera policy stated that *no one* could take photos or shoot videos *without the prior, written approval of the General Manager*, it is well established that other employees of Cumberland routinely failed to abide by the photography policy.[7] Some of the violations of the policy were open and obvious. Scarbro even admitted to taking photographs, with a non-permissible camera, beyond the last open cross cut (in violation of MSHA regulations).[8] Additionally, other members of the managerial staff routinely failed to abide by the policy or instruct employees to abide by the policy. Indeed, prior to Howard, there is no evidence that anyone had ever complied with the policy, much less been disciplined for not following it.

The company argues that the managers who violated the policy had implied permission to take photographs. Yet the written policy contains no exceptions. If all of the managers and employees who testified about taking pictures had implied permission to take photographs then there really was no policy. It is obvious that the only reason the company decided to enforce the policy with Howard was to contrive a basis for disciplining him that ostensibly did not involve his protected activities.

Conclusion

Charles Scott Howard, while performing his job as a preshift examiner, made numerous entries in the preshift examination book about leaking seals in the Band Mill No. 2 Mine. When action had not been taken to his satisfaction to correct the situation, he made a videotape of the leaking seals. Three months later he showed the videotape at an MSHA public hearing on improving seals in mines. When the company learned of his protected activities, it decided to discipline him. As a result, a written warning of disciplinary action was placed in his file for

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[7] The same policy memo provided that cell phones could not be used on the job, but if they had to be used, employees had to "clear the call with his or her *immediate supervisor*." (Comp Ex. 6.) (emphasis added.) It is apparent that the company was aware of how to provide for exceptions in the photography policy if that was the intention.

[8] Howard's videotape was not made beyond the last open cross cut and, therefore, he was not in an area of the mine where permissible equipment was required. (Tr. 283-84.)

failing to get the written permission of the general manager before making the videotape and for using a non-permissible camera in the mine. As the photography policy had never been adhered to or enforced prior to its use with Howard, it clearly was used by the company to cover its disciplining of him for engaging in protected activity. Consequently, I conclude that Howard was discriminated against for engaging in protected activities in violation of section 105(c) of the Act.

Order

Having determined that Howard was discriminated against unlawfully, it follows that he is entitled to the relief sought in his complaint. Accordingly, it is **ORDERED** that the Respondent:

1. **Expunge** from Howard's personnel file all references to the unlawful issuance of the written warning of disciplinary action, and to expunge such references from any other records maintained by the company.[9]

2. **Reimburse** Howard for all reasonable and related economic losses or expenses incurred in the institution and litigation of this case, including reasonable attorney's fees.

3. **Post** this decision at all of its mining properties in Letcher County, Kentucky, in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days.

The parties are **ORDERED TO CONFER** within **21 days** of the date of this decision for the purpose of arriving at an agreement on the specific actions and monetary amounts that the Respondent will undertake to carry out the remedies set out above. If an agreement is reached, it shall be submitted with **30 days** of the date of this decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit their respective positions, concerning those issues on which they cannot agree, with supporting arguments, case citations and references to the record, within **30 days** of the date of this decision. For those areas involving monetary damages on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. If a further hearing is required on the remedial aspects of this case, the parties should so state.

In accordance with Commission Rule 44(b), 29 C.F.R. § 2700.44(b), a copy of this

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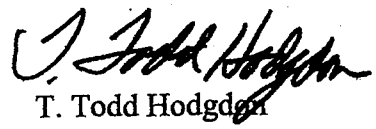
[9] The letter itself was removed from Howard's file one year after its issuance. (Tr. 231-32.) However, there also may be pending lawsuits between Howard and the company which reference the letter. (Tr. 243.) As long as those lawsuits, if any, are pending, the company may maintain references to the letter in its litigation files.

decision will be sent to the Regional Solicitor having responsibility for the Commonwealth of Kentucky so that the Secretary may take the actions required by that rule.

The judge, or his duly appointed successor, retains jurisdiction in this matter until the specific remedies to which Howard is entitled are resolved and finalized. Accordingly, **this decision will not become final** until an order granting specific relief and awarding monetary damages has been entered.



T. Todd Hodgdon
Senior Administrative Law Judge

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/rps

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 16, 2010

SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDING
ADMINISTRATION, (MSHA),	:	
Petitioner	:	Docket No. VA 2010-489-E
v.	:	Citation No. 7307437;07/21/2010
	:	
CONSOLIDATION COAL COMPANY,	:	Buchanan Mine #1
Respondent	:	Mine ID 44-04856

DECISION

Appearances: Stephen Turow, Esq., Ashton Phillips, Esq., U.S. Department of Labor , Office of the Solicitor, on behalf of the Petitioner.

R. Henry Moore, Jackson Kelly PLLC, for Respondent, Consolidation Coal Company

Before: Judge Moran

This case is before the undersigned administrative law judge ("Court") on a Referral of an Emergency Response Plan Dispute by the Secretary of Labor ("Secretary") 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 (the "Mine Act" or "Act"), as amended by the Mine Improvement and New Emergency Response Act of 2006 (the "MINER Act"), 30 U.S.C. § 876(b)(2)(G). Consol's Buchanan Mine No. 1 is an underground coal mine located in Mavisdale, Virginia. The citation in issue, No. 7307437, a Section 104(a) citation, was issued on July 21, 2010, pursuant to Section 316(b) of the Mine Act. That citation notes MSHA's concern that the ERP failed to demonstrate that it would "effectively provide for the safe maintenance of individuals who may be trapped underground in the mine for a sustained period of time" on the basis that the Strata refuges can only maintain interior apparent temperatures at or below 95°F when the mine temperatures surrounding the refuges are 70° or less. MSHA advised that it needed "*reliable* technical data that demonstrates that the Strata refuge alternatives . . . can safely maintain miners given the mine's specific conditions." Jt. Ex. 14 (emphasis added). Specifically, the Citation states that, under its ERP, Consol will be using Strata Safety Products' ("Strata") Fresh Air Bays for the refuge alternatives but that Consol has not shown that those units will provide a safe environment for miners who may need to use them.

Background

Section 2 of the MINER Act requires underground coal mine operators to develop and submit for MSHA approval an emergency response and preparedness plan ("Emergency Response Plan" or "ERP"). The ERP is intended to address the evacuation of miners who are endangered by a mine emergency and to maintain miners who are trapped underground, unable to evacuate the mine. 30 U.S.C. §876(b)(2). A central tenet of the MINER Act is to provide for the maintenance of miners who cannot evacuate and are forced to remain underground. S.Rep. No. 109-365, 109th Cong., at 4 (2006) at 4. The legislative history for the MINER Act noted that, where miners are unable to escape and therefore must await rescue, "breathable air is essential." S.Rep. at 6. In carrying out the legislation's directive, the Secretary issued guidance to the mining community and this included Program Information Bulletin No. PO 7-03 ("PIB"), which directed that ERPs must include a provision specifying how breathable air will be maintained.

The parties' stipulation as to the issues in this proceeding:

The parties stipulated that the following are the issues relevant to the resolution of the above-captioned ERP Dispute Proceeding.

a. Did MSHA District Manager Ray McKinney act arbitrarily and capriciously in revoking or withdrawing his approval of the refuge alternative provisions associated with the ERP adopted by Consol for implementation at the Buchanan Mine #1?

b. Did 30 C.F.R. § 75.1506(a)(3) obligate MSHA District Manager Ray McKinney to accept the use of the ERP-specified Strata refuge units and prohibit him from revoking or withdrawing his approval of the ERP as submitted by Consol for implementation at the Buchanan Mine #1?

c. Given the course of interaction between Consol and MSHA's District 5 office concerning the use of Strata refuge units at the Buchanan Mine #1, did MSHA act in accordance with 30 U.S.C. § 876(b)(2)(G) in issuing Citation No. 7307437.

The standard to be applied.

The Commission has most recently addressed the subject of emergency response plans, and disputes arising under those plans, in *Twentymile Coal Co.*, 30 FMSHRC 736, 2008 WL 4287782, August 2008, ("*Twentymile*"). A review of the guidance in that decision is useful here.[1] In ERP disputes, the scope of a hearing is limited to review of the disputed provision(s) of the Plan. The Secretary has the burden of proving that MSHA's refusal to approve the disputed

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[1]The Commission, then composed of four members, divided evenly on the *application* of the principles to be applied in ERP disputes, but there was unanimity as to the test itself. This decision's reference to *Twentymile* speaks only to the aspects of that decision where the Commission members were in agreement.

aspects of the Plan was not "arbitrary and capricious."[2] That term is expressed in various ways. For example, in *Twentymile*, Judge Manning described the inquiry as to a District Manager's requirement to include a provision in the Plan as whether it was "not unreasonable." Still another way to pose the question is whether the District Manager's decision was "reasonable in light of the particular circumstances."

The Commission also noted that the concept of plans is not new under the Mine Act and that the process of devising ERPs, as with the development of other plans, must address the specific conditions of the particular mine involved.[3] The process of the development of plans in general, including ERPs, is that the operator and MSHA first negotiate in good faith over disputed provisions and that the negotiation continue for reasonable period of time. Thus, the parties must identify and give notice of their respective positions and then engage in adequate discussion of the disputed issues. Once that has occurred, however, as the negotiation process cannot be unending, it is the Secretary's responsibility to "independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *Id.* at *10, quoting *UMWA v. Dole*, 870 F.2d 662, (D.C. Cir. 1989), involving mining plans. The point is that, the negotiation process is not identical to that which may occur between private parties. Rather, the Secretary, having made the effort to negotiate the issues, can ultimately "insist upon the inclusion of specific provisions as a condition of the plan's approval." *Id.* This is bounded only by the Secretary's duty to act in good faith and to not impose conditions arbitrarily.[4]

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[2]In *Emerald Coal Res., LP*, 29 FMSHRC 956(Dec. 2007), the Commission earlier upheld the "arbitrary and capricious" standard of review, noted the applicability of the 'plan' model for ERPs, stated that, as with other plans such as ventilation or roof control, ERPs must address "the specific conditions of a particular mine," and that MSHA has a duty to negotiate differences over ERPs in good faith and for a reasonable period of time. In upholding the Secretary's denial of more time for the mine operators to place purchase orders for refuge chambers, the Commission, upon examining the "totality of [the] circumstances" concluded that the Secretary acted reasonably.

[3]The MINER Act includes six areas that must be addressed in all ERPs, one of which is there must be post-accident breathable air for trapped miners which is sufficient to maintain them "for a sustained period of time." *Id.* at * 10.

[4]Consistent with its view of the process, the Commission rejected the contention that mine operators may unilaterally implement their ERPs, expressing that "the approval process, with the involvement of MSHA district office personnel, is an integral part of the plan formulation process." *Id.* at *11.

In examining the "breathable air" provision in Section 316 of the Mine Act, as amended by the MINER Act, the Commission referenced the "*Chevron*" standard,[5] and also noted that the Section imposes *additional* breathable air requirements which are sufficient to maintain trapped miners "for a sustained period of time." *Id.* at *13. The Commission expressly rejected the argument that the test for a particular requirement applies only to "likely" risks, and instead subscribed to the Secretary's standard that a "reasonable possibility" is sufficient to justify a requirement.[6] *Id.* It noted that the Senate Report expressed that the "emergency plan should address *possible* incidents[7] and the attendant need for sufficient breathable air [and that] [t]he projected need is [] fact specific." *Id.* at *14.

The parties stipulations:

Consolidation Coal Company ("Consol") and the Secretary of Labor, by her undersigned counsel, and stipulate and agreed, through counsel, as follows:

1. The Buchanan Mine No. 1 ("Buchanan") is an underground bituminous coal mine located near Mavisdale, Virginia.

2. Buchanan produces coal by the use of longwall mining and utilizes continuous miners to develop entries around blocks of coal to facilitate such mining.

3. Buchanan is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977

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[5]*Chevron U.S.A Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, (1984) represents the foundation stone for statutory construction in the administrative law sphere. Its essence is that, first, under the "*Chevron* Step One inquiry," one must determine if the statute clearly speaks to the particular issue in dispute and if it does, such expressed Congressional intent is applied. However, where the statute is not clear, the "*Chevron* Step Two" analysis is applied. That inquiry examines whether the agency's interpretation of the statutory provision is reasonable.

[6]Although the Commission was considering "reasonable possibility" in the context of determining whether the miners could become trapped, and rejected the contention that the measure was to show a "likely" risk of entrapment, the Court believes that the "reasonable possibility" measure applies to the issue faced here; whether there was a 'reasonable possibility' that miners awaiting rescue could be exposed to temperatures in the rescue chamber exceeding 95° F. While the Commission did not find, applying the *Chevron I* analysis, that a "reasonable possibility" measure was compelled by the statute, it then applied the *Chevron II* analysis and concluded that the Secretary's interpretation was reasonable.

[7]The Commission also made it clear that, in reviewing challenges to disputed provisions of an ERP, it is not germane to consider and compare how ERP's were being addressed in other mining districts.

("the Act"), 30 U.S.C. § 801 et seq.

4. On June 15, 2006, the Mine Improvement and New Emergency Response Act of 2006 ("the MINER Act") was enacted.

5. Section 316(b)(2) of the MINER Act requires that each underground coal mine operator develop and adopt a written emergency response plan ("ERP").

6. Section 316(b)(2) states that an adopted plan is subject to review and approval by the Secretary.

7. Among the elements required in each ERP are provisions with respect to supplying post-accident breathable air to trapped miners. Section 316(b)(2) of the Act contains, in part, the following:

> 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.

8. The use of refuge alternatives/chambers or shelters is a method of complying with the requirements with respect to post-accident breathable air.

9. ERPs were initially submitted prior to the promulgation of the mandatory standards for refuge chambers or refuge alternatives on December 31, 2008.

10. Consol developed an ERP that was initially approved in June 2007. A copy of such initial plan has been marked as Joint Exhibit 1 and is offered into evidence.

11. Such plan contemplated the use of refuge alternatives manufactured by Strata Safety Products LLC ("Strata"). It stated as follows:
The emergency shelters to be installed are the Strata Products 35 person Inflatable Refuge Chambers (IRC).

12. MSHA issued, on December 31, 2008, the final rule relating to Refuge Alternatives for Underground Coal Mines. A copy of the final rule is identified as Joint Exhibit 2 and is offered into evidence.

13. The final rule specifies in 30 CFR § 75.1506(a) as follows:

Each operator shall provide refuge alternatives and components as follows:

(1) Prefabricated self-contained units, including the structural, breathable air, air monitoring, and harmful gas removal components of the unit, shall be approved under 30 CFR part 7; and

(2) The structural components of units consisting of 15 psi stoppings constructed prior to an event shall be approved by the District Manager, and the breathable air, air monitoring, and

harmful gas removal components of these units shall be approved under 30 CFR part 7.

(3) Prefabricated refuge alternative structures that states have approved and those that MSHA has accepted in approved Emergency Response Plans (ERPs) that are in service prior to March 2, 2009 are permitted until December 31, 2018, or until replaced, whichever comes first. Breathable air, air-monitoring, and harmful gas removal components of either a prefabricated self-contained unit or a unit consisting of 15 psi stoppings ... that states have approved and those that MSHA has accepted in approved ERPs that are in use prior to March 2, 2009 are permitted until December 31, 2013, or until preplaced, which ever comes first. ...

14. The Strata unit is a prefabricated refuge alternative produced by Strata Safety Products LLC.

15. The Strata unit with a 36 person capacity, the type of units Consol utilizes, was approved for use by the State of West Virginia.

16. Such Strata units were in service at Buchanan prior to March 2, 2009.

17. On October 15, 2009, Consol submitted a revised ERP for approval. It provided for the continued use of Strata units. A copy of the October 15 ERP is identified as Joint Exhibit 3 and is offered into evidence.

18. By letter dated November 12, 2009, MSHA approved Consol's proposed Buchanan ERP in its entirety. A copy of the November 12, 2009 approval identified as Joint Exhibit 4 is offered into evidence.

19. In his January 27, 2010 letter to Consol General Superintendent William Meade, MHSA District Manager Ray McKinney sought to revoke Consol's October 15, 2009 ERP as it pertained to refuge alternatives in use at Buchanan. The letter served as the initial notice in the approval revocation process. A copy of the January 27, 2010 letter is identified as Joint Exhibit 5 and is offered into evidence.

20. On February 9, 2010, Mr. Meade responded to Mr. McKinney and addressed ambient mine temperatures. A copy of the February 9, 2010 letter is identified as Joint Exhibit 6 and offered into evidence.

21. On April 8, 2010, Mr. McKinney replied to Mr. Meade's letter. Mr. McKinney indicated the letter was intended to serve as the second notice in the plan revocation process. The letter addressed Mr. McKinney's concerns about the Strata units' ability to maintain an internal apparent temperature below 95 degrees where ambient mine temperatures exceeded 70 degrees. A copy of the April 8, 2010 letter is identified as Joint Exhibit 7 and it is offered into evidence.

22. Buchanan General Superintendent Brent Holbrook sent Mr. McKinney an April 30, 2010 letter memorializing discussions that he had with District 5 officials regarding Consol's interest

in the solutions identified by Mr. McKinney (e.g. de-rating refuge capacity and use of cooling systems). The letter also addressed Mr. Holbrook's inquiries regarding the Strata's grandfathered status. Mr. Holbrook requested a meeting and sought an extension to submit additional information. A copy of the April 30, 2010 letter is identified as Joint Exhibit 8 and offered into evidence.

23. A May 4, 2010 letter from Mr. McKinney approved an extension request until May 21, 2010. A copy of the May 4, 2010 extension is identified as Joint Exhibit 9 and offered into evidence.

24. A May 21, 2010 letter from Mr. McKinney further extended the deadline, until June 4, 2010, to submit additional information regarding the efficacy of the use of Strata units at Buchanan. A copy of the May 21, 2010 letter is identified as Joint Exhibit 10 and offered into evidence.

25. On July 13, 2010, Mr. McKinney sent Consol another letter and repeated his prior concerns about the effect of temperatures in excess of 70 degrees on the deployed Strata's interior. Mr. McKinney indicated his intention to revoke the ERP at Buchanan on July 20, 2010 absent a compelling explanation for allowing additional time to provide the requested information or the submission of a revised ERP specifying updated means for safely maintaining trapped miners. A copy of the July 13, 2010 letter is identified as Joint Exhibit 11 and offered into evidence.

26. On July 20, 2010, Mr. Holbrook wrote Mr. McKinney proposing revisions to Buchanan's ERP. The revised plan would limit the number of miners allowed on a section based upon the temperature-adjusted refuge alternative capacity. A copy of the July 20, 2010 letter is identified as Joint Exhibit 12 and offered into evidence.

27. On July 21, 2010, Mr. McKinney sent a letter revoking Buchanan's ERP. Mr. McKinney acknowledged that "in the abstract," Consol's "de-rating plan," which would reduce refuge chamber capacity in areas of the mine with higher temperatures, "may be a viable approach," but he rejected the revisions because they were inadequately supported. Mr. McKinney also expressed concerns about the manner in which Consol had proposed to determine ambient mine temperatures in the areas of the mine where the Strata units are located. A copy of the July 21, 2010 rejection letter is identified as Joint Exhibit 13 and offered into evidence.

28. Citation No. 7347437 was issued on July 21, 2010, pursuant to Section 316(b)(2) of the Act, 30 U.S.C. § 816(b)(2). A copy of the citation is identified as Joint Exhibit 14 and is offered into evidence.

29. Under the heading and caption "Condition or Practice" the Citation alleges as follows: Consolidation Coal Company ("Consol") violated § 316(b)(2) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") by failing to develop, adopt, and submit to MSHA an

Emergency Response Plan ("ERP") for use at the Buchanan Mine #1 that has been demonstrated to effectively provide for the safe maintenance of individuals who may be trapped underground in the mine for a sustained period of time.

Consol's ERP provides that Strata Safety Products' ("Strata") Fresh Air Bays will be used for the refuge alternatives, but Consol has failed to demonstrate that these units will provide a safe environment for miners who may need to seek refuge. Strata specified that their units can only maintain miners at internal apparent temperatures not exceeding 95° F when mine temperatures surrounding the units are 70° F and below. However, temperatures in the mine have been recorded as high at [sic] 78° F by mine examiners in locations where these units may be used, and temperatures have regularly been measured in excess of 70° F by mine examiners and MSHA inspectors in such locations. After repeated requests and significant opportunity, Consol has failed to demonstrate that, as provided in the ERP, the Strata refuge alternatives will be capable of maintaining interior apparent temperatures not exceeding 95° F.

MSHA has discussed this ERP provision with the operator over a period of seven months, highlighted its concerns with respect to the use of the Strata refuge alternative as proposed in the [Buchanan] Mine #1 , and explained the Agency's rationale for demanding reliable technical data that demonstrates that the Strata refuge alternative as used at Buchanan Mine #1 can safely maintain miners given the mine's specific conditions. MSHA has carefully considered the operator's position and reviewed all proposals the operator has submitted to address these concerns. However, Consol has failed to provide reliable information to demonstrate that the Strata refuge alternatives can safely maintain miners for a sustained period of time at Buchanan Mine #1 given the manner that the refuges are proposed for use in the ERP.

30. Strata has represented that, when used at maximum capacity, refuge units specified for use in the Buchanan Mine #1's ERP are capable of maintaining internal apparent temperatures at or below 95 degrees Fahrenheit when used in mining environments with ambient temperatures at or below 70 degrees Fahrenheit.

31. Both MSHA and Buchanan Mine #1 representatives have measured ambient mine temperatures in excess of 70 degrees Fahrenheit at locations where Strata refuges are located pursuant to Buchanan's existing ERP during certain of the warmer months of the year.

32. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.

33. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein. The parties stipulate that the correspondence and attachments between Consol and MSHA may be admitted into evidence without objection.

34. Consol's operations affect interstate commerce.

35. The subject Citation was properly served by duly authorized representatives of the Department of Labor upon an agent for Consol on the date and at the place indicated therein.

Findings of Fact

MSHA witness Gregory Meikle is the Assistant District Manager for the Technical Division in Coal District 5, Norton Office. His immediate supervisor is District Manager Ray McKinney. Meikle's duties include the oversight, review and maintenance of all required plans, including emergency response plans. In Mr. McKinney's absence, he is also the acting District Manager.

Regarding this dispute, Meikle explained that, with all plans, they are submitted to the District Manager, and it is that individual who has the authority to either approve or deny, for reason, any plan that is submitted under the regulation.[8] Here, the District Manager's concern was with Consol's ERP. Particularly involved was the survivability of miners trapped underground, an issue amplified by the agency's concerns about deep cover mines[9] and their ambient temperatures. As a consequence of those concerns, MSHA took measurements at the Buchanan Mine. Those measurements were taken with an eye towards the worst case conditions, that is, the temperatures during the hottest time of the year. Accordingly, a MSHA ventilation specialist, David Woodward, took temperature measurements in August and September 2008 at that mine at the location of the refuge alternatives.[10] These were, of course, taken in unsealed areas of the mine. Government Exhibit13 is a spreadsheet developed from those temperature readings. The concern which was articulated from those temperature readings was that the Strata units could be used at specifications higher than those for which the units were intended.

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[8]Meikle stated that with any plan, including ERPs, all parties with a stake in the matter have an opportunity for input and that such input includes that derived from operators, miners, miners' representatives, MSHA inspectors, both technical and enforcement, and the agency's technical supervisory support group.

[9]Meikle expressed that MSHA had concerns over temperatures in deep cover mines as they could impact upon the refuge chambers and the concern that temperatures above 70 degrees could exceed the capabilities of the Strata units.

[10]Both 'dry bulb' an 'wet bulb' temperatures were taken. With the latter, employment of a wet sleeve over the thermometer bulb enables one to calculate the humidity, while the former is simply a 'bare' thermometer reading. For demonstrative purposes, Gov. Ex. 13A, was entered into the record. It is a map, supplied by Consol which presented, for demonstrative purposes, a rough approximation of the location of the Strata units at the mine and the places where MSHA took its thermometer readings.

Subsequently, MSHA learned from Strata, around November 2009, that the survivability of miners inhabiting their units would be maintained as long as the mine ambient temperature, (the mine air temperature) remained at 70 degrees or below. Meikle explained that the 70 degree temperature could result in a 95 degree apparent temperature inside the unit when occupied at its full capacity. This was significant because both NIOSH and the state of West Virginia had determined that temperatures in such refuges could not be more than 95 degrees without risking survivability to those in them.

MSHA did not feel that the February and March 2005 bore hole temperatures, supplied by Consol, and indicating that the mine's temperatures would not exceed 70 degrees, were a reliable indicator of ambient temperatures to which miners could be exposed. Rather, MSHA preferred to rely upon other temperatures, taken by Consol, as reflected in Gov. Ex. 14. Those temperatures were derived from the Buchanan Mine No. 1 examination books, and they recorded the apparent temperatures around the mine's refuge chambers.

Gov. Exhibits 14A and 14B were offered to drive home the point established by Consol's own temperature readings. Exhibit 14A is a spreadsheet developed from Consol's temperature readings. While the spreadsheet does not reflect *all* of the temperature data from Consol, it would have made no sense to include all of the readings, as MSHA was concerned, in the context of the survivability of miners in a rescue chamber, about those readings above 70 degrees. Exhibit 14B is an e-mail sent from Bill Fisher, an engineer for Consol and Buchanan Mine No. 1, in connection with the operator plan submittal to MSHA. Attachments with that email consisted of charts developed of temperatures at certain locations in the Buchanan Mine and they involved July 2010 temperatures. These also show temperatures at the mine in excess of 70 degrees. The point of this information is that *Consol itself* has recorded temperatures in 2010 which were above 70 degrees at this mine at locations of the refuge chambers. Accordingly, there can be no serious dispute that mine temperatures at this mine at the relevant locations for this dispute (i.e. the location of the Strata refuge units) can and do exceed 70 degrees.

This information, that is, the temperature readings and the information from Strata, prompted the District Manager's concern about the survivability of miners in those rescue chambers under those temperatures[11] and resulted in the January 27, 2010 MSHA letter to Consol. Joint Ex. 5. The letter, from District Manager McKinney, expressed his concern about the Strata units being used in conditions beyond their intended use and that miners would not be protected under such conditions.[12] Accordingly, the letter sought information from Consol to

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[11] The information from Strata advising about the problem associated with temperatures above 70° was received by MSHA in late November, 2009.

[12]Government Exhibit 23 is a letter from Strata Safety Products discussing the refuge chamber internal heat/humidity statement. It references that a 70-degree ambient mine temperature is the temperature at which their fresh air base could maintain a 95-degree apparent temperature. Tr. 98

support the continued use of the Strata units under those adverse conditions. Reducing the number of persons occupying such refuges or employing a suitable cooling system were mentioned as possible solutions to the problem.

