JULY 1997

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

JULY 1997

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

Canterbury Coal Company v. Secretary of Labor, MSHA, Docket No. PENN 97-113-R. (Judge Melick, May 30, 1997)

Secretary of Labor, MSHA v. Harlan Cumberland Coal Company, Docket Nos. KENT 96-254, etc. (Judge Barbour, May 30, 1997)

Secretary of Labor on behalf of Clemmie Calahan v. Hubb Corporation, Docket No. KENT 97-13-D. (Judge Weisberger, June 10, 1997)

Asarco, Incorporated v. Secretary of Labor and International Chemical Workers Union, Docket No. SE 94-362-RM. (Judge Maurer, June 6, 1997)

Review was denied in the following case during the month of July:

Roldan A. Avilucea v. Phelps Dodge Corporation, Docket No. CENT 97-103-DM. (Judge Fauver, June 5, 1997)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 93-146-B
CONSOLIDATION COAL COMPANY	:	

BEFORE: Marks, Riley and Verheggen, Commissioners[1]

DECISION

BY: Riley and Verheggen, Commissioners

This interlocutory review of consolidated civil penalty and contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), concerns a discovery order dated June 6, 1996, by Administrative Law Judge Gary Melick requiring the Secretary of Labor to provide Consolidation Coal Company ("Consol") with copies of certain documents over which the Secretary has asserted the work-product privilege and copies of other documents over which the Secretary has asserted the deliberative process privilege. 18 FMSHRC 1131 (June 1996) (ALJ). In an order dated June 20, 1996, the judge denied the Secretary's motion for stay and certification for interlocutory review of the June 6 order. The Commission granted the Secretary's Petition for Interlocutory Review and stayed the judge's order pending the Commission's review. For the reasons that follow, we reverse the judge's order requiring the Secretary to produce the documents we find to be protected by the work-product privilege, affirm the judge's order requiring production of those documents the Secretary alleges are protected by the deliberative process privilege, and remand this matter for further proceedings.

---

[1] Chairman Jordan recused herself in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

I.

Factual and Procedural Background

This case arises out of an explosion at Consol's Blacksville No. 1 mine in Monongalia County, West Virginia, on March 19, 1992, which resulted in the deaths of a Consol employee and three employees of contractor M. A. Heston, Inc. Civil penalty proceedings, based on citations and orders alleging violations of various ventilation standards, were initiated by the Secretary on March 9, 1993, but were thereafter stayed because of a related criminal investigation. 18 FMSHRC at 1131. After that investigation was concluded, hearings eventually took place in several related cases, but the instant matter was continued. *Id.*

On February 22, 1996, Consol moved, pursuant to Commission Procedural Rule 59, 29 C.F.R. § 2700.59, for an order compelling discovery. *Id.* When disputes over two of the four categories of information requested in that motion were not resolved by the parties, the judge issued his order which is the subject of the Secretary's interlocutory appeal.

The first documents at issue are five memoranda prepared by Mine Safety and Health Administration ("MSHA") special investigator George Bowman ("the Bowman memoranda"). The Bowman memoranda consist of three summaries of statements that were the product of interviews conducted earlier by the MSHA accident investigation team, and two summaries of interviews conducted by special investigator Bowman of people who are not Consol employees. S. Resp. & Objection to Consol's Second & Third Req. for Produc., Attach. A, at 4 n.1. According to the Secretary, each of five individuals who are the subject of the Bowman memoranda "also provided testimony to MSHA's accident investigation team in the presence of Consol's counsel and representatives. These statements have been provided to Consol." S. Br. at 13 n.11.

The second set of documents at issue was generated in connection with MSHA's internal review of its actions at the Blacksville No. 1 mine around the time of the explosion. That review resulted in the issuance of a public document entitled "Internal Review of MSHA's Actions at the Blacksville No. 1 Mine, Consolidation Coal Company, Monongalia County, West Virginia," dated August 17, 1993 ("Internal Review Report"). The stated purpose of the MSHA internal review was "to evaluate MSHA's actions at the Blacksville No. 1 Mine and to make recommendations for improvements where appropriate." *Id.* at 2. Consol requested the judge to rule on various privilege claims the Secretary had made with respect to 55 files of documents prepared, used, or reviewed in connection with the preparation of the Internal Review Report. 18 FMSHRC at 1134.

II.

The Bowman Memoranda

A. Judge's Decision

After refusing to produce the Bowman memoranda on the ground that they are protected from discovery by the attorney work-product privilege, the Secretary provided the judge with a copy of each of the Bowman memoranda for in camera inspection. 18 FMSHRC at 1132. The judge found that the memoranda "contain only the reported statements of the interviewees and do not contain any mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* The judge did not directly decide whether the Bowman memoranda are eligible for protection as work product. Instead, he based his order requiring the Secretary to produce the documents on Consol's asserted need for the Bowman memoranda "to compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements." *Id.* at 1134. The judge decided that, "whether or not the work product privilege applies" to the Bowman memoranda, "Consol has a substantial need for those documents and has no other way of obtaining the precise information." *Id.* Characterizing as "critical" the comparison that Consol seeks to make, the judge ordered the Secretary to produce copies of the five Bowman memoranda. *Id.*

B. Disposition

The Secretary contends that the Bowman memoranda are protected by the work-product privilege because they are documents prepared by the Secretary's representative in anticipation of litigation. S. Br. at 7-8. The Secretary claims that because the Bowman memoranda constitute "opinion" work product, they should be afforded the highest protection under Rule 26(b)(3) of the Federal Rules of Civil Procedure, and that the judge erred in implicitly determining the Bowman memoranda to be merely "routine" work product. *Id.* at 8-10. The Secretary also argues that, even if the Bowman memoranda are routine work product, the judge erred in finding that Consol had demonstrated both a substantial need for the material and that it was unable to obtain substantially the same information by other means. *Id.* at 10-13. The Secretary maintains that Consol's asserted need for potential impeachment material does not rise to the level of a substantial discovery need, and that Consol can depose the five individuals at issue. *Id.* at 13-16.

Consol responds that, because the Bowman memoranda are the work of a non-attorney, and because the judge explicitly held that the memoranda contain no opinions, comments, or revelations of Bowman's mental impressions, the lowest level of work-product protection is appropriate. C. Br. at 9-10. Consol also contends that the judge correctly found that Consol has both a substantial need for the documents and no other way of obtaining the precise information contained therein. *Id.* Consol argues that it may be able to make other use of the Bowman memoranda in addition to using it for impeachment purposes, such as to discover information regarding the consistency of MSHA's application of some of its ventilation regulations. *Id.* at

11. Consol also states that depositions of the individuals who are the subject of the Bowman memoranda would not necessarily produce the same information special investigator Bowman obtained. *Id.*

Commission Procedural Rule 56(b), 29 C.F.R. § 2700.56(b), provides that parties may obtain discovery of any relevant matter that is not privileged. The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.[2] In *ASARCO, Inc.*, 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

> In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:
>
> 1. "documents and tangible things;"
>
> 2. "prepared in anticipation of litigation or for trial;" and
>
> 3. "by or for another party or by or for that party's representative."
>
> It is *not* required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery "only upon a showing that the party seeking

---

[2] Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Mine Act, the Commission's Procedural Rules, or the Administrative Procedure Act. Rule 26(b)(3) of the Federal Rules of Civil Procedure provides in relevant part:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

> discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." If the court orders that the materials be produced because the required showing has been made, the court is then required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

Id. at 2558 (citations omitted). The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege, but once that party has met its burden, the burden shifts to the party seeking disclosure to make a requisite showing that there is substantial need and undue hardship to overcome the privilege. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047 (2d Cir. 1992).

The Bowman memoranda are plainly "documents," and there is no argument that, in preparing them, special investigator Bowman was not acting in his capacity as a "representative" of a "party" to the litigation, in this case the Secretary.[3] We further find that the documents have been "prepared in anticipation of litigation or for trial," because each was prepared after MSHA had filed civil penalty proceedings against Consol on March 9, 1993. The memoranda thus were prepared not only in "anticipation" of litigation, but in the midst of it. Each of the Bowman memoranda therefore clearly meet the three requirements for the work-product privilege set forth in *ASARCO*.

We also find that the judge erred in ruling that Consol had established a "substantial need" for the Bowman memoranda. As the basis for his ruling, the judge cited Consol's need for the materials "to compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements," characterizing that comparison as "critical." 18 FMSHRC at 1134. A number of courts, however, have concluded that, by itself, the desire to determine through discovery whether potential impeachment material exists within protected work product does not constitute a "substantial need" for purposes of the work-product privilege.[4]

---

[3] The Commission has conducted its own in camera review of those documents the judge ordered the Secretary to produce in his June 6, 1996, ruling.

[4] *See, e.g., In re Grand Jury Investigation*, 599 F.2d 1224, 1233 (3rd Cir. 1979) (desire to impeach witness' testimony does not, by itself, overcome protection afforded interview memorandum); *Hauger v. Chicago, Rock Island & Pacific R.R. Co.*, 216 F.2d 501, 508 (7th Cir. 1954) (rights of litigant in work product of lawyers and agents not required to give way to adversary's right of discovery upon adversary's mere surmise or suspicion that impeaching material might be found in work product); *Fontaine v. Sunflower Beef Carrier, Inc.*, 87 F.R.D. 89, 93 (E.D. Mo. 1980) (mere speculation that contemporaneous statement may prove to be

Neither the judge's decision nor Consol's brief cites any reason why Consol believes the Bowman memoranda may contain potential impeachment material. Without such an explanation, it is impossible to find that Consol has a "substantial need" for the Bowman memoranda under Rule 26(b)(3). Moreover, the Secretary has stated that all of the five individuals who are the subject of the Bowman memoranda "provided testimony to MSHA's accident investigation team in the presence of Consol's counsel and representatives [and t]hese statements have been provided to Consol." S. Br. at 13 n.11. Thus, to the extent that the five witnesses testify at trial, Consol will be able "to compare present recollections against prior statements and to ascertain whether there are any contradictions in witness statements" (18 FMSHRC at 1134), without examining the Bowman memoranda.[5]

We therefore reverse the judge's finding that Consol has established a substantial need for the Bowman memoranda,[6] and consequently conclude that the Bowman memoranda are protected from discovery by the work-product privilege as asserted by the Secretary.[7]

---

contradictory or impeaching not sufficient to overcome limited privilege applicable to trial preparation materials); *see also Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1377 (8th Cir. 1975) (to overcome limited investigatory privilege requires more than surmise that witnesses had made earlier inconsistent statements which might be used to impeach them).

[5] In fact, as those statements were more contemporaneous with the accident than the interviews conducted by Bowman, their probative value is much greater than the Bowman memoranda. *Compare Smith v. Diamond Offshore Drilling*, 168 F.R.D. 582, 584 (S.D. Tex. 1996) (ordering production of witness statements taken immediately following accident on basis of substantial need and undue hardship exception to work-product privilege) *with Carson v. Mar-Tee Inc.*, 165 F.R.D. 48, 50 (E.D. Pa. 1996) (refusing to find substantial need on basis of impeachment value where purportedly inconsistent statement given months after auto accident to insurance adjuster was not statement most contemporaneous with accident). Moreover, three of the Bowman memoranda are merely second-hand summaries of interview statements taken a number of months before the summaries were prepared. Their value as impeachment material is therefore highly questionable, which further militates against a finding that a substantial need for the material has been established. To overcome the work-product privilege, "the impeachment value must be substantial because every prior statement has some impeachment value and otherwise the exception would swallow the rule." *Duck v. Warren*, 160 F.R.D. 80, 83 (E.D. Va. 1995) (quoting *Suggs v. Whitaker*, 152 F.R.D. 501, 507-08 (M.D.N.C. 1993)).

[6] As for Consol's argument that it has a substantial need for the Bowman memoranda to discover information regarding the consistency of MSHA's application of some of its ventilation regulations, we saw no such information during our in camera review of the Bowman memoranda.

[7] In light of our holding, we need not decide whether the judge correctly ruled that Consol also sufficiently demonstrated that it has no other way of obtaining the substantial

III.

The MSHA Internal Review Material

A. Judge's Decision

The judge was also provided, for in camera review, the MSHA internal review files at issue, which had been each assigned a "File Number" in the "Vaughn index" the Secretary had submitted in support of his objections to Consol's discovery requests.[8] 18 FMSHRC at 1134-35. The judge ordered the Secretary to produce those "materials relating to the interviews of MSHA enforcement personnel and specifically to questions regarding compliance with ventilation plan and other relevant regulations." *Id.* at 1135. The judge concluded, based on his "examination of the files . . . submitted by the Secretary[,]" that only portions of the documents included within the Secretary's File 16(b) would thus be included in the order for production. *Id.* The judge quoted the Secretary's Vaughn index as describing File 16(b) to contain "[i]nterview questions and review team notes, including notes on interviewee answers and on interviewer's impressions for 24 MSHA employees." *Id.* The judge ruled "that only the identifying information on page one of each form questionnaire (questions 1-6) and the following questions and answers are relevant to the issues herein: page 3 (questions 2-6), pages 4 and 5, page 11 (questions 6-8), page 12 (question 6), page 25 and page 26 (questions 1-6)." *Id.*

The judge denied the Secretary's deliberative process privilege claim with respect to that material. He found that the questions and answers at issue were not related to the process by which MSHA policies are formulated, concerned primarily factual matters, and to the extent that "opinions" were included within them, those opinions either were not related to the deliberative process or were related to the issues at bar, which the judge stated to include the "reasonably prudent person" test, unwarrantable failure, and negligence. *Id.* at 1136. The judge found that Consol therefore had a substantial need for the material and also would be unable, without undue hardship and additional delay to the proceeding, to obtain its substantial equivalent. *Id.*

B. Disposition

While the judge's order states that File 16(b) contains questionnaires of 24 MSHA interviewees (18 FMSHRC at 1135), for our in camera review the Secretary forwarded excerpts of the interview questionnaires for only 13 MSHA employees. According to the Secretary's

---

equivalent of the Bowman memoranda without undue hardship. Nor do we need to address whether the Bowman memoranda constitute opinion work product and, if so, what higher level of protection would therefore be appropriate under Rule 26(b)(3).

[8] A "Vaughn index" is an index containing an itemization of documents with a correlated indication of the basis for each privilege claimed. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 1002 n.15 (June 1992).

cover letter forwarding the documents, only 13 employees answered interview questions that either correspond to the form questionnaire questions specifically identified in the judge's decision, or concern compliance with ventilation plan and other regulations relevant to the issues in the case. S. Letter dated October 17, 1996. According to the Secretary, 6 of the 13 employees were asked the specific questions referred to by the judge. *Id.* The Secretary states that she submitted excerpts from the interview questionnaires of the other seven employees in accordance with the language in the judge's order limiting production to "questions regarding compliance with ventilation plan and other relevant regulations." *Id.* (quoting 18 FMSHRC at 1135).

In claiming on review that the material at issue from File 16(b) is protected from disclosure by the deliberative process privilege, the Secretary contends that the documents were generated pursuant to a program designed to critically evaluate MSHA's enforcement activities and recommend appropriate improvements, and therefore must be considered to be part of the protected deliberative process. S. Br. at 19-23. The Secretary asserts that factual material in the File 16(b) documents at issue cannot be segregated and disclosed without revealing the deliberative process of MSHA in preparing its Internal Review Report. *Id.* at 23.

Consol responds that the judge should be upheld because he based his ruling on his in camera inspection of the documents at issue, and limited his order of production to the non-deliberative, factual information contained in File 16(b). C. Br. at 15-20. Consol also claims that the judge's decision is supported by his determination that Consol has a substantial need for the information, which cannot be obtained by other means. *Id.* at 20. Consol contends that the Secretary is implicitly invoking a "self-critical analysis" privilege, which has not been well-received by a majority of the federal courts. *Id.* at 21-25.

In *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992) ("*Dust Cases*"), the Commission described the deliberative process privilege as one designed to protect "the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Id.* at 992 (quoting *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)). The Commission defined the privilege as one which "attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *Id.* Protected by the privilege are "pre-decisional" communications that are "deliberative," meaning that the communication "must actually be related to the process by which policies are formulated." *Id.* (quoting 591 F.2d at 774) (emphasis omitted).

Drawing on Supreme Court and other case law on the privilege, the Commission also recognized that "purely factual material that does not expose an agency's decision making process does not come within the ambit of the privilege." *Dust Cases,* 14 FMSHRC at 993. In instances in which factual material can be segregated from otherwise protected deliberative material, courts will order it disclosed unless the party opposing disclosure can show that the material is "so inextricably intertwined with the deliberative material that its disclosure would

compromise the confidentiality of deliberative information that is entitled to protection." *Providence Journal Co. v. United States Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992). In such cases, courts have held factual material to be protected by the privilege "where they were convinced that disclosure 'would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Quarles v. United States Dep't of the Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990) (quoting *Dudman Communications Corp. v. United States Dep't of the Air Force*, 815 F.2d 565, 568 (D.C. Cir. 1987)). The government bears the burden of proving that no segregable information exists which is not protected by the privilege. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1250 (4th Cir. 1994).

1. Was the File 16(b) Material Part of the "Deliberative Process"?

We reject the judge's conclusion that the File 16(b) material at issue was not "'deliberative' in the sense that [the questions and answers contained therein] are related to the process by which a policy is formulated." 18 FMSHRC at 1136. The judge gives no reasoning in support of his conclusion, and it is contrary to court holdings that the deliberative process privilege protects documents generated by an agency in the course of conducting a supplemental accident investigation designed to educate the agency so that it can improve its future safety performance. *See, e.g., Cooper v. United States Dep't of the Navy*, 558 F.2d 274, 276-78 (5th Cir. 1977); *Brockway v. United States Dep't of the Air Force*, 518 F.2d 1184, 1192-94 (8th Cir. 1975).

Moreover, the issue presented here was directly addressed in *Ashley v. United States Dep't of Labor*, 589 F. Supp. 901 (D.D.C. 1983). In *Ashley*, the documents in question had also been "generated . . . in connection with an in-house self-evaluation and improvements program," under which an MSHA internal review was routinely conducted after serious mine accidents. *Id.* at 904. As in this case, the MSHA internal review was supplemental to the primary accident investigation and was conducted "for the purpose of agency self-evaluation and improvement in mine safety enforcement procedures." *Id.* at 909 & n.7. The court in *Ashley* found the documents protected as part of the deliberative process because the documents were "intended to contribute to the process of *changing* agency procedures." *Id.* at 908.

The same is true with respect to the File 16(b) material in this case. The questionnaire material at issue clearly was used in drafting the Internal Review Report, which made a number of recommendations to change MSHA procedures. Much of the factual background information included in the Internal Review Report was drawn from the questionnaire answers. As it is plain that the documents were "intended to contribute to the process of *changing* agency procedures," we find them to be "deliberative" communications subject to the deliberative process privilege.