Consol's initial response was that the mine's temperatures would not exceed 70 degrees. Its theory was that cooler mine air flowing over the refuges from the mine's ventilation would reduce the temperatures inside the rescue unit. Consol also cited to bore hole temperatures[13] but MSHA concluded that the information it provided did not support the use of the refuge chambers in the conditions that concerned MSHA. That is, conditions where the mine temperature exceeded 70°. MSHA could not subscribe to the bore hole temperatures because most of them were taken from sealed areas of the mine.[14] In contrast, the temperatures taken by MSHA were derived, as previously mentioned, from the relevant active areas of the mine. Miners, of course, by definition, cannot take refuge in 'sealed' areas of a mine.

Further discussion of the mine temperatures is clearly unwarranted. There is no credible information to rebut that mine temperatures at this mine exceed 70°, at least at certain times of the year. Not surprisingly, these temperatures are experienced in the summer months. So too, the claim that the mine's ventilation system would act to cool the refuge chamber down so that effectively the temperature would not exceed 70° and therefore that the refuge interior would not exceed 95°does not warrant further discussion because, even if the ventilation had that effect, it provides no answer to a scenario where the ventilation had shut down during a mine emergency.

Joint Ex. 7 represents MSHA's response, identifying the expression of its concerns to the information offered by Consol. That letter, which referenced possible solutions to the problem MSHA identified, gave Consol until April 30, 2010 to provide the information to support the use and conditions for the refuge units. Consol's response asked for more time to submit the information requested by MSHA and the request was granted. Jt. Ex. 9. The extension gave Consol until May 21st. Then, another extension was allowed by MSHA, this time until June 4, 2010. Jt. Ex. 10. At Consol's request, MSHA also had a meeting with the Respondent on May 24, 2010. Gov. Ex 8 reflects Meikle's notes of that meeting. Tr. 80. Among other aspects of that meeting, Consol advanced its belief that MSHA had to accept the Strata units as they had been 'grandfathered.' Tr. 81. Meikle expressed that both he and the District Manager were not

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[13]A bit of an audacious offering on the part of Consol, at least in terms of the data's genesis, the bore hole temperatures it cited to support its claim that the mine does not experience temperatures above 70°came about after methane explosion fires in 2005 and 2007. The bore holes were drilled to determine gas concentrations and to assess whether there was any active fire going on in the sealed area. Tr. at 71-72.

[14]Consol's theory was that temperature measurements from a sealed area of the mine would be most indicative of the temperatures the refuge chambers would experience if the mine's ventilation shut down in an emergency. Tr. 119-120. Based on the record as a whole, for the reasons advanced by MSHA, the Court does not subscribe to this claim.

asserting that the Strata units could not be used. Rather, they were questioning *how* the units were being used in the context of the adverse temperatures that had been recorded.

According to Meikle, Consol agreed to provide information to support the use of the units in temperatures above 70°. Although the expectation was that Consol would provide information, that is supporting documentation, to justify the use of the refuge under those elevated temperature conditions, Consol never provided it by the new deadline of June 4th. Tr.83. Following that, the MSHA District Manager again wrote to Consol on July 13th. Jt. Ex. 11. Among other reasons, the letter was prompted by the District Manager's concern about the hot summer months that had arrived. This time, the letter gave Consol until July 20th to provide the information it needed regarding "the use of the refuge alternatives in the mine, in the conditions we expected and had measured." Tr. 86.

Consol did provide information to MSHA on July 20th. Jt. Ex. 12. Meikle received a draft of this information early the same day and he expressed to Consol that it did not provide the information MSHA was seeking. Tr. 87. No additional information was provided after that and Consol did not refer MSHA to any other source for that information. However, Consol did provide a table or chart, proposing to limit the number of miners that would occupy the refuges, based on mine temperatures and this information was apparently derived through Strata. Appendix C. Tr. 88. Meikle contacted MSHA's Tech Support to learn about Strata's discussions with that MSHA division and he learned that Tech Support advised that they didn't have information to support the proposed derating chart. Tr. 89.

The critical point, as expressed by Mr. Meikle, was that the information Consol provided in its July 20th submission did not enable MSHA to conclude that the refuges would maintain miners under the conditions that concerned it. Tr. 91. Thus, Consol did not submit any additional information to support the Appendix C deration table it presented. Tr. 96. As Meikle noted, the District Office did have discussions with MSHA's Technical Support Division, about the reliability of the data submitted by Consol. He related that Tech Support had questions over whether the derating table could be substantiated and that, without such data, they simply were not in a position to assert whether it was reliable or not. Tr. 96. Nor did Strata have such data by July 20th. Instead, as Meikle recollected, there were efforts to have such data from tests but they would not be conducted for weeks. Tr. 97.

In further explaining why MSHA decided to issue the citation on July 21st, Meikle noted "we were approaching the time of year where we knew, and already had credible relevant information that the temperatures were exceeding the 70 degrees, and that was a part of our concern, that if miners had to utilize those refuge alternatives, they would not have been afforded, through the use of this refuge alternative, the opportunity to remain at a 95 degree ambient temperature inside, if at full capacity, or derated capacity. We didn't have the information to support that." Tr. 93.

Not only did MSHA have problems with the lack of data to support the deration chart, it also had issues with the proposal to average temperatures from the previous week. Tr. 92. As Meikle succinctly put it, " It's not the temperature *last* week that's going to get me if I'm in that refuge. It's the temperature at the time I'm in the refuge." Tr. 92. (emphasis added).

Meikle stated that the mine was being cited, not for violating the safety standard that contained the grandfather clause, but rather for failing to demonstrate that the refuges would provide a safe environment for miners. Tr. 94. Joint Exhibit 14 is the citation that was issued and Joint Exhibit 13 was a letter which accompanied that citation, explaining the rationale for the citation's issuance. Speaking further to the contention of Consol that the grandfather provision made any citation a nullity, Meikle noted by analogy that as part of his duties he reviews other mine operator plans, such as ventilation and roof control plans. In that role he has rejected plans that proposed to use a piece of equipment in an unsafe manner, even though the equipment itself was otherwise approved. Tr. 95.

As brought out through its cross-examination of Meikle, one of Consol's contentions is that MSHA, in its "questions and answers" related to refuge chambers, dated April 29, 2009, it stated that the capacity of grandfathered state-approved units does not have to be reduced to comply with Section 75.1506(b)(1). Tr. 108-109. Consol Ex. 1., Gov. Ex. 8. As MSHA pointed out, the Final Rule discussing 75.1506(b)(1) provided in the answer to that question that "Refuge alternatives shall provide at least 15 square feet of floor space per person and 30 to 60 cubic feet of volume per person, according to the following chart. The air lock can be included in the space and volume if waste is disposed outside of the refuge alternative." Accordingly, MSHA took note that those issues are not present in this litigation. Tr. 126. Joint Ex. 2, the Final Rule at page 80698

Another contention of Consol is that MSHA did not do enough when it was aware, on July 20th and on the 21st , that Strata was doing tests. Consol believes that MSHA should have contacted Strata about this. However, this contention overlooks that it is the mine operator's plan and that it is the mine operator's responsibility to obtain supporting data. Tr. 124.

MSHA's second witness, Wesley Shumaker, is a general engineer with the Applied Engineering Division, Approval and Certification Center, Director of Technical Support. Tr. 138. He noted that Tech Support is not the entity that determines whether an ERP should be approved. Rather, approval is made by the individual MSHA districts. Tr. 144. Shumaker explained that the term "apparent temperature," sometimes referred to as "effective temperature" is a way of characterizing the effects of temperature and humidity on humans and how it relates to "core temperature" and its effects. Tr. 147. In this regard the witness identified the NIOSH report on refuge alternatives and its reference to a 95 degree apparent temperature threshold. He noted that West Virginia has established an upper limit of 95 degrees Fahrenheit for this as well. Tr. 148-149. Gov. Exhibit 15. Gov. Exhibit 16, an excerpt from the West Virginia Mine Safety Technology Task Force report, reiterates this maximum apparent temperature for refuges. Tr. 150-151.

In other testimony, Shumaker explained that derating calculations are not simple matters to carry out. Further, he noted that, while NIOSH can conduct such tests, Tech Support does not have authority to test refuge units. Tr. 156-157. Gov. Exhibit 15, a December 2007 report by NIOSH, involved the same 36 person Strata unit at issue in this litigation. However, those tests were conducted at 60 degrees Fahrenheit ambient temperatures and as such he could not assert that the unit would pass at 70 degrees, for example. Tr. 158. Importantly, beyond the deficiencies noted, making comparisons at different temperatures and with different size refuge units, Shumaker noted that before the citation was issued here he did not have the "actual test report" from Strata.[15] Tr. 160-161. Shumaker's overarching point was that, while it had done some "rough calculations," Tech Support simply did not have the information it needed to assess whether the units would work safely. While Strata has asserted that their units were effective to 70 degrees, Tech Support lacked the mechanism to verify that claim. Tr. 167. As he again noted, such calculations are "very complicated." Tr. 165. As Tech Support only had a summation of that testing, it could not evaluate it, as it did not know how the testing was done. Then too, another problem was that it involved testing on a 26 man, not a 36 man unit. Tr. 168. Accordingly, speaking as an engineer, Shumaker could not say, based on the limited information Tech Support had, that the unit could work above 70 degrees without exceeding the maximum apparent temperatures. Tr. 170. Nor did the meeting which ensued between Strata and Tech Support lay those concerns to rest. Shumaker described Strata's results regarding the 26 man unit as "off-the-cuff," meaning that supporting data was not presented. As for the more pertinent information regarding its 36 man refuge unit, Strata advised only that they had contracted with an engineering firm to do computer modeling for derating information. Tr. 173. There was also the matter of *when* the engineering firm would have the testing results. Thus, as of the July 13, 2010 meeting with Strata, there was no set timetable as to when the results would be presented, but as Shumaker understood it, the data was at least four weeks away. Tr. 177. Accordingly, while Strata *believed* that its ratio comparison, as adapted for a 36 man unit, from its 26 man information, would work, the fact it was pursuing modeling was an acknowledgment that data to back up their belief was still needed. Tr. 174-177.

In summing up his concerns, Shumaker agreed with the Court's characterization of the heart of the problem that, even if the derating proposal he had at the time of the July 13th meeting with Strata were delivered by a priest, a rabbi and a minister, and thus could be no doubt about earnest belief that the derating would effectively protect miners from temperatures above 95 degrees, Tech Support would still need to independently understand the basis for their conclusions, as it cannot take such assertions on faith. Rather it needs to understand the underlying basis for the conclusions being asserted. Tr. 182. More precisely, Shumaker stated: "[W]e thought that there had to be more information available to be able to make a good decision that the derating chart was a safe one to use." Tr. 180. Thus, while he believed that derating can be used, the information was needed to know what a safe level is and this is accomplished

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[15]Tech Support, prior to the issuance of the citation here, had Strata's initial submission to the state of West Virginia which included its methodology calculation for apparent temperature in one of its refuge chamber models, but it was not for a 36 person unit. Tr. 163.

through validation. Tr. 180.

Michael Canada is a Manager for Safety for Consol's Central Appalachia Operations. Tr. 202. Although he stated initially that far fewer than 36 persons would ever occupy the Strata units in this litigation, he later allowed that under some circumstances such numbers could occur. Circumstances such as "hot seat" change outs as shifts change and during a long wall move could present the potential for as many as 40 people working at such a location. However, Mr. Canada then maintained that there would be two chambers available and consequently that only 20 miners would need to seek refuge in a given chamber. Tr. 222-223. Even if that is the case, as the Secretary pointed out through cross-examination, Consol never brought such a contention to MSHA prior to the issuance of the citation. Tr. 225-226.

Mr. Canada also asserted several times that he "felt good," and in fact "felt real good" about his conclusion that temperatures in the shelters would not go above the 95°F mark because the mine's ventilation would keep things below that. He felt the same way about the scenario presented if the ventilation shut down. Tr. 208-209. While the Court in no way challenges Mr. Canada's feelings that such temperatures would not exceed 95°, it illustrates the fundamental problem over which MSHA's Tech Support division and the District Manager were grappling. They needed data, not simply good faith belief, to support those claims. Canada conceded the point, admitting that he lacked a basis and data to support his feeling, and relied upon his experience that told him that when air moves it cools. Tr. 227. However, as lives could be at stake, MSHA reasonably concluded that it needed data to intelligently assess the beliefs.

The second, and last witness called by Consol, was John Reinmann, who is the Vice President of engineering and operation for Strata. His testimony, in its critical aspects, may be summarized quite briefly.[16] He acknowledged that Strata met with Tech Support representatives on July 13th and that they discussed Strata's cooling development work and the "concept of derating as an option." Tr. 240. Realizing that it would have to do additional testing and that they could not rely on NIOSH to do that, Reinmann expressed that Strata knew it would "have to set up and contract to get our units tested." This resulted in testing in February 2008 to "simulate the mine conditions and to simulate the people inside [refuge] chambers." Tr. 241. Later that same year Strata did tests on a 26 man refuge unit.[17] For that 26 man unit, Strata determined that, at 76 degrees, ten men would be the most it would recommend occupying its refuge. Tr. 244. The refuge units at the Buchanan mine were "never mentioned during the entire meeting." Tr. 245. Significantly, Mr. Reinmann acknowledged that the modeling to determine temperatures in these refuge units "having to deal with both the temperature issue and the humidity issue and what's going on at all the surfaces in there, . . . *it gets to be a very complicated problem.*" Tr. 246. (emphasis added). Thus Mr. Reinmann effectively conceded that the simple ratio attempted to be employed by Consol to their 36 man units is not so simple a

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[16]Mr. Reinmann's testimony was brief by any measure, covering 23 pages of transcript.

[17]The testing is done using 'simulated' people, in the form of electrical coils. Tr. 243.

leap and by that statement as well as by the testing Strata was contracting to have done, he admitted that the ratio is no genuine substitute for data.[18]

Discussion[19]

There are several aspects of this matter that, on this record, cannot be considered to be in genuine dispute. First, there is no reasonable dispute that adverse physical results occur when people are subjected to apparent temperatures above 95° Fahrenheit. Thus, that is at the *top-most* tolerable temperature for miners to exist, for sustained periods of time, while in a refuge chamber, awaiting a rescue. This is, in the Court's view, important to bear in mind, as the 95° mark represents the maximum temperature; it is not as if there is then available some margin above that under which miners can stay in a refuge chamber and not risk adverse physical effects.[20] A second, undisputed, fact is that the Strata 36-person units used at this mine can only keep miners at or below that critical 95°mark when the ambient temperature around the refuge chamber is 70° F or less.[21] With those important facts in mind, the record establishes that the mine's ambient temperatures in fact exceeded 70° during the warmer months of the year at locations where the refuge units were located.[22] Accordingly, the reasonableness of District Manager McKinney's decision to issue the citation in issue here must be assessed both in the context that the discussions between MSHA and Consol had gone on for six months and also, given McKinney's justifiable concerns, in view of Consol's failure to provide sufficient, *reliable*, as opposed to anecdotal, information for MSHA to reasonably conclude that miners would not in fact be subject to temperatures above the maximum tolerable, should they have to seek refuge in the Strata unit.

The contention that the District Manager prematurely ended the discussions regarding the disputed issue.

Consol contends that the District Manager acted arbitrarily and capriciously in that he "prematurely terminated [the] ERP discussions." Consol Br. at 15. Under this perspective, when

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[18]Mr. Reinmann could only offer "we *think* 15 men in a 36-man chamber at 76 degrees ambient, [that] the conditions will stay below the 95 degrees ambient." Tr. 248 (emphasis added).

[19]This portion of the decision incorporates the contentions made the parties in their post-hearing submissions.

[20]Gov. Ex. 15 & 16, Tr. At 36, 151-156.

[21]Gov. Ex. 23 & 24, Tr. 44, 52, 252-253.

[22]Gov. Ex. 13, 14, 14A, 14B, and Tr. at 44-45, 54-56.

Consol submitted its derating plan on July 20, 2010,[23] the District Manager's act of rejecting it the next day was on its face arbitrary and capricious because that was an insufficient amount of time to review and further discuss Consol's offering. In the Court's view, the problem with that contention is that it views the District Manager's action as a snapshot and by doing that it ignores that the whole matter had been in discussion since late January 2010, some six months earlier. Although the turnaround time for the District Manager's response was short, only a day, MSHA knew, within that time frame, that the supportive data it needed was still lacking and it knew, even in that brief time, that Consol's idea that one could use the previous week's average temperatures to determine the derating schedule for the following week was inherently suspect, as it is clear that such a predictive method may miss the actual temperatures of the following week by a significant amount. Further discussion would not cure either deficiency.

Although Consol asserts that the District Manager could only revoke the plan "where the parties reach an impasse in which the operator refuses to comply with the District Manager's plan demands," that view is not consistent with the guidance the Commission has provided in matters involving ERPs.[24] This view also fails to consider the context in which the District Manager acted; the hottest months of the year were then present. Thus, in the context of the discussion that had been going on for six months and that the hottest months had now arrived, the Court does not agree with the assertion that the District Manager acted "prematurely and precipitously" in deciding to issue the subject citation.

Further, the discussions between MSHA and Consol during the six months preceding the issuance of the citation, MSHA did not dictate how Consol was to assure that the refuge chambers not exceed the 95° maximum, as it allowed that this could be achieved, potentially,[25] through air conditioning for the units or at least through the more basic method of simply "de-rating" the units, a term which simply means reducing the maximum number of miners that

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[23] Consol acknowledges that it was not until July 20, 2010 that it first "submitted a specific derating proposal for the refuge alternatives." Consol Br. at 6.

[24]While Consol argues that the District Manager's statement that Consol's plan offered a potentially viable approach demonstrates that it was premature for MSHA to end the discussions, as it was made only a day after Consol's July 20th submission, this contention ignores that MSHA had concluded that further talk would not be a suitable substitute for the supporting data and that the talk had been going on for a half a year. This contention folds into Consol's related assertion that, at that point, it was *MSHA's* responsibility to obtain such data from Strata. Consol Br. at 20. Last, in this regard, while Consol also contends that Strata had the needed data and that it was available to the District Manager, the claim that Strata had the data is not supported by the record and consequently the idea that it was "available" is not supported either.

[25]The approach of reducing refuge chambers through air conditioning is not realistic at this point in time as there are no approved units presently. Tr. 105. Thus, only derating is a viable remedy to this issue.

would occupy a chamber, down from the 36 person maximum each unit could accomodate.[26] But "de-rating" is more complex than simply plucking a reduced occupancy number out of the air and then declaring that, with that reduced number, the 95°mark would not be exceeded. MSHA must be able to independently evaluate, by being provided with some reasonably supported scientific data, that the de-rated number of miners occupying the chamber would not endure temperatures above 95 degrees. Under such a standard of review, Consol did not provide MSHA with any reliable information so that it could independently assess the impact of the proposed de-rated number on the ambient temperature.[27]

Accordingly, while Consol attempted, on July 20, 2010, a date at the very end of a six-month period of time, during which period discussions occurred with MSHA,[28] to provide some information to support its de-rating proposal, it lacked the critical supporting data, for MSHA to thoughtfully assess it. Accepting the proposal in that state would have required MSHA to adopt it on faith, instead of science. The late-in-the-discussion data, provided through Strata, was a simply a linear extrapolation. As set forth in footnote 6 of the Secretary's Post-hearing Statement, when Strata met with MSHA on July 13, 2010, they "explained that the de-rating calculation for the 36-person unit was based on a single test on a Strata 26-person unit at 76°F [and that] they calculated the appropriate de-rating value for the 36-person unit at 76°F by merely performing a proportional calculation based on the de-rating result obtained from the single test on the 26-person unit." *See* Sec's Stmt at n. 6 p. 8. With these variables at work, MSHA's Technical Support section could not agree with any independent degree of confidence that the simple linear extrapolation was sufficiently reliable. Strata admitted as much, since it acknowledged that computer modeling would be needed to support the claim that the linear extrapolation would be a reliable predictor of the temperatures. Tr.174-175.

It was against this backdrop, the elapsing of six months of opportunity for discussion and the late-presented linear extrapolation approach to de-rating, an approach unsupported with any computer modeling data, that the District Manager, aware that the hottest months of the year

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[26]Brief mention may be made of Consol's assertion that it was extremely unlikely that 36 miners would ever need to use a given Strata unit. First, the Court agrees that because, as of the time of the citation's issuance, Consol had not made that claim, and because the Court agrees with the Secretary's contention that the District Manager's decision to issue the citation must be evaluated on the basis of what he knew at the time that citation was issued, that argument cannot be considered now. Even though that is dispositive of the contention, it is also noted that Consol's witness at the hearing conceded that there can be circumstances when as many as 40 miners may be at work in a particular part of the mine at a given point in time.

[27]To be clear, neither Strata, nor Consol, provided such *reliable* information to MSHA.

[28]To be sure there were some delays in responses during the six month period of discussion time but, given the requested extensions by Consol, it can hardly be claimed that this was attributable to one side exclusively.

were at hand, reasonably decided he could wait no longer and issued the subject citation.[29]

Neither the information provided by Consol which tended to show how mine ventilation can cool the temperatures inside a refuge, nor its mine temperature readings from sealed areas of the mine, assuaged the District Manager's concerns that there could be days when the temperature in the refuge could exceed 95 degrees. The Secretary asserts, and the Court agrees, that this information was not dispositive, in the case of ventilation's cooling effect, as that assumption takes as a given that the mine's ventilation will continue to operate after a mine event in which miners cannot evacuate. Just as Consol's argument that, for most of the year, temperatures in the mine are at or below 70°, will not help miners awaiting rescue in a refuge chamber if the mine's temperatures are above that on the day of a disaster, nor can the assumption that ventilation will cool a rescue chamber actually have such an effect if the ventilation, for whatever reason, shuts down during a mine disaster. By their very nature, plans to save miners, in the event of a disaster, cannot be built upon the odds that the mine ventilation will keep running any more than such plans can 'play the percentages' that the disaster will cooperate and occur on a day when the mine's temperatures are at the year's average.[30]

As to the temperatures Consol presented from sealed off areas of the mine, offered to show the ambient temperatures, if there is no ventilation operating in an event requiring the use of a refuge chamber, MSHA points out that Consol did not provide information showing how long it would take for the ambient temperatures to match up with those of the surrounding rock. While, at some point, such equilibrium may occur, there was no data to show the time it would take for this to happen.[31]

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[29]The District Manager's concerns were not limited to the lack of independent information to support the linear extrapolation proposal. He also had issues with Consol's idea that it would determine the ambient temperature for an upcoming week by averaging the previous week's temperatures. That concern stemmed from the fact that a previous week's temperatures can not guarantee those of a current week.

[30]The Secretary also points out that Consol, as with the lack of supporting data for the linear de-rating, failed to provide data or analysis, to show the efficacy of forced convection. JT Ex. 7 at p. 2; and at 8, 9 and 12. Sec's Stmt at 12.

[31]The Secretary notes this was not the only problem with the 'surrounding rock' temperature theory advanced by Consol. For example, the temperatures Consol took were taken in the cooler months of February and March and the ambient temperatures in the sealed area had between 7 to 30 days to attain the levels recorded. But, in the event of a mine disaster and the need to retreat to a mine refuge, there is no such time luxury for temperatures to even out. Indeed, the refuge chamber is designed with the hope that, within 96 hours, those trapped will be rescued. Though this is certainly enough to justify MSHA's rejection of the 'surrounding rock' temperatures as a gauge of the ambient temperatures, MSHA considered and then rejected that theory in its final rule for the refuge alternative. JT Ex. 2 at p 80663. Tr. at 258.

Further addressing the timing of the District Manager's decision to issue the citation on July 21, 2010, the Secretary observes that Congress provided a mechanism for resolving ERP disputes which emphasized promptness.[32] As mentioned, beyond that clear expression of Congressional will, there was the practical consideration facing the District Manager: the very months he was concerned about, the warm months of summer, were at hand. In short, the dialogue had gone on long enough. Congress and the Mine Act made it clear that, certainly by July, it was time for this dispute to be referred to the Commission.[33] Beyond satisfying the procedural requirement to discuss the refuge chamber temperature issues, the Secretary notes that, substantively, the District Manager was also conferring with MSHA's Technical Support division during this process. These consultations with MSHA's Tech Support caused him to conclude that Consol had not provided the reliable support needed for him to accept their de-rating plan. Given that no reliable support would be forthcoming until the computer modeling was completed, and as that the date for that information's delivery was uncertain, the District Manager reasonably concluded that, as the hottest months were upon the mine, the citation had to be issued.

The contention that the grandfathering provision precludes MSHA from raising objections concerning refuge chambers until 2018.

It is Consol's contention that "MSHA was aware of the issue of mine temperatures [which were] above the apparent temperature criteria used by the State of West Viriginia in approving shelters" and that, in 30 C.F.R. § 75.1506, it 'grandfathered' such approved shelters anyway.[34] Consol Br. at 7-8.

Consol argues that 30 CFR § 75.1506(a)(3) exempted the ERP-provided Strata refuge units from the compliance standards and that, as a consequence of that exemption, the District Manager had no choice but to accept their use at the Buchanan Mine No. 1. Consol Br. at 21. Consol contends that the language of this provision could not be clearer; it maintains that such "grandfathered refuge alternatives are exempt from compliance with the standards as they relate to ERPs." Consol Br. at 22. For Consol, this means that if refuge has deficiencies, as long as it is "grandfathered" the ERP cannot be denied or revoked, no matter what. All that needs to be

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[32]The Secretary points to S. Rep. 109-365, 109th Cong., 2d Sess (Dec. 6, 2006), in which Congress spoke to "the need for expedition in the resolution of [ERP] disputes." Sec's Stmt at 15.

[33]On this point, the Secretary notes that the Commission has spoken about this expressly. In *Cumberland Coal*, it held that although the District Manager must negotiate, in good faith, disputed plan provisions for a time, once that has occurred the Secretary ultimately has the authority to insist upon the inclusion of particular provisions if approval is to occur.

[34]Consol contends that the grandfathering provision at 30 C.F.R. § 75.1506, makes the District Manager's request for "all inclusive data" arbitrary and capricious. Consol Br. at 14.

shown for this insulated status to take effect is that the ERP be state approved and in service in an MSHA-approved ERP before March 2, 2009. If that is the case, then the refuge is "pre-approved" and as such exempt from compliance with 30 CFR Part 7. While Part 7 specifies that the apparent temperature of a refuge not exceed 95°F that requirement is ignored if the unit is both state approved and in service in an MSHA-approved ERP before March 2, 2009. In effect, Consol's argument here is that, even if survivability cannot be sustained, in this case if temperatures in the refuge exceed 95°F, what really counts is the refuge's grandfathered status, not survivability.

While the Court rejects Consol's interpretation, nevertheless it is still surprising that the Respondent would make the contention, its legal merits aside, given the possible result in taking such a stance. Despite the potential consequences, of such a stance if the contention were to prevail, Consol asserts that the legislative history also supports its position. In this regard it notes that the final rule expressly spoke of allowing refuges that do not meet the requirements of the final rule and that such refuges are to be afforded a "reasonable time *for manufacturers* to meet the safety and approval requirements of the final rule." Consol Br. at 23 (emphasis added). Consol finds further support for its position in MSHA's "Questions and Answers" to its final rule on these refuges, noting that the agency stated that the capacity of the grandfathered state approved units did not have to be reduced in order to comply with § 75.1506 (b)(1).[35] Undeterred by the potential consequence of its argument if it carried the day, Consol contends that everyone understood that these refuges would not be 'perfect' and that their effectiveness in sustaining lives would be "an evolutionary process"[36] for which *manufacturers* would be given a reasonable period of time to meet the final rule's requirements. Consol Br. at 24 (emphasis added). However, the problems the District Manager has with Consol's refuge units is not about the units themselves. Rather, it is about ambient temperatures above 70° and the number of miners that would be using the refuges under such conditions and that is a matter for which Consol must make adjustments, not Strata.

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[35]Consol also rejects as inapplicable the testimony of MSHA witness Meikle that one could have a single boom roof bolter which is approved for permissibility but not for roof control use, because the refuge chambers in issue here are approved for apparent temperature. Consol Br. at 25. Thus, Consol maintains that the Strata units being in compliance with Section 75.1506(a)(3) means that the units are approved, period, without regard to whether the refuges meet 30 CFR part 7. As previously stated by the Court, *the units* are approved but *the use* of those units is a distinct matter which can be addressed where such *use* can impact whether the refuge can function to support miners awaiting rescue.

[36] While a mine operator may contend that there is a 'low probability' of an event occurring, one can imagine that, despite low odds, such an event may strike and that the occurrence of a disaster does not depend on the odds. Should such an event occur, the public may rightly ask why MSHA and Consol too for that matter, did not err on the side of caution where sustaining the lives of those awaiting rescue is involved.

Regarding the contention advanced by Consol that the Refuge Alternative Final Rule precluded the District Manager from reviewing the existing EPR at the Buchanan Mine #1, the Secretary asserts that such a claim runs contrary to "the essential fabric of the Mine Act" and is refuted by the final rule addressing the subject. Sec's Stmt at 19, citing JT Ex 2 at 80694-80700. The Secretary notes that the District Manager concluded that, even if the Strata units were covered under 30 C.F.R. § 75.1506 (a)(3), that did not preclude him from considering the *manne* in which those units were used in specific settings. The Secretary takes the position that, since the District Manager is the "MSHA representative formally authorized to conduct the periodic review of [Consol's] ERP, the [District Manager's] reading of the provision is the Agency's formal application of the provision for purposes of this proceeding, and is entitled to significant deference." Sec's Stmt at 20.[37] The Court agrees and it adds that, taken to its logical extreme, Consol's position in this regard would lead to outrageous results. For example, if one assumes, hypothetically, that the ambient temperature would be such that miners in the refuge chamber would be subjected to temperatures of 100°F, Consol would have it that, as the units had been approved, even those extremes could not be addressed until 2018. While Counsel suggested that under such circumstances, of its own volition, Consol would act, it lays bare the untenable stance it takes. Clearly Congress would not have intended such a result, a scenario which ignores the distinction between approving the use of the units generally and approving the *manner* of their use.

In addition, the Secretary contends that its interpretation of the regulatory provision is "consistent with its function as an exception to § 75. 1506(a)(1)'s mandate that all refuge unit components be approved pursuant to 30 CFR Part 7." Sec's Stmt at 21. While it concedes that MSHA permitted a limited exception to that provision, it did not permit a mine operator to then use an approved refuge unit beyond the manufacturer's recognized capability for such units. In this regard it notes that such exceptions are to "be read narrowly to achieve the remedial purposes of the statute and the final rule." Sec's Stmt at 23, citing *The Helen Mining Co.*, 1 FMSHRC 1796, 1979. In sum, the view expressed by Consol would mean that the provision would allow mine operators to have refuge units that could not safely maintain miners, a patently untenable result under the Mine Act.[38] Sec's Stmt at 23-24.

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[37]The Secretary cites to *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176 (10th Cir. 2008) as one example of this principle.

[38]As referred to earlier, Consol's position would operate to bar District Managers from conducting periodic reviews of ERP's to assure real world compliance with Part 75 provisions until December 31, 2018, at which time the structural components are to be approved, per Part 7. Besides, as the Secretary has noted, MSHA is not acting here to prohibit the use, per se, of the existing Strata refuge units, even though they lack Part 7 approved components. Rather, it is for now only insisting on the proper *manner* of such use of those units.

The contention that the District Manager acted arbitrarily and capriciously by seeking perfection in Consol's ERP

Although Consol concedes that the "District Manager [is required] to periodically review [emergency response] plans,"[39] it is Consol's contention that in this instance the District Manager acted arbitrarily and capriciously in not approving Consol's plan. Consol Br. at 12. It contends that the District Manager sought 'perfection' from Consol's ERP and, by that view, his rejection of Consol's "derating schedule and associated temperature calculation method was arbitrary and capricious." Consol Br. at 12. It notes there is agreement that, at least when temperatures are 70 degrees or less for the refuge chambers involved in this litigation, the apparent temperature in those refuges will be 95 degrees or less. While Consol agrees that there will be times during the course of the year when the ambient mine temperature will exceed 70 degrees, its proposal to cut the number of persons who would use the refuge in such circumstances by "over 50%" should have been accepted by the District Manager. It argues that such acceptance should have been forthcoming because the heat and humidity sources come from the number of people occupying the refuge and because, with fewer people, the heat from the CO^2 scrubbers would also be reduced.

Oddly, while Consol admits that the District Manager's rejection was based on the lack of sufficient information to support the claimed effects of the reduction of the number of miners who would occupy the refuge, it maintains that Strata's derating schedule should have been sufficient, a view it urges in the context of its position that such ERPs aren't perfect anyway but rather are an 'evolving' phenomena.[40] It also contends that its plan for managing the derating, that is, by looking at the average temperature in the preceding week, was a 'reasonable' touchstone for formulating the upcoming week's derating schedule.[41] The shortcomings of this temperature prediction method have already been discussed.

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[39] The Court finds that it is part of the District Manager's statutory obligation to periodically review the mine's ERP every six months in order to continue to conclude that the Strata units could safely maintain miners consistent with the ERP. 30 U.S.C. § 876(b)(2)(D).

[40]Consol also maintains that the MSHA shares the burden for developing the supporting information. Thus, it is critical of MSHA for failing to come up with its own derating proposal, and for failing to obtain additional information from Strata on its own. Consol Br. at 13.

[41]This is another example of Consol's position that, if MSHA didn't like the plan to average a prior week's temperature and apply those results for the following week's derating, then it was incumbent on MSHA to present an alternative approach. The Court does not agree with Consol's idea that the burden of production shifts to MSHA if it does not accept the mine operator's proposal. MSHA's role is to evaluate the mine operator's proposal and assess whether data from the operator supports that proposal. Here, reliable data was not presented.

ORDER

In conclusion, the Court agrees with the fundamental assertion in the Secretary's post-hearing statement that the Strata 36 person refuge units used at this mine may not assure a safe environment at all times in that there may be periods during the course of the year in which the ambient temperatures could become too high for miners to safely inhabit the refuges. That being the case, the Court agrees that MSHA District Manager Ray McKinney did not act in an arbitrary or capricious manner when he issued the citation which triggered this litigation. The process of trying to resolve the reasonable concerns of the District Manger had continued for six months (from January 27 through July 21, 2010) and certainly by that point in time, (if not sooner), as District Manager McKinney did not have sufficient information from which he could *reliably conclude* that the refuge units could safely maintain trapped miners, the issuance of the citation, pursuant to Section 316(b)(2)(G)(ii), was fully warranted. Accordingly, the citation is affirmed and Consol is directed to submit a revised ERP, which establishes that miners will in fact be afforded the protection required under Section 316(b)(2) of the Mine Act, at all times, no matter what month or day of the year such a refuge may be needed.

As noted at the outset of this decision, the parties stipulated as to the issues to be resolved in this proceeding. On the basis of the the foregoing discussion, the Court concludes that:

a. MSHA District Manager Ray McKinney did not act arbitrarily and capriciously in revoking or withdrawing his approval of the refuge alternative provisions associated with the ERP adopted by Consol for implementation at the Buchanan Mine #1.

b. 30 C.F.R. § 75.1506(a)(3) did not obligate MSHA District Manager Ray McKinney to accept the use of the ERP-specified Strata refuge units and prohibit him from revoking or withdrawing his approval of the ERP as submitted by Consol for implementation at the Buchanan Mine #1.

c. Given the course of interaction between Consol and MSHA's District 5 office concerning the use of Strata refuge units at the Buchanan Mine #1, MSHA did act in accordance with 30 U.S.C. § 876(b)(2)(G) in issuing Citation No. 7307437.

Accordingly, for the foregoing reasons, the citation at issue is AFFIRMED and it is ORDERED that Consol submit a revised ERP that is demonstrated, at all times, to provide miners with the protection mandated in Section 316(b)(2) of the Mine Act.

William B. Moran

William B. Moran
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

August 26, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2009-377
Petitioner	:	A.C. No. 11-03054-177990 -01
v.	:	
	:	
BIG RIDGE, INC.,	:	Willow Lake Portal
Respondent	:	Mine ID 11-03054
	:	
BIG RIDGE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2009-274-R
	:	Order No. 6683084; 01/22/2009
	:	
	:	Docket No. LAKE 2009-276-R
v.	:	Order No. 6683965; 01/23/2009
	:	
	:	Docket No. LAKE 2009-277-R
	:	Order No. 6683966; 01/23/2009
	:	
	:	Docket No. LAKE 2009-278-R
SECRETARY OF LABOR,	:	Order No. 6683088; 01/26/2009
MINE SAFETY & HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. LAKE 2009-279-R
Respondent	:	Order No. 6683089; 01/26/2009
	:	
	:	Docket No. LAKE 2009-280-R
	:	Order No. 6683090; 01/26/2009
	:	
	:	Docket No. LAKE 2009-310-R
	:	Order No. 6683968; 01/29/2009
	:	
	:	Docket No. LAKE 2009-311-R
	:	Order No. 6683972; 01/29/2009
	:	
	:	Docket No. LAKE 2009-312-R
	:	Order No. 6683973; 01/29/2009
	:	
	:	Willow Lake Portal
	:	Mine ID 11-03054

DECISION

Appearances: Anthony Jones, Esq., and Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois on behalf of the Secretary of Labor;
R Henry Moore, Esq., and Arthur Wolfson, Esq., Jackson Kelly, Pittsburgh, Pennsylvania on behalf of Big Ridge., Inc.

Before: Judge Melick

This expedited civil penalty proceeding is before me upon a petition filed by the Secretary of Labor (consolidated with related contest proceedings) on July 23, 2009, 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 Big Ridge, Inc. (Big Ridge) with twelve violations of mandatory standards and proposing civil penalties of $230,003.00 for those violations. The general issue before me is whether Big Ridge violated the cited standards as charged and, if so, what is the appropriate civil penalty for those violations. Additional specific issues are addressed as noted. The Secretary filed a motion for expedited hearings on May 19, 2010 and, upon agreement of the parties, expedited hearings were held over three days commencing on June 22, 2010 in Evansville, Indiana.

Order Number 6683824

This order, issued on December 10, 2008 pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:[1]

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[1] Section 104(d) of the Act provides as follows:

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection © to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized

Accumulations of combustible materials in the form of loose coal, coal fines, and float coal dust (distinct black in color), was [sic] also observed along both sides and beneath the 4 E belt conveyor from the head roller inby to the belt tail. When inspected accumulations of coal was [sic] observed from 1 inch to 5 inches in depth from the head roller inby to 8 crosscut. Accumulations of coal was [sic] also observed from 2 feet inby the belt tail for a distance of 18 feet outby along both sides and beneath the belt tail. These accumulations were observed up to 2 feet in depth and was [sic] observed with the bottom belt sliding on the coal, and the tail roller turning in the coal. Also, float coal dust distinct black in color was observed deposited upon the roof, rib floor, and belt structure, to and including the connecting crosscuts.

The cited standard, 30 C.F.R §75.400 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".

This order alleges two violative conditions along the 4E belt conveyor; (1) accumulations from the head roller inby to the No. 8 crosscut; and (2) accumulations at the tail piece. Michael Rennie, an experienced inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) credibly testified that on December 10, 2008, he saw accumulations of loose coal, coal fines, and float coal dust along both sides and beneath the 4E belt conveyor from the head roller inby to the belt tail. Inspector Rennie estimated the accumulations around the belt tail of the 4E conveyor to be approximately two feet deep and eighteen feet long. According to Rennie, the bottom belt and tail roller of the 4E conveyor were also turning in coal around the belt tail and that the friction caused thereby was an ignition source. The belt was also misaligned causing the belt to cut into the belt structure almost an inch. This too was a potential ignition source. Accumulations of coal ranging in depth from one to five inches were also seen by Rennie from the head roller inby to crosscut 8.

Bart Schiff, Respondent's safety manager who accompanied Rennie, testified that there were accumulations on both sides of the bottom belt and that the bottom belt was running in the coal accumulations at the 4E conveyor tail. Schiff further testified that he observed accumulations underneath the rollers that were approximately "three to five inches" deep along several sections of the 4E conveyor. James Holmes, Respondent's section foreman, testified that he checked the cited tailpiece around 7:00 a.m. and 9:00 a.m. and found it to be clean. Around 9:15 a.m., however he found that the 4E tail was full of coal fines. According to Holmes, it took only 15 minutes to shovel the tailpiece, but six hours to get equipment and to clean and rock dust the entire beltline. Monty

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representative of the secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

Applin, Big Ridge's mine examiner, testified that he performed an inspection on the 4E conveyor around 3:15 a.m. on December 10, 2008 and observed float dust at the 4E head roller that needed rock dusting. Applin recorded this in the "remarks" section of his pre-shift inspection book.

Respondent asserts that the coal found by Inspector Rennie at the tail piece was non-violative "spillage" and not an "accumulation"citing *Old Ben Coal Company 1 FMSHRC* 1955 at 1958 (Dec 1979) and *Utah Power and Light v. Secretary* 951 F.2d 292 at 295 n.11 (10th Cir. 1991). The Commission stated in *Old Ben* that "we accept that some spillage of combustible materials may be inevitable in mining operations. Whether a spillage constitutes an accumulation under [30 C.F.R §75.400] is a question, at least in part, of size and amount" The Circuit Court in *Utah Power and Light* similarly stated that "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenient speed." *Utah Power and Light* 951F.2d at 295 n. 11. In this case however, I find that because of the significant size and amount of the cited coal spillage, the exception noted in the cited cases is not applicable herein.

The secretary has alleged that the violation was "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 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 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). This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 599, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573 at 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.,* 10 FMSHRC 498 (Apr. 1988).

I find that the Secretary has, indeed, met her burden of proving each of the four elements outlined in *Mathies.* As noted, a violation of the mandatory standard at 30 C.F.R § 75.400 has been proven. I find that this condition exposed miners to an identifiable and discrete safety hazard, i.e., the danger of a belt fire from the friction caused by the belt cutting into the belt structure. The belt was misaligned and credible testimony established that it had cut almost an inch into the belt structure. I further find that a belt fire was reasonably likely because the coal accumulations were significant and an ignition source was present. Indeed, the serious hazard of hot metal and rubber shavings

igniting coal was corroborated by the Respondent's own expert witness, Chad Barras. I have no doubt that should a belt fire occur, the injuries could reasonably be expected to be severe or even fatal from smoke inhalation, carbon monoxide poisoning and/or burns. It is also undisputed that miners frequently worked and traveled near the 4E belt conveyor and that shuttle cars frequently entered the belt tail area. The violative conditions were therefore "significant and substantial" and of high gravity.

Respondent argues that, assuming a violation has occurred, that violation was not "significant and substantial" for several reasons. Respondent first argues that an MSHA report prepared by its Chief of Health and Safety, Terry Bentley, "Reducing Belt Entry Fires in Underground Coal Mines" (2007) demonstrates the unlikelihood of substantial injury as a result of a belt fire. I do not however agree that the report supports the proposition that serious injury or death is not a reasonably likely result of a fire in an underground mine." Respondent next argues that the accumulations were not extensive. However, based on the credible testimony of Inspector Michael Rennie, the accumulations around the belt tail alone were two feet deep and eighteen feet long. I find such accumulations to be extensive. In addition, according to Respondent's section foreman, James Holmes, it took about six hours to obtain the equipment and to clean and rock dust the entire cited beltline. That is evidence that the accumulations were extensive. Under the circumstances I reject the Respondent's arguments that the accumulations were not extensive.

Respondent next argues that there was no heat or ignition source for the accumulations. To the contrary, the evidence shows that the subject belt was misaligned causing it to cut into the belt structure nearly an inch. As previously noted, Respondent's own expert witness, Chad Barras, testified that there was a serious hazard of ignition of coal from hot metal and rubber shavings. This testimony further corroborates the credible testimony of Inspector Rennie regarding the existence of an ignition source.

Respondent further argues that it has "numerous fire detection and suppression systems at the Willow Lake Mine and has "a fire brigade trained in techniques similar to those employed by fire departments." Respondent argues that these are the types of preventive measures in place that would minimize the possibilities of injuries and death in the event of a fire on a belt line." In *Buck Creek Coal Inc., v. FMSHRC*, 52 F.3d 133, 136; 7th Cir. (1995), the Court in addressing a "significant and substantial" issue rejected the same argument, i.e., the mine operators' reliance on fire suppression equipment such as CO monitors and water sprays, mitigates accumulation hazards. The Commission is in agreement. See *Amax Coal Company*, 19 FMSHRC 846, 850 (May 1997)

The Secretary also alleges that the subject order was the result of Respondent's "unwarrantable failure." In *Lopke Quarries, Inc.* 23 FMSHRC 705, 711 (July 2001), the Commission recently reiterated the law applicable to determining whether a violation is the result of "unwarrantable failure" and stated as follows:

> 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 in 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 203-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb 1991); *Lopke Quarries Inc.*, at 711.

Whether conduct is "aggravated" within the context of determining an unwarrantable failure is determined by analyzing the facts and circumstances of each case to identify whether any aggravating factors exist. Such factors include: the length of time the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. Id. See also *Jim Walter Resources, Inc.*, 28 FMSHRC 579 (Aug 2006).

The credible evidence in this case establishes that the coal accumulations were obvious and extensive. Loose coal, float coal dust and coal fines two feet deep extended over a distance of 18 feet around the belt tail of the conveyor. Accumulations of coal were also observed from one to five inches deep from the head roller inby to the No. 8 crosscut. Moreover, it took 15 minutes to clean the belt tail area and took a crew of at least six miners more than six hours to get equipment and to remove the material and rock dust along the length of the cited belt conveyor.

It is also noted that prior to the issuance of the subject order on December 10, 2008 Big Ridge was placed on notice that greater efforts were required to comply with the cited standard by the fact that it had 118 final citations and orders for violations of that standard in the 15-month period preceding the issuance of the subject order. Respondent argues that those prior violations may have no relevance to this case without knowing the precise nature of those violations. This Commission has, however, rejected such arguments. See *Enlow Fork Mining Company 19 FMSHRC 5* (Jan. 1997). MSHA also held closeout and pre-inspection conferences with management officials from Big Ridge. The precise conversations at these meetings were not revealed but it may reasonably be inferred that problems with accumulations of combustible materials were discussed.

The existence of any one of the above factors, would justify a finding that the violations were the result of Respondent's unwarrantable failure and high negligence. Since there is no dispute that there had been no intervening clean inspection (determined by conference call on August 8, 2010), "Section 104(d)(2)" Order No. 6683824 is hereby affirmed[2]. See *Secretary v. Cypress Cumberland Resources Corporation*, 21 FMSHRC 722 (July 1999); *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984).

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[2] There is likewise no dispute that there had been no intervening clean inspections preceding all of the "Section 104(d)(2)" orders in these proceedings.

Order Number 6683084

This order, issued on January 22, 2009, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.362(b) and charges as follows:

> An inadequate on shift examination was made on the slope belt. This inspector walked this belt approximately forty five minutes after the on shift examination had been made. Three bottom rollers were observed turning in coal fines approximately 100ft. outby the slope tail piece. The coal accumulations were packed around these rollers. Based upon this inspector's experience this condition had been present for at least one shift. No notification had been made by the examiner to management about this condition. The belt was de-energized until another examination was made of the belt and rollers cleared. Also, a citation in conjunction with this order was issued for the accumulation of coal. To abate this order, all examiners will need to be re-instructed on the proper way to examine a belt line.
>
> The cited standard, 30 C.F.R § 75.362(b), provides as follows:
>
> During each shift that coal is produced a certified person shall examine for hazardous conditions along each belt conveyor haulage way where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

The specific violation charged herein is that in inadequate onshift examination was performed because the mine examiner did not report to management a condition found by Inspector Lee about 45 minutes after the mine examiner's examination i.e. that three of the slope belt bottom rollers were turning in coal accumulations.

MSHA Inspector Scott Lee testified that on January 22, 2009 about 45 minutes after the shift examination, he observed that three of the slope belt's bottom rollers were turning in accumulations of coal fines. He estimated that the accumulations ranged from 3 to 12 inches around the bottom rollers at multiple locations along the bottom of the 800- foot long belt.

The shift examination was conducted by Big Ridge's examiner, Dennis Morris. Morris had found and recorded in the examiner's book the existence of "carbon piles" under the slope belt "from the top of the slope to the bottom of the slope". (Ex. RB-24). Morris testified however that he did not find any points of friction between rollers and accumulations. Lee nevertheless speculated that this examination was inadequate based on his belief that the conditions he later observed had also existed at the time of the examination by Morris and that Morris therefore should also have seen and reported the belt rollers turning in coal accumulations.

Lee's speculative conclusion that the condition he found 45 minutes after the mine examination also existed at the time of Morris' examination was based apparently only on his "experience". I find however, that examiner Morris' firsthand testimony regarding his actual observations during his mine examination to be entitled to the greater weight and I conclude that neither the "carbon piles"nor any accumulations he observed some 45 minutes before Lee's examination were in contact with the bottom rollers of the slope belt at the time of his examination. Under the circumstances, I find that the Secretary has failed to have sustained her burden of proving the violation as charged and Order No. 6683084 must be vacated.

Order Number 6683086

This order, issued on January 22, 2010, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.1107-1(d) and charges as follows:

> The following pieces of equipment were left energized for approximately 2 hours while unit 4 (014/004) people were sent outby to shovel on belt: ram cars 859, 861, 856, and 857. Also battery scoop 514. The 861 ram car was loaded with coal sitting on the feeder. Management should have known before leaving unit to make sure all electrical equipment was de-energized. This mine has already experience [sic] a battery scoop fire due to the power being left on between shifts and the electrical short circuiting. In order to abate this citation all people at this mine will have to be re-instructed on de-energized equipment when left unattended.

The cited standard, 30 C.F.R §75.1107-1(d), provides that:"[m]achines and devices described under paragraph (c) of this section must be inspected for fire and the input powerline de-energized when workmen leave the area for more than 30 minutes."

There is no dispute that on January 22, 2009, Inspector Lee observed four battery operated ram cars and one battery operated scoop that were left energized and unattended on Unit 4. It is further undisputed that all five machines had been left energized for more than 30 minutes while the Unit 4 miners were sent outby to clean up accumulations on the slope belt Lee had previously cited.

Respondent maintains that there was no violation as charged because the cited standard does not apply to battery operated equipment. Respondent notes that the standard, on its face, applies only to machines and devices having an "input powerline" and therefore it applies only to equipment connected to an outside source of power.

When confronting a matter of regulatory interpretation, the starting point is the language of the standard itself. See *Consumer Product Safety Commission v. GTE Sylvania Inc.,* 447 U.S. 102, 108 (1980). Absent a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Product Safety Commission* 447 U.S. at, 108; see also *Phelps Dodge Tyrone Inc.,* 30 FMSHRC 646, 651-52 (Aug,. 2008). Unless words are otherwise

defined, they are to be interpreted as to their ordinary, contemporary meaning. *Perrin v. United States*, 444 U.S. 37, 43(1979).

As noted, the language of the cited standard is clear and compliance is achieved when "the input powerline [is] de-energized." The term"input powerline" indicates that power is supplied to the piece of equipment from a separate source and the term is recognized as such throughout the industry. Accordingly, the cited standard does not apply to equipment having no "input powerline" such as battery powered equipment.

The Secretary argues that the reference in the standard to "[m]achines and devices described under paragraph(c) of this section" renders Section 75.1107-1(d) applicable to battery-powered equipment. The Secretary points to the language in Section 75. 1107-1 (c) that refers to "any machine or device regularly operated by a miner assigned to operate such machine or device" and argues that this language brings battery-powered equipment within the scope of Section 75.1107-1(d). However, under the rules of regulatory construction, the more specific standard controls the more general. *Morales v. Trans. World Airlines. Inc.,* 504 U.S. 374, 384 (1992); *Lyons v. Ohio Adult Parole Authority.* 105, F.3d 1063, 1070 (6th Cir. 1997), cert. denied, 520 U.S. 1224 (1997).

Here, under the Secretary's argument, the two "associated standards" are Sections 75.1107-(1)(c) and 75.1107-1(d). Section 75.1107(1)(c) is the more general referring to "any machine or device regularly operated by a miner assigned to operate such machine or device." Section 75.1107-1(d) is the more specific referring to equipment with "an input powerline." Because the more specific standard controls the more general, the reference to "any machine or device....." in Section 75.1107-1(c) is qualified by the reference to "an input powerline" in Section 75.1107-1(d). Therefore, the reference in Section 75.1107-(1)(d) to equipment described under paragraph (c) does not undercut the Respondent's argument that the standard applies only to equipment with an input powerline. Indeed there are legitimate differences between battery equipment and cable-powered equipment that the Secretary appears to recognize in the standard.

The Secretary also relies on an interpretation of the meaning of "de-energized"in the Program Policy Manual in support of her position. Her reliance is misplaced. The relevant portion of the Program Policy Manual is unclear. It reads as follows:

> Paragraph (d) of this Section requires that machines normally used at the face be inspected (for fire), and the input powerline de-energized when the miner leaves the area for more than 30 minutes. De-energization means disconnecting the power cable, or equivalent, at the power center.