2. Does the File 16(b) Material Include Protected Factual Information?

Our in camera inspection revealed that, with one exception, all of the questions in the interview questionnaire that the judge ordered the Secretary to produce were designed to elicit purely factual information. In addition, all of the answers given, including to the one question which requested an opinion of two MSHA enforcement personnel, provided strictly factual information, some of which appears in the Internal Review Report released to the public. Consequently, we affirm the judge's ruling that the material at issue is not protected by the deliberative process privilege on the ground that it contains purely factual information.

The Secretary does not claim that the File 16(b) material at issue here is covered by the deliberative process privilege because it contains "advisory opinions, recommendations and deliberations" the Commission identified in the *Dust Cases* as protected by the privilege. Rather, relying almost exclusively on language from the district court's opinion in *Ashley* and an affidavit below in support of her claim that all of the File 16(b) material is protected from discovery, the Secretary maintains that the *factual* material contained within the documents at issue is protected because it cannot be disclosed without revealing MSHA's deliberative process. S. Br. at 23. We find all of the Secretary's arguments in support of this position unavailing.

With respect to "segregable factual material," the court in *Ashley* required MSHA to "demonstrate that the withheld documents contain no reasonably segregable factual material, which must be disclosed unless to do so would compromise the private remainder of the documents." 589 F. Supp. at 910. The court explained:

> For purposes of this segregability requirement, the District of Columbia Circuit has drawn a rough distinction between documents which are primarily evaluative, analytical or recommendatory, from which factual material need not be disclosed if it is inextricably intertwined, and documents which are "subjective" only because the author has chosen which facts are important or which issues to highlight. All factual material in documents of the latter variety must be disclosed unless the agency can demonstrate that the document supports a specific, identifiable decision, that revelation of the factual material would reveal aspects of the agency's decisionmaking process, and that the factual material at issue is available to the public in some other, albeit less convenient, form.

Id. (citations omitted). The Secretary argues that, as in *Ashley*, her deliberative process privilege claim should be upheld here because the factual material in dispute supports specific, identifiable decisions, that revelation of it would reveal aspects of MSHA's decisionmaking process, and that it is already available to the public in the Internal Review Report. S. Br. at 23.

The Secretary is mistaken in her reading of *Ashley*. The court there only ordered the Secretary to produce the first type of factual information described in *Ashley* — that which was not "inextricably intertwined" in documents that were "primarily evaluative, analytical or recommendatory" material. *See* 589 F. Supp. at 910-12. The court found that all of the MSHA documents it held to be protected by the deliberative process privilege "contain[ed] the personal opinions, evaluations, or recommendations of agency staff." *Id.* at 909. In contrast, the File 16(b) material at issue here not only includes no such material, but actually is more like the material found to be easily segregable and thus *unprotected* by the court in *Ashley* — information from short field reports regarding observations made by MSHA personnel. *See id.* at 911.

In addition, the Secretary provides no support, other than conclusory statements, for her claim that the File 16(b) material at issue here meets the requirements for protection of factual material set forth in *Ashley*. The *Ashley* court found that "MSHA's affidavits describe *in detail* how *each document* was or may be utilized and how it fits into the agency's deliberative process." *Id.* at 909 (emphasis added). Here, the only support for the Secretary's claim that the questionnaire excerpts should be protected is an affidavit submitted below by an MSHA official in support of the Secretary's position that *all* of the questionnaire files should be covered by the privilege.

Moreover, courts only protect from disclosure under the deliberative process privilege factual material in underlying documents when it is clear that there was an evaluation made by an agency regarding which facts it would rely upon and those which it would disregard. *Compare Playboy Enterprises, Inc. v. United States Dep't of Justice*, 677 F.2d 931, 935-36 (D.C. Cir. 1982) (mere act of selecting facts to appear in report does not render such report deliberative), *with Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (protecting factual summaries as deliberative where record established that agency personnel preparing such summaries engaged in evaluative process in choosing which facts to include in summary and which to exclude).[9] But the File 16(b) material at issue here differs little from the factual background material already made public in the Internal Review Report. Because the evidence submitted by the Secretary does not establish that an evaluative process took place with respect to the File 16(b) material in question during preparation of the Internal Review Report,[10] we find

---

[9] The dissemination of the Internal Review Report as a public document distinguishes this case from *Cooper* and *Brockway*, cases in which the deliberative process privilege was successfully invoked to protect from disclosure the factual content of investigative documents which formed the basis for confidential internal review reports.

[10] We are not persuaded by the Secretary's claim that the factual material at issue should be considered protected material simply because it comes from "answers which the [internal review team members] thought important enough to note." S. Br. at 24. Such an argument has been rejected in similar situations. *See, e.g., ITT World Communications, Inc. v. FCC*, 699 F.2d 1219, 1239 (D.C. Cir. 1983) (refusing to protect notes containing what appeared to be no more than "straightforward factual narrations" where agency had "presented no evidence that the notes

the material at issue to be "purely factual material that does not expose [MSHA]'s decision making process" and thus hold that the material is not protected by the deliberative process privilege.

While neither the judge nor the Secretary addressed the issue, the File 16(b) material in question does include two instances in which MSHA interviewees were asked an identical question which requested not facts, but rather their respective opinion on a matter. Specifically, an MSHA ventilation supervisor, in the second question on page 5 of his interview questionnaire, and another MSHA official, in the second question on page 4 of his interview questionnaire, were asked whether MSHA should have taken a specified action. Because both, instead of giving an opinion, indicated in their answers that the action had been taken, their answers, as factual information, are not protected material under the deliberative process privilege.

Moreover, the question itself is not necessarily protected simply because it requested opinion information. Standing alone, it establishes nothing more than MSHA's desire to know what course of action individual employees felt should have been taken. As the Internal Review Report itself indicates that there was a difference of opinion among MSHA employees on the subject, disclosure of the fact that MSHA inquired into the subject as part of its internal review can hardly be said to invade MSHA's deliberative process. Even opinion information is not protected by the deliberative process privilege when its disclosure would not reveal the

---

[were] evaluative in nature" in support of claim that agency personnel had made subjective decisions in taking those notes), *rev'd on other grounds*, 466 U.S. 463 (1984). Moreover, our in camera inspection revealed that in many instances, with respect to the same question, some review team members recorded an interviewee's answer while others did not.

We also reject as a ground for protecting the File 16(b) factual material from disclosure the Secretary's claim that "because the interview notes are at issue in this case, the findings of fact [in the Internal Review Report] 'necessarily were premised on an assessment and resolution of the relative credibility of [the] statements' given by the interviewees." S. Br. at 23 (quoting *Providence Journal*, 981 F.2d at 562). Unlike the record before the court in *Providence Journal*, there is no support here for the Secretary's claim that she made credibility determinations in deciding what information from the questionnaire answers should be reflected in the Internal Review Report and what information should be left out. The Secretary has not cited, and we were not able to find, any instance in the documents at issue in which differing or inconsistent accounts were given regarding the same subject.

deliberative process within the agency.[11] Accordingly, we affirm the judge's production order as to all of the File 16(b) material.[12]

IV.

Conclusion

For the foregoing reasons, we reverse the judge's order requiring the Secretary to produce the Bowman memoranda, affirm the judge's order requiring production of MSHA internal review File 16(b) material, and remand this matter for further proceedings.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[11] *See, e.g., Mead Data Central, Inc. v. United States Dep't. of the Air Force*, 566 F.2d 242, 256 n.40 (D.C. Cir. 1977); *Dudman Communications*, 815 F.2d at 1568.

[12] We thus need not address the judge's findings that the File 16(b) material in question must also be produced by the Secretary because Consol has a substantial need for the information and would be unable to obtain the substantial equivalent of the information contained therein by other means and without undue hardship and further delay to the proceedings.

Commissioner Marks, concurring in part, dissenting in part:

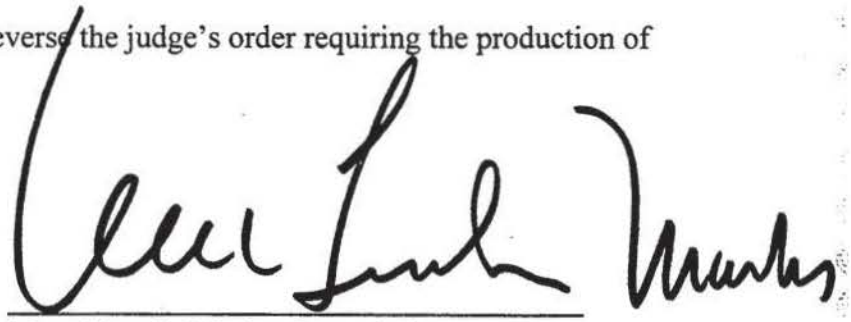
I am in agreement with my colleagues' conclusion that the Bowman memoranda are protected from discovery because of the work-product privilege, and that therefore the judge's decision to the contrary should be reversed.

With respect to the MSHA Internal Review File 16(b) material at issue, I conclude, as do my colleagues, that the documents are deliberative communications subject to the deliberative process privilege. However, contrary to my colleagues, I also conclude that the subject material contains factual material that, if disclosed, does pose a risk of exposure of MSHA's decisionmaking process.

In this regard, I am particularly persuaded by the Secretary's argument that disclosure of the specific questions and responses will clearly reflect what was important to the interview team conducting the review and thereby impermissibly trample upon the Secretary's deliberative process. S. Br. at 23. As such, I find that my colleagues' reference to *Quarles v. United States Dep't of the Navy*, 893 F.2d 390 (D.C. Cir. 1990), is directly on point — factual material should be protected by the privilege when disclosure "would expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." Slip. Op. at 9 (citing 893 F.2d at 392). Moreover, "because the interview notes are at issue in this case, the findings of fact 'necessarily were premised on an assessment and resolution of the relative credibility of [the] statements' given by the interviewees." S. Br. at 23(quoting *Providence Journal Co. v. United States Dep't of the Army*, 981 F.2d 552, 562 (1st Cir. 1992)).

Thus, I strongly feel that the approach taken by my colleges needlessly results in a conclusion that seriously threatens to undermine an important Secretarial effort — to conduct an internal review of its own actions to see if the enforcement of the Mine Act is being conducted in the best possible way. To justify the disclosure of such material — material we all conclude is properly subject to the deliberative process privilege — the Commission should have been presented with far more compelling reasons than those provided by Consol.

Accordingly, I dissent and I would reverse the judge's order requiring the production of the material in File 16(b).



Marc Lincoln Marks, Commissioner

Distribution

Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

David J. Hardy, Esq.
Jackson & Kelly
P.O. Box 553
Charleston, WV 25322

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 29, 1997

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES RIEKE	:	
v.	:	Docket No. LAKE 95-201-DM
AKZO NOBEL SALT INC.	:	

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Gary Melick determined that Akzo Nobel Salt Inc. ("Akzo") violated section 105(c)(1)[2] of the Act by

---

[1] Commissioner Verheggen assumed office after this case had been considered and decided by the Commission. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Verheggen has elected not to participate in this matter.

[2] 30 U.S.C. § 815(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . in any . . . mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the . . . mine of an alleged danger or safety or health violation in a . . . mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

demoting James Rieke to a laborer position from his position as powderman/blaster. 17 FMSHRC 1368, 1378 (August 1995) (ALJ). The judge ordered his immediate reinstatement to the powderman/blaster position. *Id.* at 1379. At issue is whether the judge properly denied the Secretary of Labor's later motion for relief from that reinstatement order, requesting that Rieke be permitted to remain in a higher-paying position with Akzo that he secured after his discriminatory demotion. 17 FMSHRC 1501, 1502 (August 1995) (ALJ). We granted a petition for discretionary review filed by the Secretary challenging the judge's denial. Akzo subsequently filed a motion to dismiss the proceeding as moot. For the reasons that follow, we reverse in part, vacate in part and remand to the judge.

I.

Factual and Procedural Background

The underlying facts of the discrimination are not in dispute. On February 10, 1994, Rieke observed his foreman remove a "down" tag on a powder rig without determining whether the necessary repairs had been made. 17 FMSHRC at 1371, 1375. Rieke reported the incident to his union safety committee and an MSHA inspector. *Id.* at 1375. On March 31, 1994, the foreman informed Rieke that he was being disqualified from the powderman position and demoted to a position as laborer. *Id.* at 1370.

Rieke subsequently bid on and was awarded a higher-paying position as haul truck driver on October 21, 1994. 17 FMSHRC at 1501; S. Br. at 2-3; A. Br. at 1. In January 1995, the Secretary filed a complaint of discrimination on Rieke's behalf, seeking, among other things, "[a]n order restoring the Complainant to his position as a blaster." S. Complaint at 4. At the time of the hearing on May 11, 1995, Rieke occupied the haul truck driver job. 17 FMSHRC at 1501; Tr. 9. He testified on direct examination as follows:

> Q. Mr. Rieke, what kind of relief are you seeking in this case?
> A. My qualifications to be reinstated.
> Q. Which qualifications are those?
> A. Powderman and EIMCO driver; and the backpay that I have lost, because I was demoted to a lesser paying job; and all the overtime that I have lost.

Tr. 39. The Secretary filed a post-hearing brief on July 12, 1995, also seeking an "order restoring the Complainant to his position as a powderman." S. Post-Hearing Br. at 19.

In an interlocutory decision dated August 7, 1995, the judge determined that Rieke's disqualification from the powderman job constituted discrimination in violation of the Act. 17 FMSHRC at 1378. The judge assessed a civil penalty of $2,000 against Akzo and directed the "immediate[ ]" reinstatement of Rieke to his position as powderman/blaster. 17 FMSHRC at 1379. The judge ordered the parties to confer on the issue of damages and report back to him by

August 25, 1995. *Id.* The parties stipulated to damages of $2,542.04 and the judge awarded this amount to Rieke. 17 FMSHRC 1500 (August 1995) (ALJ).

On August 22, 1995, the Secretary moved, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, for relief from that portion of the order directing Akzo to reinstate Rieke to the powderman position. The Secretary asserted that she inadvertently failed to modify the prayer for relief to delete the request for reinstatement and that "the miner wished to maintain the higher paying job." S. Mot. for Relief at 2. The Secretary alleged that (1) she informed counsel for Akzo, prior to imple-mentation of the order, that Rieke was not interested in the powderman position; (2) Akzo replied that Rieke could bid on the haul truck job opening and reinstated Rieke to the powderman's job; and (3) a miner with greater seniority secured the haul truck job. *Id.* Akzo objected to the Secretary's motion for relief.

Judge Melick denied the motion for relief. 17 FMSHRC at 1501-02. He reasoned that Rieke was granted the "precise remedy sought" whereas modifying the order would displace an innocent third party employee who had been awarded Rieke's haul truck driver job and violate the collective bargaining agreement. *Id.*

On September 1, 1995, the Secretary filed with the judge motions to withdraw her previous motion and for reconsideration of the reinstatement order, to which Akzo objected. The judge referred these pleadings to the Commission because they were filed after the issuance of his final decision and he therefore no longer had jurisdiction over the case. The Commission granted the Secretary's petition for review of the judge's denial of relief.

While the appeal was pending and after all briefs had been filed with the Commission, Akzo filed a motion to dismiss the proceeding as moot based on Rieke's discharge for cause. The Secretary opposed the dismissal motion, contending that a live controversy still existed.

II.

Disposition

A. Motion to Dismiss

Akzo asserts that on July 8, 1996, Rieke was discharged for a violation of its attendance program. A. Mot. at 1. It alleges that Rieke's absence resulted from his conviction for felonious assault, for which he was incarcerated. *Id.* As a result, Akzo argues that no issues remain for the Commission to resolve. *Id.* at 1-2. The Secretary opposes the dismissal on the grounds that, "[e]ven if the complainant was lawfully discharged in July 1996," the Commission must still decide the issues of whether the judge erred by not allowing Rieke to remain in his higher paying job and whether Rieke is then entitled to backpay in the amount of the difference between the two jobs. S. Opp'n at 1-3.

We agree with the Secretary that Rieke's discharge does not moot the issue of whether Rieke is entitled to additional backpay if the judge erred in failing to permit Rieke to remain in the higher paying haul truck driver position. Accordingly, we deny the motion to dismiss. However, if Rieke was in fact discharged for cause in July 1996, as Akzo asserts, and that discharge has not been and could not now be timely challenged, Rieke is not entitled to reinstatement nor is Rieke eligible for backpay after his discharge date. *See Cruz v. Puerto Rican Cement Co.*, 7 FMSHRC 487 (April 1985) (post-discrimination conduct on the part of employee may render an order of reinstatement inappropriate and toll period for which backpay is due); *Alumbaugh Coal Corp. v. NLRB*, 635 F.2d 1380, 1385-86 (8th Cir. 1980) (employee misconduct may justify rejection of reinstatement remedy).

B. Remedy

The Secretary argues that the judge's refusal to modify the reinstatement order is contrary to the Mine Act's objective of making victims of discrimination whole and that a complainant is not required to accept reinstatement to a job that pays less than his present employment. S. Br. at 12-14. Additionally, she contends that the judge should have changed Rieke's mandatory reinstatement to an *offer* of employment in accordance with case law under the National Labor Relations Act, 29 U.S.C. § 160(c) (1994) ("NLRA"). S. Br. at 7-8. The Secretary asserts that the judge further erred by failing to amend the pleadings to conform to Rieke's testimony regarding the remedy sought. *Id.* at 9-12. The Secretary also contends that neither the displacement of another employee nor the collective bargaining agreement prevent modifying the reinstatement order. *Id.* at 16-17.

Akzo responds that the judge properly denied the Secretary's motion for relief because the Secretary failed to explain her inadvertence in not seeking to modify the remedy sought until after the order issued. A. Br. at 1-4. According to Akzo, the basis for appellate review of a denial of a Rule 60(b) motion or a motion for reconsideration is whether the judge abused his discretion and the judge has not done so here. *Id.* at 4-6. Akzo submits that the judge did not err in granting the Secretary the exact relief she requested on Rieke's behalf. *Id.* at 7-8, 10. Akzo also challenges the Secretary's claims that the remedy is at odds with Rieke's testimony and that the judge erred in failing to amend the complaint when the Secretary never sought leave for such an amendment. *Id.* at 8-10.

The Commission enjoys broad remedial power in fashioning relief for victims of discrimination. Mine Act section 105(c)(2) states in pertinent part: "The Commission shall have authority . . . to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and interest." 30 U.S.C. § 815(c)(2). As the Commission stated in *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 142 (February 1982), this is a "broad remedial charge" and that "so long as our remedial orders effectuate the purposes of the Mine Act, our judges and we possess considerable discretion in fashioning remedies appropriate to varied and

diverse circumstances." Thus, the Commission reviews the judge's remedial order for abuse of discretion and to ensure that it effectuates the purposes of the Mine Act.[3]

The Mine Act's legislative history similarly indicates Congressional intent for expansive remedial relief to victims of discrimination:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal.
>
> . . . .
>
> It is the Committee's intention that the Secretary propose, and that the Commission require, all relief that is necessary to make the complaining party whole and to remove the deleterious effects of the discriminatory conduct including, but not limited to reinstatement with full seniority rights, back-pay with interest, and recompense for any special damages sustained as a result of the discrimination. The specified relief is only illustrative.