Program Policy Manual, Vol. V at 114, Exh. (RC-39). The Secretary argues that the Program Policy Manual contemplates an equivalent to "disconnecting the power cable at the power center". But that is not how the language reads. The term "or equivalent" modifies "power cable". It does not modify "at the power center." To illustrate, an equivalent of disconnecting the power cable while still de-

energized at the power center would be to lock and tag out the power center, which again does not involve battery operated equipment.

The Program Policy Manual is unclear, except to make clear that the standard is addressing cable equipment. It makes no reference to battery operated equipment which would be expected if it were to apply to such equipment. In any event, since the Program Policy Manual is not binding, it would be inappropriate under these circumstances to apply it. See *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1360 (Sept. 1991). If the Secretary is correct and the Program Policy Manual extends the standard to battery equipment, she has adopted a substantive change without notice and comment rule-making. This she cannot do. See Keystone Coal Mining Operation, 16 FMSHRC 6 (Jan. 1994); Drummond Co., Inc., 14 FMSHRC 661 (May 1992); and *Hibbing Taconite Company*, 21 FMSHRC 346 (March 1998) (ALJ).

Under the circumstances, I find that the cited standard is indeed inapplicable to battery operated equipment. Since the equipment cited herein was battery operated, Order Number 6683086 must therefore be vacated.

Order Number 6683965

This order, issued on January 23, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.400 and charges as follows:

> An accumulation of combustible materials, in the form of coal fines, belt pressings, and loose coal, is present on the operating 3A conveyor belt from the drive to the tail piece (approximately 900 feet). There are 19 bottom rollers turning in contact with these accumulations. The accumulations are under the bottom rollers, but are also between the bottom rollers under the belt. The accumulations range from 1 to 18 inches in-depth by 2 to 6 feet in width and at various lengths along the belt line. These accumulations were seen from the travel way entry and are obvious to the most casual observer. The conveyor belt was removed from service by management when notified by management. This violation is an unwarrantable failure to comply with a mandatory standard.

Experienced MSHA Inspector Larry Morris testified that on January 23, 2009, he observed accumulations of loose coal, coal fines, and belt pressings along the entire 900-foot length of the 3A conveyer belt from the drive to the tail piece. Morris testified that he found the accumulations to be from 1 to 18 inches deep by 2 to 6 feet wide at various locations along the belt. Morris also testified that he found 19 bottom rollers turning in contact with the coal accumulations and determined that the friction caused thereby was an ignition source.

While the inspector's testimony is credible in itself, it is also largely corroborated by Respondent's mine manager Bob Hill. Hill observed accumulations beneath the belt rollers and that the belt rollers were turning in the coal fines. He thought the coal fines were wet, but he nevertheless

considered it a hazard noting that friction will dry out the coal. within this framework of evidence, I find that the violation has clearly been proven as charged.

The Secretary argues that the violation was also "significant and substantial" under the *Mathies* criteria. The credible evidence establishes that there was a reasonable likelihood of an ignition of the cited coal accumulations considering normal continued mining operations with 19 rollers turning in coal fines and with the history at this mine of belt misalignments and cutting into the belt frame. The operator's expert, Chad Barras also confirmed that hot rubber and metal shavings from a belt and hot lubricant from a defective roller are ignition sources. In addition, should a belt fire occur, the resulting injuries would reasonably be expected to be severe or even fatal from smoke inhalation, carbon monoxide poisoning and/or burns. Miners frequently access the area near the 3A belt thereby exposing them to these hazards. Within the above framework of evidence, I conclude that, indeed, the violation was "significant and substantial" and of high gravity and that the Secretary has met her burden of proof in this regard.

In reaching this conclusion, I have not disregarded Respondent's arguments that, assuming normal mining operations, the accumulations would have been discovered by the day shift examiner who would have shut the belt down and have had the accumulations cleaned. The Respondent further notes that no methane was found along the 3A belt at the time the order was issued, and that historically, very little methane is found along the belts at the subject mine. In addition, Respondent asserts that the fire detection and suppression system, the water sprays and the existence of a trained fire brigade contradicts any "significant and substantial" findings. While evidence that would reduce the likelihood of a fire or the likelihood of a more serious fire would appear to be relevant and probative in determining whether a violation is "significant and substantial" the Commission and the Federal Circuit Court for the seventh circuit have rejected such measures as negating such findings. *Buck Creek Coal Inc., v. FMSHRC*, 52 F.3d 133, 136; 7th Cir. (1995); *Amax Coal Company*, 19 FMSHRC 846, 850 (May 1997).

The Secretary further argues that the violations were the result of Respondent's "unwarrantable failure". In this regard, the Secretary maintains that the coal accumulations were obvious and extending at various locations over a distance of 900 feet along the 3A conveyer. At various locations, the accumulations ranged from 1to 18 inches deep by 2 to 6 feet wide. In addition, Inspector Morris credibly testified that he observed 19 bottom rollers turning in contact with the accumulations. Moreover, the 3A conveyer had less than 90 total rollers and 19 of them were turning in the accumulations. Indeed, the accumulations under the 3A belt were so obvious that Inspector Morris initially saw them from 75-80 feet away. Morris found that they would have been obvious even to a casual observer. Finally, it is undisputed that the accumulations were so extensive that it took a crew of at least 6 miners between 1 and 2 hours to abate the condition.

Big Ridge had also been placed on notice that greater efforts were required to comply with the cited standard. Indeed, it had received 118 final citations and orders for violations of that standard in the preceding 15 months. Respondent's mine Manager, Bob Hill, also knew that they had a problem with coal accumulations on the 3A conveyer. Hill acknowledged that the 3A conveyer had to be cleaned every day because of accumulations. Mine Superintendent, Ricky Phillips also told

Morris that the 3A conveyer had had problems with accumulations since its installation. The knowledge management had regarding continuing problems with accumulations therefore required that closer attention be paid to the condition of the 3A belt. Under the circumstances, I find that the Secretary has met her burden of proving that the violation was the result of unwarrantable failure and high negligence.

In reaching these conclusions, I have not disregarded Respondent's argument that the accumulations existed only because of an inadvertent mistake. Mine Manager Hill thought he had instructed the belt cleaners to clean the 3A belt at the beginning of the morning shift on January 23, 2009 but according to Hill, the belt cleaners mistakenly believed that a note he gave to the crew stated "3D" and the crew accordingly went to the 3D belt instead of the 3A belt. Hill acknowledged however, that the 3A belt needed more cleaning since it was accumulating faster than the other belts, and that the cleanup crew ordinarily started its shift by first cleaning the 3A belt. Within this framework of evidence, I find that Hill's failure to have followed up with the cleanup crew to make sure they were cleaning the known problematic 3A belt constituted a serious lack of reasonable care and, therefore, the violation was the result of Respondent's unwarrantable failure and high negligence. Under the circumstances, I can give this asserted defense but little weight. Order No. 6683965 is accordingly affirmed.

Order Number 6683966

This order, issued on January 23, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R § 75.362(b) and charges as follows:

> An inadequate on shift examination was made of the 3A conveyor belt on the evening shift of 01/22/2009. An accumulation of combustible materials was present on the conveyor belt and were [sic] not recorded in the violation/hazards area of the examiner's record book as referenced by Order#6683965. These accumulations were seen from the travel way entry and should have been seen by the examiner that examined the conveyor belt. To terminate this order, all examiners will have to be re-instructed on the proper way to examine a belt line and to enter the hazards and violations in the proper area of the examiner's record books.

This order is based upon the conditions Inspector Morris observed at 8:25 a.m. on January 23, 2009 as described in Order Number 6683965 and the report of the onshift examination of the 3A belt conducted by Mr. Minic during the second shift 11 hours earlier at 8:48 p.m. on January 22. Minic reported the conditions he found as "fine piles inby the head and slurry and fines under the rollers from the takeup to the 3B"(Exh. RB24). According to the order at bar, it is the Secretary's position that Minic's onshift examination was inadequate because he should have seen and reported the conditions Inspector Morris saw at the 3A belt 11 hours later. The Secretary's argument is premised on the inspector's unsupported opinion that the same hazardous condition he observed at 8:25 a.m. on January 23 also existed at 8:48 p.m. on January 22 I find however, that the Secretary has failed to sustain her burden of proving that premise. Indeed, the persuasive evidence is that the accumulations described in Order Number 6683965 developed after Mr. Minic's examination at 8:48 p.m. on January 22nd.

It is noted in this regard that, following Minic's examination, coal production continued until 1:00 a.m. on January 23rd, that the belts would have run until 1:30 a..m. and that production resumed at 7:00 a.m. on January 23rd. In addition, there is affirmative credible evidence that the conditions Inspector Morris observed were not in fact present even at the time of the most recent onshift examination preceding Morris' observations. Mr. Whiting conducted the preshift examination of the transfer points, drive, and tail of the 3A belt between 4:30 a.m. and 5:30 a.m. on January 23rd and did not see the conditions Inspector Morris later cited at 8:25 a.m. that day. Under all the circumstances, I do not find that the Secretary has met her burden of proving that the violative conditions cited by Inspector Morris in Order No. 6683965 existed at the time of the mine examination at issue. Order Number 6683966 must accordingly be vacated.

Orders Numbers 6683087; 6683088; 6683089 and 6683090

Order Numbers 6683087, 6683088, 6683089, and 6683090 involve MSHA Inspector Scott Lee's January 26, 2009 inspection of the 1A belt. The 1A belt was approximately 500 feet long and was considered to be a relatively short belt at this mine. At the time of Lee's inspection, a water pump was located beneath the belt. There is conflicting evidence as to what material was on the top and base of this water pump. This evidence is discussed below, under the heading for Order Number 6683087.

Inspector Lee was accompanied on his inspection by company representative Mike Davis and union representative Greg Fort. Upon arriving at the 1A belt, the inspection party initially stopped at the water pump where Lee indicated that he was issuing an order for spillage on top of the pump. Messrs. Lee, Fort and Davis then walked the entire belt line. There was material along the 500 feet of the 1A belt variously described as float coal dust, coal fines and wet coal fines. In addition, the shaft of a roller had broken off on one side of the belt and, as a result, the roller had dropped to the ground. A ribbon or warning flag was hanging from the top of a rail about a foot above the damaged roller.

Charlie Hyers was the mine examiner who conducted the onshift examination of the 1A belt for the day shift on January 26, 2009. He examined the 1A belt at approximately 8:00 a.m. and walked the entire beltline to complete his examination. He observed a hazard in that a carbon pile was present under the belt at the No. 3 crosscut. He addressed the hazard, by knocking the pile down and away from the belt. He also observed that the beltline was dark in color and needed rockdusting. Hyers testified that he did not observe a bad roller at the time of his examination.

Order No. 6683087, issued on January 26, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:

> Excessive accumulations of coal fines was [sic] allowed to accumulate on top cover of unit #1(011/001) 480 VAC water pump. These accumulations were 4 to 8 inches deep, 10.5 feet in length and four feet in width. There were also accumulations present next to the electrical boxes that were 4 to 6 inches deep on the bottom skid plate of the unit. This unit was place directly under the 1A unit belt. Management had to know about the placement of this unit and that it could be susceptible to coal fines build up around electrical components. This mine has also been put on notice regarding the high number of 75.400's which have been issued this inspection quarter.

There is no dispute that a water pump had been installed directly beneath the unit 1A conveyer belt. Experienced MSHA Inspector, Scott Lee testified that there were fine coal accumulations on the top cover of the pump ranging from 4 to 8 inches deep covering the 10 1/2 foot by 4 foot length and width of the pump. According to Lee, there were also accumulations "underneath the unit down where the electrical motor and things were present" 4 to 6 inches deep. Union President, Greg Fort accompanied Lee during the subject inspection. According to Fort, the cited water pump "had accumulated quite a bit of coal fines around the top of it and around the external part in the sides."

Respondent's Safety Manager, Mike Davis, also accompanied the inspection party but disagreed as to the amount of coal on top of the pump. He testified that there had been five rock dust bags placed on top of the pump and there was "not over an inch or so" of coals spillage on top of that. Davis also testified that there was "a lot of gob pushed up" on the bottom skid plate. Respondent's shift manager, also testified that he observed coal dust on top of the water pump. Certainly to the extent that there is corroborated evidence that at least a layer of coal accumulations existed on top of the water pump. I find that the Secretary has met her burden of proving the violation as charged.

I further find that the Secretary has met her burden of proving that the violation was "significant and substantial." While there is disagreement regarding the amount of the accumulations cited, I find that credible evidence from the testimony of Inspector Lee corroborated by eyewitness Greg Fort supports a finding that it was a significant accumulation not only on the water pump but also along the entire 500-foot 1A beltline (See Order No. 6683088). The hazard was aggravated by the presence of an ignition source about 150 feet away from the pump. While the solid- state electrical components on the pump itself were not an ignition source the belt rubbing on a damaged bottom roller caused belt shavings to be torn off the belt. Respondent's expert, Chad Barras, also testified that hot lubricant from damaged rollers can also provide a source of coal ignition. Under the circumstances, I find that the Secretary has sustained her burden of proving that the violation herein was "significant and substantial" and of high gravity.

I further find that the violation was the result of Respondent's unwarrantable failure and high negligence. The amount of accumulations on and around the pump were extensive and, due to the

presence of a nearby ignition source, were hazardous. In addition, the report of the examination by Mr. Diaz earlier on January 26th placed management on notice of potentially hazardous conditions along the 1A belt. Finally, the history at this mine of 118 violations of the standard at issue in the 15 months prior to the instant order clearly placed the mine on notice that greater efforts were required to maintain the subject belt. Under the circumstances, Order No. 6683087 is affirmed.

Order No. 6683088, issued on January 26, 2009, pursuant to section 104(d)(2) of the Act, also alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:

> Accumulations of combustible material in the form of coal float dust (1/8 to 1/4 inches deep) and coal fines under bottom rollers (4 to 8 inches deep) were allowed to accumulate. This condition was present rib to rib on the mine floor and was also present in the take-up and drive areas of the belt. This condition was present in the mine record books but was written under remarks instead of hazards. This mine has already been put on notice regarding the high number of 75.400's which have been issued this quarter.

During the same inspection on January 26, 2009, Inspector Lee observed float coal dust accumulations black in color along the entire 500-feet-long beltline rib-to-rib and underneath the belts rollers 4 to 8 inches deep. Accumulations in the take up and drive motor areas were also 4 to 8 inches deep. Lee's testimony was corroborated by Union President, Greg Fort who also observed black accumulations of float coal dust and coal fines along the entire belt. I find Inspector Lee's testimony to be credible and fully supported by Fort. This evidence clearly supports a finding that the Secretary has met her burden of proving the violation charged herein.

The Secretary also maintains that the violation was "significant and substantial". I agree that the Secretary has sustained her burden of proving each of the four elements set forth in *Mathies*. The violation has been proven as charged. Moreover, based on the credible testimony of Inspector Lee, corroborated by Union President Fort, I find that the coal fines and float coal dust accumulations were extensive and the Secretary has established that an ignition source was present. The ignition source was the friction and heat generated by the 1A belt rubbing against the bottom roller. Both Inspector Lee and Union President Fort testified credibly that the damaged bottom roller on the 1A belt had rubbed so hard against the belt that belt shavings had been torn off the belt. Should a fire occur, it is reasonably likely to result in serious injuries and fatalities from smoke inhalation, carbon monoxide poisoning and/or burns.

Respondent argues that the Commission has rejected testimony, such as Inspector Lee's, that an event such as a fire "could" occur in evaluating the reasonable likelihood of an event under the *Mathies* criteria. See *Texasgulf Inc.*, 10 FMSHRC 498 at 500-01 and *Zeigler Coal Co.*, 15 FMSHRC 949 at 953-54(June 1993). However, in this case, Respondent's own expert witness, Chad Barras,

confirmed that hot lubricant from damaged rollers and hot rubber and metal particles from a conveyor belt are a source of coal ignition.

The Secretary also alleges that the violation was the result of Respondent's unwarrantable failure. I have found the Secretary's evidence credible that the cited accumulations were obvious and extensive. Indeed the evidence shows that the accumulations were so extensive that it took more than three hours to abate the conditions. I find that the report in the record book that the beltline was dark in color, also placed management on notice of a potentially hazardous condition along the cited belt. Finally, I note that Big Ridge had received 118 citations and orders for violations of the cited standard in the 15 months preceding the issuance of the order at bar. I find that Big Ridge was therefore on notice that greater efforts were required to comply with the cited standard. Within this framework of evidence, I conclude that indeed the violation was the result of Respondent's unwarrantable failure and high negligence. Under the circumstances, Order Number 6683088 is affirmed.

Order No. 6683089, also issued on January 26, 2009, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.1725(a) and charges as follows:

> The 1A belt was not being maintained in a safe operating condition. At 5 ½ cross cut the bottom belt was rubbing hard on one side of a bottom roller which had been dropped out on one side. This belt has already been cited this inspection shift for accumulations of combustible material. Management should have been made aware of this condition, but there was no record of it in the mines record books. The roller was flagged, so it appears that the condition was present for at least one shift. The belt was removed from service. This mine has already been put on notice regarding the high number of 75.1725(a) issued this quarter regarding belts rubbing structure .

The cited standard, 30 C.F.R § 75.1725(a), 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."

The Commission has long held that in deciding whether machinery or equipment is in a safe operating condition, the alleged violative condition under 30 C.F.R. Section 75.1725(a) is to be measured against the standard of whether a reasonably prudent person familiar with the circumstances surrounding the allegedly hazardous conditions and any facts peculiar to the mining industry, would recognize a hazardous condition warranting corrective action within the purview of the applicable standard. *Alabama By-Products Corp.* FMSHRC 2128, 2129, (December 1982). Inspector Lee credibly testified that a defective bottom roller on the 1A belt had been rubbing hard against the belt to the extent that it had worn a flat spot. Union President, Greg Fort corroborated Lee's testimony that the damaged bottom roller was obvious and that the roller rubbed so hard

against the belt that belt shavings from pieces of the belt had torn off. Both Lee and Fort testified that the ignition source created by the damaged roller together with coal accumulations on the 1A belt created a hazard. Respondent's expert witness Chad Barras, also testified that rubber and metal shavings from a conveyer belt would be hot enough to ignite coal. Within this framework of credible and corroborated testimony, I find that clearly there was a violation of the cited standard.

I further find that the Secretary's allegations that the violation was "significant and substantial" are also supported by credible evidence. While, as I have noted before, Lee's testimony that an ignition "could" happen is insufficient in itself to conclude that a fire would be reasonably likely, I find that Lee's testimony in addition to that of union president Fort and the testimony of the Respondent's expert witness, Chad Barras, combines to provide an ample basis to find a reasonable likelihood of an ignition of the coal accumulations and a reasonable likelihood of serious or fatal injuries from smoke inhalation, carbon-monoxide poisoning and/or burns. I conclude therefore that the violation was "significant and substantial"within the framework of *Mathies* and of high gravity.

I further find that the violation was the result of Respondent's unwarrantable failure and high negligence. I first note that it is undisputed that a red ribbon or warning flag noting the existence of a hazardous or dangerous condition was hanging within 20 inches of the damaged roller. There is no dispute that mine examiners typically use such ribbons as a way of posting hazards and dangerous conditions. It may therefore reasonably be inferred that an agent of the operator was aware of the defective roller. I note that Respondent's Safety Manager, Mike Davis, opined that the ribbon looked old because it had rockdust and "stuff" on it and that it was not uncommon for such flags not to be removed after a roller has been repaired or changed. However, because of the close proximity of the ribbon to the position of the defective roller, i.e., only 20 inches away, I give Mr. Davis' speculation but little weight. I further find that the defective roller, for the reasons previously stated, presented a high degree of danger as an ignition source for the extant coal accumulations. Finally, based on 30 previous citations and orders issued to Respondent for violations of the standard at issue herein, I conclude that Big Ridge had notice that greater efforts were required to comply with the cited standard.

Within this framework of credible evidence, I conclude that, indeed, the violation charged in Order Number 6683089 was the result of unwarrantable failure and high negligence. The Order is therefore affirmed.

Order No. 6683090, also issued on January 26, 2009 pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.362(b) and charges as follows:

> An inadequate exam was performed on the 1A belt on day shift 1/26/2009. A flagged bottom roller at 5 ½ cross cut was not recorded in the mine record books. The roller had been dropped out on one side and the belt was rubbing hard on the side still connected to the

structure. This condition had to have been present for at least one shift due to the presents [sic] of the flag. This order also includes a hazardous condition being placed in remarks instead of hazards in the mine record books. This belt was cited this inspection shift for accumulations of combustible material in the form of coal float dust and coal fines. This condition was present in the mines record books, but was identified in remarks instead of hazards.

This order alleges two separate violations, i.e., (1) that the examination performed on the 1A belt conveyer on the day shift of January 26, 2009 was inadequate because a flagged bottom roller at the 5 ½ crosscut was not recorded in the mine record book and (2) the failure to report a hazardous condition in the "hazard" section instead of "remarks" section of the mine record book. I find that the Secretary has failed to have met her burden of proving either of the violations alleged. The most recent onshift examination prior to Inspector Lee's finding of a violation at 6:45 p.m. on January 26, 2009 was conducted by Mr. Diaz at approximately 8:00 a.m. earlier on the same day. There is insufficient evidence as to when that roller was found to be defective and flagged. Moreover, I find credible the testimony of Mr. Diaz that he walked the entire belt and recorded and observed other hazards and conditions, but did not observe any defective rollers or a flag. His examination was, of course also some 10 hours before the violation was cited. The Secretary has simply failed to sustain her burden of proving that the conditions cited by Inspector Lee had existed at the time of Diaz's examination.

Moreover, the existence of accumulations found by Inspector Lee some 10 hours after the examination by Mr. Diaz, does not itself establish that the same conditions had existed at the time of Diaz's examination. While Diaz indicated in the mine record books that the beltline was dark in color he did not report that condition as a hazard because the material was paper-thin. Diaz explained that he had been taught that a "hazard" for purposes of reporting is an immediate problem such as rollers turning in coal. In any event, the Secretary has failed to sustain her burden of proving that the conditions Inspector Lee found at 6:45 a.m. on January 26th had existed some 10 hours earlier when Diaz conducted his examination.

Whether the material constitutes "accumulations" and whether that material constitutes a "hazard" rather than a "condition" to be reported in the mine record books is also a matter clearly left to the sound discretion of the mine examiner. The fact that this examiner reported that the beltline was dark in color does not necessarily mean that it must be reported in the record books in any particular column. The condition found by Diaz was reported as a condition requiring attention by management and that is what is required.

Even assuming, arguendo, that the Secretary is now interpreting for purposes of reporting in the mine examiners record books that a belt that is black in color must be listed as a "hazard" she has provided no notice of that interpretation. At hearings, the undersigned requested that the Secretary produce an official statement by the Secretary concerning what constitutes a "hazard" for

reporting purposes, but she failed to do so. Mine Examiner Charlie Diaz testified moreover that he could not get MSHA to give him a straight answer as to what constitutes a "hazard" for reporting purposes. I find under the circumstances, that the Secretary has failed to provide fair notice of her interpretation of the term "hazard" for purposes of reporting in mine examiners' books and that therefore, due process also requires that Order No. 6683090 be vacated. See *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995); *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Gates & Fox Co v. OSHRC*, 790 F. 2d.154, 156 (D.C. Cir. 1986); *General Electric* 53 F.3d, 1324 at 1333-34 (D.C. Cir. 1995)

Order Number 6683968

This order, issued on January 29, 2009, pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.400 and charges as follows:

> An accumulation of combustible materials, in the form of coal fines and loose coal, is present at the operating 2C conveyor belt tail piece. The accumulations range from 1 to 18 inches in depth by approximately 6 feet in width by 15 feet in length and the rotating belt is in contact with the dry, ground up coal fines and there are coal fines built up on the frame work of the tailpiece to the angle of repose. The belt was removed from service by management when notified by MSHA.

Inspector Morris credibly testified that on January 29, 2009, he observed black accumulations of coal fines and loose coal on the operating 2C conveyer belt tailpiece. Morris estimated that the accumulations ranged from 1 to 18 inches deep by about 16 feet long at the tailpiece. On the mine floor, they were wet and damp but at the tail roller, they were dry and powdery. Brad Champley, Respondent's section foreman, testified that he observed what he opined was a fresh pile that had spilled off at the scraper by the tail piece. He estimated the material to be up to 3 feet by 4 feet in size. I find in either case that the cited material was of significant size and amount.

Respondent argues that the cited material was non-violative "spillage" and not a violative accumulation, citing *Old Ben Coal Company*, 1FMSHRC 1955 (December 1979) and *Utah Power and Light v. Sec. of Labor*, 951F.2d 292 (10th Cir. 1991). As previously noted, the Commission stated in *Old Ben* that some spillage of combustible materials may be inevitable in mining operations but "whether a spillage constitutes an accumulation under [30 C.F.R §75.400] is a question, at least in part, of size and amount". In addition, the Circuit Court in *Utah Power and Light* noted that "while everyone knows that loose coal is generated by mining in a coal mine, the regulation plainly prohibits permitting it to accumulate; hence it must be cleaned up with reasonable promptness, with all convenience speed." *Utah Power and Light at* 295 n.11.

In this case, I find that the combustible material was significant in size and amount, i.e., Inspector Morris credibly testified that the coal accumulations was 1 to18 inches deep and about 6 feet wide and 15 feet long. I find that whether the material has been cleaned up with reasonable

"promptness with all convenient speed" depends in part on the knowledge that the mine operator has regarding the recent history of spillage at the cited location. Here, there is no dispute that the Respondent's section foreman, Brad Champley, was aware of frequent coal spillage on the 2C tailpiece and had to frequently clean it. Indeed, he had already cleaned the tail piece twice that day before the order was written. Champley, had also previously reported to higher company officials that "we were having a nuisance with coal coming back on the bottom belt at the scraper" Champley also testified that "it was nothing more than constantly observing [he bottom belt at the scraper]and shoveling it back up. It is further noted that the order at bar was issued around 9:00 a.m. and that the tailpiece had already been cleaned at around 7:00 a.m. and then again around 8:00 a.m. Champley therefore knew that they had a serious spillage problem at the tailpiece that needed constant attention. Under the circumstances even if the spillage had existed for only 30 minutes to an hour I find that it constituted a violative "accumulation." The violation cited in Order Number 6683968 is accordingly affirmed.

I further find that the violation was "significant and substantial" within the framework of *Mathies.* As previously noted, I accept Inspector Morris' credible observations regarding the size, dryness and blackness of the material. I also find credible the testimony of Inspector Morris that the rotating conveyer belt and metal tail roller were in contact with the combustible material. It may be reasonably inferred that this condition was then an ignition source or would become an ignition source upon continuing normal mining operations. Again, while the evidence shows that the cited material probably had not been present for more than 30 minutes to an hour, since mine management knew of a continuing problem at that location, this relatively short time period is significant in determining the "reasonable likelihood" of a belt fire. There is additional evidence that the belt had become misaligned. With continuing normal mining operations, that misaligned belt would likely have created metal or rubber shavings hot enough to ignite coal. That such shavings are an ignition source is confirmed by Respondent's expert Chad Barras. I find that should a fire occur, injuries could reasonably be expected to be severe or even fatal from smoke inhalation, carbon monoxide poisoning and/or burns. Under the circumstances, I find that the violation was indeed "significant and substantial" and of high gravity.