S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

In accordance with these principles, the Commission endeavors to make miners whole and to return them to their status before the illegal discrimination occurred. *Secretary of Labor on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Dunmire*, 4 FMSHRC at 143. "'Unless compelling reasons point to the contrary, the full remedial measure of relief should be granted to [an improperly] discharged employee.'" *Arkansas-Carbona*, 5 FMSHRC at 2049 (quoting *Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982)).

---

[3] Abuse of discretion may be found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (February 1997) (citing *Utah Power & Light Co., Mining Division*, 13 FMSHRC 1617, 1623 n.6 (October 1991); *Bothyo v. Moyer*, 772 F.2d 353, 355 (7th Cir. 1985)), *appeal docketed*, No. 97-1392 (4th Cir. March 25, 1977).

As a corollary to the basic principle that the Commission must provide full remedial relief to make the miner whole, a miner should not be made worse off than he otherwise would have been because he has chosen to vindicate his rights under the Mine Act. The judge's denial of the Secretary's motion runs afoul of this principle by placing Rieke in a lower paying job than he would have occupied had he not filed a complaint. We conclude that reinstatement against the wishes of the discriminatee does not further the broad remedial charge of Mine Act section 105(c). *Cf. Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941) (National Labor Relations Board may or may not order re-employment depending on circumstances); *NLRB v. Brown-Dunkin Co.*, 287 F.2d 17, 20-21 (10th Cir. 1961) (Board in its discretion could properly grant wronged employees option of reinstatement or remaining in higher paying jobs); *Oil, Chemical and Atomic Workers International Union v. NLRB*, 547 F.2d 598, 603-04 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1078 (1977) (no requirement that wronged employee mitigate damages by accepting offer of reinstatement if he has secured higher paying interim job).

The judge's rationale for denying the Secretary's request to modify the reinstatement order was inconsistent with Commission precedent. In this case, the judge should not have looked to the collective bargaining agreement in fashioning his relief under section 105(c). The Commission has stated that it does not "decide cases in a manner which permits parties' private agreements to overcome mandatory safety requirements or miners' protected rights." *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 899 (May 1987) (citing *Loc. U. No. 781, Dist. 17, UMWA v. Eastern Assoc. Coal Corp.*, 3 FMSHRC 1175, 1179 (May 1981)). By the same token, displacement of the third party is not controlling. Section 105(c) of the Mine Act provides for reinstatement or rehiring. If transferring Rieke back to his truck driver position had resulted in other grievances under the collective bargaining agreement, as Akzo suggested in its Response to Motion for Relief at 2-3, then it was for Akzo, the wrongdoing operator, rather than Rieke, the victim of discrimination, to bear any burden resulting from purportedly conflicting requirements of section 105(c) and the union contract. *Cf. W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766-70 (1983) (where compliance with consent decree under Title VII of the Civil Rights Act of 1964 caused discriminating employer to violate seniority provisions of collective bargaining agreement, burden for breach appropriately placed on employer rather than on employees). It was not for the judge to weigh the rights of other parties not before him. *See Mullins*, 9 FMSHRC at 899 ("the Commission does not sit as a super grievance or arbitration board").

Akzo's other arguments are not persuasive. Its contention that the Secretary obtained exactly the relief requested is disposed of by *Dunmire*, 4 FMSHRC at 144. There, the Commission rejected the operator's argument that the miner's backpay was tied to the Secretary's pleadings. *Id.* The Commission held that the relief to the miner was "not necessarily limited by[] the relief sought in the pleadings" and that "[o]ur concern is to make miners whole, and technical problems in the pleadings can fairly be cured." *Id.; see also Brandon v. Holt,* 469 U.S. 464, 471 (1985) ("it is appropriate for us to proceed to decide the legal issues without first insisting that such a formal amendment be filed"). Therefore the Secretary's failure to properly amend the pleadings to account for Rieke's request to remain in the higher paying job is not

determinative of this issue. We note however that this case involves Secretarial inadvertence in failing to seek the appropriate relief for Rieke. S. Mot. for Relief at 2. At the hearing, Rieke testified that he wished to have his qualifications restored, not that he wanted his old job back. Tr. 39. Despite this testimony, the Secretary did not attempt to remedy this mistake until after filing her post-hearing brief and the judge's issuance of his reinstatement order. The Commission eschews punishing a miner for the inadvertence of the Secretary. *Cf. Secretary of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905, 908 (June 1986) ("Congress clearly intended to protect innocent miners from losing their causes of action because of delay by the Secretary").

The parties disagree over whether Akzo intended to discriminate against Rieke by returning him to the powderman position. S. Br. at 17; A. Br. at 12. Akzo's intent makes no difference and we make no finding in this regard. The effect of the judge's refusal to allow Rieke to remain a haul truck driver was to penalize Rieke for filing a discrimination complaint and such a penalty contravenes the broad remedial charge to make a miner whole under section 105(c)(2) of the Mine Act.[4]

---

[4] The Secretary's motion for expedited consideration is moot in light of our disposition. In addition, we decline to address, as beyond the scope of the petition before us, the Secretary's request, contained in note 1 of her Opposition to Akzo's Motion to Dismiss, to determine Akzo's possible successor-in-interest. 30 U.S.C. § 823(d)(2)(A)(iii). Moreover, as we have explained, "[t]here is no serious legal question that a Commission judgment may be enforced against a genuine successor." *Simpson v. Kenta Energy, Inc.*, 11 FMSHRC 770, 778 (May 1989) (citing cases).

III.

Conclusion

Based on the foregoing, we conclude that the judge's refusal to modify the reinstatement order to allow Rieke to remain in his job of haul truck driver, amounted to an abuse of discretion. We reverse the judge and remand for the calculation of backpay, including the loss of pay and benefits which he suffered as a result of his demotion from haul truck driver to powderman. If, as Akzo asserts in its motion to dismiss, Rieke was discharged on July 8, 1996, and the discharge is final, we will not order Rieke's reinstatement to the haul truck driver position. Accordingly, we vacate the reinstatement order and remand to the judge to determine the questions of whether Rieke was discharged in July 1996, whether Rieke has contested that discharge, and whether that discharge is final. If the judge determines that the discharge is in fact final, Rieke's reinstatement claim is moot and we instruct the judge to dismiss it and to award no backpay for the period following the discharge date.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Distribution

Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Wm. Michael Hanna, Esq.
Squire, Sanders & Dempsey, L.L.P.
4900 Key Tower
127 Public Square
Cleveland, OH 44114

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 8, 1997

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA)	:	
on behalf of RONALD MAXEY,	:	Docket No. KENT 97-256-D
Complainant	:	BARB CD 97-07
v.	:	
	:	Mine No. 68
LEECO, INCORPORATED,	:	Mine ID No. 15-17497
Respondent	:	

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, on behalf of Ronald Maxey;
Marco Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of Leeco, Incorporated.

Before: Judge Melick

DECISION

This case is before me upon the application for temporary reinstatement filed by the Secretary of Labor, pursuant to Section 105(c), of the Federal Mine Safety Health Act of 1997, 30 U.S.C. § 801 et. seq., the "Act", and Commission Rule 45, 29 C.F.R. Section 2700.45. The Secretary seeks an order temporarily reinstating Ronald Maxey to his former position as railrunner operator for Respondent, Leeco, Incorporated (Leeco), at its No. 68 Mine pending a final hearing and disposition on the merits of the related discrimination proceeding (Docket No. KENT 97-257-D).

Under Section 105(c)(2) of the Act, the Secretary is required to file an application for the temporary reinstatement of a miner when he finds that the underlying discrimination complaint has not been "frivolously brought." Under Commission Rule 45(d), 29 C.F.R. Section 2700.45(d), the issues in a temporary reinstatement hearing are limited to whether the miner's complaint was frivolously brought. The Secretary has the burden of proving that the complaint was not frivolous. Under this Rule, the Respondent also had the 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 was frivolously brought. By providing for an evidentiary hearing comporting with due process standards at which witnesses may testify under

oath and documents may be presented, it may be presumed that the Secretary's decision regarding temporary reinstatement must be viewed at the completion of this evidentiary hearing.

The Eleventh Circuit Court of Appeals in *Jim Walter Resources, Inc., v. FMSHRC*, 920 F.2d 738, 747 (11th Cir. 1990), concluded that "not frivolously brought" is indistinguishable from the "reasonable cause to believe" standard under the whistleblower provisions of the Surface Transportation Assistance Act. In addition, that Court equated "reasonable cause to believe" with a criteria of "not insubstantial or frivolous" and "not clearly without merit." 920 F.2d 738, at 747.

In her application for temporary reinstatement, the Secretary alleges as follows:

> On February 11, 1997, Maxey was discharged from his employment with Respondent, Leeco, Inc. This discharge occurred as a result of safety complaints made by Maxey to representatives of the Mine Safety and Health Administration on February 5, 1997, with regard to unsafe conditions at Respondent's No. 68 Mine. These conditions included no brakes or lights on the railrunners and one man trip, railrunners sticking on point, no track communication, sanders not functioning on railrunners due to water on the track, no jacks or bars on the railrunners, overcrowded mantrips, switches installed incorrectly on the track and railrunners colliding with each other because of no lights or brakes. As a result of these complaints, an inspection was conducted by several MSHA personnel on February 7 and 9, 1997, and several citations were issued with regard to the unsafe conditions alleged by Mr. Maxey. When Mr. Maxey returned to work on February 11, 1997, he was fired.

At expedited hearings held July 2, 1997, in Manchester, Kentucky, senior MSHA Special Investigator, Ronnie Brock, testified that on February 5, 1997, he talked to Maxey by telephone. Maxey was then in another MSHA office with MSHA Special Investigator Maurice Mullins. Brock testified that Maxey claimed that he had been suspended because he made safety complaints to the operator. Brock then explained to Maxey his right to file a "105(c)" complaint. Maxey declined, stating that he would wait. Brock told Maxey that he was nevertheless obligated to send an inspector to the mine based upon the violations Maxey reported and Maxey pleaded with Brock not to send an inspector fearing he would be fired. Brock documented the conversation and told Mullins to obtain the details of the violations from Maxey.

Don Baker, a regular MSHA inspector at the Leeco No. 68 Mine, who was familiar with Maxey, received a telephone call from Maxey on the evening of February 4, in which Maxey reported that he was having trouble with the company and needed to talk. Baker met with Maxey the next day at the MSHA office and, based on what he said, referred Maxey to Special Investigator Maurice Mullins, who was also then present in the MSHA office. On February 6, Baker's supervisor gave him a checklist of items to be inspected at the No. 68 Mine. A copy of

this list, based on Maxey's complaints, is in evidence as Government Exhibit No. 5. Baker was told to maintain confidentiality.

Early in the morning of February 7, Baker and MSHA engineer Scott Whitaker proceeded to the No. 68 Mine to conduct the inspection. Meeting initially with second shift mine foreman Ricky Campbell, Baker stated that he was continuing his regular inspection and would be looking at, among other things, the escapeway. Baker did not immediately inspect the rail equipment, the subject of Maxey's complaints, but proceeded first to the escapeway. He then proceeded to the track entry to deal with the issues in Maxey's complaint. As a result of his inspection on February 7, Baker issued one citation and four notices-to-provide-safeguards relating to the rail equipment. (Government Exhibits No. 6 and 7). Baker had never previously issued this many safeguards at one time and, indeed, had only once before issued a safeguard at the subject mine. Baker returned to the mine on February 9, and issued two additional citations for violations on the rail equipment. Baker testified that he did not give Leeco the list of safety problems furnished by Maxey nor did he tell anyone that he was present because of Maxey's complaint.

Maxey testified that he had worked for Leeco for sixteen years prior to his suspension and had been a railrunner for the previous ten years. He had been railrunner at the subject mine for one and one half years. He explained that it is an underground mine with three sections. His job was to haul supplies to the head drives and to the working sections. He worked the 6:00 a.m. to 3:00 p.m. day shift, primarily in the 003 Section. At the time of his discharge, Vic Lewis was his supervisor.

According to Maxey, on February 4, 1997, he arrived at work around 6:00 a.m. and met with Lewis. Maxey acknowledged that on the previous day he was supposed to have taken "eight-by-eight's" to the section to be used for track support. Maxey reportedly responded that he had not done so, claiming he had not had time because he and Lewis had built a cement-block wall the day before. According to Maxey, Lewis then responded, "then you need to go to 004 Section so you'll know what coal mining is about" (Tr. 75-76). Maxey apparently refused to go to the section and Lewis then told him to report to mine superintendents Amon Tracey or Everett Kelley. When Tracey later arrived, Maxey reported that Lewis had sent him to meet with him. Tracey conferred with Lewis and returned saying, "it sounds like to me that you quit," and told Maxey to get off mine property (Tr. 78).

Maxey denied to Lewis that he quit but, as he was leaving the mine property he ran into Talmadge Mosley, Leeco's President. Mosley intervened with Tracey and, 20 or 30 minutes later, Maxey was called back and told that, rather than be fired he would only be suspended for five days. According to Maxey, Tracey then told him to return on February 11, to operate the "lo-lo," maintaining cables and shoveling loose coal at the belt. Tracey then asked Maxey if he had any written warnings and Maxey purportedly responded that he "didn't think so" (Tr. 81).

That same day Maxey called MSHA Inspector Baker and followed up with a visit the next day. He reportedly told Baker that he was suspended because of the complaints he made to

mine officials regarding the condition of the hoist and the railrunners. He subsequently met with Special Investigator Mullins and provided him with a checklist of items (Government Exhibit No. 5).

Maxey thereafter returned to work on February 11, at about 5:40 a.m. No one from Leeco had contacted him after his February 4 suspension. As he was dressing for work, Lewis told him to see Tracey. According to Maxey, Tracey told him that, after reviewing his records and in light of his refusal to work he had decided to terminate him. Maxey maintains that he was shown three written warnings, one each in 1984, 1985 and 1987, and that he told Tracey that these were ten years old. Tracey apparently did not respond. Maxey testified that on February 4th, he did not recall that he had these earlier warnings, although he did remember when shown them on February 11.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination on the merits under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) rev'd on grounds, sub nom. *Consolidation Coal Co. v. Marshall*, 663 F2d 1211 (3rd Cir.1981); and *Secretary on behalf of Robinette v. United Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). At a trial on the merits, the operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively at a trial on the merits by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir.1983) (specifically approving the Commission's *Pasula-Robinette* test). *Cf. NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act).

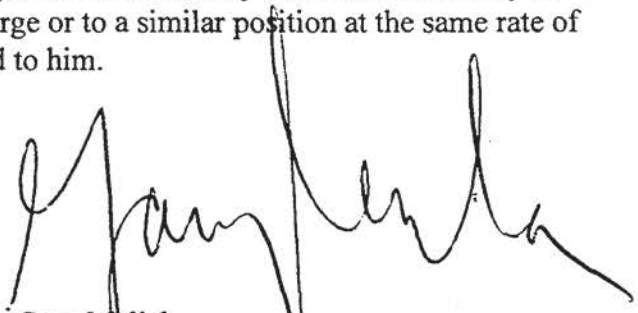
It is undisputed in this case that Maxey engaged in protected activity by reporting safety complaints to MSHA on February 4 and 5, 1997, and that he suffered adverse action (discharge) on February 11, 1997. As noted, the second element of a *prima facie* case of discrimination is a showing that the adverse action was motivated in any part by the protected activity. As this Commission observed in *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981) rev'd on other grounds sub nom. *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983), "[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." The Commission considered in that case the following circumstantial indicia of discriminatory intent: knowledge of protected activity; hostility towards protected activity; coincidence of time between the protected activity and the adverse action; and disparate treatment. In examining these indicia the Commission noted that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case."

The most striking evidence of unlawful motivation in this case is the close proximity in time between Maxey's safety complaints to MSHA on February 4 and 5, 1997, (followed by the inspections on February 7 and 9, 1997, during which an MSHA inspector issued Leeco four safeguard notices and three citations pertaining to rail equipment) and the subsequent termination of Maxey upon his return to work on February 11, 1997. It may reasonably be inferred in this case that Mine Superintendent Amon Tracey had good reason to believe that Maxey was the cause of the MSHA investigation resulting in the issuance of the safeguards and citations. Maxey was the supplyman operating rail equipment in the cited track area, he was suspended on February 4, and the inspections on February 7 and 9, were focused upon the rail equipment operating in the same area. In addition, the number of safeguards issued by the inspector was unusually high. Tracey himself acknowledged, moreover, that 80 percent of the time he would know about citations the day following their issuance and he did not deny that he had knowledge of the subject citations and safeguards prior to Maxey's dismissal (Tr. 289). It is also reasonable to infer that Tracey would have been hostile toward Maxey if he had believed Maxey initiated the MSHA inspections. Leeco was liable for civil penalties for the citations and it may be inferred that compliance with the four additional safeguards would have resulted in additional expense and detraction from production.

Under the circumstances, I have no difficulty in concluding that not only has the Secretary established that the complaint of Ronald Maxey in this case was not frivolously brought, but that she has established a *prima facie* case of discrimination. Whether that *prima facie* case can be rebutted or whether the Respondent can affirmatively defend within the *Pasula-Robinette* framework are questions to be deferred for trial on the merits of the discrimination case.

ORDER

The Secretary's application for temporary reinstatement of Ronald Maxey **IS GRANTED** and it is accordingly **ORDERED** that Leeco, Incorporated immediately reinstate Mr. Maxey to the position he held immediately prior to his discharge or to a similar position at the same rate of pay and with the same or equivalent duties assigned to him.



Gary Melick
Administrative Law Judge

Distribution:

Mary Beth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

Tony Oppegard, Esq., Mine Safety Project of the ARDF of Kentucky, Inc., 630 Maxwelton Court, Lexington, KY 40508 (Certified Mail)

Marco M. Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, 1700 Lexington Financial Center, 250 West Main Street, Lexington, KY 40507 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 11 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 96-290
Petitioner	:	A.C. No. 15-10753-03677
v.	:	
	:	Docket No. KENT 96-291
CLEAN ENERGY MINING, CO.,	:	A.C. No. 15-10753-03678
Respondent	:	
	:	Docket No. KENT 96-329
	:	A.C. No. 15-10753-03679
	:	
	:	Docket No. KENT 97-31
	:	A.C. No. 15-10753-03687
	:	
	:	No. 1 Mine

DECISION

Appearances: Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
John T. Bonham, II, Esq., Jackson & Kelly, Charleston, West Virginia, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Clean Energy Mining Company pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 30 violations of the Secretary's mandatory health and safety standards and seek penalties of $14,698.00. For the reasons set forth below, I affirm three contested orders, approve the settled cases and assess penalties of $11,851.00.

A hearing was held on March 11, 1997, in Pikeville, Kentucky. In addition, the parties submitted post-hearing briefs in these matters.

Settled Dockets

The parties settled all of the citations in Docket Nos. KENT 96-290, KENT 96-329 and KENT 97-31.[1] With regard to Docket No. KENT 96-290, the Respondent agreed to pay the proposed penalty for Citation No. 4023148; the Secretary agreed to modify Citation No. 4508816 to include the allegations in Citation No. 4508817 and to vacate Citation No. 4508817, and the Respondent agreed to pay the proposed penalty for Citation 4508816; and the Secretary agreed to modify Citation Nos. 4508818 and 4508819 by deleting the "significant and substantial" designations and the Respondent agreed to pay reduced penalties. (Tr. 5-7.)