I also find that the violation was a result of unwarrantable failure and high negligence. The violation was serious and obvious. In addition, because of the recent history of significant spillage at the tailpiece, it was incumbent upon the Respondent to maintain greater vigilance at that location. In addition, Respondent had a long history of violations of the cited standard. In the 15 month period preceding the issuance of the subject order, the mine had received 118 final citations and orders for violations of the cited standard. Under all the circumstances, I find that the violation was the result of Respondent's unwarrantable failure and high negligence. Order No. 6683968 is accordingly affirmed.

Order Number 6683972

This order, also issued on January 29, 2009, pursuant to section 104(d)(2) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.202(a) and charges as follows:

> An area of roof, on the Unit #2 (MMU-002) working section, between Rooms #3 and #4 in the last open cross cut, are not being supported or otherwise controlled, where persons work or travel, to protect persons from hazards related to falls of the roof. The area measures approximately 12 feet by 6.5 feet. This area is recorded in the third shift examiner's record books on 01/28/2009 and countersigned by the foreman and mine manager. A perimeter cut has been made inby this area on the day shift. This is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R § 75.202, provides as that: "[t]he 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."

This order is supported by Inspector Morris' testimony that on January 29, 2009, he observed an area of unsupported mine roof in the crosscut between rooms 3 and 4 in the number two working section. The area of unsupported roof measured 12 feet by 6 ½ feet. The inspector observed two loose roof bolts hanging 6 inches down from the roof. The roof bolts were not secured against the roof. The roof in the cited was also composed of "stack rock" described as thin, unconsolidated and layered rock. It is undisputed that the subject mine had experienced multiple roof falls in areas comprised of stack rock and, in recognition of this hazard, the approved roof control plan required additional roof support in such areas.

Indeed, there is no dispute that the unsupported roof cited by Inspector Morris existed, that the area of unsupported roof was recorded in the third shift mine examiner's record book on January 28, 2009 and that the book entry was countersigned by section foreman Brad Champley and the mine manager. Champley personally observed the loose bolts hanging down. In addition, there is no dispute that in spite of the hazard having been reported in the record book, the hazard was not abated prior to work being performed in the area.

From the undisputed evidence noted above, I find that the Secretary has met her burden of proving the violation as charged. I also find that the violation was "significant and substantial" within the framework of the *Mathies* decision. The violative condition exposed miners to an identifiable and discreet safety hazard i.e. the danger of a roof fall from an area of unsupported roof. The failure to immediately correct the hazard together with assigning miners to work and travel in the cited area contributed to a risk of injury. Indeed, a roof fall was reasonably likely because of the presence of unstable rock strata prone to collapsing. Indeed, there is no dispute that the mine had experienced multiple roof falls in areas of stack rock and hence the approved roof control plan required additional roof support in stack rock areas. Should a roof fall occur, there can be no doubt that serious injuries and fatalities would likely result. It is also undisputed that Respondent's employees worked and traveled near the area of unsupported roof when miners made a perimeter cut

inby the cited area on the day shift of January 29, 2009. A miner operator and a ram car-operator worked in the cited area to produce and load coal. Under the circumstances, the Secretary has clearly met her burden of proving that the violation was "significant and substantial" and for the same reasons that the violation was of high gravity.

I also find that the violation was a result of Respondent's unwarrantable failure. There is no dispute that Respondent was aware of the cited unsupported roof since the hazard was recorded in the mine examiner's book and countersigned by section foreman Brad Champley and the mine manager. The area of unsupported roof was also obvious since the two loose roof bolts were hanging down about 6 inches from the roof. Since the loose bolts were also in an area of dangerous stack rock, the condition was also extremely dangerous.

In reaching this conclusion, I have not disregarded Respondent's argument that the fact that Champley sent miners to work and travel in the area of unsupported roof, was a result of an inadvertent error and therefore not the result of its unwarrantable failure. Champley explained that when he was copying the conditions reported in the examiners book into his notebook, he mistakenly wrote that the bolts were located between rooms 2 and 3 rather than 3 and 4. Therefore, when he assigned work to the roof bolters, he inadvertently sent them to the wrong location. This error was corroborated by the fact that the miners had actually installed bolts between rooms 2 and 3 rather than 3 and 4. I find, however, that Champley's actions nevertheless showed a "serious lack of reasonable care" and that therefore those actions constituted unwarrantable failure and high negligence. Under the circumstances, Order No. 6683972 is affirmed.

Order Number 6683973

This order, also issued on January 29, 2009, pursuant to section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R §75.363(a) and charges as follows:

> A hazardous condition, in the Unit #2 (MMU-002) working section, was found on the third shift of 01/28/2009 by the pre-shift examiner and was recorded in the pre-shift examiner's record book, countersigned by the foreman and mine manager. The condition referenced in citation #6683972 hazard was not corrected prior to work being performed in the area. A hazardous condition shall be corrected immediately, or the area shall remain posted until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area. This is an unwarrantable failure comply with a mandatory standard.
>
> The cited standard, 30 C.F.R § 75.363(a) provides as follows:
>
> Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the condition creates an imminent danger, everyone except those

persons referred to in section 104 (c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

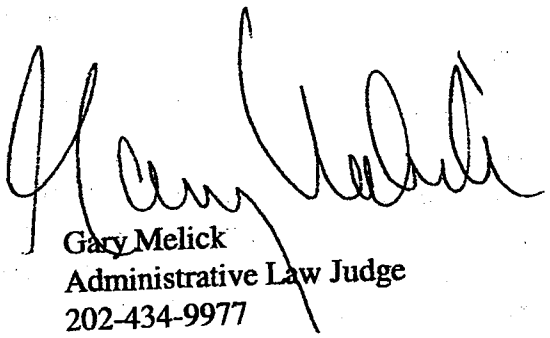
Respondent argues that there was no violation as alleged in the order at bar because the area had been posted with a ribbon as a warning flag. It is undisputed that there was a red or pink ribbon lying on the mine floor beneath the cited condition. According to Inspector Morris, the examiner had flagged-off the area by hanging the ribbon from surrounding roof bolts. Morris testified that he was satisfied that the endangered area had been posted correctly (Tr. 686). I find accordingly that there was no violation as charged in Order Number 6683973. The order must accordingly be vacated.

CIVIL PENALTIES

Under section 110(i) of the Act, in assessing civil monetary penalties, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of the penalty to the size of the business of the operator charged, whether the operator was negligent, the affect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good-faith of the person charged and attempting to achieve rapid compliance after notification of the violation. Big Ridge is a large business with a significant history of violations. There is no evidence that even the proposed penalties would affect its ability to remain in business. There is no dispute that the violations were abated promptly and in good faith. The negligence and gravity of the violations herein have been previously discussed. Considering the factors set forth in section 110(i) of the Act, I find that the civil penalties ordered herein are appropriate.

ORDER

Order Numbers 6683084; 6683686; 6683966; 6683090 and 6683973 are hereby vacated. Order Numbers 6683824; 6683965; 6683968; 6683972; 6683087; 6683088 and 6683089 are hereby affirmed. Big Ridge Inc., is directed to pay the following civil penalties (totaling $153, 700.00) for Order Numbers 6683824 $50,000.00; 6683965 $20,300.00; 6683968 $50,000.00; 6683972 $7,700.00; 6683087 $17,300.00; 6683089 $17,300.00; 6683089 $9,100.00 within 40 days of the date of this decision.: Contest proceedings Docket Numbers LAKE 2009-274-R; LAKE 2009-276-R; LAKE 2009-278-R; LAKE 2009-279-R; LAKE 2009-310-R and LAKE 2009-311-R are hereby granted and Contest Proceedings Docket Numbers; LAKE 2009-277-R; LAKE 2009-280-R and LAKE 2009-312-R are hereby dismissed.



Gary Melick
Administrative Law Judge
202-434-9977

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/to

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August 31, 2010

THOMAS BEWAK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2008-161-DM
v.	:	
	:	
ALASKA MECHANICAL,	:	Rock Creek Mine
INCORPORATED,	:	Mine ID 50-01850
Respondent	:	

DECISION

Appearances: Melinda D. Miles, Law Office of Melinda D. Miles, Palmer, Alaska, for Complainant; Allen F. Clendaniel, Sedor, Wendlandt, Evans & Filippi, Anchorage, Alaska, for Respondent.

Before: Judge Lesnick

This proceeding is before me on a Complaint of Discrimination filed by Thomas Bewak ("Bewak") against Alaska Mechanical, Incorporated ("AMI"), under section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c). The complaint alleges unlawful discharge from employment in retaliation for having made safety complaints to AMI.

Bewak filed a Discrimination Complaint with the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on August 8, 2007.[1] Ex. O. In a letter to Bewak dated September 21, 2007, MSHA notified him that, based on its investigation of the allegations contained in the Complaint, it had concluded that a violation of section 105(c) had not occurred. Ex. P. Bewak, initially *pro se*, initiated this instant proceeding before the Commission on November 5, 2007, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).[2]

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[1] Section 105(c)(2) provides, in pertinent part: "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 alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall

Before a hearing was held, Bewak obtained counsel. A hearing was subsequently held in Anchorage, Alaska. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that Bewak engaged in activity protected by the Act, and that his protected activity motivated Alaska Mechanical to terminate his employment.

I. Factual Background

The complainant, Bewak, is a welder and welding inspector who lives in Chickaloon, Alaska. His inspector certifications were valid at all times relevant to these proceedings, and authorized him to inspect the quality of welds and welding bolt-ups. Tr. 104-07. In early July 2007, Bewak was hired by AMI to work on a construction project at the Rock Creek Mine near Nome, Alaska, primarily as a pipe welder, and secondarily as a quality control inspector. Tr. 112-13; Ex. B. He worked at the Rock Creek site from on or around July 8, 2007, until he was fired on July 25, 2007. Tr. 113, 165; Ex. D.

During 2007, NovaGold Resources and their subsidiary, Alaska Gold, were developing a gold mine on the Rock Creek site. AMI had been hired as a general contractor to build processing facilities on the site. Tr. 242. At the time Bewak worked at the Rock Creek Mine, Kurt Imig was AMI's principal in charge of the Rock Creek Mine project, and also the company's acting corporate safety officer, chief financial officer, and chief purchasing officer. Tr. 284, 286-87. Imig testified that "[t]here was a big push in '07 to get the work done so that [Alaska Gold] could pour a bar of gold before the new year." Tr. 247.

When Bewak reported for work at the Rock Creek site, he received a 20-30 minute "minimal safety orientation" before being told to "hang out and just watch everybody the way they work and just get used to being [on the site]." Tr. 113-16. During his first day on the job site, Bewak observed several work practices and conditions that he felt were unsafe, including ironworkers working overhead and allowing "more than the usual amount of stuff" to fall from where they were working onto areas frequented by other workers, welding leads running "up over and around the stairways where people could trip over" them, "some people [who] wore their safety equipment for climbing around and other people [who] didn't," and supervisors who were not addressing the safety problems he observed, acting instead as if "as long as they saw the people moving, . . . that was good enough for them." Tr. 116-17, 119.

Bewak's observations were corroborated by Bret Garland, a pipefitter who worked for AMI at the Rock Creek Mine during the same period Bewak did. Tr. 21-23. Garland testified that during the time he worked at Rock Creek, "[t]here just was a constant array of red flags popping up" regarding unsafe working conditions. Tr. 24. When he first reported for work – at which time he did not receive any "orientation or training," the site "looked rough . . . they

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have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission . . . ."

needed to come in with a little bit more fine fill and level out the place." Tr. 31-34. Although he brought his concerns to the attention of his supervisor, the conditions causing him concern were never addressed. Tr. 36, 42. According to Garland, "as safety cultures go, this one [at AMI's Rock Creek Mine project] was deficient." Tr. 78.

Each workday at the Rock Creek Mine began with a meeting of all AMI employees that John Jackson, AMI's Mechanical Superintendent, described as consisting of "a group discussion on where the main work activities were going to be located for that day, a general quick summary of the type of activity, whether it was crane work, and – and the corresponding potential hazards. Then that usually lasted not long, perhaps 15, 20 minutes." Tr. 412. After this all-hands meeting, Jackson testified that "the mechanical guys . . . would always have a safety meeting." Tr. 413. After these smaller meetings, members of the work crew were required to sign a Task Hazard Assessment ("THA") highlighting any potential hazards associated with that day's work. According to Jackson, "[i]t was mandatory that you sign those. . . . And by signing those . . . [y]ou understood what your job was, and you agreed with the potential hazards and what to do to correct them." Tr. 415.

On July 19, 2007, two AMI employees, Craig Bagley, 28, and Tyler Kahle, 19, died as a result of injuries sustained when the manlift they were operating tipped over. Tr. 95-96. Immediately following this accident, AMI's operations on the site were essentially suspended while inspectors from the Mine Safety and Health Administration ("MSHA") investigated the accident. Tr. 444. MSHA eventually cited AMI for violating the task training requirements of 30 C.F.R. § 48.27(a), alleging: "The task training did not identify the specific safe operating procedures and limitations of the Load Management System that was critical to safely operate [the] manlift." Ex. 6. AMI was also cited for unwarrantable failure to comply with 30 C.F.R. § 56.14205 by operating the manlift beyond its design capacity. Ex. 6.[3]

The day after the accident was a paid day off; over the following four days, July 21-24, Bewak did "[v]ery little," though on either July 22 or July 23, Jackson asked Bewak to inspect bolts used by AMI in constructing a mill building on the site. Tr. 193, 448. Bewak began inspecting the bolts, but found that, in his opinion, "90 percent of the joints that I looked at had to be reworked, if not all of them." Tr. 149. He told Jackson "[i]t looks pretty rough," and declined to finish the inspection because AMI did not have any necessary reference materials on site for Bewak to consult. Tr. 152-53. Jackson testified that Bewak told him "he didn't feel comfortable in performing that task." Tr. 424. On July 25, 2007, Bewak attended the all-hands

[3] AMI contested both the citations and the penalties arising from the accident. *Alaska Mechanical, Inc.*, Docket Nos. WEST 2008-1582-M, WEST 2008-135-RM, and WEST 2008-153-RM. The Secretary of Labor ("Secretary") and AMI filed a joint motion to approve settlement in the proceedings, dated March 12, 2010. On June 30, 2010, I concluded that the reduced penalty agreed to by the parties for Citation No. 6398234 lacked the factual basis necessary for me to determine whether the penalty would adequately effectuate the deterrent purpose underlying the Act's penalty assessment scheme, and denied the motion.

meeting and a fall protection training session in the morning, then was told by his supervisor, Rob Lancaster, that he had work for his crew, whereupon he assigned a welding job to several members of his crew, including Bewak. Tr. 206-07. At approximately 2 o'clock that afternoon, Bewak was fired. Tr. 165-67. Lancaster testified that he fired Bewak because, as he told Jackson that day, "I just can't get Tom to work." Ex. N at 50.[4]

Jackson testified Bewak was fired "[b]ecause he would not follow safety procedures. . . . He wouldn't do his work. He would . . . go out, walking around, talking to other guys that are trying to do their work, thereby impacting my job . . . it was just becoming too much." Tr. 435-36. Jackson explained further:

> I mean, the rules were very simple and were explained daily: Sign the THAs. For whatever reason, he wouldn't. Wear your safety vest. . . . Practically every day: Would you get the vest on, please? Stay on task. Do what you're hired to do, which in his case was putting together pipe. Do that. And he would have other people, laborers and whatnot, do his work for him. He would be out and about. I'd show up where he was supposed to be working, and he's not there. . . . And so after a point here, this guy's more problem than he's worth to me. And so that's it. And it was not like it was out of the blue. You know, if you don't start getting back on beam here, I'll lay you off . . . and you can step aside and let a man that's serious about his job come in here and do it. You know, we ramped up here.

Tr. 436-437.

II. Findings of Fact and Conclusions of Law

A complainant alleging discrimination under section 105(c) of the Act, 30 U.S.C. § 815(c), establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). In determining whether a mine operator's adverse action was motivated by protected activity, the Commission has noted that a judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge*

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[4] Lancaster did not testify at the hearing on this matter. Instead, his testimony was taken in a telephonic deposition on August 6, 2009, the transcript of which was admitted into the record for evidentiary purposes as Exhibit N.

Corp., 709 F.2d 86 (D.C. Cir. 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." 3 FMSHRC at 2510 (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 3 FMSHRC at 2510-12; *see also Sec'y of Labor on behalf of Williamson v. CAM Mining LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009) (finding "proximity in time" where the time between the protected activity and adverse action was three weeks); *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34, 37-38, 43-44 (Jan. 1999) (finding temporal proximity despite 16-month gap between protected activity and adverse action).

A. Protected Activity

Bewak has established that, before AMI terminated his employment, he engaged in protected activity when he brought safety concerns to the attention of his supervisors and an MSHA inspector.[5] There is no dispute that Bewak resisted signing THAs. *See* Tr. 419-20 (Jackson's testimony that he "heard through the foremen initially that [Bewak] wasn't signing the THAs). According to Bewak, he resisted signing THAs because the work crews to which he was assigned "never actually physically went to [a work] area to do a THA ever, not with me . . . [and] you're supposed to physically go there. And everybody is supposed to point, hey, look, the ground is not right for the manlift or – or this ladder is broken. Numerous things that could be pointed out by everybody looking at the job." Tr. 496.

When asked whether he told AMI management why he was reluctant to sign the THAs, Bewak said:

> I told Lancaster flat out. . . . I said, . . . in order for me to sign this, we got to really do one of these things [i.e., an adequate task hazard assessment]. And he's like – looks at me like – kind of like a deer in headlights, and just kind of blew it off and would say some unnatural thing like, yeah, okay, we will or something like that. You know, Tom, sign the damn thing so we can get to work.

Tr. 130. Garland also testified that, in his experience, no THAs were ever done to address specific hazards of specific jobs in the areas where the jobs were to be performed. Tr. 50-52.[6] I

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[5] Section 105(c)(1) of the Act provides, in pertinent part, that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation."

[6] In this connection, I would note that it was clearly the opinion of MSHA that AMI's task training was tragically inadequate on at least one occasion. In its report on the July 19

find that Bewak's concerns regarding the THAs, and his communicating these concerns to AMI management, constituted protected activity.

As detailed above, on either July 22 or 23, Jackson asked Bewak to inspect bolted joints[7] in the mill building that AMI had under construction on the site. Tr. 193, 448. Bewak testified that he agreed to do so, and found the work performed on the joints to be so inferior that, in his opinion, most of the joints needed to be reworked. Tr. 149. He relayed his concerns to Jackson and declined to finish the inspection. Tr. 152-53. According to Bewak, he told Jackson "you would almost have to start from scratch [on] every joint." Tr. 157. Given Bewak's background as a quality control inspector, I find that his concerns as to the quality of the work done on the bolted joints were based upon a good faith, reasonable belief in a hazardous condition. *Robinette*, 3 FMSHRC at 812 (in the context of protected work refusals, the Commission has held that in order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition"). I also find that when Bewak told Jackson that the bolted joints were "pretty rough" and required extensive reworking, that this constituted protected activity.

After the July 19 double fatality at the Rock Creek Mine, MSHA Inspector Stephen Cain arrived at the site to investigate the accident. Cain testified that Bewak approached him during his investigation with concerns regarding the safety of the bolted joints being used in the construction of the mill building. Tr. 94-98. Bewak testified:

> I had been there for over a week, and everything I saw, up [to] and including the deaths . . . just compelled me to [approach Inspector Cain]. . . . I wanted to talk to him. And I – when I first got the opportunity, I took it. He was standing out there pretty much alone, and I was with a group of people. I went right over there and introduced myself and asked him if – if he could do anything about the quality of the work [in the mill building], because after the guys got killed, I was afraid that building was going to fall down on somebody.

Tr. 161. Bewak's contacts with Inspector Cain constituted protected activity.

B. Adverse Action

It is undisputed that on July 25, 2007, AMI terminated Bewak's employment at the Rock Creek Mine, that it was Rob Lancaster who told Bewak he was fired, and that it was John

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double fatality, the agency concluded that AMI management "failed to ensure the training [provided to the manlift operators] addressed all safe operating procedures," and this failure was a root cause of the accident that killed the operators of the manlift. Ex. 6.

[7] In his Complaint filed with the Commission, Bewak stated that he examined "the DTI or direct-tension-indicator bolt-up connections." Ex. O, p.1.

Jackson, AMI's mechanical superintendent, who made the ultimate decision to fire Bewak. Tr. 167, 409, 431, 433; Exs. C, D, & N at 50. I also find that Bewak was fired at around 2 o'clock in the afternoon on July 25, after he had spent the morning in a training session on fall protection. Tr. 165-67, 206-07. When he was fired, Bewak was part of a crew that had been assigned a welding job by Lancaster. AMI does not dispute, and I thus credit Bewak's testimony that "it was a two-man job at best, and he [Lancaster] had five, maybe even more people on that job all wanting to get back to work, because they hadn't been doing anything for two days. That was like the big deal, the first job that came up. Nobody wants to stand around." Tr. 494.

Aside from these bare essentials, I find it necessary to address the testimony of Bewak's supervisors on the events of July 25, 2007. I note in particular that Lancaster's account of what occurred on July 25 differs in many respects from these findings. Ex. N at 36-50. According to Lancaster, on the day he fired Bewak, he "had a project that came in the door, and it was a welding project." *Id.* at 36-37.[8] He testified that he assigned the project to Bewak, with one other person, Mike Morgan, to act as a "fire watch" for Bewak (i.e., someone "with a fire extinguisher nearby, in case something flared up"). *Id.* at 37. After attending to other tasks, he returned to where he had assigned Bewak to work and discovered that:

> Mike Morgan was welding it. So I said, I need Mike to be a fire watch on the job, that's the way we lined it out. I wanted to, you know, get him working. So I told him, I need you to complete the job, so I pulled Mike off of it. . . . I need[ed] a structural welder on it and not a pipefitter welder. Mike wasn't certified as a structural welder and Tom was supposed to be. . . . I didn't reprimand anybody at that point. I asked Tom to complete the job, and I went back to the main office, I believe, and did some paperwork there.

Id. at 38-42. Lancaster said he again returned to Bewak's work area and found that "no one was welding on the plate" and that Bewak did not have on his safety vest. *Id.* at 42. Lancaster went on to testify that "at this point it's already been three-plus hours that this blade should have been worked on and there wasn't any prep work done to it. . . . I said, I need to get it done by noon." *Id.* at 42, 49. He left again "to go check on the rest of the crew," then returned again to Bewak's work area:

> And when I came back he was just standing next to the blade. . . . So at that point I just walked right to the office. I told John Jackson, I said, I just can't get Tom to work. And he said, well, you know what to do then . . . we're not paying people to stand there. So I told [Jackson] I was going to let [Bewak] go. So I went back to Tom and I told him.

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[8] Lancaster was not clear as to the nature of this project. First, he said it was a welding job "on a big blade off a piece of equipment," but then said, "I don't remember exactly what it was, but it was a welding project." Ex. N at 36-37. Later, he again said the project involved "some type of bulldozer blade." *Id.* at 43.

Id. at 49-50.

The most significant problem I find with Lancaster's testimony is that it is at odds with record evidence that establishes an entirely different sequence of events. Although Lancaster claims that after "three-plus hours" he told Bewak he needed the welding project "done by noon," during that time period, i.e., the morning of July 25, Bewak was attending fall protection training. *See* Ex. L. Lancaster also contradicts himself when, on the one hand, he says that when he first checked on Bewak, he found Morgan welding, and on the other hand, says that later, "there wasn't any prep work done to it." If he found Morgan welding, there must have been at least *some* prep work done. He was questioned further on this point, and further highlighted the contradictions in his testimony:

> Q. Why did you say start on the project if you had already seen him working on the project before?
>
> A. He hadn't worked on the project yet. And it's been over three hours, that's why I got a little upset. I told him I need to get this blade started.
>
> Q. Started. Okay. But this is the blade that Mike was welding on and Tom was watching him?
>
> A. Yes.

Ex. N at 44. As to Lancaster's assertion that Morgan "wasn't certified as a structural welder," Morgan himself testified at the hearing that he was, in fact, certified at the time to do both pipefitting and structural welding. Tr. 70-71. Lancaster's testimony is also at odds with Bewak's, who said Lancaster "had five, maybe even more people on that job all wanting to get back to work." Tr. 494.

Finally, I note that another of Bewak's supervisors, Michael Shawn Engstrom, an AMI general foreman, strangely enough told a story very similar to Lancaster's. Asked to comment generally on Bewak's performance, Engstrom testified:

> [O]ne particular day I made sure that there was a weld for Mr. Bewak to do, and he was to weld it. And anyways, I come back out later, and one of the other kids was welding on it. . . . Well, obviously I had confronted him about it. And I can't remember exactly what the exact story was, but I recall that he wanted to let the kid have some more practice and ... get some more welds under him, which, you know, is fine, but I need[ed] to evaluate . . . Mr. Bewak, and I need[ed] him to do the stuff that's assigned to him.

Tr. 330-31. When asked if he was aware that Lancaster told "the same story," Engstrom was taken aback, responding: "As far as – no, because I don't know – I'm not exactly sure what you're getting at." Tr. 341-42. When counsel clarified the question, Engstrom replied, "If Rob Lancaster is telling that story as well, then that would be on a separate incident." Tr. 342. When Bewak was asked about the same story being told by Engstrom and Lancaster "about you having another younger welder do a weld that you had been asked to do," he replied, "They're confused. It only happened once." Tr. 494.

I agree with Bewak. I find that Engstrom and Lancaster were, at best, confused, and that this fact casts considerable doubt on their testimony as a whole, as well as even greater doubt on the particular testimony each offered regarding the story about Bewak and the younger welder. I discredit their contradictory testimony. Instead, I find that Lancaster assigned a welding job to a crew that included Bewak on July 25, 2007; that this occurred after Bewak attended the fall protection training session; and that once on the job, Bewak allowed a less experienced, albeit properly certified, welder an opportunity to gain some experience by doing a structural weld. I also find that any welding job AMI undertook at the Rock Creek Mine would have required the company to "pay[] people to stand there," because as Lancaster stated, when welding was done, "you always had to have a fire watch . . . in case something flared up." *See* Ex. N at 37, 50.

C. Motivation

I find that the record contains ample reliable evidence to support a conclusion that AMI's termination of Bewak was motivated by his protected activity. In reaching this conclusion, I have relied primarily upon the following indicia of AMI's discriminatory intent: (1) the company's admitted knowledge of Bewak's protected activity; (2) the animus demonstrated by AMI towards Bewak's protected activity; and (3) the very close proximity in time between Bewak's protected activity and AMI's adverse action.

1. Knowledge

The Commission has held that an "operator's knowledge of the miner's protected activity is probably the single most important aspect of a circumstantial case," and that "knowledge . . . can be proved by circumstantial evidence and reasonable inferences." *Chacon*, 3 FMSHRC at 2510. Here, however, I do not need to resort to any circumstantial evidence or inferences to find that AMI knew of Bewak's protected activity because the company admitted it knew of these activities. John Jackson, who made the ultimate decision to fire Bewak, testified he knew Bewak made safety complaints:

> Q. Mr. Bewak complained about safety violations at the Rock Creek Mine project prior to the deaths of Mr. Bagley and Mr. Kahle. Isn't that correct?
>
> A. The only complaints I was aware of were the ones that were specific,

that he would make specific to what his area of work or what he was involved in.

Q. Right. So he did make complaints about safety, right?

A. Yeah.

Tr. 462; *see also* Tr. 409, 431, 433; Ex. C & D. Jackson also testified that he "heard through the foremen initially that [Bewak] wasn't signing the THAs, and so I – after a short while of this – and I had a chat with him. Is there a problem here? . . . I can recall him saying he had safety issues." Tr. 419-20; *see also* Tr. 431, 433, Exs. C & D. Engstrom denied ever hearing Bewak complain about THAs. Tr. 304-05, 356. In light of Jackson's testimony that he "heard through the foremen initially" that Bewak had objected to signing THAs (Tr. 419-20), I discredit Engstrom's testimony on this point. To the contrary, I find that Engstrom knew of Bewak's concerns regarding the THAs.

Lancaster testified that before Bewak was transferred to his crew, he was unaware of Bewak refusing to sign any THAs. Ex. N at 32. Bewak, however, testified that on July 25, in particular, Lancaster confronted him after he had not signed the THA for that day's work assignment:

> [Lancaster] assigned the work, and then he . . . reminded me before he left, kind of away from everybody, [he] said, well, you didn't sign the [THA] again. And he . . . acted like he was a little more ticked off about it this time than all the other times. So I said, yeah. . . . And when he left, I went and signed it, because I was thinking, well, I really don't want to lose my job. And so I did. I went and signed it against my better judgment.

Tr. 166. Bewak also stated that he "told Lancaster flat out" why he was reluctant to sign the THAs. Tr. 130. Jackson also testified that he "heard through the foremen" – not a singular "foreman" – about Bewak's reluctance to sign THAs. Tr. 419. Having already found Lancaster's testimony generally unreliable, I discredit his testimony here, and find that he knew that Bewak had problems with signing THAs.

Jackson denied that Bewak told him after inspecting the bolts in the mill building that he "would almost have to start from scratch [on] every joint." Tr. 157, 448. However, I find Jackson's testimony on this point lacking any credibility. His denial of being told by Bewak that the bolting job was done poorly came only after a series of non-responsive, equivocal answers on cross examination:

> Q. Do you recall that when Mr. Bewak told you that he was refusing to inspect the mill building, that the reason he gave you was because it was so poorly done, [you] would need to start from scratch?
>
> A. I would have to think about that for a minute because that's not – he's

not in a position to make that decision. He's not qualified.

. . .

Q. Okay. But whether or not he was qualified to state so, do you agree that when Mr. Bewak refused to inspect the mill building, the reason he gave you was that it was so poorly done, you would need to, quote, start from scratch?

A. I disagree with that statement. He's not qualified to make it.

Q. I'm not asking you, Mr. Jackson, whether you agree or disagree with the statement. I'm asking whether you agree that Mr. Bewak made that statement.

A. No. I don't recall that.

Tr. 446-447. Contrary to this testimony, I find that Jackson was well aware of the concerns Bewak expressed concerning the bolts in the mill building Jackson asked him to inspect. Specifically, I find that Jackson knew that in Bewak's opinion, the quality of work done on the bolts was inferior and needed to be reworked.

Jackson also was aware that Bewak talked to an MSHA inspector after the July 19 fatal accident, and that this was "during the process of him being laid off." Tr. 427. Bewak also testified that when he spoke with Inspector Cain about the bolt-up in the mill building, he did so in plain sight of his supervisor, Rob Lancaster. Tr. 169. Especially in light of Cain's testimony that he spoke to AMI management about Bewak's concerns (Tr. 98), I infer that Jackson knew that the subject of the conversation Bewak had with Cain was the bolt-up.

2. Animus

I find ample reliable evidence of the animus AMI management held towards Bewak. With regards to THAs, despite concerns Bewak expressed about signing them when no adequate hazard assessment had been done, he was told repeatedly that before he could start working, he had to sign a THA, and that failure to sign one could lead to his being fired. Tr. 125-26. According to Bewak, "we were told flat out we could get fired if we didn't sign it, flat out." Tr. 129. Jackson testified that Bewak was reluctant to sign the THAs, and "had a chat with him," but dismissed Bewak's safety concerns as "just chatter." Tr. 419-420. When told by Bewak of the problems with the bolt-up in the mill building, and that he did not want to proceed with inspecting them, Bewak testified that Jackson was "visibly upset." Tr. 156. When explaining why he changed Bewak's Termination Report from indicating Bewak was laid off, with "Not Qualified" listed as the "Reason for Separation" (Ex. C), to indicating he was "Fired" for "Refusing to Follow Safety Procedures," Jackson testified: "Well, quite honestly, he just pissed me off." Tr. 431, 433. Bewak also testified that when he spoke with Inspector Cain, he did so in plain sight of his supervisor, Rob Lancaster. After Bewak finished, he testified: "When I turned around, [Lancaster] gave me that look, like, oh, that dirty rat." Tr. 169.

In light of this testimony, I find that Bewak worked in an environment in which management was pervasively hostile to his safety complaints.

3. Proximity in Time

Bewak was employed by AMI at the Rock Creek Mine for less than three weeks, from July 8 or 9 until July 25, 2007. Tr. 113, 165; Ex. D. Clearly, the events that are the subject of this proceeding occurred in very close proximity in time. The most relevant sequence of events, however, occurred within a period of three or four days, from July 22 or 23, when Jackson asked Bewak to inspect the bolt-up in the mill building, to July 25, when he was fired.

Jackson testified that he asked Bewak to inspect the bolt-ups on either Sunday, July 22, or Monday, July 23. Tr. 448. I have already found that after examining some bolts, Bewak told Jackson that the quality of work done on the bolts was inferior and needed to be reworked, and I have credited Bewak's testimony that upon hearing this, Jackson was "visibly upset." Tr. 156. Soon after he expressed his concerns to Jackson, Bewak asked MSHA Inspector Cain "if he could do anything about the quality of the work" in the mill building, and told Cain he was "afraid that building was going to fall down on somebody." Tr. 161. Cain, in turn, told AMI management of Bewak's concerns. Tr. 98. I have already drawn the inference that Jackson knew that Bewak spoke to Cain about the bolt-up. On Tuesday, July 24, 2007, Jackson signed a Termination Report on Bewak with "Layoff" checked and "Not Qualified" listed as "Reason for Separation." Tr. 431, Ex. C. By the afternoon of the following day, Wednesday, July 25, Bewak had been fired. Tr. 165-67. Clearly, there is a significant coincidence in time between these various events, and I thus find such a coincidence in time between Bewak's protected activity, specifically his complaints regarding the bolt-up in the mill building, and the adverse action AMI took against him.

D. Prima Facie Case

In light of the findings I have made above, that Bewak engaged in protected activity, that AMI took adverse action against him, and that the adverse action was motivated by Bewak's protected activities, I therefore conclude that Bewak has met his burden of establishing a prima facie case of unlawful discrimination under the Mine Act.

E. AMI's Defenses

An operator may rebut a prima facie case of prohibited discrimination by showing either that no protected activity occurred, or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it may nevertheless defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern*

Associated Coal Corp. v. FMSHRC, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying Pasula-Robinette test); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test). The Commission has also noted that judges "may conclude that [such] justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive." *Chacon*, 3 FMSHRC at 2516.

AMI argues that Bewak's "[s]afety complaints, if any, had nothing to do with his termination. He was fired because of his poor performance and workplace misconduct." AMI Br. at 3. In finding that AMI was motivated at least in part by Bewak's protected activities, I have rejected this defense. It remains for me to determine whether AMI would have fired Bewak for unprotected activity alone. Before addressing this issue, however, AMI's documentation of Bewak's firing is problematic enough that I need to first address the contradictions and problems arising from these documents and the testimony about them.

The record contains two Termination Reports for Bewak signed and dated by Jackson. Exs. C & D. The first of these reports was signed and dated by Jackson on July 24, 2007, and lists July 24 as an effective date of termination. Under "Type of Separation," "Layoff" is checked, and "Other: Not Qualified" is listed as a "Reason for Separation." The section of the report entitled "Employee Evaluation" shows that Jackson believed Bewak's attendance was "Satisfactory," and that his cooperation, initiative, job knowledge, and quality of work were all "Fair." Under "Recommendation," "Some Reservation" is checked; however, under "Rehire," a line appears midway between "Yes" and "No." Ex. C.

The second report has no effective date of termination, but was signed and dated by Jackson on July 27, 2007. Under "Type of Separation," "Fired" is checked, and "Other: Refusing to Follow Safety Procedures" is listed as a "Reason for Separation." Jackson has changed his evaluation of Bewak's initiative and quality of work from "Fair" to "Unsatisfactory." Under "Recommendation," "Would Not Recommend" is checked, and under "Rehire," "No" is clearly marked. Ex. D. Neither Termination Report was signed or dated by Bewak in the space provided for him to do so.

When asked why he changed the Termination Report to reflect more poorly on Bewak's performance, Jackson said that Bewak's behavior after being fired, but before leaving Nome, led him to make the changes. Tr. 433-35. However, this rationale fails to stand up to any degree of scrutiny.

At some point around the time Bewak was fired, AMI provided him a ticket to fly from Nome to Anchorage, Alaska, aboard Alaska Airlines Flight 153. Ex. H (Travel Request dated July 25, 2007, but signed and dated by Jackson on July 24). On the evening of July 25, 2007, the day Bewak was fired, an incident involving Bewak occurred at the Nome Airport. Tr. 177-79. A police report on the incident notes that Bewak "was told that he could not fly [that night] because of intoxication and to reschedule for tomorrow [July 26]." Ex. K. Bewak testified that he "went

back to [his] hotel room and waited till the next day and flew out." Tr. 178.

Jackson, on the other hand, testified that after Bewak was fired, "[h]e pulled a disappearing act and was gone for three days. And we didn't know where he was." Tr. 433. In other words, according to Jackson, Bewak was fired on July 25, disappeared for three days, during which AMI personnel "were cruising around town" but "couldn't find Bewak," then re-appeared on July 28 and "pops up at the airline . . . and starts giving a bunch of grief to the gal there." Tr. 433-34. Jackson went on to say:

> I mean, right, wrong or otherwise, if you're working for me, as far as I'm concerned, you have to maintain . . . a professional bearing, you know. . . . And there was no need for that.
>
> I mean, what was – give me a reason why you'd want to do that. And that made me angry, because, to me, it was an insult. And so I changed the paper. I mean, this is – if that's the kind of guy he is, that's the kind of guy that we don't want working for our company. And so I changed his papers, and I put in "Fired." And basically, as far as I'm concerned, that meant he's not eligible for rehire, and so be it.

Tr. 434-35. Jackson fails to explain in his testimony the discrepancy between his story and the police report of the airport incident dated July 25, which corroborated Bewak's testimony that he attempted to leave Nome that evening, but was forced to wait until the next day, July 26, to leave. Nor did Jackson mention the airport incident in his July 27 termination report, nor the three day "disappearing act." In fact, all he mentioned was Bewak's purported "Refus[al] to Follow Safety Procedures" – which clearly has nothing whatever to do with Bewak's conduct *after* being fired.

Jackson's testimony contradicts the documentary evidence. I find it singularly unreliable. Furthermore, I find the second Termination Report to be a post hoc rationalization of AMI's firing of Bewak for making safety complaints to MSHA. Moreover, I find Bewak's conduct after being fired irrelevant to these proceedings, and reject as absurd AMI's insinuation that it was justified in firing Bewak for something he did *after* he was fired. The July 27 Termination Report is a cynical attempt to turn the tables on Bewak, to make him out to be an unsafe worker, and shift the focus away from the company's all too tragic failure to maintain a safe working environment on the Rock Creek Mine site.

In its posthearing brief, AMI points to an incident during which Engstrom told Bewak that he had been seen "stealing tools out of . . . somebody's toolbox." AMI Br. at 3 (quoting Tr. 136-37). When Engstrom told Bewak who purportedly had made this accusation, Bewak went to confront his purported accusers, ignoring Engstrom's order not do so. When Bewak confronted the workers, they insisted that they never made any such accusation. Bewak then returned to his job, where Engstrom "didn't say another word to me ever after that." Tr. 135-37. According to

Engstrom, the incident "was blown out of proportion," and that "it wasn't like anybody was calling [Bewak] a thief." Tr. 332-33. AMI now argues that the incident justified Bewak's termination because "he disobeyed a supervisor's direct order [and] angrily confronted other employees." AMI Br. at 4 (citing Tr. 136-37).[9]

As to whether AMI would have fired Bewak for this conduct alone, the fact is that they did not do so, nor does the company's contemporaneous documentation of his firing mention that he was insubordinate or confrontational with other employees. *See* Exs. C & D. Nor did Jackson ever offer this incident as among the reasons Bewak was fired. *See* Tr. 436-437. Moreover, the record reflects that at the AMI Rock Creek site, misconduct was not tolerated, and that failure to follow the company's rules could lead to one being summarily fired. Calling the all-hands meeting "the daily threat," Bewak testified that "when everyone left the meeting . . . They would talk – you know, they were angry. They were nervous. They were upset. These guys have families to feed, and children and bills, and they're all walking away every day thinking that if they do . . . just some normal thing that may not suit [project manager Frank] Torres' idea of a normal thing, they would be on the next plane out of here." Tr. 120-21. Garland corroborated Bewak's testimony, saying of the all-hands meetings: "What sticks out in my mind is the emphatic demands that you don't stand around. . . . Every morning my job felt threatened by Frank Torres." Tr. 43, 45. Had Bewak's behavior upon being accused of stealing tools been so egregious, I find it likelier than not that he would have been fired at that time rather than after making safety complaints to management and an MSHA inspector. I find AMI's argument unconvincing, and thus reject it.

AMI reiterates its argument that Bewak was fired for "misconduct (including safety violations), and personality conflicts," and adds "poor performance" to its reasons. AMI Br. at 5. The only "safety violation" the company points to is that Bewak repeatedly failed to wear his safety vest. In fact, Bewak admitted that he failed to wear his safety vest on at least two occasions, one of which was on July 25, the day he was fired. Tr. 493. On July 25, Bewak was dressed in protective welding leathers: "when a welder welds, he's got to cover his arms. Some leathers are only covering one arm. Some leathers cover from the chest and both arms, and some are a full leather jacket. . . . I have all three. On that particular day [I was fired], I was wearing the full jacket." Tr. 500-01. In fact, had he not been wearing leathers, he would have been in violation of AMI's work rules. Tr. 500. Notably, Bewak wore his leathers over the safety vest provided by AMI because sparks would melt the vest. Tr. 171-72, 417-18, 493. Garland also testified: "I'm not used to ever seeing welders wearing a safety vest." Tr. 57-58. Bewak had good reason to shield his safety vest from sparks generated as he welded. To fault him for doing so, AMI placed Bewak between a rock and a hard place – requiring him to wear protective leathers on the one hand, and on the other hand, to wear a safety vest that was "probably more

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[9] The company also highlights Bewak's statement that after he returned to his job, when Engstrom "didn't say another word to me," he "would have smacked [Engstrom] if he did." Tr. 137. At the time of the incident, however, Bewak neither voiced nor acted upon any such intention. I reject AMI's attempt to use his statement, made at trial over two years after the incident, to show that Bewak intended to strike Engstrom. *See* AMI Br. at 3.

dangerous, really, because it [would] melt to you." Tr. 172. I conclude that this particular justification "is so weak, so implausible, [and] so out of line with normal practice that it [is] a mere pretext seized upon to cloak discriminatory motive." *See Chacon*, 3 FMSHRC at 2516.

AMI's other grievances against Bewak lack credibility. The company argues that Bewak was confrontational towards "Engstrom and other members of the crew." AMI Br. at 5 (citing Tr. 335). But Engstrom, over whose credibility I have already raised doubts, testified "he was confrontational with *some other people*." Tr. 335 (emphasis added). Such a vague, unsubstantiated statement is the very epitome of pretext. The company argues that Bewak "was too social, which caused him to not do his work, but also to distract other employees from doing their work." AMI Br. at 5. On the one hand, Engstrom testified that Bewak "[stood] around talking a lot" (Tr. 331), while on the other hand Lancaster said that "Tom never spoke much. I don't know if he ever really talked to me at all . . . he was pretty quiet." Ex. N at 30. Given the overall lack of credibility I found in the testimony of these two witnesses, I conclude that Engstrom's accusation is yet further pretext. AMI's assertion that Bewak "did not do welds that he was assigned and would give them to others to do" (AMI Br. at 5), refers to Engstrom's version of the story involving the welder Mike Morgan, which I explicitly discredited above. I also discredited Lancaster's version of this story, which AMI also attempts to offer as justification for Bewak's termination. AMI Br. at 6.

F. Conclusion

I find no merit in AMI's attempts to resuscitate their case against Bewak by falling back on unreliable, contradictory record evidence. Having thus found that the proffered rationale for Bewak's discharge is not credible and was merely a pretext for terminating him because of his protected safety complaints, I find that the Complainant herein has sustained his burden of proving that his firing on July 25, 2007, was in violation of section 105(c)(1) of the Mine Act.

ORDER

Accordingly, inasmuch as Bewak has established, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Thomas Bewak against Alaska Mechanical, Incorporated, under section 105(c) of the Act, is **GRANTED**.

Within ten days of the date of this decision counsel for the parties **ARE ORDERED** to confer to determine the appropriate back pay and interest to be awarded Bewak for the days he missed work as a result of his illegal termination, and any other relief required to make Bewak whole.[10] Within 15 days of the date of this decision, counsel shall report the results of their

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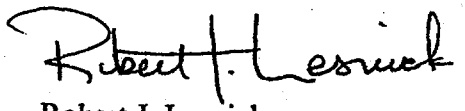
[10] Section 105(c)(3) of the Act provides, in pertinent part: "The Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order . . . dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems

discussions to me jointly in writing, and I will issue a decision and order ruling on the agreed-upon relief. If counsel are unable to agree, they shall jointly advise me in writing within 15 days of the date of this decision, and I will issue an order regarding the issue of relief.

Also within 15 days of the date of this decision, counsel for the parties **ARE ORDEREI** to separately address the civil penalty criteria set forth in section 110(i) of the Act.[11] Based on these submissions, I shall enter findings on each criterion and will assess Alaska Mechanical, Incorporated, a civil penalty for its violation of section 105(c).



Robert J. Lesnick
Chief Administrative Law Judge

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appropriate . . . Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation."

[11] Section 110(i) of the Act provides, in pertinent part: "The Commission shall have authority to assess all civil penalties provided in this Act. 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."

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, DC 20001-2021
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July 2, 2010

JUSTIN NAGEL, Complainant	:	TEMPORARY REINSTATEMENT PROCEEDING
v.	:	Docket No. WEST 2010-18-DM
	:	Docket No. WEST 2010-464-DM
NEWMONT USA LIMITED, Respondent	:	WE MD 09-11
	:	Mine ID: 26-02512 Leeville Mine

ORDER CONSOLIDATING CASES AND DENYING COMPLAINANT'S MOTION FOR TEMPORARY REINSTATEMENT

This matter is before me upon an Application for Temporary Reinstatement filed by Justin Nagel (Complainant) on June 8, 2010 pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c). Section 105(c)(1) of the Act prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety-related, protected activity. A discrimination complaint under section 105(c)(2) of the Act shall be filed by the Secretary of Labor if, after an investigation conducted pursuant to section 105(c)(2), the Secretary determines that a violation of section 105(c)(1) has occurred. A discrimination complaint under section 105(c)(3) of the Act may be filed by the complaining miner if the Secretary, after investigation, has determined that the provisions of section 105(c)(1) of the Act have not been violated. In essence, Mr. Nagel seeks an order under 105(c)(3) requiring Newmont Mining Company ("Respondent") to temporarily reinstate him to his former position as Underground Operations Technician 3 at its Leeville Mine, or to a substantially equivalent position at the same rate of pay, even though Nagel settled his right to temporary reinstatement under section 105(c)(2). For the reasons set forth below, I find that Mr. Nagel is not entitled to such relief and his Motion for Temporary Reinstatement is denied. Respondent's motion to strike and motion for attorney fees are also denied.

Procedural Background

On October 5, 2009, the Secretary filed an Application for Temporary Reinstatement on behalf of Justin Nagel pursuant to section 105(c)(2). That Temporary Reinstatement Proceeding was Docket No. WEST 2010-18-DM. The Application sought an order requiring Respondent to reinstate Nagel pending disposition of the complaint of discrimination that Nagel filed with the Secretary's Mine Safety and Health Administration (MSHA) on September 9, 2009. Respondent

requested a hearing on the Application, and a hearing was scheduled for October 22, 2009 in Elko, Nevada before Senior Administrative Law Judge Michael E. Zielinski.

Prior to the hearing, the parties negotiated a settlement of the issues raised by the Application and executed a Settlement Agreement and Joint Motion for Temporary Reinstatement. That Settlement Agreement economically reinstated Nagel, effective November 1, 2009, until the merits of his discrimination complaint have been resolved. The Agreement further provided, however, that in the event that the Secretary makes a finding of no discrimination, the economic reinstatement will terminate on that date. The Settlement Agreement was signed by Complainant, who acknowledged that "I have read this agreement in full and consent to its terms."

On November 4, 2009, Judge Zielinski issued an Order of Temporary Reinstatement, consistent with the parties' Settlement Agreement. Specifically, that Order of Temporary Reinstatement provided:

> This Order shall remain in effect until the merit's of Nagel's discrimination complaint have been resolved, as specified in the Settlement Agreement. In the event that the Secretary makes a finding of no discrimination on the complaint, Nagel's period of economic reinstatement shall terminate, effective upon the date of the Secretary's determination. If the Secretary finds that the discrimination complaint has merit and causes a Complaint of Discrimination to be filed with the Commission, Nagel's period of economic reinstatement shall expire after any decision or similar order from the Commission becomes final.[1]

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[1]A Judge's Order temporarily reinstating a miner is not a final decision within the meaning of Commission Procedural Rule 69, 29 C.F.R. § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding. See Commission Procedural Rule 45(e)(4), 29 C.F.R. § 2700.45(e)(4). Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a Petition for Review of Temporary Reinstatement Order within 5 business days of the Judge's written order. See Commission Procedural Rule 45(f), 29 C.F.R. § 2700.45(f).

By contrast under Commission Procedural Rule 69(a), 29 C.F.R. § 2700.69(a), "[a]n order by a Judge approving a settlement proposal is a decision of the Judge." I note that this rule is not limited to settlement of civil penalty proceedings. Furthermore, under section 113(d)(1) of the Act, "[t]he decision of the administrative law judge of the Commission shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2)," which provides, inter alia, that petitions for discretionary review must be filed within 30 days of the issuance of the judge's decision. See section 113(d)(2)(i).

It is arguable that Judge Zielenski's Order of Temporary Reinstatement, which is not final, was also an Order approving a settlement proposal, which became a final decision of the

On December 1, 2009, the Secretary issued a Notice of Finding of No Discrimination Respondent never moved for dissolution of the Order of Temporary Reinstatement. Consequently, the Judge never dissolved the Order.[2] Instead, Newmont just terminated Nagel's economic reinstatement, per the terms of the parties' Settlement Agreement.[3]

On January 5, 2010, Complainant filed an action on his own behalf before the Commission under Section 105(c)(3) of the Act charging discrimination under Section 105(c)(1). That discrimination proceeding is Docket No. WEST 2010-464-DM. Nagel alleges that Respondent discriminated against him in violation of Section 105(c)(1) when the company terminated his employment on August 20, 2009 for safety complaints that he made.

On March 26, 2010, the Commission received Respondent's Motion to Dismiss, which denied any violation of the Act and asserted that Nagel's complaint failed to state a claim upon which relief may be granted. On April 30, 2010, the Commission received the Complainant's Response to Respondent's Motion to Dismiss. On May 28, 2010, Chief Administrative Law Judge Robert J. Lesnick issued an Order Denying Respondent's Motion to Dismiss. On June 2, 2010, Chief Lesnick issued an Order of Assignment, which assigned the discrimination proceeding in Docket No. WEST 2010-464-DM to the undersigned. My pre-hearing Order in that discrimination proceeding will issue today under separate cover.

Commission 40 days after its issuance. Given my finding of a voluntary, clear and unmistakable waiver by Nagel of his right to temporary reinstatement, I need not resolve this issue.

[2]In August 2006, the Commission revised Rule 45(g), 29 C.F.R. § 2700.45(g), to delete the requirement that the judge dissolve the order of temporary reinstatement after the Secretary has made a determination of no discrimination. See 71 Fed. Reg. 44190, 44198-99 (Aug. 4, 2006). The preamble explained that the deletion "leaves open for litigation the issue of whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under section 105(c)(3). See 31 FMSHRC at 896, n. 8. Commission Procedural Rule 46(g), 29 C.F.R. § 2700.45(g) now reads as follows:

> (g) Dissolution of order. If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

[3]Cf. *Gatlin, Robert v. KenAmerican Resources, Inc.*, 31 FMSHRC 1050, 1052 n. 2 (Oct. 2009) (respondent should have moved judge to modify temporary reinstatement order based on subsequent layoff alleged to have tolled economic reinstatement, rather than unilaterally determine that workforce reduction justified termination of reinstatement).

On June 10, 2010, Nagel filed the instant Motion for Temporary Reinstatement with the undersigned and captioned his motion as a Temporary Reinstatement Proceeding, Docket No. WEST 2010-18-DM . Essentially, Complainant moves for a temporary reinstatement order while his case proceeds under section 105(c)(3), despite the prior Settlement Agreement that he executed resolving the reinstatement issue under 105(c)(2). To prevent any confusion, Docket No. WEST 2010-18-DM and Docket No. WEST 2010-464-DM are hereby **Ordered** to be consolidated and I have considered Complainant's instant motion as part the discrimination proceeding pending before me in Docket No. WEST 2010-464-DM.