Docket No. KENT 96-329 consists of 19 citations. The operator agreed to pay the proposed penalty for Citation Nos. 4036830, 4036831, 4036832, 4224951, 4036822, 4036823, 4036824, 4036825, 4036826, 4036827, 4036828, 4036829, 4224952 and 4509450. (Tr. 7-11.) The Secretary agreed to modify Citation No. 4224947 by reducing the number of people affected by the violation from ten to one and to reduce the penalty accordingly. (Tr. 9.) The Secretary agreed to modify Citation Nos. 4224948 and 4224950 by deleting the "significant and substantial" designations and to reduce the penalty. (Tr. 9-10.) Further, the Secretary agreed to modify Citation No. 4224949 by deleting the "significant and substantial" designation, but the penalty would remain as proposed. (Tr. 10.) Finally, the Secretary agree to vacate Citation No. 4509449. (Tr. 11.)

Docket No. KENT 97-31 consists of one citation. The Respondent agreed to pay the penalty as proposed. (Tr. 13.)

Lastly, in Docket No. KENT 96-291, the Secretary agreed to modify the degree of negligence in Citation No. 4516854[2] from "moderate" to "low" and in Citation No. 4592883 from "low" to "none" and the Respondent agreed to pay the penalties as originally proposed. (Tr. 16.) The remaining three orders in that docket were contested at the hearing.

After considering the parties representations, I concluded that the settlements were appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and approved the agreements. Their provisions will be carried out later in this decision.

---

[1] Docket No. KENT 97-30, originally scheduled to be heard with these cases, was severed from this proceeding at trial. (Tr. 14.)

[2] This citation is erroneously referred to as "No. 4506854" in the transcript.

Contested Orders

Background

On March 11, 1996, MSHA Inspector John P. Church went to the Clean Energy No. 1 Mine as part of a combined CDB[3]/AAA inspection. Specifically, that day he was inspecting the belt haulage system. He proceeded down the No. 1, or "slope," belt, which brings coal to the surface, to the No. 2 belt. The No. 2 belt is a short belt, approximately 80 feet long, and moves coal from the No. 3 belt to the No. 1 belt. The No. 3 belt is about 1600 feet long and brings coal from farther inside the mine.

His inspection resulted in the issuance of Order Nos. 4012619, concerning the No. 2 belt, 4012620, concerning the No. 3 belt, and 4023151, concerning the onshift examination of both belts. Order No. 4012619 alleges a violation of section 75.400 of the regulations, 30 C.F.R. § 75.400,[4] for:

> Accumulations of coal dust, float coal dust, loose coal, oil cans (5 gal.) with oil residue observed inside, oil cans (5 gal.) with open lids and being approx. ½ full of oil, paper boxes, paper towels, aerosol cans containing WD-40 and other combustible materials were observed on, in[,] around and under the #2 belt conveyor. . . . These accumulations measured from 1 inch to 20 inches deep. Coal dust and float coal dust was observed in suspension. Accumulations of coal dust and float coal dust were observed inside the #2 belt conveyor starter box (575 volts AC). The belt was very black in color and dry at several locations.
>
> The operator's belt conveyor examination records indicated that the #2 belt was O.K., this was inaccurate. The accumulations were observed from the head drive to the tail piece. This condition appears to have existed for several days.
>
> The operator has been cited repeatedly for violations of 30 CFR 75.400 over numerous inspection quarters.

---

[3] A "CDB" inspection is "a winter alert program that [MSHA] do[es] through the winter months to address mine ventilation controls, accumulations of coal dust, float coal dust and loose coal . . . rock dust application, methane liberation; things of that nature." (Tr. 26.)

[4] Section 75.400 requires that: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings or on electric equipment therein." This language is taken verbatim from section 304(a) of the Act, 30 U.S.C. § 864(a).

Other haulage belt conveyors have been cited in this mine repeatedly.

Several discussions have been held with mine management on violations cited of the same standard. These discussions were held during conferences of cited violations.

(Govt. Ex. 11.)

Order No. 4012620 also alleges a violation of section 75.400.[5] It relates that:

Accumulations of coal dust, float coal dust, and loose coal with coal dust on surfaces of rock dusted areas were observed along the length of the #3 belt conveyor for a distance of approx. 1600 feet, from the head drive to the tail piece. The bottom rollers of the coal haulage belt conveyor were seen rolling in the materials observed and several bottom rollers were stuck and not rolling. The materials surrounding the rollers was [*sic*] warm to the touch. The belt was in operation when this condition was observed. The belt was very black in color and dry in all locations. The accumulations ranged from 1 inch to 26 inches in depth on both sides of the belt, along it's length. There were accumulations of coal dust and float coal dust inside the #3 belt conveyor starter box (575 volt AC) that was energized.

The operator's belt conveyor examination records indicated that the #3 belt conveyor needed dusting by both the day shift and 2nd shift belt examiners (Curtis Adkins --1st shift and Doug Williamson -- 2nd shift).

The records were documented and signed by both belt examiners and countersigned by Charlie Morley -- Mine Foreman.

This condition has been reported on every production shift from 2/29/96 thru 3/8/96.

The operator has been cited repeatedly for the violation of 30 CFR 75.403 over several inspection quarters.

Several discussions have been held with mine management on violations cited of the same standard. These discussions were held during conferences of cited violations.

(Govt. Ex. 12.)

---

[5] The order originally set out a violation of section 75.403, 30 C.F.R. § 75.403, but was modified to allege section 75.400 on April 1, 1996.

Order No. 4023151 alleges a violation of section 75.362(b), 30 C.F.R. § 75.362(b).[6] It states:

> An inadequate [*sic*] on shift examination for hazardous conditions along each belt conveyor haulage way where belt conveyors are operated are [*sic*] not being conducted at this mine. Hazardous conditions were observed along the #2 and #3 coal haulage belt conveyors. Excessive accumulations of combustible materials were seen and not adequately reported. The operators coal haulage belt conveyor record books indicated that conditions along the #2 belt were O.K. when they were not. See order #4012619. Conditions along the #3 belt conveyor were recorded as only needing rock dusting. Examination of the belts by M.S.H.A. revealed excessive accumulations of coal dust, float coal dust and loose coal. Several bottom rollers were observed stuck and others were rolling in loose coal and float coal dust, warm to the touch. See order $4012620.
>
> Hazardous roof and rib conditions were observed along the length of the #3 belt conveyor at several locations. The similar conditions documented (of just rock dusting) in the operator's records and other hazardous conditions that existed, were not adequately reported or the conditions corrected.

(Govt. Ex. 13.)

Findings of Fact and Conclusions of Law

Whether the company committed the violations alleged in these orders depends on whether the inspector's or the company's version of the facts is accepted. The testimony is almost literally black and white and determining who to believe was particularly difficult. However, after carefully reviewing the evidence, I find the inspector's testimony more credible and, therefore, conclude that the violations occurred as set out.

Concerning the No. 2 belt, Inspector Church testified that he observed

> excessive accumulations of coal dust, float coal dust and loose coal . . . . There were oil cans with some oil left inside of them with raw oil residue.
>
> There was [*sic*] other combustible materials of paper boxes, paper towels, aerosol cans, which appeared to me to be a WD-40 can, things of that nature, which was [*sic*] along, around and under and on the Number 2 belt.

---

[6] Section 75.362(b) provides, in pertinent part, that: "During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated."

The deepest part of the accumulations was under the belt conveyor head drive, and I believe I measured it at approximately 20 inches at its deepest.

(Tr. 37.)

The inspector related that he witnessed the same conditions along the No. 3 belt. In addition, he "observed several rollers that were stuck and not turning, and there was [*sic*] several rollers observed along the length of the belt that had been rolling and accumulations of coal dust and float coal dust." (Tr. 44.) He further stated that he used his hammer to rake loose coal and float coal dust "out from around a couple or several rollers that had been, while the belt was running, rolling in loose coal and coal dust. And that material felt very warm to the touch." (Tr. 103.)

Inspector Church testified that the failure of the belt examiners to record the accumulations which he observed, and which, in his opinion, had been there for several shifts resulted in his issuing the order for inadequate shift examinations. He pointed out that the belt examiners book stated that the No. 2 belt was "O.K." for every examination from February 29, 1997, through March 10, 1997, and that it stated only that the No. 3 belt "need dusted" for the same period. (Govt. Ex. 14.)

The company's witnesses consisted of Mine Foreman Charles Morley, the two belt examiners, Curtis Adkins and Doug Williamson, and Section Foreman Arnold Coleman. Their testimony was to the effect that there were little or no accumulations around the belts and that what was present was non-combustible because it had been rock dusted.

Morley, who accompanied Church on the inspection, stated that the No. 2 belt entry "was clean; pretty much clean. It was a little bit -- it was grayish and there was some coal, a little bit of spillage that had spilled at the tail piece, the slope belt, where the No. 2 belt dumps. There was probably maybe a ten-by-ten area, a ten-foot-by-ten-foot area where there was some coal that had come off the belt, probably two or three inches thick. Well, it was just small pieces of coal, which had came [*sic*] off the belt as it dumped, probably gravel size or smaller." (Tr. 128.) He opined that "[i]t looked like probably a couple hours at the most it had accumulated there. In less time, probably, but I would say probably a couple hours." (Tr. 129.)

Morley testified that along the No. 2 belt "[t]here was a light amount of float coal dust on top of rock dust, but it was just gray. It was not a black belt." (Tr. 131.) He asserted that "[t]he only thing that would be close to an accumulation was the little bit of coal that was at the head where it had spilled off that morning because it would have been cleaned or it was cleaned on the Friday shift, the last shift we run [*sic*] on Friday night." (Tr. 140.)

Williamson testified that, although he did not believe a hazard existed, he had indicated that the No. 3 belt line "need dusted" in the examination book because "it's black. Any time a belt line is black, it requires dusting." (Tr. 170.) Adkins agreed that even though no hazard

existed the No. 3 belt needed to be dusted. He did not agree, however, that the belt was "black." Both contended that there were no accumulations on either the No. 2 or the No. 3 belt lines.

Coleman's section cleaned up the belt lines to abate the violations. He claimed that 99 percent of what they cleaned up was rock dust. He testified that his crew "wanted to know why we had to shovel that rock dust up just to put it back down again." (Tr. 210.) He denied seeing any accumulations of coal, loose coal or float coal dust.

Morley testified that he did not see Inspector Church take any measurements of accumulations along either belt line. He implied that the dust in the air, which Church had described as float coal dust, was rock dust from a trickle duster.[7] However, even if the inspector did not take measurements, which I conclude that he did, but just estimated them, and even if the trickle duster was blowing a continuous supply of rock dust, it does not explain the stark contrast between the inspector's and the company's evidence.

There was some inconsistency in the company's testimony, most notably whether the belts were black or gray, but the main reason that I find the inspector's testimony credible is the company's lack of response to his issuing the orders. If the belt lines really were as pristine as the company maintains, one would expect indications of outrage and indignation at the injustice of such allegations. Yet, according to the evidence, nothing at all was said to the inspector. No one said words to the effect of "you're kidding," "what accumulations," "show me the accumulations" or anything of that nature. The only company response in evidence was to assign a crew of seven men to clean-up the accumulations.

While I find that the company's failure to challenge the orders at the time most striking, there are other reasons to believe the inspector. His testimony was corroborated by his notes, (Resp. Ex. A), and the orders themselves, which were made contemporaneous with the inspection and were very detailed. The company has advanced no motive for the inspector not to tell the truth, nor is there any indication in the record that he had some reason for making false accusations. Thus, I am not aware of any reason why he would not tell the truth. Further, his lengthy experience as a coal miner and coal mine inspector demonstrates that he knows what he is testifying about and can tell the difference between accumulations of coal and coal dust and rock dust. Finally, the length of time required to clean-up the non-existent accumulations corroborates his description of what he observed.

On the other hand, the company's witnesses, three of whom, Morley, Adkins and Williamson, would appear to be directly responsible if the accusations are true, have an obvious motive for shading the truth. In addition, the operator, who is ultimately responsible for answering the allegations, has an obvious motive for encouraging them to do so. Further, much

---

[7] A trickle duster is a mechanical device that continuously puts small amounts of rock dust into the air, in this case "up the entry on the Number 2 belt and around the head." (Tr. 126-27.)

of the company's testimony appears to be based on the assumption that the belt lines had been cleaned on the shift before the inspection so that there could not have been the extensive accumulations found by the inspector. However, no one with personal knowledge testified that such cleaning had taken place. Furthermore, the repetitive entry in the examination book that at least the No. 3 belt needed dusting indicates that cleaning and dusting were not always performed as they were supposed to be.

Accordingly, I find that accumulations of coal dust, float coal dust, loose coal and other combustible materials existed along the Nos. 2 and 3 belt ways as described by the inspector. I further find that the accumulations had existed for several shifts and that, since no mention was made of them in the belt examination book, the required belt examinations were not being properly made. Consequently, I conclude that Clean Energy violated sections 75.400 and 75.362(b) as alleged.

Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); Austin *Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Inspector Church testified that the main hazard from the black, dry accumulations was the danger of a fire which with its resulting smoke and gases could asphyxiate miners. He additionally stated that with the amount of float coal dust in the air the potential for a mine explosion also existed. He propounded that a fire or explosion could be ignited by the "arcs or sparks or flash, flames from the operation of electrical components inside these belt starter boxes." (Tr. 39.) In this connection, he noted that he found float coal dust inside the belt starter boxes. He also advanced that ignition could result from the metal belt rollers becoming stuck and causing heat and he pointed out that several of the rollers on the No. 3 belt were, in fact, bound and the accumulations in the area were warm to the touch.

The Respondent maintains that the accumulations consisted mainly of rock dust and were, therefore, nct combustible. I have already rejected this argument in finding that the accumulations were as described by the inspector. Thus, I find that the two accumulation violations presented the hazard of fire or explosion, that given the ignition sources described by Inspector Church a fire or explosion was reasonably likely to occur during continued normal mining operations and that a fire or explosion would result in reasonably serious injuries to miners.

Accordingly, I find the two accumulation violations to be "significant and substantial." Furthermore, since the failure to properly examine the belts as required by the regulation directly lead to the accumulations, I find that violation was also "significant and substantial."

Unwarrantable Failure

All three orders are alleged to have resulted from the operator's unwarrantable failure to comply with the regulations. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994).

The Commission has held "that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Company, Inc.*, 16 FMSHRC 192, 195 (February 1994) (citation omitted). In this case, all of those factors indicate that the violations were unwarrantable

In accepting the inspector's testimony, I have found that the accumulations were on, in, around and under the No. 2 belt and extended along the entire 1600 foot length of the No. 3 belt. Clearly, the accumulations were extensive. They had existed for several shifts and there is no evidence that the company made any effort to clean them up or had taken any special precautions to prevent them from happening.

This is particularly egregious in view of the fact that Inspector Church had advised, when he first began inspecting the mine the previous fall, that attention needed to be paid to accumulations. He related that

during my preinspection conference, I mentioned to Mr. Stump and Mr. Morley through conversation that I was concerned about the amount of violations that had been issued to them by other inspectors conducting inspections at the mine in the past. I specifically addressed the 75.400 because of the amount of gas that the mine liberates to go along with the accumulations that's being cited under 400.

. . . .

I just simply stated to them that, "Fellows, you need to maybe look at these a little bit stronger in those areas where you're getting these type of violations; to maybe focus on those a little bit and try to get your history of violations down in that area."

What I was basically doing was making them aware during the preinspection conference that these were areas of concern, and I felt like they needed to be informed and made aware of it because I was aware of it.

(Tr. 33, 35.) The inspector's concerns were well founded. The record indicates that 25 citations for violations of section 75.400 had been issued at Mine No. 1 in the 2-years prior to the instant violations. (Govt. Ex. 3.)

Accordingly, I find that the accumulation violations resulted from the company's unwarrantable failure to comply with section 75.400. I further find that the violation of section 75.362(b) also arose from the company's unwarrantable failure. After receiving numerous citations for accumulations and being advised by the inspector that he would be paying particular attention to such violations, the failure of the belt examiners to report these can most charitably be described as indifferent. Plainly, the operator had not instilled a heightened alert to the problem in its employees.

Civil Penalty Assessment

The Secretary has proposed civil penalties of $14,698.00 for the violations in these cases, of which $7,000.00 was for the contested orders. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.* 18 FMSHRC 481, 483-84 (April 1996).

In connection with those criteria, the parties have stipulated that: (1) the proposed penalties are appropriate to the size of the operator's business and will not affect the operator's ability to remain in business; (2) the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violations; and, (3) the Clean Energy Mine No. 1 produced 1,006,479 tons of coal in the twelve months preceding these violations and during the same period the company's controlling entity, Fluor Corporation, produced 21,675,226 tons of

coal. (Tr. 16-17.) In addition, I find that the company's history of violations falls in the average range. (Govt. Ex. 1.)

Based on the penalty criteria, I will assess the penalties proposed by the Secretary for the uncontested citations, and the penalties agreed on for the settled citations. For the contested orders, in accordance with my S&S findings, I conclude that the gravity of the three violations was serious. I further conclude that they resulted from the operator's "unwarrantable failure" to follow the regulations and involved "high" negligence. Consequently, I assess penalties of $7,000.00.

The penalty assessed for each citation or order is as follows:

Docket No. KENT 96-290

Citation/Order No.	Penalty
4023148	$ 235.00
4508816	$ 1,200.00
4508817	Vacated
4508818	$ 100.00
4508819	$ 100.00

Docket No. KENT 96-291

4012619	$ 2,000.00
4012620	$ 3,000.00
4023151	$ 2,000.00
4516854	$ 50.00
4592883	$ 50.00

Docket No. KENT 96-329

4036830	$ 235.00
4036831	$ 235.00
4036832	$ 50.00
4224947	$ 235.00
4224948	$ 171.00
4224949	$ 690.00
4224950	$ 345.00
4224951	$ 50.00
4036822	$ 235.00
4036823	$ 50.00
4036824	$ 50.00

4036825		$ 50.00
4036826		$ 50.00
4036827		$ 50.00
4036828		$ 50.00
4036829		$ 235.00
4224952		$ 50.00
4509449		Vacated
4509450		$ 50.00
	Docket No. KENT 97-31	
4235493		$ 235.00
	Total Penalties	$11,851.00

ORDER

Accordingly, Citation No. 4023148 is **AFFIRMED**, Citation No. 4508816 is **MODIFIED** to include the allegations in Citation No. 4508817 and **AFFIRMED** as modified, Citation Nos. 4508818 and 4508819 are **MODIFIED** to delete the "significant and substantial" designations and **AFFIRMED** as modified, and Citation No. 4508817 is **VACATED** in Docket No. KENT 96-290; Order Nos. 4012619, 4012620 and 4023151 are **AFFIRMED**, Citation No. 4516854 is **MODIFIED** to reduce the level of negligence from "moderate" to "low" and **AFFIRMED** as modified, and Citation No. 4592883 is **MODIFIED** to reduce the level of negligence from "low" to "none" and **AFFIRMED** as modified in Docket No. KENT 96-291; Citation Nos. 4036822, 4036823, 4036824, 4036825, 4036826, 4036827, 4036828, 4036829, 4036830, 4036831, 4036832, 4224951, 4224652 and 4509450 are **AFFIRMED**, Citation No. 4224947 is **MODIFIED** to reduce the number of miners affected by the violation from ten to one and **AFFIRMED** as modified, Citation Nos. 4224948 and 4224950 are **MODIFIED** to delete the "significant and substantial" designations, and Citation No. 4509449 is **VACATED** in Docket No. KENT 96-329; and Citation No. 4235493 is **AFFIRMED** in Docket No. KENT 97-31.