On June 18, 2010, Respondent filed an Opposition to and Motion to Strike Complainant's Motion for Temporary Reinstatement. Respondent argues that under the express terms of the Settlement Agreement and Judge Zielinski's November 4, 2009 Order, the Complainant's temporary reinstatement automatically terminated upon a finding of no discrimination by the Secretary on December 1, 2009. Respondent argues that it complied with the Settlement Agreement by economically reinstating the Complainant during the agreed period, and that Complainant must also comply with the terms of the Settlement Agreement, which stipulate that the reinstatement period terminated upon the Secretary's finding of no discrimination. Thus, Respondent argues that Complainant cannot now move to reargue an issue that has been determined by stipulation and binding contract and has been formally adjudicated by prior Order. Respondent's motion also seeks recovery of attorney fees for the cost of replying to what it characterizes as Complainant's "frivolous motion."

On June 28, 2010, Complainant Nagel filed his Response. Complainant argues that no part of the Settlement Agreement states that he cannot request reinstatement again, that he is eligible for temporary reinstatement under section 105(c)(3), and that Respondent is not entitled to any "financial adjustment" i.e., attorney fees, because he has not violated the Settlement Agreement.

Legal Analysis

Rulings on the Parties' Motions

Complainant's Motion for Temporary Reinstatement is denied for the reasons explained below. Accordingly, Respondent's motion to strike is denied as moot.

Respondent's motion for attorney fees is also denied. Essentially, Nagel argues that the Settlement Agreement is only valid with regard to Nagel's claims under section 105(c)(2), and that he remains free to request temporary reinstatement again under section 105(c)(3). For the reasons set forth herein, I find that position to lack merit, but I do not find it frivolous. Given the views of the Secretary of Labor, Chairman Jordan and Commissioner Cohen in *Phillips v. A&S Construction Co.*, 31 FMSHRC 975, (Dec. 2009), more fully explained below, an argument could be advanced that the plain meaning of section 105(c)(2) requires a temporary reinstatement order to remain in effect until there has been a final Commission order on the merits of the miner's underlying discrimination complaint brought under section 105(c)(3), even though all parties have entered a

settlement of the temporary reinstatement issue under section 105(c)(2). In addition, I note that the Complainant is acting *pro se.* Moreover, Respondent presents no authority to support attorney fee recovery. Therefore, Respondent's motion for an award of attorney fees is denied.

Although I find Complainant's Motion for Temporary Reinstatement to be non-frivolous given an arguable extension of the views of Chairman Jordan and Commissioner Cohen in *Phillips v. A&S Construction Co.*, I deny his Motion as lacking in merit. Rather, as further explained herein, I find that Nagel clearly and unmistakably waived his right to temporary reinstatement once the Secretary made a determination of no discrimination under the express terms of the parties Settlement Agreement resolving the temporary reinstatement issue under section 105(c)(2).

The Commission's split views in *Phillips v. A&S Construction Co.*

In examining the merits of Nagel's motion, an overview of the language of section 105(c)(2) and 105(c)(3) and of the facts and analysis in *Phillips v. A&S Construction Co.* may prove helpful. I then analyze Commission precedent concerning voluntary dispute resolution and settlement of discrimination claims.

At the outset, it is important to note that Section 105(c)(2) expressly provides for temporary reinstatement. It provides that any miner may file a discrimination complaint with the Secretary, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. Section 105(c)(3) contains no provision or language concerning temporary reinstatement.

In *Phillips v. A&S Construction Co.,* 31 FMSHRC 975, (Dec. 2009), the Commission addressed the issue of whether an order of temporary reinstatement remains in effect after the Secretary of Labor has made a determination that facts revealed from an investigation by MSHA regarding a miner's discrimination complaint do not constitute a violation of section 105© of the Act. The judge concluded that such an order does not remain in effect after MSHA's determination that no discrimination occurred and the judge dissolved his earlier order of temporary reinstatement and dismissed the temporary reinstatement proceeding. 30 FMSHRC 1119, 1123 (Nov. 2008) (ALJ Barbour).

Thereafter, Mr. Phillips filed a petition for discretionary review challenging the judge's order with the Commission, and Phillips concomitantly filed an action on his own behalf under section 105(c)(3). The Commission granted the petition for discretionary review and stayed the judge's order dissolving the temporary economic reinstatement, pending the Commission's decision. The Commission then split 2-2 regarding whether the judge correctly determined that a temporary reinstatement order no longer remains in effect after the Secretary has made a determination of no discrimination. The effect of the split decision allowed the judge's order dissolving the temporary reinstatement proceeding to stand, as if affirmed. 31 FMSHRC at 979, citing *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), aff'd on other grounds, 969 F.2d 1501 (3d Cir. 1992). Accordingly, the Commission lifted the stay, dissolved the order of

temporary reinstatement and dismissed the temporary reinstatement proceeding. 31 FMSHRC at 979, n.1.[4]

On the merits, Commissioners Duffy and Young affirmed the judge's dissolution of the order of temporary reinstatement and his dismissal of the temporary reinstatement proceeding. In their view, based on the plain language of sections 105(c)(2) and (c)(3) and the legislative history and statutory structure, a temporary reinstatement order remains in effect pending final order on th miner's complaint as advanced by the Secretary under section 105(c)(2), but does not extend to the pendency of an action under section 105(c)(3). 31 FMSHRC 981.

On the other hand, Chairman Jordan and Commissioner Cohen reversed the judge's order, but each by way of different analysis. In Chairman Jordan's view, the statute clearly states that a temporary reinstatement order remains in effect pending a final Commission order on the same underlying complaint filed with MSHA and prosecuted by either the Secretary under 105(c)(2), or by the complainant under 105(c)(3). 31 FMSHRC at 997. That is, the statute requires a final orde from the Commission on the complaint, not a determination from the Secretary, in order to dissolv a grant of temporary reinstatement. Id. at 992. In her view, there is no "final order on the complaint" until the Commission issues an order affirming, modifying, or vacating the Secretary's proposed order in accordance with section 105(c)(2), or dismisses or sustains the complainant's charges in accordance with section 105(c)(3), and in either case, the final order must be based on the Commission's findings of fact and determination of whether discriminatory conduct in violation of section 105(c)(1) has occurred. Id. at 991.

In Commissioner Cohen's view, given his colleagues' and the Secretary's different and contrary interpretations of the statute's text, structure, legislative history and purpose, all set forth a having "plain meaning" and all having some plausibility, the statute must be ambiguous in terms of the *Chevron I* analysis. Id. at 1002.[5] Therefore, applying a *Chevron II* analysis, Member Cohen

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[4]Recently, two events occurred which may resolve the Commission deadlock on the propriety of a judge's dissolution of a temporary reinstatement order after the Secretary's determination of no discrimination under Sec. 105(c)(2), where no final order of the Commission has issued on the miner's action under Sec. 105(c)(3). First, the Commission granted review on this issue in the matter of *Sec'y of Labor on behalf of Gray v. North Fork Coal Corporation*, Docket No. KENT 2009-1429-D. In that proceeding, the Secretary argues that under the plain language of section 105(c)(2), a temporary reinstatement order must remain in effect until there is a final Commission order on the merits of the miner's underlying discrimination complaint, regardless of whether the complaint is litigated by the Secretary under section 105(c)(2) or by the miner under section 105(c)(3). Alternatively, the Secretary has argued that even if the meaning of section 105(c)(2) is not plain, the Secretary's interpretation of section 105(c)(2) is reasonable and entitled to deference under *Chevron II*. Sec'y Br. at 19-20. Second, Commissioner Nakamura joined the Commission and will likely break the tie vote.

[5]See *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-844 (1984) (if a statute is clear and unambiguous, effect must be given to its plain language under a *Chevron I*

would accord deference to the Secretary's reasonable and permissible interpretation of the statute, as amicus curiae, to require that a temporary reinstatement order remain in effect until there is a final Commission order on the miner's underlying discrimination complaint, whether it is litigated by the Secretary pursuant to section 105(c)(2) or by the miner under section 105(c)(3). 31 FMSHRC at 1002, citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).[6]

Nagel's Temporary Reinstatement Rights Pending Litigation of his Discrimination Complaint Under Section 105(c)(3) Were Voluntarily Settled and Clearly and Unmistakably Waived

Nagel's temporary reinstatement case is clearly distinguishable from the dissolution of the temporary reinstatement order in *Phillips v. A&S Construction Co.* because it involves a voluntary settlement of the temporary reinstatement application by all parties. In such circumstances, I find that the principles of voluntary dispute resolution must prevail over granting Nagel a second bite at the apple by allowing his motion for temporary reinstatement under section 105(c)(3). Otherwise the Secretary and Commission, already struggling to reduce a vast and growing backlog, would be endlessly negotiating for settlement of multiple applications or motions for temporary reinstatement, and re-adjudicating issues of temporary reinstatement that they thought were settled under section 105(c)(2), time and again under section 105(c)(3). Such a result would gut the principles of voluntary dispute resolution and the confidence that the parties must have in the finality of their settlement agreements.

Knowing and voluntary settlement is an essential aspect of dispute resolution under the Act. In this regard, the Commission recently vacated a settlement in the context of a Section 105(c)(2)

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analysis, but if the statute is ambiguous or silent on a point in question, a second inquiry is necessary to determine whether the agency's interpretation of the statute is a reasonable one and entitled to deference under a *Chevron II* analysis); see also *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996).

[6]Member Cohen emphasized the Secretary's interest in ensuring that section105(c) is interpreted in an expansive manner to vigorously protect miners, who make safety complaints, since "enforcement of the [Mine] Act is the sole responsibility of the Secretary." *See Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006). 31 FMSHRC at 1003. Thus, he found that the Secretary has a real interest in ensuring that her view of the Mine Act's temporary reinstatement provision prevails, even where she has determined that there has been no violation of section 105(c)(1) in a particular case. 31 FMSHRC at 1004. Accordingly, he rejected the views of Commissioners Duffy and Cohen that the Secretary is owed no deference because she is no longer "charged with administering" the temporary reinstatement provision of the Act once the Secretary has made a determination of no discrimination. 31 FMSHRC at 1002-1003. Rather, he concluded that temporary reinstatement is based on a finding by the Secretary that the discrimination complaint was not "frivolously brought," and the fact that the Secretary may later find that discrimination did not occur, does not alter or diminish her finding that the complaint was not "frivolously brought." 31 FMSHRC at 1103.

discrimination complaint because the miner, who filed the complaint with MSHA, was not a part to the agreement. See *Pendley, Lawrence v. Highland Mining Co., LLC,* 29 FMSHRC 164, 164, (Apr. 2007). The Commission emphasized the importance of the miner's participation in agreein to the settlement terms.[7] Specifically, the Commission emphasized the following:

> The Commission has made clear that "[s]ettlement of contested issues is an integral part o dispute resolution under the Mine Act." *Tarmann v. Int'l Salt Co.*, 12 FMSHRC 1, 2 (Jan. 1990) (quoting *Pontiki Coal Corp.*, 8 FMSHRC 668, 674 (May 1986)). In this respect, th Commission has observed that "the record must reflect and the Commission must be assu that a motion for settlement [approval], in fact, represents a genuine agreement between th parties, a true meeting of the minds as to its provisions." *Tarmann*, 12 FMSHRC at 2 (quoting *Peabody Coal Co.*, 8 FMSHRC 1265, 1266 (Sept. 1986)). *See also Wake Stone*, 2 FMSHRC at 290 (decision approving settlement vacated where it was "unclear whether th parties achieved a true meeting of the minds").

The Commission concluded that because Pendley had objected to and had not come to an agreed disposition of the matter, the judge's decision approving the settlement and dismissing the proceeding should be vacated.

In this case, miner Nagel, who has filed a complaint with the Commission under section 105(c)(3), is a party under Commission Procedural Rule 4(a). Unlike Pendley, however, Nagel has voluntarily relinquished his right to temporary reinstatement under the terms of the Settlement Agreement that he executed. That is, once the Secretary made a finding of no discrimination on December 1, 2009, Nagel's economic reinstatement terminated on that date pursuant to the clear an unmistakable terms of the Settlement Agreement that he signed.

In this regard, the Settlement Agreement, specifically provides that "[i]f the Secretary make a finding of no discrimination at any time after Mr. Nagel's temporary reinstatement, the temporary reinstatement will terminate on the date on which a negative decision is made...." As a consequenc Nagel's period of economic reinstatement terminated by agreement of the parties, including Nagel, on December 1, 2009, the date of the Secretary's determination of no discrimination.[8] Thus, the

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[7] In that case, the miner, Pendley, did not agree to the initial settlement agreement. *Id.* The Commission found that there must be a "meeting of the minds" between the representatives of the parties for the settlement agreement to stand. *Id.* at 165. Since Pendley did not agree to, or sign, the settlement agreement, there was no genuine agreement between all the parties as to the provisions of the settlement agreement. *Id.*

[8] I note that neither the Secretary nor Nagel reserved the right to argue that in the event that the Secretary determined that Section 105(c)(1) had not been violated, the temporary reinstatement shall remain in effect "pending final order on the complaint." See 30 U.S.C. § 815(c)(2). The Secretary has reserved this argument in settlement of other temporary reinstatement cases. See e.g., *Clapp, Cindy v. Cordero Mining, LLC,* Docket No. WEST 2010-1314-D (June 2007).

record reflects a clear meeting of the minds on the issue of temporary reinstatement, as required by Commission precedent. In these circumstances, I conclude that Nagel clearly and unmistakably waived his right to temporary reinstatement once the Secretary made a determination of no discrimination under the express terms of the parties Settlement Agreement resolving the temporary reinstatement issue under section 105(c)(2).[9]

Perhaps more importantly, Commission case law also establishes that a temporary reinstatement order may be vacated by voluntary settlement where the alleged discriminatee is party to the agreement. See *Koerner, John v. Arch Mineral Coal Co.* 1 MSHC 2078 (judge's decision vacating temporary reinstatement order after settlement of discrimination proceeding affirmed upon receipt of assurance that settlement and vacation of reinstatement order were agreed to by miner). In *Koerner*, a discrimination proceeding under Section 105(c)(2), the Secretary moved to vacate a temporary reinstatement order on the ground that the parties had negotiated a settlement of the discrimination proceeding. The judge granted the motion, but the Commission remanded because the record did not indicate whether the alleged discriminatee agreed with the motion to vacate. The Commission's primary concern in directing review was to assure that the alleged discriminatee voluntarily agreed to vacation of the reinstatement order. The Commission emphasized that "[i]t is the *miner's* rights that are being settled, and we must, therefore, insure that the settlement and vacation of the reinstatement order were agreed to by the miner, not just the Secretary and the operator." *Id.* The Secretary's submissions on remand indicated that discriminatee Koerner was a party to the settlement and authorized the Secretary to move for vacation of the temporary reinstatement order. In these circumstances, since the record established that alleged discriminatee Koerner was a voluntary party to the agreement, the Commission's concerns were satisfied and the judge's vacation of the temporary reinstatement order was affirmed.

The same logic applies to the instant matter even though it involves settlement of the temporary reinstatement issue under Section 105(c)(2), not the entire discrimination proceeding under 105(c)(3). Complainant Nagel, like alleged discriminatee Koerner, was a knowing and

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[9]Cf. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)(union could waive its officers' statutory right under § 8(a)(3) of the National Labor Relations Act to be free of anti-union discrimination, but such waiver must be clear and unmistakable); *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 80-81 (1988) (collective-bargaining agreement's *general* arbitration clause did not clearly and unmistakably waive an employee's right to a judicial forum for his claim under the ADA, distinguishing *Gilmer v. Interstate/Johnson Lane Corp..*, 500 U.S. 20 (1991) because *Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights of represented employees and hence the "clear and unmistakable" standard was not applicable); *Interstate Brands v Bakery Drivers*, 167 F.3d 764 (2d Cir. 1999) (*Wright's* "clear and unmistakable" standard is based upon a concern about allowing a union to waive an individual employee's statutory rights—i.e., a concern about the waiver of one's rights by someone else; however, where one waives one's own rights, the "clear and unmistakable" standard is not required).

voluntary party to the Settlement Agreement and the terms under which his economic reinstatemen order would be terminated, as evidenced by his signature on the Settlement Agreement. In these circumstances, I find the terms of the Settlement Agreement controlling. Accordingly, I conclude that the temporary reinstatement order was properly terminated on December 1, 2009 - the date th Secretary issued a finding of no discrimination - pursuant to the express terms of the parties' Settlement Agreement.

Accordingly, **IT IS ORDERED** that Docket No. WEST 2010-18-DM and Docket No. WEST 2010-464-DM are consolidated. **IT IS FURTHER ORDERED** that the Complainant's motion for temporary reinstatement has been voluntarily waived and is therefore **DENIED**. Consequently, **IT IS FURTHER ORDERED** that the temporary reinstatement proceeding **IS DISMISSED**. Respondent's Motion to strike Complainant's Motion is moot and Respondent's motion for attorney fees is **DENIED**.

Thomas P. McCarthy
Administrative Law Judge

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July 12, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2009-803
Petitioner	:	A.C. No. 36-07416-195550
	:	
v.	:	
	:	
CONSOL PENNSYLVANIA COAL CO.,	:	Enlow Fork Mine
Respondent	:	

ORDER REGARDING MOTION FOR PARTIAL SETTLEMENT AND STAY OF REMAINING CITATION

Before the Court is the Secretary's Motion for partial settlement and a stay regarding one (Citation No. 7064741) of the eight (8) citations within this docket. The Motion states that the parties negotiated settlements for seven of the citations and it seeks the Court's approval for them. The motion sets forth reasons to justify the reduction from the originally proposed penalties, which totaled $23,491.00[1] to the proposed settlement amount, which totals $4,184.00, a reduction of 82% .

As set forth in the Motion, the Secretary offers the following in support of the reductions it now advocates and for which the Respondent concurs:

For Citation No. 7084566, alleging improper storage of gas cylinders, the issuing inspector failed to determine if the cylinders contained fuel. This created an evidentiary shortcoming and that failure supports the reduction in the penalty sought to $128.00.[2]

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[1]The proposed penalty includes a 10% reduction from the amount which would be derived from the total points under the penalty policy, representing an across-the-board reduction for "good faith."

[2]While accepted in this instance, the Court notes that the citation states there had been 13 citations for this regulation at this mine in the past two years, a significant number of occurrences for the same problem. In the future, the Secretary will need to explain how this was considered.

For Citation No. 8008112, which alleged improperly setting temporary roof support, the Motion's attached Exhibit "A," explains that in fact no violation existed. The Court is bound to accept the Secretary's action, but not the request that the matter be dismissed "without prejudice." At least as to this event, the Secretary cannot have it both ways by agreeing on the one hand that no violation in fact existed and simultaneously asserting that it may still re-file the proceeding for the same event. Therefore, the proceeding is dismissed as to this Citation, but "with prejudice."

For Citation No. 8008113, an energized battery was not ventilated with intake air that was properly coursed in that it traveled to the primary escapeway. The Citation noted this condition had been cited 12 times in the last two years at this mine. The Motion states that it was later determined that only a small amount of air was traveling over the charger to the intake and that the batteries were being vented into the return. The reevaluation of the circumstances concluded that a fire was not reasonably likely to occur. While there is some conflict about the air's travel path, the Court will accept the Motion's reassessment of the gravity and the attendant reduction in the proposed penalty to $499.00. However, as noted *supra*, future motions will need to address how the Secretary has factored the assertion that this standard has been violated so often in the past.

For Citation No. 7084571, the Citation asserts the presence of damp loose coal and coal fines along a nine foot distance of a conveyor belt. The issuing inspector noted there have been 180 citations of this regulation over the past two years at this mine. The Motion asserts that "there was no confluence of factors to support that fire was reasonably likely to occur" and that the air travels in an outby direction and would affect only one person, the beltman, either by burns or smoke inhalation. Originally assessed at $11,306.00, the Motion seeks to reduce the penalty to a mere $207.00, a reduction of 98%. Given the unrefuted factors listed in the citation, and the significant history of this class of problem at the mine, the drastic reduction proposed, without more explanation or justification, cannot be accepted. **Therefore the proposed settlement for this Citation is DENIED.**

For Citation No. 8008115, the facts asserted in the Citation are essentially the same as those presented in Citation No. 8008113. While the Court continues to have the same misgivings expressed for Citation No. 8008113, it accepts the proposed settlement but with the same admonition that future settlement motions will need to explain how a significant history of the same regulatory violation was considered.

For Citation No. 7064745, the settlement provides for the full amount originally proposed and accordingly, the settlement is accepted.

For Citation No. 8008120, the settlement provides for the full amount originally proposed and accordingly, the settlement is accepted.

As noted above, the Motion seeks a stay with regard to Citation No. 7064741. The requested stay anticipates that a decision involving the same regulation, presently on appeal before the Commission, is likely to impact the resolution of this matter. On that basis, the Motion seeks a stay until a decision is issued in that matter, PENN 2008-189. This is a reasonable request and accordingly the request for a stay is GRANTED as to that citation.

Accordingly, *except for* Citation No. 7084571, which proposed settlement is **DENIED**, and Citation No. 7064741, which is **STAYED**, the Settlement Motion is GRANTED as to the remaining Citations, as identified above.

William B. Moran

William B. Moran
Administrative Law Judge

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July 13, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. VA 2008-400 A.C. No. 44-06804-156224
v.	:	
KNOX CREEK COAL CORPORATION, Respondent	:	Mine: Tiller No. 1

ADDITIONAL ORDER TO SHOW CAUSE WHY MOTION FOR SUMMARY DISPOSITION FOR FAILURE TO FILE A TIMELY ANSWER AND RESPONSE TO NOTICE TO SHOW CAUSE SHOULD NOT BE GRANTED

Statement of the Proceedings

This proceeding concerns proposals for assessment of civil penalties filed by the Petitioner against the Respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The October 29, 2008 Petition seeks civil penalty assessments in the amount of $25,996 for 11 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The citations and proposed civil penalty assessments are as follows:

Citation No.	Date	30 C.F.R.	Section Assessments
7317861	4/15/08	75.370(a)(1)	$1,795.00
7317862	4/16/08	75.202(a)	$2,106.00
7317904	4/16/08	75.370(a)(1)	$3,689.00
6632093	4/21/08	75.400	$3,689.00
6632099	4/23/08	75.400	$ 745.00
6632100	4/23/08	75.202(a)	$1,412.00
6632101	4/23/08	75.362(b)	$2,473.00
6632102	4/23/08	75.400	$3,996.00
6632103	4/23/08	75.400	$ 745.00
6632105	4/23/08	75.400	$3,689.00
6632107	4/23/08	75.517	$1,657.00

On November 16, 2009, Chief Administrative Law Judge Robert J. Lesnick issued by certified mail an Order to Respondent to Show Cause why default judgment should not be entered for failure to file an Answer as required by Commission Procedural Rule 29, 29 C.F.R. §2700.29. Chief Judge Lesnick Ordered that an Answer to the Petition be filed within 30 days of said Order, or Respondent will be placed in default and ordered to pay the assessed penalties. The return receipt indicates that said Order was served on Respondent on November 19, 2009. Respondent failed to file its Answer, as ordered, or otherwise respond to the Order to Show Cause.

Nearly six months later, on May 17, 2010, the Petitioner filed a Motion for Summary Disposition of Proceedings pursuant to Commission Procedural Rule 66, 29 C.F.R. §2700.66 because Respondent had not filed an Answer to date and had not responded to the Order to Show Cause.

On May 18, 2010, counsel for Respondent filed a Notice of Appearance. On May 20, 2010, Respondent, by and through counsel, filed its Answer, which admits, inter alia, that Respondent received a proposed assessment from the Secretary for $25,996.00. On or about May 24, 2010, Respondent, by and through counsel, served its Memorandum in Opposition to Motion for Summary Disposition of Proceeding on the Secretary and Commission by telecopy and first-class mail.

In its Memorandum in Opposition, Respondent argues that it has bona fide defenses to the underlying 11 citations and that summary disposition would be unfair. Respondent avers that the Petition and Order to Show Cause were served on Respondent, but never assigned to outside counsel, and that the Secretary's Motion for Summary Proceedings was served and immediately assigned to outside counsel, who immediately filed Respondent's Answer. Respondent avers that it has unspecified bona fide defenses that could result in vacation of the citation, or reduction in the gravity cited and penalty assessed. In such circumstances, Respondent argues that it would be unjust to impose the full $25,996.00 assessment against it for apparent administrative oversight in failing to assign this matter to outside counsel, particularly since the Secretary has argued no prejudice from any delay in having to defend the citations against reasonable inquiry and cross-examination. On the contrary, Respondent argues that any delay would be most likely to prejudice Respondent since unspecified persons with relevant knowledge of the citations have left its employ. In sum, Respondent argues that it is ready to proceed with discovery and that this case should be decided on the merits, not inadvertent procedural missteps.

Petitioner replies that the Respondent has admitted its failure to respond to the Petition and Order to Show Cause and has simply stated that this case was not "assigned to outside counsel" until the Secretary filed the instant motion. Thus, Petitioner argues that but for the Secretary's motion, Respondent's inaction would have resulted in default judgment. The Secretary then analyzes requests for relief from default orders under Commission precedent applying Fed. R. Civ. P. 60(b), which provides that to obtain relief from a final judgment, a party

must establish (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) that the judgment is void; (5) that the judgement has satisfied, released, or discharged or should not have prospective application; or (6) any other reason justifying relief. In essence, the Secretary argues that a party requesting reopening from a final judgment or default order under Fed.R.Civ.P. 60(b)(1) must establish more than mere carelessness, i.e., that this case was "never assigned to outside counsel." Finally, the Secretary argues that Respondent must, but has failed to, identify facts that, if proven on reopening, would constitute a meritorious defense. Accordingly, the Secretary argues that Respondent has failed to satisfy its burden of establishing an entitlement to extraordinary relief from final order and the Secretary's Motion for Summary Disposition should be granted.

Discussion

The applicable Commission Rules in this case provide as follows:

29 C.F.R § 2700.27

> § 2700.27 Proposal for a penalty.
>
> (a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

29 C.F.R § 2700.28

> § 2700.28 Answer.
>
> A party against whom a penalty is sought *shall* file and serve an answer within 30 days after service of a copy of the proposal on the party. An answer shall include a short and plain statement of the reasons why each of the violations cited in the proposal is contested, including a statement as to whether a violation occurred and whether a hearing is requested. (Italics added).