Clean Energy Mining Company is **ORDERED TO PAY** civil penalties of **$11,851.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

John T. Bonham, II, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 14 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 94-160-M
Petitioner	:	A.C. No. 03-01619-05504 A
v.	:	
	:	Blue Bayou Sand and Gravel Mine
CLOVIS L. JEWELL,	:	
Employed by D. JEWELLCO, INC., d/b/a	:	
BLUE BAYOU SAND & GRAVEL, CO.,	:	
Respondent	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Mr. Danny Jewell, Owner, Jewellco, Inc., Texarkana, Arkansas for Respondent.

Before: Judge Weisberger

This case is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (Petitioner) pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), alleging that Clovis L. Jewell (Respondent), employed by D. Jewell Co., Inc., d/b/a Blue Bayou Sand & Gravel Co., ("Blue Bayou") knowingly authorized, ordered, or carried out a violation of 30 C.F.R. § 56.14101(a)(1). [1]

---

[1]In a prior proceeding involving the citation at issue in the instant proceeding which had been issued to Blue Bayou Sand and Gravel, Inc., it was found at the ALJ level that Blue Bayou violated 30 C.F.R. § 56.14101(a)(1), but that the violation was not S&S (16 FMSHRC 1059) (May 1994). The Secretary petitioned the Commission for discretionary review challenging the ALJ's S&S and imminent danger determinations. The Commission reversed the determination that the violation did not present an imminent danger, and remanded the S&S issue. Blue Bayou appealed to the U.S. Court of Appeals, and the instant proceeding was stayed pending this appeal. Subsequently, Blue Bayou withdrew its appeal.

The Secretary, in the instant proceeding, filed a motion in limine to preclude Jewell from challenging the existence of a significant and substantial violation of Section 56.14101(a)(1), supra, arguing that the Secretary should not be required again to prove that Blue Bayou violated

(continued...)

Pursuant to notice the case was heard on May 1, 1997, in Shreveport, Louisiana.[2] At the conclusion of the hearing, the parties were requested to file post-hearing briefs, and the filing date was subsequently extended to June 27, 1997. On July 1, 1997, Petitioner filed a Post-Hearing Statement. On July 7, 1997, Respondent filed a Post-Hearing Statement.

I. Findings of Fact and Discussion

A. Introduction

Section 110(c) of the Act provides in essence, that a corporate agent who "knowingly authorized, ordered, or carried out" mandatory safety standard shall be subject to a civil penalty. Hence in order for Petitioner to prevail, she must establish a violation of a mandatory standard, and that Respondent either knowingly authorized ordered or carried out such violation.

1. Violation of 30 C.F.R. § 56.14101(a)

a. Petitioner's evidence

D. Jewellco Inc., d/b/a Blue Bayou Sand & Gravel, Inc., operates an open-pit sand and gravel mine in Arkansas. On April 28, 1993, Larry Slycord an MSHA inspector, and his supervisor, Billy G. Ritchey inspected the mine. Slycord observed a 22-ton Euclid haul truck after it had been loaded by a truck hoe. Slycord motioned to the driver, William Jewell, to stop, and advised him that he wanted to check the brakes. According to Slycord, William Jewell said that "the brakes weren't any good on the truck" (Tr. 55). Slycord asked William Jewell how he was "holding" the truck, and William Jewell told him "that he was holding the truck with the transmission" (Tr. 56).

Slycord directed William Jewell to open the door of the truck, and drive forward. Slycord walked alongside the truck, which he estimated was traveling at 3 to 4 miles an hour, and motioned to William Jewell to stop the truck. According to Slycord, as Jewell applied the service brakes, the truck kept rolling for 20 to 25 feet and came to a "slow rolling stop" (Tr. 59). The truck was tested again with the same result. Ritchey

---

[1](...continued)
Section 56.14101(a) supra. After entertaining oral argument from representatives of both parties in a telephone conference call, the Secretary's motion was denied.

[2]The Stay Order previously issued in this case on September 14, 1994, and continued in an order issued on July 22, 1996, is hereby lifted nunc pro tunc to April 17, 1997.

corroborated Slycord's testimony, and indicated that when Jewell applied the service brakes the wheels did not hesitate or grab. Accordingly, he concluded that there was no indication that braking was taking place.

Slycord issued a withdrawal order, which is not at issue herein, and a citation alleging a violation of 30 C.F.R. § 56.14101(a)(1) which, as pertinent, provides as follows: "(a) Minimum requirements. (1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels."

According to Slycord, Paul Jewell examined the brakes after the vehicle was cited, and found a leak in one of the brake pods which he replaced. Slycord opined that with a leak in one pod there would be a loss of air volume and air pressure, resulting in insufficient air to supply to all four brakes and all four brake pods.

b. Respondent's position

Respondent did not proffer the testimony of any eyewitness to contradict the testimony of Slycord and Ritchey that when the former directed the truck to be stopped it did not stop, but continued to roll forward. Clovis Jewell, testified that William Jewell who had operated the truck in question for three weeks prior to its being cited, had not expressed any problems with the truck. Also Clovis Jewell indicated that he had operated the truck in this time period, and did not have any problems stopping. According to Clovis Jewell he stopped the truck by using a retarder, and the brakes never failed to operate properly. He opined that, applying the retarder when the truck travels at 3 to 4 miles an hour down a 3 percent grade would slow it to a speed of less than that of a person walking. He also opined that the retarder is designed for use in emergencies, and that at a top speed of 10 to 12 miles an hour and carrying a full load the truck would still stop within six seconds. According to Clovis Jewell, revving the truck's motor would put more air than needed in the braking system.

c. Discussion

Based on the uncontradicted testimony of Slycord and Ritchey that the truck did not stop when the brakes were applied and continued to roll forward, I find that the weight of the evidence establishes a violation of section 56.14101(a) supra.

2. Knowingly authorized ordered or carried out the violation.

The Commission has defined "knowledge", under section 110(c) to include both actual knowledge and having reason to know of a violative condition. The Commission has also held that liability under section 110(c) requires aggravated conduct rather than ordinary negligence (Secretary v. Richardson, 3 FMSHRC 8, 16 (1981), aff'd, 689 F.2d 632 (6th Cir. 1982 accord, Secretary v. Beth Energy Mines, 14 FMSHRC 1232, 1245 (1992). The Commission's interpretation was held to reasonable and was adopted, in essence, by the D.C. Circuit in Freeman United Coal Co., v. FMSHRC, 108 F.3d 358, (D.C. Cir. 1997)).

Approximately 4 to 5 weeks prior to April 28, 1993, Albert Braneff, was hired to operate the track hoe. He testified that when he started to work, Clovis Jewell told him to put a mound of dirt between the track hoe, and the Euclid truck when it backed up to be loaded by the track hoe, as there were problems stopping it. Braneff indicated that Clovis Jewell told him to watch the brakes on the truck, and to assist in stopping it by using the bucket at the back of the track hoe. He indicated that the driver of the truck told him that the brakes were not holding, and to watch him to make sure the truck would not roll. According to Braneff, all employees knew there were problems with the truck.

J.E. Jewell, testified that he inspected the truck the day after the citation was issued, and the only problem that he found with the brakes was that "there was an 'O' ring out in the air pod" (Tr. 219, February 9, 1994)[3] He opined that the leak in the air pod was not of sufficient size to affect the ability of the brakes to work properly. He said that the leak would have affected braking ability only if the brakes were applied for about 15 minutes. The only repair he performed in order to abate the citation was to replace the 'O' ring.

In his defense, Clovis Jewell testified that he operated the truck prior to April 23, and there were no problems stopping. Accordingly to Jewell, William Jewell, the operator of the truck, never expressed to him any problems with the truck. Clovis Jewell specifically denied telling Braneff to stop the truck with a bucket. However, it is most significant that Clovis Jewell did not contradict Braneff's testimony that he (Clovis Jewell) had stated that there were problems with stopping the truck, and to stop it with the bucket of the track hoe.

---

[3]J.E. Jewell testified in the initial proceeding commenced by the Secretary against the Blue Bayou (16 FMSHRC supra). He died after that hearing, and it was stipulated that his testimony at that initial proceeding be admitted herein.

Within the above context, I find that it has been established that Clovis Jewell knew that there were problems with the truck's brakes. Since as foreman, he allowed this condition to continue and did not repair it, I find that it has been established that he violated Section 110(c) supra.

B. Penalty

Petitioner seeks a penalty from Respondent of $1,000. The Commission, in Secretary v. Sunny Ridge Mining Co. Inc., 19 FMSHRC 254, 272 (Feb 28, 1997), set forth as follows the penalty criteria that apply to individuals when a judge makes findings assessing a penalty pursuant to 110(c) of the Act:

> In making such findings, judges should thus consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay. Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be make on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

The facts relating to Respondent's history of violations would appear to be within the control of Petitioner. However, Petitioner did not adduce any facts concerning this criteria. As set forth above, Respondent did not contradict Braneff's testimony that he had told him to watch the brakes on the truck as there were problems stopping the truck. Nor did Respondent impeach the credibility of this testimony. I therefore accept it. Since Respondent permitted the truck to operate knowing that there problems with the brakes I find his negligence to be of relatively high level.

According to Ritchey, the leading cause of fatalities are mobile equipment accidents. In this connection, Slycord testified that the truck could roll back to the track hoe, and cause injuries to either or both operators. Ritchey indicated an MSHA study revealed that in six years there were eight fatalities and 47 serious injuries where trucks have traveled through and over berms. Slycord noted that since the truck had problems with its brakes, it could have rolled over the block at the hopper, and injured the hopper operator, or the truck operator. I find that the operator of the truck used the transmission to hold it. Hence, such an accident could have occurred only if the transmission failed to operate. In this connection, I note that there is no evidence that there were any problems with the transmission.

According to both Inspectors, because there were problems with the brakes, the truck could have hit persons who were working approximately 20 feet from the roadway. Such an accident could have occurred only if the truck could not have been steered correctly. There is no evidence that the truck's steering was defective.

Additionally, the seriousness of the violative condition, i.e., a leak in a brake pod, is mitigated somewhat by noting Clovis Jewell's uncontradicted testimony that proper use of a retarder operates to slow the truck.

Based on all the above, I find that the record establishes that the gravity of the violation was only moderate.

The violation was abated in good faith as the defect in the brakes, i.e., the leaking pod, was replaced the following day.

The facts concerning Respondent's income, family support obligations, and ability to pay appear to be within control of Respondent. However, he did not adduce any evidence regarding these criteria. I find that he has not come forward with any evidence to mitigate a penalty based upon his ability to pay.

In assessing a penalty I take in account the high level of Respondent's negligence and the fact that he was the foreman at the site. I also consider the fact that Respondent has not adduced any evidence to mitigate a penalty based upon lack of ability to pay. On the other hand, the violation was abated in good faith, and the gravity of the violation was only moderate. Also, Petitioner has failed to adduce any evidence to establish that a penalty is to be increased based upon Respondent's history of violations. Taking all these into consideration, I find that a penalty of $200 is appropriate.

ORDER

It is **ORDERED** that Respondent, within 30 days of this decision, pay a civil penalty of $200.

Avram Weisberger
Administrative Law Judge

Distribution:

Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, 4th Floor, Arlington, VA 22203 (Certified Mail)

Mr. Danny Jewell, Jewellco, Inc., 6 Oakcreek Circle, Texarkana, AR 71854 (Certified Mail)

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 15, 1997

BLUESTONE COAL CORPORATION, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 93-165-R Order No. 2723399; 1/13/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Keystone No. 6 Strip Mine ID 46-03404
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 94-117 A. C. No. 46-03404-03509
v.	:	Keystone No. 6 Strip
BLUESTONE COAL CORPORATION, Respondent	:	

DECISION ON REMAND
AND
ORDER APPROVING SETTLEMENT

Before: Judge Barbour:

On June 18, 1997, The Commission reversed in part my decision in these matters by overturning my conclusion that Bluestone did not violate 30 C.F.R. § 77.1600(b), as alleges in Citation No. 2723400 (*Bluestone Coal Corp.*, 19 FMSHRC __ (June 18, 1997)). The Commission remanded the cases to determine whether the violation of section 77.1600(b) was a significant and substantial contribution to a mine safety hazard (S&S violation) and for the assessment of a civil penalty (slip op. 5, 10).

In light of the Commission's decision, the parties have reached a settlement and the Secretary has filed a motion seeking approval of the settlement (29 C.F.R. § 2700.31). The settlement is as follows:

Citation No.	Date	30 C.F.R. §	Assessment	Settlement
2723400	1/13/93	77.1600(b)	$6,000	$500

The citation alleges that mine management did not have "traffic rules, signals or warning signs standardize[d] in the steep mountain incline to provide the coal haulage equipment [with] a warning of the steep incline" (Citation No. 2723400).

Given the Commission's finding that Bluestone violated the cited standard, the parties have agreed the violation was S&S and Bluestone will pay a civil penalty of $500. The S&S nature of the violation is consistent with the findings of the Secretary's inspector and the $500 penalty is consistent with other findings made in my decision (*Bluestone Coal Corp.*, 16 FMSHRC 2500 (December 1994)). Therefore, the proposed settlement is reasonable and in the public interest. Pursuant to 39 C.F.R. § 2700.31, the Secretary's motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

Bluestone is **ORDERED** to pay a civil penalty of $500 in satisfaction of the violation in question. Payment is to be made to MSHA within 30 days of the date of this proceeding. Upon receipt of full payment, these matters are **DISMISSED**.

David Barbour
Administrative Law Judge

Distribution:

David J. Hardy, Esq., Jackson & Kelly, P. O. Box 553, Charleston, WV 25322 (Certified Mail)

Robert S. Wilson, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203 (Certified Mail)

Patrick L. DePace, Esq., Office of the Solicitor, U. S. Department of Labor, 881 Federal Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LOUISBOURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 15 1997

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-357-D
ON BEHALF OF SAMUEL KNOTTS,	:	MORG CD 94-03
Complainant	:	
v.	:	Coalbank Fork No. 12
	:	Mine ID 46-07062
TANGLEWOOD ENERGY, INC.,	:	
FERN COVE, INC.,	:	
RANDY BURKE AND RANDALL KEY,	:	
Respondents	:	

REMAND DECISION

Before: Judge Koutras

Statement of the Case

This discrimination proceeding concerns a challenge by the respondents to decisions by former Commission Judge Roy J. Maurer. After an evidentiary hearing on the merits of the complaint, Judge Maurer issued his decision finding that the respondents terminated the complainant's employment on January 28, 1994, in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. 17 FMSHRC 1044 (June 1995). Subsequently, Judge Maurer issued his decision on damages. 17 FMSHRC 1667 (September 1995). He found the respondents jointly and severally liable for the payment of damages as follows:

a. Samuel Knotts is entitled to back pay in the total amount of $20,760 less $3640 which he received in state unemployment benefits, or $17,120 net back pay.

b. Samuel Knotts is entitled to costs of $508.

c. Samuel Knotts is entitled to interest on the above two awards in the amount of $1,762.80.

d. The Secretary of Labor is entitled to a civil penalty in the amount of $1000 for the violation of the Mine Act.

In assessing a civil penalty of $1,000, for the violation, Judge Maurer rejected the Secretary's proposal for a $25,000, penalty, finding that such an amount was "clearly unwarranted" for the following reasons (17 FMSHRC 1668):

> * * * * This was a relatively close "mixed-motives" case where the complainant prevailed by the thinnest of margins. The record also indicates that the respondents herein are experiencing serious financial difficulties in the coal mining business including several hundred thousand dollars in unpaid civil penalties. These difficulties, combined with the back pay, costs, and interest being awarded to the complainant herein, lead me to conclude that $1000 is an appropriate civil penalty pursuant to the criteria contained in section 110(i) of the Act. I also believe that the total monetary award to the complainant in this case is itself a serious disincentive against future violations of the discrimination provisions of the Mine Act by these respondents.

The Secretary and the respondents appealed Judge Maurer's decisions to the Commission. The respondents argued that no adverse action was taken against the complainant, and that any individual liability may only be based on section 110(c) of the Act, which provides for civil penalties against corporate officers or agents for knowing violations. The respondents agreed with Judge Maurer's penalty assessment of $1,000, and his deduction of unemployment compensation from the damages awarded the complainant.

The Secretary claimed that the question of individual liability is not an issue because it was not raised before the judge. The Secretary further contended that Judge Maurer failed to consider and properly apply the six statutory penalty criteria of section 110(i) of the Act when he assessed a $1,000 penalty for the violation, and that he improperly reduced the complainant's backpay award by the amount of unemployment compensation he received.

On May 15, 1997, the Commission issued its decision and affirmed Judge Maurer's finding that the corporate and individual respondents discriminated against the complainant in violation of section 105(c) of the Act. However, the Commission reversed the judge's order deducting $3,640, in state unemployment benefits from the respondent's back pay award. The Commission also vacated the judge's civil penalty assessment of $1,000, on the ground that he only considered one of the six statutory penalty criteria found in section 110(i) of the Act, the operator's ability to stay in business. The Commission remanded the matter for further consideration and findings of fact regarding the other five penalty criteria found in section 110(i) of the Act, and in view of Judge Maurer's transfer to another agency, the matter was assigned to me for further adjudication. 19 FMSHRC 833 (May 1997).

In response to my order requiring the parties to discuss possible settlement or stipulations with respect to the Commission's remand, the parties confirmed that they were unable to reach a settlement with respect to a mutually acceptable penalty assessment for the violation. However, the parties agreed that an additional hearing was not required and that the matter can be submitted for a decision on the existing record.

Discussion

In the decision below before Judge Maurer, the parties stipulated as follows at 17 FMSHRC 1044-45 (June 1995):

> 1. The subject mine was operated by Fern Cove, Inc., a successor in interest to Tanglewood Energy, Inc.
>
> 2. The assessed violation history report may be used in determining an appropriate civil penalty.
>
> 3. For purposes of the assessment of civil penalties the violation history of Tanglewood Energy, Inc. at the Coalbank Fork No. 12 Mine shall be considered to be the violation history of Fern Cove, Inc. and vice versa.
>
> 4. Fern Cove, Inc. and Tanglewood Energy, Inc. are jointly and severally liable for all civil penalties assessed against either by the Federal Mine Safety and Health Review Commission relative to the Coalbank Fork No. 12 Mine.

Judge Maurer found that Respondent Randy Burke is President of Fern Cove, Inc. and of TANGLEWOOD Energy, Inc. Respondent Randall Key is a part owner and officer of Fern Cove, Inc. and Vice-President of Tanglewood Energy, Inc. (17 FMSHRC 1047).

I have carefully reviewed and considered the entire record in this matter, including the posthearing arguments filed by the parties with respect to the merits of the case, as well as the remedial damages aspect of the case, when it was adjudicated by Judge Maurer. In accordance with the Commission's remand instructions, my findings and conclusions with respect to the statutory penalty assessment criteria found in section 110(i) of the Act follow below.

History of Previous Violations

The Secretary submitted computer print-outs detailing the violation history for the No. 12 mine for the 24 month period immediately prior to the violation (January 28, 1992 through January 27, 1994), and for the 24 month period ending six months prior to the date of the violation here (July 28, 1991 through July 27, 1993). The Secretary states that this history shows 187 violations in 114 inspection days, and concludes that this is a relatively high number of violations.

The Secretary asserts that "respondents egregious history of non-compliance" is further shown by the fact that it paid only $572 of the $43,128, in penalties that were assessed for the aforementioned 24 month period. Further, the Secretary points out that the respondents have been sued by the United States to collect $281,664 in unpaid penalties that are the subject of final Commission orders. The Secretary concludes that this "blatant disregard" for the final orders of the Commission justifies the penalty proposed in this matter.

Finally, the Secretary maintains that the most important element of the respondents' history of prior violations is that just two months prior to the violation in this case, the respondents were found to have discharged miner Perry Poddey for his protected activity of reporting safety violations. Secretary on behalf of Perry Poddey v. Tanglewood Energy, Inc., 15 FMSHRC 2401 (November 1993). The Secretary concludes that the respondents have "a demonstrated record of illegally discharging employees who attempt to improve safety by reporting violations".

The respondents do not dispute the accuracy of the listed past violations history. However, they point to particular "problems" in explaining the 187 violations for Fern Cove during the period from January 28, 1992 through January 27, 1994. The respondents asserted that it would appear that there was a particular quarter in which a number of problems resulted in increased violations. The history prior to 1992 and in the first months of 1994 demonstrates that the mine has not had a consistent history of safety problems, although it appears that during 1993, especially from September through December, there were problems for a number of reasons, including financial problems and increased inspection scrutiny.

The respondents further argue that no record of any prior violation history has been submitted for the individual respondents. Further, with respect to Judge Amchan's prior Poddey decision, the respondents conclude that it is apparent that the judge found that Tanglewood Energy, Inc., did not intend to violate the Act, although the termination of Poddey was safety related. Respondents contend that if the Poddey decision is considered as part of the history, it must be considered in its entirety.

I take note of the fact that prior to the Poddey case, there is no evidence of any past discrimination complaints filed against the respondents. Although I have taken this into consideration, I have also considered the overall general history for all past violations as noted in the record in this matter. See: Secretary ex rel Perry Poddey v. Tanglewood Energy, Inc., 18 FMSHRC 1315, 1322 (August 1996), and the cases cited therein.

For an operation of its size, I conclude and find that the respondent's history of prior violations is not a good one, and I have taken this into consideration in the civil penalty assessed for the violation in this case. I reject the Secretary's assertion that the failure by the respondents to pay prior final civil penalty assessment orders justifies its proposed penalty assessment of $25,000, for the violation in this case. See: Jim Walter Resources, Inc., 18 FMSHRC 841, 850 (June 1996), where the Commission held that the judge abused his discretion in basing his civil

penalty assessment, in part, upon a mine operator's delinquency in the payment of penalties. The Commission ruled that payment of past penalty assessments is not one of the six penalty assessment criteria set forth in section 110(i) of the Act. Further, I consider the past failure to pay penalties to be a debt collection matter best left to the Secretary and the Government. In this regard, I take note of Reich v. OSHRC, 102 F.3d 1203 (11th Cir. 1997), holding that the cessation of business does not render civil penalty assessments for past violations moot.

The Commission has further ruled that although deterring future violations is an important purpose of civil penalties, and that deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria, deterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered. See: Jim Walter Resources, 19 FMSHRC 498, 501 (March 1997).

With respect to the Secretary's reliance on the prior Poddey case in support of its conclusion that it "requires that a message be sent to these respondents and to others who would emulate them", I take note of the fact that respondents Burke, Key, and Fern Cove. Inc., were not named as respondents in the Poddey case. Further, as discussed later in connection with the question of negligence, Judge Amchan rejected the Secretary's proposed penalty assessment of $2,500 to $3,000, and assessed a penalty of $100, based on several mitigating circumstances, including a lack of intent by Tanglewood Energy, Inc. to discourage safety complaints or cooperation with MSHA and a lack of any prior retaliation or attempts to inhibit employees in exercising their rights.

In the Poddey case, the facts reflect that he was discharged for insubordinate conduct, including threatening his section foreman with bodily harm, and allegedly threatening to kill him after the discharge. Although Judge Amchan nonetheless found a violation, he did so after acknowledging the "difficult and complicated" issues presented, and his reinstatement order included an admonition to the complainant Poddey with respect to his future conduct. Under the circumstances, I do not view the Poddey case as a particularly aggravated or egregious example of discriminatory conduct on the part of the mine operator warranting any "special message", and I have given it little weight in assessing a penalty in this case.

I take note of the fact that on appeal of Judge Amchan's Poddey decision, the Commission affirmed in result his finding of low negligence, affirmed his low gravity finding, reversed his deduction of unemployment compensation from Poddey's backpay award, vacated his $100 civil penalty assessment, and remanded the case for assessment with further findings on the operator's history of previous violations. 18 FMSHRC 1315 (August 1996). In vacating the $100 penalty assessment, the Commission took particular note of Judge Amchan's "terse finding" that the mine operator had "a relatively large number of previous violations" and stated that this finding "does not provide the necessary foundation for our review of the appropriateness of the $100 penalty, which was a significant reduction of the $2,500 to $3,000 penalty proposed by the Secretary". 18 FMSHRC 1322.

The remanded Poddey case was also assigned to me, and the parties subsequently settled the matter. They agreed that a $1,000 penalty assessment was appropriate given the Commission's determinations concerning negligence, gravity, and the operator's history of previous violations, and that the $4,000, unemployment compensation award received by Poddey should not be deducted from his backpay award. I approved the settlement and issued my Remand Decision and Order on January 7, 1997. 19 FMSHRC 134 (January 1997).

Negligence

The Secretary maintains that there is no dispute in this case that the violation was intentional. In support of this conclusion, the Secretary notes Judge Maurer's statement at 17 FMSHRC 1052 that "It is stipulated in this record that the reason for the discharge was his (the complainant's) conversation with Campbell". The Secretary further states that the defense advanced by the respondents that the complainant's discharge was based upon the length of the conversation not its content, and that it contained "gossip" and other inflammatory language, was properly rejected as "a feeble pretense." 17 FMSHRC 1053.

Although the respondents deny that the complainant was in fact fired for protected activity, they recognize that Judge Maurer found that they failed to meet the burden of proving that the discharge "was also motivated by an unprotected activity and that it would have taken the adverse action in any event for the unprotected activity alone". Respondents Key and Burke contend that they have consistently testified that the complainant was terminated because of the length of time which he spent talking, and that Key was disturbed by the slanderous nature of the complainant's conversation, and would have terminated him regardless of any references to safety related questions such as morale. Under these circumstances, they conclude that the degree of negligence must be judged by the failure of Key to recognize that the complainant's comments concerning morale and equipment were safety related and that such discussion was, therefore, protected activity. In other words, Key did not intend to violate the Act in failing to recognize that the safety related aspects of the conversation would make the conversation protected activity and the subsequent discharge of the complainant a violation under the Act. Likewise, Burke did not intend a violation of the Act in approving the discharge.

Respondent Burke concludes that the testimony is clear that Key made the decision to discharge the complainant, and that Burke's approval of that decision was based on Key's representation that the reason for the termination was that the complainant had not worked for a two-hour period while being paid by the company. Burke points out that he never heard the conversation between the complainant and Campbell.

The Secretary's suggestion that the respondents stipulated that they discharged the complainant because of his conversation with mine engineer J. Randy Campbell is not totally accurate and is taken out of context. Stipulation No. 9, at pg. 1046, of Judge Maurer's decision states as follows:

Complainant Samuel Knotts was discharged because of respondents belief that he spoke with mine engineer J. Randy Campbell for over 2 hours on January 27, 1994.

In the absence of any additional "record" support for Judge Maurer's statement, I can only conclude from the aforementioned stipulation that the respondents stipulated that they discharged the complainant for speaking with Mr. Campbell for over two hours, and not for simply carrying on a conversation with him. The thrust of the respondents' defense is that the complainant was discharged for interrupting his work and carrying on a lengthy conversation with Mr. Campbell that included "gossip" and inflammatory language. Judge Maurer found that the conversation lasted 75 to 90 minutes and was "condoned" by respondent Key who could have interrupted the conversation and ordered the complainant back to work, but did not do so.

With respect to the content of the conversation, Judge Maurer found that certain portions of what the complainant was communicating to Mr. Campbell could indeed be characterized as "gossip" and inflammatory language, and he concluded that these statements constituted unprotected activity. However, in the context of the "overall mining industry," the judge found that the statements were "pretty mild stuff compared to many other cases which come before the trial judges of this Commission", and he concluded that the unprotected statements of the complainant could not reasonably have formed the basis for his discharge without more. On balance, the judge further found that the respondents did not meet their burden of proving their affirmative defense. 17 FMSHRC 1053-1054.

I find nothing to support the Secretary's statement that the defense advanced by the respondents was "rejected as a feeble defense". Indeed, in his decision of September 26, 1995, awarding damages in this case, Judge maurer stated that the case "was a relatively close mixed-motives case where the complainant prevailed by the thinnest of margins". 17 FMSHRC 1668.

The Secretary cites the prior Poddey case in which the respondent Tanglewood Energy, Inc., was found to have violated section 105(c) of the Act for discharging a miner for his protected activity of reporting safety violations. As a result of that case, the Secretary concludes that the respondents in the instant matter were well aware that discharging miners for making safety complaints was a violation of the Act, and that as a result of this prior case, the respondents have "a demonstrated record of illegally discharging employees who attempt to improve safety by reporting violations".

I take note of the fact that in the Poddey case, he was discharged for threatening his section foreman. Mr. Key and Mr. Burke were not named as individual respondents, and former Commission Judge Amchan found a violation of section 105(c) of the Act after concluding that Mr. Poddey's threats were excusable because his behavior was spontaneous, impulsive, and inextricably related to his reporting a brake malfunction to a mechanic and the foreman, and then discussing the matter with an MSHA inspector. Judge Amchan found that the timing of Mr. Poddey's discharge, a day after his discussion with the inspector, created an inference that

his discharge was motivated in part by his protective activity, and that the respondent did not rebut this prima facie case of discrimination. In finding a violation, Judge Amchan ruled that Mr. Poddey's insubordinate conduct, in inviting his foreman, Jeff Simmons to fight him off mine property, and later expressing a desire to kill Mr. Simmons after he was discharged did not justify forfeiture of Mr. Poddey's rights under the Act. 15 FMSHRC 2401, 2414 (November 1993).

I take note of the fact that Judge Amchan rejected the Secretary's proposal for a civil penalty assessment of $2,500 to $3,000, and assessed a penalty of $100 for the violation. In assessing this substantially reduced penalty, Judge Amchan remarked as follows at 15 FMSHRC 2415-2416:

> * * * * I find that a $100 penalty is appropriate using the criteria of gravity and negligence (which I view as a determination of fault in the discrimination context). Although I find that Mr. Simmons and Mr. Key unjustifiably placed blame or provoked the outburst that led to Mr. Poddey's discharge, I find no evidence that they did so with the intention of generally discouraging safety complaints or cooperation with MSHA.
>
> There is no evidence in the record that Respondent had, on any previous occasions, retaliated against employees for exercising their rights under the Act, or tried to inhibit them from so doing. Morever, there is no indication that Respondent would have so retaliated but for the unusual circumstances of this case. Mr. Simmons' conduct appears to be motivated by the natural desire to avoid being saddled with responsibility for the citation, which he though was not his fault, and the long standing animosity between himself and Mr. Poddey.
>
> Mr. Key's conduct was also an understandable reaction to being cited for a condition he thought had been corrected, his understanding of the reason for the violation gained from Mr. Simmons, and his reaction to the behavior of Mr. Poddey towards Mr. Simmons. While I do not find sufficient evidence to conclude that either Mr. Simmons or Mr. Key sought to inhibit employees in exercising their rights under the Act, I believe Mr. Poddey's discharge does tend to do just that. (See Tr. 39, 40, 51 -52). For that reason, I believe a $100 penalty is warranted.

In affirming his prior reinstatement of Mr. Poddey, Judge Amchan further stated as follows at 15 FMSHRC 2415-2416;

> * * * * Mr. Poddey is reinstated with the admonition that he will be expected to conduct himself with due respect to Respondent's supervisory personnel, particularly Mr. Simmons. He must recognize that Respondent has a

right to choose its supervisory personnel and that these supervisors have, with narrow exceptions provided by law, wide latitude as to what they may demand of an employee.

It seems clear to me that Judge Amchan, in the Poddey case, found strong mitigating circumstances in support of his low negligence finding. He found a lack of intent by Tanglewood to discourage safety complaints or cooperation with MSHA, and a lack of intent by Mr. Key to inhibit employees in exercising their rights under the Act. He also admonished the complainant with respect to his future conduct upon reinstatement.

In affirming Judge Amchan's low negligence finding, the Commission stated in relevant part as follows at 18 FMSHRC 1320:

> * * * * Although Key's actions in discharging Poddey were intentional, there was mitigating circumstances that do not support a finding that such actions demonstrated an aggravated lack of care. Tanglewood discharged Poddey for what it perceived to be a threat, or at least insubordinate behavior, toward Simmons. * * * * Poddey confronted Simmons, yelling at him, accusing Simmons of lying when he told Key that Poddey had deliberately informed MSHA about the brake problem, and invited Simmons to fight "outside the gate." * * * * (citations omitted).

In the instant case, I find that the argument advanced by the respondents that the violation was the unintentional result of Mr. Key's failure to recognize the clear distinction between the complainant's unprotected statements and protected statements to be plausible and reasonable. After careful consideration of the entire record, I cannot conclude that the discharge of the complainant constituted an "undisputed intentional violation" of law amounting to egregious or aggravated conduct by the respondents amounting to a high degree of negligence. To the contrary, I conclude and find that the violation was the result of the failure by the respondents to exercise reasonable care to avoid a section 105(c) violation, and that this amounts to ordinary negligence.

Gravity

The Secretary argues that consideration should be given to the "chilling effect" that the discrimination had on the complainant who engaged in protected safety activities and on the reporting of future safety problems. Citing the legislative history of the Act, the Secretary maintains that section 105(c) was enacted to "protect miners from the adverse chilling effect of loss of employment". More broadly, the Secretary asserts that the legislative history establishes that Section 105(c) was intended to encourage miners to "play an active role in the enforcement" of the Act, and to "protect [miners] against any possible discrimination," by giving miners "the right to refuse to work without the fear of reprisal."

The Secretary takes the position that a violation of section 105(c) must be presumed to create a "chilling effect" on the protected safety activities of miners and that such a "chilling effect" occurs by virtue of the very fact that a miner was punished for reporting safety problems. The Secretary asserts that the instant case presents a compelling example of the "chilling effect" of violations of Section 105(c), in that there is ample testimony from both the complainant and MSHA inspectors about the effect that the prior Poddey discharge had on the miners (citing Tr. 44-45, 114-119). The Secretary further states that the effect was such that the complainant was hesitant to make his safety complaints to Campbell and repeatedly expressed fear that he might be discharged for his actions (citing Tr. 114, 119).

The Secretary maintains that only the serious risks posed by the respondents' blatant disregard for safety were able to overcome the complainant's concern for his livelihood. The Secretary concludes that given this environment, it is hard to overstate the effect that the complainant's discharge must have had, coming as it did just one year after Poddey's discharge and two months after the issuance of Judge Amchan's finding of discrimination. This effect could only be exacerbated by the fact that the complainant himself testified on the Secretary's behalf and provided important information at Poddey's discrimination hearing.

The respondents argue that their actions did not directly place any employee in danger of any harm or create any direct safety hazard. Acknowledging that it may be possible that the termination of an employee for engaging in protected activity may have a "chilling effect" on the actions of other miners, respondents maintain that there was no evidence in this case of such a "chilling effect". In fact, respondents assert that none of the miners who testified in this case referred to any reference by Mr. Key to safety in any discussion concerning the reasons for the complainant's termination (Doy Carpenter Volume 2, Page 37; Randy Young Volume 2, Page 48, 50 - neither of whom were employees of respondents at the time of their testimony) (Mike Chestnut Page 172). Respondents points out that the only witness who stated that there was a comment connecting the discharge with safety was the complainant himself (Volume 1, Page 164). Under the circumstances, the respondents conclude that the termination of the complainant was not believed by any employees except the complainant to have been connected to protected activity and the determination of the gravity of the offense should reflect that fact.

In Secretary ex rel Carroll Johnson and UMWA v. Jim Walter Resources, Inc., 18 FMSHRC 552, 558 (April 1996), the commission rejected the Secretary's argument that a chilling effect should be presumed in every discrimination case, and it stated as follows at 17 FMSHRC 558-559:

> * * * *We also conclude, however, that subjective evidence of a chilling effect, e.g.., testimony of the complainant or other miners, is relevant to consideration of the gravity of a section 105(c) violation. Accordingly, we hold that both subjective and objective evidence should be considered in evaluating

whether a chilling effect resulted from adverse action. We agree with the Secretary that, in the event that a chilling effect is found, such a determination does not a fortiori mean the gravity of the violation is high-that is a fact-specific conclusion.

In the Poddey case, at 18 FMSHRC 1315, 1320, the Commission again rejected the Secretary's argument that a chilling effect on protected activities should be presumed for any violation of section 105(c), and reaffirmed its Caroll Johnson case holding that any chilling effect determination should be made on a case-by-case basis. The Commission found no evidence to support the Secretary's "chilling effect" argument, and affirmed Judge Amchan's low gravity finding.

The Secretary has cited transcript pgs. 44-45, 114, and 119 in support of the assertion that there was "ample testimony from both the complainant and MSHA inspectors about the effect that the prior discriminatory discharge of Perry Poddey had on the miners". Transcript reference pgs. 44-45, refers to the testimony of MSHA Inspector Kenneth W. Tinney at the January 19, 1995, hearing before Judge Maurer. Mr. Tinney was testifying about an inspection and citation that he issued two years earlier during the last quarter of 1992, and the first quarter of 1993. He stated as follows at (Tr. 44-45):

Q. Did you speak to any miners about that problem while you were up there?

A. Yes, sir. We tried. The crew was outside. And as we tried — we tried to interview all the miners that was outside and they basically refused to tell us anything about it. That was after the Perry Poddey discharge — was discharged. And they basically said, "We're not going to talk to you. We want to work here," and so on.