29 C.F.R § 2700.63

> § 2700.63 Summary disposition of proceedings.
>
> (a) Generally. When a party fails to comply with an order of a judge or these rules, an order to show cause shall be directed to the party before the entry of any order of default or dismissal.
>
> (b) Penalty proceedings. When the judge finds the respondent in default in a civil penalty proceeding, the judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

In this penalty proceeding, it is undisputed that the Respondent failed to file a timely

Answer and failed to respond to the Show Cause Order. However, a Commission Administrative Law Judge (ALJ) never issued an order of default. That is, *to date*, there has been no finding by an Administrative Law Judge that Respondent was in default, and no entry of a summary order assessing the proposed penalties as final. On the other hand, the facts establish that it was only after the Secretary's Motion for Summary Disposition that Respondent filed its belated Answer because the case was not assigned to outside counsel before then. In essence, therefore, the Petitioner seeks a default judgment on the ground that the Respondent failed to file a timely answer to the Petition and Notice to Show Cause. Cf. *Air Climate Systems, Inc.*, 357 NLRB No. 75 (May 30, 2008) (default judgment granted in absence of good cause shown for late filed answer).

Based on the facts outlined above, I am sympathetic to the Petitioner's plight and loathe to require the expenditure of time and money in litigating matters that appear ripe for summary disposition for failure to follow Commission rules and ALJ Orders, particularly during this time of growing backlog in Commission case processing. In my view, the days for two or three bites at the apple may well be over. In fact, I recognize that the Commission is in the process of issuing a Notice of Proposed Rulemaking for a new Commission default rule, which proposes a rule including relief not only from orders that have become final by operation of law under section 105(a) of the Act, but also from defaults resulting from a party's failure to file an answer to a petition for assessment of penalty. Nevertheless, I also recognize that default is a harsh remedy, and that if the defaulting party can make a showing of good cause for failure to timely respond, appropriate proceedings on the merits may be warranted.

Accordingly, out of an abundance of caution, I have decided to issue this additional Order to Show Cause Why Summary Disposition for Failure to File a Timely Answer and Response to Notice to Show Cause Should Not Be Granted. In an effort to provide as much guidance to the parties as possible, the Commission, in its proposed rule has set forth two principal factors that the Commission would consider in determining whether to reopen a final order of default, as well as other additional factors that it may also consider. The first factor that the Commission would consider is the nature of the error or omission leading to the default (including whether the operator exercised due diligence in attempting to contest the proposed penalty, whether the untimeliness was within the reasonable control of the operator, and the effectiveness of the operator's internal contest procedures). The second factor is the period of time between the operator's discovery of its default and the filing of the request to reopen with the Commission. Additional factors that the Commission might consider include the operator's history of penalty delinquencies, the size of the operator, the operator's experience with Mine Act procedures, whether the operator was represented by counsel at the time of the default, the size of the proposed penalty, prejudice to the Secretary or any affected person, whether the motion is opposed, and any other relevant factor.

The parties are hereby placed on notice that I have decided to consider these factors in arriving at my disposition of this matter. Accordingly, within **14 days** from the date of this order, the Respondent is Ordered to address these factors and to Show Cause Why Summary Disposition for Failure to File a Timely Answer and Response to Notice to Show Cause Should Not Be Granted in this matter. The Petitioner is directed to respond, if appropriate, within **8**

days after service of Respondent's showing. No further papers will be permitted. I will then rule on whether the Petitioner's proposed civil penalty assessments should not be made the final order of the Commission, and whether the motion for default judgment should be granted or denied.

SO ORDERED.

Thomas P. McCarthy
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

July 19, 2010

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2009-1123 A.C. No. 46-05868-179688
v.	:	Mine: Pinnacle Preparation Plant
PINNACLE MINING COMPANY, LLC, Respondent	: : :	Docket No. WEVA 2009-1124 A.C. No.46-09030-179694 Mine: Green Ridge #1 Mine

ORDER ACCEPTING LATE FILINGS
ORDER DENYING MOTIONS TO DISMISS

The Secretary of Labor, Mine Safety and Health Administration ("Secretary") filed her penalty petition in each of these cases on September 8, 2009. On September 11, 2009, Respondent Pinnacle Mining Company, LLC ("Pinnacle") filed its motions to dismiss for the Secretary's failure to timely file the penalty petitions. Pinnacle did not allege that it was prejudiced by this delay. Pinnacle also filed its answer to the penalty petition on September 11, 2009.

On December 11, 2009, the Secretary filed an opposition to Pinnacle's motion to dismiss and a request to accept the petition out-of-time.[1] The Secretary alleges that the delay was the result of the high rate of contests, resulting in an unprecedented number of petitions to be processed, coupled with a lack of adequate staff to handle the increased workload.

Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("Mine Act"), states that a mine operator wishing to contest a citation or an order or a notification of proposed assessment of penalty must notify the Secretary of Labor ("Secretary") of its desire to do so within 30 days of receipt of the citation or order or proposed assessment, at which time the Secretary immediately shall notify the Commission, and the Commission shall afford an opportunity for hearing. Commission Rule 28(a) provides that "within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the

[1] In future proceedings, the Secretary should file the Motion to File the Petition Out of Time concurrent with or prior to the penalty petition, in accordance with 29 C.F.R. § 2700.9.

Commission a petition for assessment of penalty." 29 C.F.R. § 2700.28(a).

Pinnacle filed its notices of contest in the above-captioned dockets on March 31, 2009. Accordingly, under Section 2700.28(a), the Secretary's petitions for assessment of civil penalty should have been filed by May 22, 2009.

Case law demonstrates the Commission's preference toward resolving cases on the merits rather than based on procedural defects. *See M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986) and *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept.1995). It is well-settled that the late filing of a civil penalty petition is not jurisdictional. *See Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1716 (July 1981). While the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term "immediately" contained in Section 105(d) of the Mine Act nor the time limit should be construed as a "procedural strait jacket[ ]." *Id.* at 1716.

Furthermore, given the unprecedented number of cases currently before the Commission, as well as the unprecedented number of penalty petitions pending before the Secretary, strict adherence to the 45-day time line is unrealistic. *See Solar Energy*, 31 FMSHRC 729, 730 (June 2009) (ALJ Feldman).

In light of all of the foregoing, it is **ORDERED** that the Secretary's late-filed penalty petitions are **ACCEPTED**. Accordingly, Pinnacle's motions to dismiss the above captioned dockets are both **DENIED**.

Robert J. Lesnick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 19, 2010

OAK GROVE RESOURCES, LLC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2009-261-R
	:	Citation No. 7696616; 01/08/2009
	:	
SECRETARY OF LABOR,	:	Oak Grove Mine
MINE SAFETY AND HEALTH	:	Mine ID 01-00851
Respondent	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-487
Petitioner	:	A.C. No. 01-00851-180940-01
v.	:	
	:	
OAK GROVE RESOURCES, LLC.,	:	Oak Grove Mine
Respondent	:	

ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and its ALTERNATIVE MOTION FOR PARTIAL SUMMARY DECISION AS TO SIGNIFICANT & SUBSTANTIAL FINDINGS

This case arose in connection with a fatality at the Respondent's Oak Grove Mine on May 22, 2008. It is alleged that on that date a motorman died when he was crushed between "a derailed haulage car and the locomotive he had been operating." Citation No. 7696616, issued January 8, 2009. The Citation averred that the haulage car was being pushed on the main haulage road and that the miner would not have been exposed to the hazard if the haulage car was pulled, instead of being pushed. MSHA contended that the practice of pushing the haulage car contravened a safeguard notice, number 2604892, issued more than more than twenty years earlier, on March 3, 1986.

The pertinent text from the March 3, 1986 issuance of the safeguard provided:

> This notice to provide safeguard requires that cars on main haulage roads not be pushed except where necessary to push cars from side tracks located near the working section to the

producing entries and rooms.[1]

Oak Grove Exhibit 2.

Presently before the undersigned Administrative Law Judge ("Court") is Respon Motion for Summary Decision, or in the Alternative, Motion for Partial Summary Decisio Respect to Significant and Substantial Findings. ("Motions"). The Secretary filed a Response Respondent's Motions ("Response"). Regarding its Motion for Summary Decision, Conte Respondent Oak Grove Resources, LLC ("Oak Grove") acknowledges that the Safeguard was is in 1986 but that it then received a waiver from that Safeguard on August 31, 1987. Oak Grove recounts that, on December 21, 2001, MSHA issued a notice that the waiver was void and that '[f]uture MSHA inspections of the transportation of men and materials shall be directed by provisions of 30 CFR Part 75.1403." Motion at 3. The history of the events surrounding Safeguard is not in dispute. Rather, Oak Grove's critical assertion is that, although MSHA voided its waiver, it then needed to reinstate the Safeguard, Number 2604892, but that it never so. Thus, the question posed is what procedural steps are required by MSHA in circumstances wl it issues a valid Safeguard notice, then issues a "waiver" for that Safeguard, and then, thinking bet of that decision to issue a waiver, wishes to reinstate the original Safeguard. If Oak Grove is corr that MSHA needed to formally reinstate the Safeguard, then it would be entitled to summa decision, as the safeguard did not exist at the time of the fatality and consequently any citati relying on it would be null.

Oak Grove's motion in the alternative argues that, even if the safeguard did not need to b reinstated, the "significant and substantial" designation can not be included within the Citatio because only "mandatory health and safety standards" may have such a finding and a "Notice t Provide Safeguard" is not such a "mandatory standard" under the Mine Act. *Id.* at 4.

Discussion

I. Oak Grove's Motion for Summary Decision

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[1]The condition or practice identified in the safeguard, which prompted the notice to provide safeguard on that date, provided; "The No. 902 battery powered locomotive was being used to push two loaded supply cars consisting of a car of timber and a car of roof bolts down the graded haulage supply mine track entry of the main south area of the mine, near the intersection of the No. 7 and No. 14 section switch and the No. 10 and No. 5 section switch. Such area is approximately 2100 feet from the main bottom area of the mine and approximately 3600 feet from the No. 7 section and the No. 10 sections, respectively." Oak Grove Exhibit 2, copy of the Safeguard issued March 3, 1986. Oak Grove agrees that, apart from the particular condition or practice identified, the Safeguard "requires that cars on main haulage roads not be pushed except where necessary to push cars from side tracks near the working section to the producing entries and rooms." Oak Grove Memorandum in Support of its Motion (Memorandum in Support) at 2.

In its Memorandum in Support of its Motions, Oak Grove describes MSHA's 1987 action as waiving the safeguard which had been issued the year before. Thereafter, in 2001, it acknowledges that it was informed by letter that the 1987 waiver was void. However, it contends that not only did the letter *not* indicate that the 1986 safeguard was now reinstated, but to the contrary, it believed that the letter suggested that, with the act of voiding the waiver, safeguards then would be issued in the future. Oak Grove, looking to the wording of the safeguard provisions, points out that while such safeguards may be "provided" to minimize hazards with respect to the transportation of men and machines, this is implemented by the authorized representative's issuance, in writing, of the "specific safeguard which is required" and which is to include a time for the operator to provide and maintain such safeguard. Memorandum in Support at 4. It is Oak Grove's position that the December 3, 2001 voiding letter is not a substitute for those safeguard issuance requirements found at 30 C.F.R. § 75.1403. The MSHA letter, it contends, is merely a "blanket statement of sorts" which voided all waivers issued before 1986. Oak Grove complains that the letter left it with "no required notification of what [would now be] specifically required of [it]" and this left Oak Grove unable to discern whether it would be receiving a new safeguard or simply that the prior safeguard would be reinstated. *Id.*

In the Secretary's Response, it characterizes MSHA's August 31, 1987 letter as "a waiver of 30 C.F.R. 75.1403-10(b) contingent upon six conditions."[2] It then asserts that MSHA's December 3, 2001 letter "provided the Respondent with clear notice that the August 31, 1987 letter was void." The effect of that voiding, it contends, was to "re-establish[] the original conditions of [the 1986] Safeguard." Response at 2. MSHA asserts that the December 2001 letter "specifically voided the pushing of heavy equipment on track haulage roads." The contention is accurate, as the letter states that the Respondent is "hereby notified that the waiver dated August 31, 1987, permitting the pushing of heavy equipment on track haulage roads and any other waivers granted prior to January 1, 1996, is void." Significantly, as observed by the Secretary, the next line in the letter voiding the August 1987 waiver advises that "[f]uture MSHA inspections of the transportation of men and materials shall be directed by the provisions of 30 C.F.R. Part 75.1403."

The Court agrees with the Secretary that the December 3, 2001 letter from MSHA to the Respondent negated the August 1987 waiver and thereby restored the effective status of the March 3, 1986 notice to provide safeguard. Although Oak Grove cites to *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Rev. Comm. April 1985) ("*SOCCO I*") for the proposition that a safeguard notice must identify with specificity the nature of the hazard being addressed and the conduct to remedy it, this requirement is applicable at the time the safeguard is first issued. Oak Grove would prefer to treat this case as if no prior safeguard had been issued, but that is not the case. In short, the December 3, 2001 letter from MSHA was not issued as if there was a blank slate on the issue, as that

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[2]The Secretary asserts that the August 31, 1987 letter "never specifically stated that Safeguard No. 2604892 was waived." Response at 2. This is not a credible contention as the single page letter is titled "W A I V E R", advises in it that "[a] Waiver is issued to the operator," and then provides that the conditions upon which the "waiver" is contingent, identifying six procedural steps to be followed.

is not the historical reality.[3]

Oak Grove's position that MSHA did not provide "proper notice that the safeguard woul *again* be considered enforceable" is rejected. *Id.* at 6 (emphasis added). Although it contends tha the December 2001 letter from MSHA indicated only "a *future* intention to enforce Section 75.1403 with no mention of the past Safeguard" and, applying that perspective, it asserts that the Safeguar in issue had not been "properly reinstated," that is not a fair reading of the December 3, 2001 lette from MSHA. *Id.* (emphasis in original). Oak Grove cites no principle of law to support its clain that, because it issued a waiver, MSHA must begin the safeguard notice process *ab initio*. Even the waiver itself listed six contingencies for it to apply and there was no indication in that letter tha MSHA could not entirely void the contingent-laden waiver. It is noted that the context in which the waiver was issued was not contractual and therefore MSHA did not take on any obligations which would restrict its ability to reactivate the 1986 Safeguard notice.[4] Nor does the affidavit of Mr. Thompson, offered by Oak Grove to support the idea that the Notice of Safeguard was not in effect after it received the December 3, 2001 letter from MSHA, provide a recognizable defense, as the determination made here involves the *legal determination* of the terms of the waiver and the December 2001 notification to Oak Grove that the waiver was now void. For that reason, Mr. Thompson's *personal interpretation* of the MSHA December 2001 letter does not establish the letter's legal effect.

Accordingly, the Court finds that the December 3, 2001 letter revived the March 3, 1986 Safeguard and there was no obligation for MSHA to take the strictly procedural steps anew in order to return the notice of safeguard to its full effect.

II. Oak Grove's Alternative Motion for Partial Summary Decision with Respect to Significant and Substantial Findings.

As noted, Oak Grove's alternative contention is that, even if the Court finds that the safeguard is in effect, the Citation in issue in this case cannot include a "significant and substantial" finding because that designation is only available for violations of mandatory health and safety standards and a safeguard is not such a standard. To support this argument,
Oak Grove looks to Section 104(d) of the Mine Act, which provides that if a violation of a mandatory health or safety standard is found, other findings may accompany that determination. One of those possible findings is that the nature of the violation is such that it "could significantly and

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[3]Oak Grove makes similar arguments on that theme, such as contending that an inspector must first determine that a hazard exists before a notice to provide safeguard may be issued. These fail for the same reason; Oak Grove's contentions cannot be grounded on amnesia.

[4]Most frequently, as distinct from the situation involving Oak Grove, the subject of voiding a waiver arises in plea bargain contexts where there is, in effect, a contract between the parties.

substantially contribute to the cause and effect of a . . . mine safety and health hazard," which is known by the shorthand expression as a "significant and substantial" finding or, even briefer, a "S & S" finding.

As only "mandatory health and safety standard[s]" can potentially include the "significant and substantial" finding, Oak Grove looks to the Mine Act's definitions section for the meaning of such standards. There, at Section 3(l)[5], the Mine Act provides that this means "the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act[.]" In short, an "S & S" finding can only be included if the standard is established by titles II or III of the Mine Act or promulgated pursuant to Title I of the Mine Act.

Oak Grove notes that cases, such as *Cyprus Emerald Resources Corp. v. FMSHRC*, 195 F.3d 42 (D.C. Cir. 1999) ("*Cyprus Emerald*") support this view. The Court of Appeals held there that a "significant and substantial" finding was not available for two cited regulations because they were not mandatory standards promulgated under section 101 of the Mine Act.[6] Instead the regulations in issue there were promulgated under section 508 of the Mine Act. Mandatory safety and health standards are to be promulgated under section 101 of the Act. The Court concluded that no *Chevron* analysis[7] was needed, as the plain wording of the Act allows the "significant and substantial" finding only for violations of mandatory health or safety standards. *Cyprus* at *45.

For its part, the Secretary too cites to *Cyprus Emerald*, agreeing that only a mandatory health or safety standard may have the additional designation of "S & S." Thus, the Secretary turns to Section 3(l) of the Mine Act as well. The Secretary then observes that the interim *mandatory safety standards* under Title III of the Mine Act provide, without any qualifier, that the provisions of sections 302 through 318 of Title III *shall be* interim mandatory safety standards applicable to all underground coal mines and shall be enforced *in the same manner and to the same extent as any mandatory safety standard.* The Secretary submits that this language is inescapable and consequently that Section 314(b) is to be enforced as the mandatory standard that it is. Response at 4.

The essential problem with *Cyprus Emerald* is that its reach is limited to standards that are

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[5] To avoid confusion, it is noted that the designation after 3 is a lower case "L."

[6]The regulations promulgated under section 508 involved 30 C.F.R. § 50.10, a requirement to notify MSHA of a refuse pile collapse and 30 C.F.R. § 50.11(b), for failing to investigate that collapse.

[7]"*Chevron*" refers to the Supreme Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which is the seminal decision on the subject of deference to agencies' interpretations of the statutes and regulations they administer.

not mandatory health or safety standards.[8] If the matter involves a mandatory health or safet standard, as it does in this *Oak Grove* case, then *Cyprus Emerald* counts for naught. 30 C.F.R. 50.11(b), dealing as it does with accident investigations, is not a mandatory *health or safety* standard Rather, it is a standard dealing with a mine operator's duties in the wake of an accident. While the Commission concluded that non-mandatory health or safety standards could include a 'significant and substantial" designation on the theory that the Mine Act was ambiguous on tha point, the D.C. Circuit in no way suggested that such a designation was improper where a mandatory health or safety standard *is* involved.[9]

The Secretary also notes that the 11th Circuit, in addressing the language found in Section 201(a) of the Mine Act, which language is nearly identical to that in Section 301(a), concluded that Section 202(f) is a mandatory health standard. *National Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264 (11th Cir. 1998). Although the focus of that case was the next step envisioned by Congress, that such mandatory standards could be superseded, but only by *improved* mandatory standards, it necessarily agreed that, until *such improvements* came about, the existing *interim* standards were *mandatory*.[10] This meant that, applying the plain language of Title II, which has the heading "Interim Mandatory Health Standards," the 11th Circuit had to have recognized the word "Coverage" for such mandatory health standards and read exactly what Congress directed: "[t]he provisions of sections 202 through 206 of [Title II] and the applicable provisions of section 318 of title III shall be interim *mandatory health standards* applicable to all underground coal mines until superceded

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[8]As an aside, the Court notes that sometimes there is much made of whether an enforcement tool is denominated as a 'regulation' or a 'standard.' However, it is noteworthy that the Court of Appeals in *Cyprus Emerald* used those descriptions interchangeably. As one example, among others in that decision, the D.C. Circuit spoke of "conditions that did not violate the regulation under which the mine operator was cited. Because that regulation *was* a mandatory standard." *44 at n. 3. At least here though it does not matter as this case deals strictly with mandatory standards.

[9]The Court is aware of the holding in *Big Ridge*, 30 FMSHRC 1172, (ALJ, Nov. 24, 2008) in which another ALJ reached a different conclusion than this Court does today. The reasons for this Court's conclusions have been set forth in this Order. While the judge in *Big Ridge* expressed that allowing a S & S finding for a safeguard would elevate "form over substance," the form and the substance was created and expressed by Congress when it enacted Section 301(a).

[10]The fact that the 11th Circuit determined that MSHA came up short in its attempt to supplant the existing mandatory standards with improved standards meant simply that the existing interim standards remained what they were: mandatory. In fact, the court specifically stated that "[m]andatory health and safety standard is defined, in §802 (*l*) as the 'interim mandatory health or safety standards.'" *1267. And, to make it clear, that court added that the such interim standards remain what they are, mandatory, and they continue as such until they are superceded effectively. *1268.

[by improved mandatory health standards]." Title III employs the same approach, the only difference being that the subject addressed by Congress there is "interim *mandatory safety standards* for underground coal mines. Thus, in the "Coverage" under Title III, Congress mirrored its commands for Title II, by providing that "[t]he provisions of sections 302 through 318 of [Title III] shall be interim mandatory safety standards applicable to all underground coal mines until superceded [by improved mandatory safety standards]."

As applied here, there is no genuine dispute but that the measure for deciding whether a "significant and substantial" finding may attach to safeguard violations is dependent on whether the standard was established by titles II or III of the Mine Act or as a standard promulgated pursuant to title I of that Act.

Oak Grove sums up its position that the authority for the Secretary of Labor to issue safeguards is derived from Section 314(b) of the Mine Act and that the Secretary implemented that statutory provision by promulgating the regulations found at 30 C.F.R. § 75.1403. *Id.* at 9. It asserts that the "requirements set out in the safeguard, not the Order or the criteria or Section 314(b) or Section 75.1403, establish the conduct required of the operator." *Id.* at 10. On those bases it contends that, as a safeguard is neither an "interim standard" established by Titles II or III of the Mine Act nor is it promulgated under Title I pursuant to notice and comment rulemaking, it does not fit within the definition of a mandatory standard. *Id.* at 11.[11]

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[11]Oak Grove implies that, as safeguards are issued on a mine-by-mine basis, and as the "typical[]" method for promulgating mandatory health standards is through "notice and comment rulemaking," this distinction somehow bears upon the authority to include "significant and substantial" findings. But this observation overlooks that a purpose of making such a finding is to record whether the nature of the violation is such that it "could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." Lest the legal analysis completely obscure the facts, it should be remembered that there was a fatality here and, according to the allegations, it was exactly the conduct proscribed in the safeguard notice that caused the motorman to be crushed between the haulage car and the locomotive. Further, had the safeguard's proscription been heeded, namely had the haulage car been pulled, instead of pushed, the fatality would not have occurred. While the Court does not suggest that this controls the outcome, it is noted that the safeguard is very different from the circumstances the Court of Appeals dealt with in *Cyprus Emerald* because the regulations there dealt with notifying MSHA after an accident and failing to investigate such accident. Violation of those duties could not conceivably significantly and substantially contribute to the cause and effect of a mine safety or health hazard. Another distinction asserted by *Oak Grove* is that there must be a violation before one can challenge a safeguard and that this is different from the ability to challenge mandatory safety and health standards promulgated under Section 101 of the Mine Act. The short answer to this is that *Congress* created the authority to deal with this specific topic in order to minimize hazards it recognized as inherent with the transportation of men and materials. Therefore, the challenge, if one were to be made, should have been when the statutory provision was enacted.

Oak Grove further maintains that, contrary to the determination of Judge Feldman in *Wolf Run Mining Co.*, 30 FMSHRC 1198, 2008 WL 5479246, (December 18, 2008), safeguards are not interim mandatory standards established under Title III of the Mine Act. To support this view, Oak Grove points to the fact that safeguard notices are issued on a mine-by-mine basis by the issuing inspector and it contends that the "substantive benchmark for the safeguard is the individual safeguard notice itself." *Id.* at 14. It rejects the position that one can rely on section 314(b) of the Mine Act as the source of the safeguard because that statutory provision does not itself spell out the requirements that can be violated.[12]

In the Court's view, the arguments made by Oak Grove in this regard note, from its perspective, alleged problems with safeguard notices but their argument does not show that safeguards were not established as interim mandatory standards under Title III of the Mine Act. Thus, to remark that safeguards lack a particular code section to examine, and to note that the safeguard notice itself provides the substantive benchmark, is really a disagreement over the method *Congress employed* to address enforcement for the safe transportation of men and materials, but not a challenge to whether safeguards are interim mandatory standards under Title III. Despite the subject's obvious concern to Congress, as expressed through Section 314, Oak Grove's interpretation would deny MSHA from expressing that a given violation is "significant and substantial" even when, as here, the facts, at least as alleged here, fairly shout that it was.[13]

Oak Grove does attempt in a fashion to address the language that is troublesome to its argument, namely that Section 301(a) of the Mine Act provides that "the provisions of Sections 302 through 318 shall be interim mandatory safety standards applicable to all underground coal mines . . . and shall be enforced in the same manner and to the same extent as any mandatory standard promulgated under section 101 of this Act." *Id.* at 15. (ellipsis in quoted language). To avoid this plain expression, Oak Grove simply puts that language aside and contends that safeguards only allege a violation of the underlying language in that safeguard and therefore never allege a violation of Section 301 itself.

While Oak Grove acknowledges that Judge Feldman correctly observed that since Section 314(b) is included within Title III and therefore that safeguards issued pursuant to that Section *must* be classified as interim mandatory standards, it describes this observation as "an unnecessary detour" which can be avoided if one examines only the underlying safeguard itself. *Id.* at 16.

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[12]In this Court's view at least, in its next breath, Oak Grove's own memorandum provides the answer to this issue, because as it notes, Congress gave the agency "a general grant of authority" to issue safeguards to minimize hazards pertaining to the transportation of men and materials. Oak Grove Memorandum at 14.

[13]While Oak Grove points to the fact that 30 C.F.R. § 75.1403 is "a verbatim replication of Section 314(b)" of the Mine Act and sees that as evidence of the problem with safeguards, the Court sees it as evidence that, in fact, safeguards *literally* allege violations of Section 314(b).

The Court does not view Judge Feldman's route as a "detour" but rather as the main thoroughfare to answering the issue.[14]

Accordingly, for the reasons stated, Oak Grove's Motion for Summary Decision or Partial Summary Decision is **DENIED**. The case should now proceed for scheduling of the hearing. The parties are directed to contact the Court for that purpose.

William B. Moran

William B. Moran
Administrative Law Judge

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[14]Nor, for reasons already articulated, does the Court accept Oak Grove's reliance on the D.C. Circuit's analysis in *Cyprus Emerald* to support its argument, as the Part 50 violations there did not involve either interim mandatory standards established by Titles II and III nor standards promulgated under Title I. Accordingly, the Court does not agree with Oak Grove's view that the D.C. Circuit's expression in *Cyprus Emerald* "rings just as true for safeguards as it does for Part 50 regulations." Oak Grove Memorandum at 19. The reach of *Cyprus Emerald* is simply not as broad as Oak Grove would wish.

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