Q. Did any of them specifically say that, that they wanted to keep their jobs?

A. Every one of them that we tried to interview declined to answer. Because they wanted to work there was the opinion we got.

Q. Was that a change from previous times when you had been there?

A. Yes, Sir. The attitude changed after the Perry Poddey discharge. Whether Perry Poddey's discharge was related to a protected activity or not didn't matter to those guys. The men believed that he was discharged because of that and they would barely talk to us.

The record reflects that Tanglewood's counsel characterized this testimony as "classic hearsay" and stated that in the absence of the names of the miners who purportedly spoke to the inspector, and because of MSHA's policy "protecting" their names, he was unable to refute the

inspector's statements (Tr. 45-46). Judge Maurer recognized this evidentiary problem, and although he admitted the hearsay testimony, he stated that "it can't be tested every well so it's not worth very much" (Tr. 46).

I take note of the fact that when initially asked by MSHA's counsel if he recalled what happened during the inspections in question, Inspector Tinney commented that "it's been two years ago. The citations would be helpful to me" (Tr. 37). I further note his contradictory response when asked if any of the miners specifically stated that they wanted to keep their jobs. He responded that all of the miners declined to answer, and that it was his opinion that they wanted to work.

On cross-examination, Inspector Tinney confirmed that miners other than Poddey and Knotts have told him about situations that have resulted in his issuing citations for violations. When reminded that he answered "no" to a similar question during the Poddey hearing, Mr. Tinney further explained his discussions with miners during his inspections, including discussions in the presence of mine management (Tr. 46-48). Mr. Tinney further testified that "I do get complaints continuously", and has developed additional information from the miners so as to enable him to look into the matters further (Tr. 46-49). This testimony contradicts the Secretary's assertion that miners were inhibited and intimidated by the actions of the respondents. It seems to me that they spoke freely with the inspector.

I agree with Judge Maurer's bench comment that Inspector Tinney's testimony "is not worth much". The testimony related to events that transpired two years earlier, the inspector needed to be refreshed by reviewing the citations that he issued, and there is no evidence that he took notes or otherwise documented his purported contacts with miners.

I find Mr. Tinney's testimony regarding any adverse or "chilling effect" on miners to be based on his unsubstantiated opinions, rather than on any reliable or credible testimony by miners. Indeed, except for the complainant, the Secretary called no other miner witness to testify about any "chilling effect." Although the Secretary did call three other inspectors, I have reviewed their testimony and find no support for the Secretary's "chilling effect" argument. Insofar as Mr. Tinney's testimony is concerned, I find it unreliable and lacking in evidentiary credibility and I have given it very little weight.

The Secretary's assertion that the complainant repeatedly expressed his fear that he might be discharged for his actions in speaking with Mr. Campbell is not well taken. The complainant testified that he informed Mr. Campbell at the beginning of their conversation that "it would be possible they would fire me", and that he also "told him that again at the end of it, that I was a little worried about it" (Tr. 149). That was the extent of his "chilling effect" testimony.

Mr. Campbell's testimony reflects that the complainant expressed this concern one time (Tr. 114), and he testified that the complainant's statement "was one of the first statements he made, so it was like up front" (Tr. 133). Mr. Campbell characterized the complainant's statement

as "general" and that it was not made in regard to any safety comment (Tr. 133). Mr. Campbell, a self-employed surveyor who was hired by the property owners to survey the mine, testified that the purpose of his mine visit when he spoke with the complainant was to inquire about production projections, and that he did not inquire about any safety matters because that was not part of his purpose in going to the mine (Tr. 124).

The Secretary's further assertion that the complainant was hesitant to make his safety complaints to Mr. Campbell is also not well taken. Mr. Campbell testified that his conversation with the complainant was "free flowing", and that the complainant spoke "freely" and expressed his opinions concerning the mining operation without being asked many questions (Tr. 131-133).

With regard to the question of the morale of the work force, the secretary's suggestion that morale was low because of the Poddey discharge is not supported by Mr. Campbell's testimony. He testified that the morale problem was the result of a miner/management conflict over vacations without pay, employee benefits, a new truck purchased by respondent Burke, and the use of "junk miners" for spare parts (Tr. 111-112).

I find nothing in transcript reference page 119 in support of the Secretary's "chilling effect" argument. The reference to page 114 is the comment by Mr. Campbell that the complainant said "If they heard this, they would probably fire him". In the final analysis, I can only conclude that the "ample testimony" suggested by the Secretary to support any "chilling effect" argument consists of Mr. Campbell's best recollection of the complainant's self-serving statement that he would "probably be fired" if management heard him tell Mr. Campbell about violations and inspector visits.

Although the complainant testified that he was "verbally reprimanded" by his foreman for giving an inspector some information that resulted in a past training violation, I find no evidence that this had any "chilling" effect on the complainant since he subsequently freely discussed this with an inspector (Tr. 140-143). With respect to the complainant's testimony that respondent Key told him that he did not like the testimony he had given in the Poddey case, the complainant confirmed that Mr. Key never verbally abused him or otherwise threatened him in any way because of his prior testimony (Tr. 182-183). Further, given the testimony of Mr. Campbell that the complainant freely and voluntarily spoke with him about the conditions at the mine, apparently after his conversation with Mr. Key, and after the Poddey hearing, I cannot conclude that these events had any adverse "chilling effect" on the complainant.

The respondents called three miner witnesses (Davis, Carpenter, and Young) to testify in their behalf. Carpenter and Young were no longer employed by the respondents when they testified, and they presented no evidence of feeling harassed, intimidated, or "chilled" by the actions of the respondents.

Continuous miner operator Doyle Davis has worked at the No. 12 Mine for four and one-half years, and he testified that he has given information to MSHA inspectors that has resulted in the issuance of violations, and he has never felt discriminated against or reprimanded for doing so (Tr. 17-19).

In the Poddey case, at 18 FMSHRC 1321, the Commission observed that since Poddey was discharged in part as a result of his heated confrontation with his foreman, the discharge would not "reasonably tend to discourage miners form engaging in protected activities", citing Carroll Johnson, 18 FMSHRC at 558. I believe the same can be said of the instant case where, to a lesser degree, the complainant was discharged in part for spending a lot of his working time speaking with Mr. Campbell, indulging in company "gossip" in the course of the conversation, and making negative and "inflammatory" comments about company management.

After careful review and consideration of the entire record in this case, I find no credible or probative evidence to support the Secretary's assertion that the action taken by the respondents against the complainant in this case had any "chilling effect" on the rights of the miners working at the mine, or on the complainant. Under the circumstances, the Secretary's "chilling effect" argument IS REJECTED. I conclude and find that on the facts of this case, the violation of section 105(c), by the respondents was a low gravity, non-serious violation.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The record reflects that the mining operations conducted by the respondents were relatively small operations. I conclude and find that respondents Tanglewood Energy, Inc., and Fern Cove, Inc., are small mine operators.

It is clear that the presiding judge is not bound by the proposed civil penalty assessment made by the Secretary. Rather, the amount of the penalty to be assessed is a de novo determination by the judge based on the six statutory criteria specified in section 110(i) of the Act, 30 U.S.C. 820(i), and the information relevant thereto developed in the course of the adjudicative hearing. Shamrock Coal Co., 1 FMSHRC 469 (June 1979), aff'd, 652 F.2d 59 (6th Cir. 1981); Sellersburg Stone Company, 5 FMSHRC 287, 292 (March 1983).

As a general rule, and in the absence of evidence that the imposition of civil penalty assessments will adversely affect a mine operator's ability to continue in business, it is presumed that no such adverse affect would occur. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd 736 F.2d 1147 (7th Cir. 1984). Conversely, the size and documented financial condition of a mine operator is required to be considered in any determination as to whether or not the payment of civil penalties will adversely impact on a mine operator's ability to continue in business.

The Secretary asserts that the financial information submitted by the respondent does not support their claim that the payment of the proposed penalty assessment of $25,000, will adversely affect their ability to continue in business. In support of this argument, the Secretary states that much relevant financial information appears to be missing from the submissions by the respondents and that the last year for which there are federal corporate tax returns is 1993. The Secretary further states that the only documents more recent than 1993, are unaudited and unsigned balance sheets and income statements apparently prepared by respondent Burke's wife, an officer of Tanglewood Energy, and not by an outside accountant.

The Secretary asserts that although Tanglewood's State corporate report for 1992, and respondent Burke's individual 1992 tax return show losses and negative equity for the last several years, they do not explain how these companies could nonetheless afford to make "generous payments" to respondents Burke and Key during that time. As an example, the Secretary cites a 1993 consolidated corporate tax return for Fern Cove and Tanglewood, showing payments to Key and Burke of $102,012.00 each, and a 1991 return for Tanglewood showing a payment to Key of $110,735.00 and payments to Burke and his wife totaling $127,735.00. Since the corporations were able to make these substantial annual payments to their officers (the individual respondents), notwithstanding the alleged poor financial condition of their business, the Secretary concludes they that they can manage to pay a comparatively "modest penalty" of $25,000 in this case without affecting their ability to continue in business.

The Secretary concludes that the respondents have failed to meet their burden of showing that the proposed penalty is excessive. Further, the Secretary points out that the individual tax returns do not show what assets the individual respondent possess, and in the case of respondent Burke, his assets appear to be quite substantial in that his 1993 return reveals interest income of $8,778, and a capital gain of $13,637, but does not reveal the underlying source of that income.

Finally, the Secretary points out that the ability to remain in business is only one of six factors to be considered, and believes that in this case, any impact on the respondent's ability to remain in business is more than outweighed by their "atrocious" violation history and should not mitigate the penalty in any way.

The respondents submit that based on the financial information filed in this case, any substantial penalty will have a severe and drastic effect on their ability to continue in business. Respondents assert that Tanglewood, Inc. is no longer in business, and Fern Cove, Inc., operated one small deep mine at a loss of $182,885.82 , for the first half of 1995 as set forth in its income statement. The respondents concluded that the ability of the operators to continue in business is questionable.

With regard to the individual corporate officers and respondents in this case, they assert that their tax returns are a matter of record, together with the corporate financial statements showing substantial loans by the officers to the corporations. The individual respondents maintain that substantial penalties against them would severely and unfairly penalize them for

actions which they did not intend as violations of the Act in the first place. Accordingly, they submit that any substantial penalty would be inappropriate and an injustice. They further submit that their livelihood is already in danger with the poor prospects for Fern Cove, Inc. to continue in business, and that any substantial penalty will be unduly punitive.

By letter filed on June 27, 1997, counsel for the respondents states that none of the respondents is presently engaged in the coal business, and that the corporate respondents ceased operations after the hearing. Counsel further states that respondent Burke left the mining business and is now engaged in the insurance business, and that respondent Key was involved in a subsequent mining operation, but has also ceased operation.

Respondent Burke testified that the number 12 mine was started in 1990, and the number six mine was started in 1988. The two mines were in the same coal seam, but were cut together in 1993. The number six mine was shut down permanently in 1993, for economic reasons when the property owners from whom they contracted to mine the coal filed chapter 11 bankruptcy. New management took over property, but it is in Chapter 7 bankruptcy which has caused the No. 12 mine to be idle. The corporate respondents are owed money from the bankruptcy, and they do not own the coal. The coal was mined by contract with the property owners, and the respondents were paid on a tonnage basis twice a month. Mr. Burke was in charge of the No. 6 mine, and Mr. Key was in charge of the No. 12 mine (Tr. 56-59). Mr. Burke further explained that the heirs and executor of the landowners leased the property to Phoenix Resources, and Phoenix Resources contracted with Tanglewood and Fern Cove to mine the coal (Tr. 81, 85).

Mr. Burke confirmed that he has not paid penalty assessments for violations issued in 1993 and up to January of 1994, because "we haven't had the financial capability to pay them" (Tr. 88). He further stated that another mining venture "up north" was "one of the worst business decisions I have ever made" and that it operated at a loss every month except two, and it eventually ended in bankruptcy and he was not paid for all of the coal that he mined (Tr. 73, 89).

After careful review and consideration of the corporate tax returns and other financial information of record with respect to the financial condition of the corporate respondents in this case, I conclude and find that although they have suffered financial losses during the period from 1991 to mid-1995, they have also earned some income from the mining operations during these years, and as correctly stated by the Secretary, both corporate entities were able to make rather substantial payments to Burke and his wife, and to Key in 1991 and 1993. However, it would appear that Tanglewood, which had a net income of $19,598.61, in 1995 from the sale if equipment is no longer in business, and that Farm Cove, which showed a loss of $182,885.82, in 1995, is also no longer in business.

Considering the fact that the corporate respondents are small mine operators with rather serious financial difficulties, I find that the imposition of the full amount of the proposed $25,000 penalty assessment will impact adversely on their ability to continue in business. However, I am not persuaded that the financial state of the corporate respondents is such as to adversely impact

on their ability to pay the civil penalties that I have assessed for the violation in question. The corporations appear to have some assets, including mining equipment.

With regard to the individual respondents Burke and Key, the financial information they have provided does not persuade me that they are unable to pay the civil penalties that I have assessed for the violation in question, and I concluded and find that payment of the penalties will not adversely affect their personal assets or finances.

Good Faith Compliance

The record reflects that the complainant has been employed as an equipment operator for the West Virginia Department of Highways since he was terminated by the respondents (Tr. 136-137). He confirmed that while he asked for reinstatement to the Coalbank Mine in his original complaint, he no longer desires to be reinstated and wants to stay with his current job (Tr. 191-192).

The respondents' assertion that the good faith criterion is inappropriate for consideration in this case because "there was no clear-cut violation to correct in the first place" IS REJECTED. The respondents have been found to be in violation of section 105(c) of the Act, and liable for the resulting damages.

The Secretary's suggestion that failure to pay the previously assessed penalties is a relevant consideration of the good faith compliance criterion found in section 110(i) of the Act has been rejected. Although prior violations are relevant to an operator's compliance history, good faith compliance relates to the section 105(c) discrimination violation that has been affirmed in this case. To the extent that the complainant has apparently not been made whole in compliance with Judge Maurer's damages award, I cannot conclude that the respondent's have demonstrated good faith compliance in this case, but I have considered the fact that Judge Maurer's damages decision was appealed by both parties.

Penalty Assessment

Based on the foregoing findings and conclusions with respect to the six statutory civil penalty assessment criteria found in section 110(i) of the Act, and in particular the small size of the respondent's mining operations, and the low gravity and ordinary negligence associated with the violation, I cannot conclude that the proposed civil penalty assessment of $25,000, by the Secretary is warranted. Considering all of the section 110(i) criteria, including the poor compliance history of the corporate respondents, I conclude and find that a total civil penalty assessment of $3,000 allocated as shown below in my Order is fair and reasonable in this case.

ORDER

In view of the foregoing, IT IS ORDERED AS FOLLOWS:

1. Respondent Tanglewood Energy, Inc., shall pay a civil penalty assessment of $1,000 for the violation.

2. Respondent Fern Cover, Inc., shall pay a civil penalty assessment of $1,000 for the violation.

3. Respondent Randy Burke shall pay a civil penalty assessment of $500, for the violation.

4. Respondent Randall Key shall pay a civil penalty assessment of $500, for the violation.

5. Payments of all of the aforementioned penalties shall be made to MSHA within thirty (30) days of the date of this decision and order.

George A. Koutras
Administrative Law Judge

Distribution:

James V. Blair, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

Paul O. Clay, Jr., Attorney at Law, Laurel Creek Road, P.O. Box 746, Fayetteville, WV 25840 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

JUL 18 1997

TIMOTHY CARPENTER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 96-319-DM
v.	:	
	:	Smoky Valley Common Operation
ROUND MOUNTAIN GOLD CORP.,	:	
Respondent	:	Mine ID No. 26-00594

ORDER GRANTING MOTION FOR SUMMARY DECISION
ORDER OF DISMISSAL

Timothy Carpenter filed a complaint of discrimination against Round Mountain Gold Corp. ("Round Mountain") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3)("Mine Act"). Mr. Carpenter was terminated from his employment by Round Mountain following an accident that occurred on March 8, 1996. In his discrimination complaint, Mr. Carpenter alleges that he was denied peer review of his termination because he called MSHA to discuss the accident. Round Mountain contends that it terminated Carpenter for just cause and that it did not know that he had contacted MSHA until after the decision was made to deny his request for peer review.

On June 10, 1997, Round Mountain filed a motion for summary decision under 29 C.F.R. § 2700.67. Mr. Carpenter did not respond to the motion. Summary decision is appropriate "only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." *Id.* If a party does not respond to a motion for summary decision, "summary decision, if appropriate, shall be entered against him." 29 C.F.R. § 2700.67(c). Based on the record in this case, I find that summary decision is appropriate and grant Round Mountain's motion.

The accident that preceded Mr. Carpenter's termination occurred on March 8, 1996. He was sent home that day and was called back to the mine on March 12, 1996. On that date he was informed that he was being terminated from his employment. Round Mountain's employee handbook contains a peer review policy. Under that policy, an employee may request that an adverse action taken against him be submitted to a peer review committee to determine the propriety of the action. The request for peer review must be made within three days of the adverse action. The general manager of the mine has the authority to deny the request. The peer review committee is composed of five hourly employees. Mr. Carpenter contends that he called

General Manager Steve Mueller on March 15, 1996, to request peer review. Round Mountain contends that he did not request peer review until April 8, 1996.

On April 8, 1996, Mr. Carpenter called the human resources department at the mine to check on the status of his request for peer review. A human resources employee told Carpenter that she would check on it, and called him back a few minutes later to tell him that she would "get one started." (Carpenter dep. at 105). After these conversations, Mr. Carpenter called MSHA for the first time. (Carpenter dep. at 39, 105). An MSHA official told Mr. Carpenter that MSHA would investigate the March 8 accident. Carpenter called the human resources department again on April 9, 1996, and was told that his request for peer review had been denied. He did not tell anyone at the mine on April 8 or 9 that he had contacted MSHA about the March 8 accident. (Carpenter dep. at 111).

In an affidavit, Mr. Mueller testified that he made the decision to terminate Mr. Carpenter and to deny him peer review. His decision to terminate Mr. Carpenter could not have been linked to Mr. Carpenter's call to MSHA, since the call was made a month later. Mr. Mueller testified that his decision to deny Mr. Carpenter's request for peer review was not in any way influenced or caused by the fact that Mr. Carpenter contacted MSHA. Indeed, he testified that he had no knowledge at the time he made that decision that Mr. Carpenter had called MSHA. He based his decision in large part on the fact that he believed that Mr. Carpenter had not made a timely request for peer review. The record does not contain evidence to refute Mr. Mueller's testimony. Thus, there are no genuine issues of material fact and Round Mountain is entitled to summary decision as a matter of law. The date that Mr. Carpenter first requested peer review is not material to my determination.

Many of the allegations set forth in Mr. Carpenter's complaint of discrimination state that he was treated unfairly by Round Mountain. I do not have the authority to determine whether Mr. Carpenter's discharge was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial 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 Company,* 12 FMSHRC 2535, 2544 (December 1990)(citations omitted).

Based on the record in this case, as summarized above, I find that summary decision is appropriate. Accordingly, Round Mountain's motion for summary decision is **GRANTED** and this proceeding is hereby **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Victor M. Perri, Esq., 515 South Third Street, Las Vegas, NV 89101 (Certified Mail)

Steven J. Merker, Esq., MERRICK, CALVIN & MERKER, 600 17th Street, Suite 950, Denver, CO 80202 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 18 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-47
Petitioner	:	A.C. No. 48-01078-03537
v.	:	
	:	Eagle Butte Mine
AMAX COAL WEST, INC.,	:	
Respondent	:	

DECISION

Appearances: Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio; Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado (on brief); Ronald F. Paletta, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Price, Utah, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll. Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against AMAX Coal West, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges a violation of the Secretary's mandatory health and safety standards and seeks a penalty of $506.00. For the reasons set forth below, I vacate the citation.

A hearing was held on April 9, 1997, in Gillette, Wyoming. The parties also submitted post-hearing briefs in this case.

Background

AMAX operates the Eagle Butte surface coal mine which is situated in Campbell County, Wyoming, near Gillette. During an August 20, 1996, inspection of the mine, MSHA Inspector Herbert Skeens observed what he believed to be an unsafe tire while inspecting a 240 ton Caterpillar off-road haul truck. The tire was the inside tire of the two tires on the right rear.

Based on his observations, the inspector issued Citation No. 4366124. The citation alleges a violation of section 77.404(a) of the Secretary's regulations, 30 C.F.R. § 77.404(a),[1] because:

> The right rear inside tire on the 793B Caterpillar end dump haul truck # 386 is in an unsafe condition. A chunk of the rubber tread approximately 6" x 6" in size has been cut away leaving the steel belt cords exposed. The 3 outer steel cord layers are completely worn through in the 6" x 6" area. The 4th steel cord layer is worn through in 2/3 of the 6" x 6" area. At least 7 steel cords are broken in the 5th layer. The tire is a 40.00R57 tubeless v-steel E-lug radial Bridgestone (serial # 55R002896). The truck has been removed from service until the tire can be replaced.

(Govt. Ex. P-2.)

Findings of Fact and Conclusions of Law

The Commission has long recognized that "section 77.404(a) imposes two duties: (1) to maintain equipment in safe operating condition; and (2) to remove unsafe equipment from service immediately. *Peabody Coal Co.*, 1 FMSHRC 1494, 1495 (October 1979). The '[d]erogation of either duty violates the regulation.' *Id.*" *Ambrosia Coal & Construction Co.*, 18 FMSHRC 1552, 1556 (September 1996). It has further held that "[e]quipment is in unsafe operating condition under section 77.404(a) when a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (involving identical standard applicable to underground coal mines)." *Id.* at 1557.

In this case, I find that a reasonably prudent person familiar with the factual circumstances surrounding the damaged tire would not have recognized a hazard warranting corrective action. In doing so, I find that the company's witnesses were more knowledgeable concerning the tire in question than was the inspector, who, furthermore, was not aware of all of the facts pertaining to the tire.

Inspector Skeens described the tire as follows:

> What I found was an area that was six-by-six inches, approximately. And in that six-by-six area, the entire tread, rubber layer was missing, was gone away.

---

[1] Section 77.404(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."

Whether it had been skived [2] out or torn out, I'm not sure. That exposed the steel belts underneath the tread layers.

Okay. This six-by-six area left the steel belts exposed underneath the rubber. And in that area, I counted the outer three layers of those steel belts were completely worn through. The fourth layer, which is underneath those, there was approximately two-thirds of that steel belt in that six-by-six area that was worn completely through. And then the fifth layer, I counted a minimum of seven steel cords broken in that fifth layer on that tire.

(Tr. 24.) He further stated that his "concern was that the damage to the tire compromised the structural integrity of that tire greatly and that tire would fail at any time, blow out." (Tr. 26.)

On the other hand, Steve Laird, an AMAX safety manager who accompanied the inspector on the inspection, Jeff Carter, the General Coordinator of Maintenance at the mine, and T. J. Wesley, the store manager for Fletcher's Cobre Tire in Gillette, all testified that the tire was not in an unsafe condition. While they agreed with the inspector that there was a six-by-six hole in the tire and that three steel belts had been skived out of that area, they did not agree that there was any danger of a blow out. I find their testimony more persuasive.

Inspector Skeens related that he had gained his knowledge of tires from having acted as a maintenance foreman and safety director for small mines in Virginia and Kentucky, where the largest haul truck was 40 to 50 tons, from his entry and intermediate level training for coal mine inspectors at the National Mine Academy, and from a one day training session in Gillette put on by Cobre Tire. Concerning his actual knowledge of tires and tire maintenance, I find the following exchange illuminating:

Q. Now, you said that the three outer steel cords were worn through in your citation. That's what you said?

A. Yes.

Q. Could they have been -- rather than being worn through, could they have been skived out in repairing that tire previously?

A. That's possible.

Q. That's fairly standard practice when you have a damaged area of a tire, to skive it out?

---

[2] "Skiving" is the "[r]emoval of a material in thin layers or chips . . . ." Bureau of Mines, U.S. Department of Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1022 (1968).

A. In some cases.

Q. And the purpose of skiving it out, I guess you use -- what is it? A skiving knife is the first step to cut away the damaged portion?

A. They have some kind of tool to cut or skive it out.

Q. You're not sure what type?

A. No.

Q. And do they use power tools like grinders and that to skive out a tire?

A. I'm not sure what they use.

Q. I take it you have never been part of any maintenance group that's been in charge of maintenance of tires.

A. No.

(Tr. 45-46.)

The company witnesses had far more experience with, and knowledge of, haul truck tires. Laird has a degree in Mining Engineering, has been in the mining industry since 1977, has operated large haul trucks and supervised operators of large haul trucks and has examined numerous tires. Carter is in charge of maintenance at the mine. He has worked in maintenance for 20 years and been responsible for tire repairs since 1988. He works closely with the two Cobre employees who are continuously at the mine and perform tire inspections, changes and repairs. He demonstrated considerable knowledge of tire components, tire requirements for haul trucks and tire repairs. Wesley has been in the tire business for more than 20 years. He was a tire repairman for over 15 years, more than 13 of which were as a repairman at mines. For the last 7 years he has worked for tire dealers supplying tires and tire maintenance to mines.

That the inspector had less expertise than the company witnesses about tires is further evidenced by his lack of general familiarity with tires. For instance, he testified that the tire's steel belts were part of the casing. (Tr. 60.) In fact, according to the 1990 Bridgestone *Technical Data* manual for off-the-road tires, they are not. (Resp. Ex. 1, at 6.) He testified that the term carcass referred to the tread, belts and casing of a tire. (Tr. 50.) In fact, according to the Bridgestone manual, a radial tire does not have a carcass as a bias ply tire does, but its equivalent would be the casing. (Resp. Ex. 1, at 6.)

Furthermore, the citation was issued without an awareness of all the facts concerning this specific tire. For example, the inspector testified that the tire had six steel belts including the

casing belt. (Tr. 31, 45.) In fact, the tire had six steel belts plus a casing belt. (Tr. 148, Resp. Ex. 5.) In addition, he was not aware that the tire had been repaired at an earlier date. Nor was he aware that the reinforcement patch had been placed inside that tire during the repair. (Tr. 111, Resp. Ex. 3)

Since the inspector was not aware that the tire had been repaired, he did not know that the top three belts had been skived out, rather than worn out. Moreover, he demonstrated a limited knowledge of MSHA's *Tire and Rim Safety Awareness Program* (Rev. 1996). (Govt. Ex. 3.) Thus, while he used it to point out that excessive speeds and rocky terrain, neither of which were shown to be present in this case, could have a detrimental affect on tires, he did not appear to be aware of section G(3)(b) which states that: "**Reinforcement Repairs** -- are for cuts that penetrate more than 1/4 but less than 3/4 of the tire plies. In such cases, strength must be reinforced. Fabric repair material is used to reinforce the tire . . . ." (Govt. Ex. 3 at 19.) That was done to the tire in this case. Indeed, although more than 3/4 of the plies were not penetrated, nor the casing ruptured, a reinforcing patch was placed on the inside of the tire as recommended for such severe damage in section G(3)(c) "**Section Repairs**." Instead, the inspector operated under a "rule of thumb," not found in the manual, that if two belts of a tire are penetrated it must be taken out of service. (Tr. 56-58.)

Wesley, Carter and Laird testified that the tire was safe for use on the truck. All examined the tire at, or near, the same time as the inspector. They concluded that the tire was safe because the tire was not hot, meaning that there was no belt movement or separation; the remaining belts did not appear to be moving because their protective rubber covering was still intact; the remaining belts were not separated; the tire had no other cuts or anomalous conditions and was otherwise in good condition; the casing of the tire was not damaged; the tire had been reinforced on the inside; and the tire was the inside tire of dual tires on the rear, so that even if it did blow out, which they considered extremely unlikely, operation of the truck would not be adversely affected enough that the driver could not safely bring it to a halt.

As Wesley testified, the tire was not unsafe because:

> The damage that was done to that tire was nothing to hurt the structural integrity of it. You know, we have talked about the tire, and what you need to know is . . . there is a steel cord that wraps around the bead and that is the casing. And that is the strength of the tire.
>
> You in fact could have that tire with no tread, no belts and run that tire. The strength is not there. Carry the same load. Then you have them belts there for -- they are put in there to protect. All they are there for is to protect the casing. And then the tread is on there to protect the belts.

(Tr. 141.)

It is evident that when this tire was repaired it had been plugged and the plug had subsequently fallen out. However, as Wesley stated, "the only reason the plug is there for is to keep dirt, water away from the steel. It's not there to make the tire strength [*sic*] or anything." (Tr. 165.) The difference between dirt and water getting into tire that has been cut, but not skived out, and a tire that has been skived out is that dirt and rocks can get trapped inside the cut and cause belt separation, but cannot be caught inside a skived out area because there is nothing to contain them.[3] Consequently, the plug having fallen out did not make it any less safe, it only meant that the tire might not wear as long.

In sum, because of their greater knowledge and expertise, I accept the testimony of the company's witnesses over that of the inspector. I find that the damage to the tire was not as severe as the inspector believed. I further find that the company's witnesses are reasonably prudent men with more familiarity with the factual circumstances surrounding the hole in the tire than the inspector, particularly as the tire was being used at this mine, and that they properly did not recognize any hazard warranting corrective action. Accordingly, I conclude that the tire was not in an unsafe condition and that AMAX did not, therefore, violate section 77.404(a).

ORDER

It is **ORDERED** that Citation No. 4366124 is **VACATED** and this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

[3] "If you cut a tire, what's going to damage the tire is not skiving it out. If you get dirt or rocks in there, then that's what's going to start the separation." (Tr. 102.) Skiving it out "prevents the dirt from getting in there and starting the separation process." (*Id.*)

Distribution:

Patrick M. Zohn, Esq., Office of the Solicitor, U.S. Department of Labor, 881 Federal Office Building, 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Mr. Ronald Paletta, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, Wix Plaza, 215 East Main Street, Price, UT 84501 (Certified Mail)

R. Henry Moore, Esq., Buchanan Ingersoll, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 2 1 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-45
Petitioner	:	A.C. No. 15-07082-03719
v.	:	
	:	
FREEDOM ENERGY MINING CO.,	:	
Respondent	:	Mine No. 1

DECISION

Appearances: Susan E. Foster, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee and Wallie McMasters, Conference and Litigation Representative, Nashville, Tennessee, on behalf of the Petitioner;
William Miller, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondent.

Before: Judge Melick

This civil penalty proceeding is before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to challenge nine citations issued by the Secretary of Labor to Freedom Energy Mining Company (Freedom Energy) and the civil penalties proposed for the violations charged therein. The general issue before me is whether Freedom Energy violated the cited standards and, if so, what is the appropriate civil penalty to be assessed considering the criteria under the Section 110(i) of the Act. Additional specific issues are addressed as noted.

At hearing, the parties agreed to settle the violation charged in Citation No. 4225596 and Respondent agreed to pay the proposed penalty of $309.00, in full. The settlement was accepted at hearing and that determination is here confirmed. Remaining at issue are eight "Section 104(a)" citations. At hearing, Respondent admitted that, with the exception of Citations No. 4229803 and 4229804, the violations existed as charged (Tr. 6-7).[1]

---

[1] This admission at hearings constituted a knowing waiver of the right to dispute the violations. Respondent's subsequent attempt in its post-hearing brief to retract its admission comes too late and is accordingly disregarded. Once the Secretary had completed her case and the evidentiary record was closed, such a waiver becomes irrevocable and, absent fraud or other compelling circumstances warranting a new trial, cannot be retracted. See Rule 60(b), Federal Rules of Civil Procedure.

Respondent has challenged the "significant and substantial" findings associated with all of the citations.

Citation Nos. 4225600 and 4229801

Citation No. 4225600 alleges a "significant and substantial" violation of the operator's ventilation plan and charges as follows:

> Operator failed to follow the approved ventilation plan in the No. 4 entry of the 003-0 mmu where the continuous mining machine was operating. The air quantity when measured near the inby end of the exhausting line curtain using an approved Calibrated Anemometer was 1,584 CFM. The approved ventilation plan, date 4-18-96, requires a minimum 6,500 CFM to be maintained at faces where coal is being mined, cut, loaded or drilled for blasting.

It is not disputed that the operator's ventilation plan required 6,500 cubic feet of air per minute as noted in the citation. Respondent has admitted the existence of the violation but maintains that it was duplicative of Citation No. 4229801 and should therefore be dismissed. I do not find that Respondent has waived his right to raise this issue by its admission that both violations had occurred (Tr. 6-7).

Citation No. 4229801 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 75.326, and charges as follows:

> Operator failed to maintain a minimum mean entry velocity of 60 FPM, in the No. 4 entry of the 003-0 mmu, where the continuous mining machine was operating. The air quantity, when measured near the inby end of the exhausting line curtain using an approved calibrated Anemometer, was calculated to be 15.64 FPM.

The cited standard, 30 C.F.R. § 75.326, provides as follows:

> In exhausting face ventilation systems, the mean entry air velocity shall be at least 60 feet per minute reaching each working face where coal is being cut, mined, drilled for blasting, or loaded, and to any other working places as required in the approved ventilation plan. A lower mean entry air velocity may be approved in the ventilation plan if the lower velocity will maintain methane and respirable dust concentrations in accordance with the applicable levels. Mean entry air velocity shall be determined at or near the inby end of the line curtain, ventilation tubing, or other face ventilation control devices.

The relevant ventilation plan provides that "the minimum mean-entry air velocity in working places where coal is being cut, mined, loaded, or drilled for blasting shall be: 60 fpm when exhausting, N/A where blowing."

According to MSHA Inspector Roger Williams, the mean-entry air velocity is a measurement of the "air velocity which is taken up the broad side of the entry to contain dust in the face area and remove the dust from the face behind the exhausting line curtain." (Tr. 40). Mean-entry air is calculated by "utilizing the quantity of air in cubic feet per minute divided by the square foot of the area which is on the broad side of the curtain." (Tr. 40-41). The mean-entry air velocity cited herein is therefore, a function of the same quantity of air which was the subject of the prior citation (Citation No. 4225600). It is undisputed that both violations were based upon the same air reading, in the same location and at the same time.

Under the unique facts of this case, wherein the identical air reading provided the basis for both violations and there is a direct correlation between the quantity of air and velocity of air, I find that the violation charged in Citation No. 4225600 merges into Citation No. 4229801, as a lesser included violation and the former citation must be vacated. The charges are duplicative as the duties imposed under the cited provisions of the ventilation plan are effectively the same. *Secretary v. Cypress Tonapah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). Accordingly, Citation No. 4225600, is vacated and dismissed.

The violation charged in Citation No. 4229801 was however, also "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

The testimony of inspector Williams on this issue is undisputed. Visible dust was present in the No. 4 entry when the citation was issued and indeed, according to the inspector, the dust was "rolling back" over the continuous miner and shuttle cars. Four miners were working in the No. 4 entry, including the continuous miner operator, two shuttle car operators and a person conducting a time study. None of these employees were wearing a respirator. Williams opined that the failure to maintain adequate ventilation therefore posed a health hazard namely, black lung and other respiratory ailments, to these miners. It may also be inferred that such a quantity of dust affected visibility thereby posing an independent hazard of accident with such mobile equipment.

Inspector Williams also noted that the subject mine had a history of liberating large amounts of methane, i.e., 576,928 cubic feet of methane during a 24-hour period. The mine therefore, was on a "spot inspection cycle" mandated by Section 103(i) of the Act. Williams noted that it is possible to hit bleeders of high methane anytime at the face leading to explosive levels. Within this framework of evidence alone it may reasonably be inferred that the violation was indeed "significant and substantial," and of high gravity. Operator negligence may also be inferred since the dust was so visible.

Citation No. 4229802

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 75.206(b), and charges as follows:

> The conventional roof support materials (wood timber) being installed on the 001-0 mmu, did not meet the minimum cross-sectional area of wooden posts. Timbers installed as breaker posts, roadway posts, and two posts averaged a cross-sectional area of 4.7425 sq. inches. The mining height on the 001-0 measured 90 inches.

The cited standard, 30 C.F.R. Section 75.206(b), provides in relevant part that the minimum cross-sectional area of wooden posts between 84 inches and 108 inches longer, is 28 square inches. As previously noted, the operator admitted that the violation existed as charged and challenged only the Secretary's finding that the violation was "significant and substantial" (Tr. 6-7).

According to the undisputed testimony of Inspector Williams, using wooden timbers during retreat mining provides warning of an impending roof fall and protects miners from dry rock in the existing shale roof. Williams noted that the shale roof in the cited area was not of good quality and was subject to falling-out between the bolts. Six or seven miners were working on the section who could have been exposed to a roof fall hazard including those installing timbers, the shuttle car operators, the miner operator, the section foreman and the section mechanics. Sufficient evidence exists from which a "significant and substantial" and serious violation may be inferred.

The Secretary offers no theory, however, to support a negligence finding. I note that Inspector Williams opined at hearing that the mine foreman or mine superintendent should have observed even on the surface that the timbers were inadequate. However, since the violation was in fact abated by clustering timbers, the dimension of the timbers alone apparently would not provide warning of their inadequacy. The fact that the timbers, as they were actually installed, were obviously inadequate according to the undisputed testimony of the issuing inspector suggests however that the operator is chargeable with at least moderate negligence.

Citations No. 4229803 and 4229804

The captioned citations both allege violations of the standard at 30 C.F.R. § 75.203(e). That standard provides as follows:

> Additional roof support shall be installed where - - (1) the width of the opening specified in the roof control plan is exceeded by more than 12 inches; and, (2) the distance over which the excessive width exists is more than 5 feet.

Citation No. 4229803 alleges a "significant and substantial" violation of the above standard and charges as follows:

> [e]xcessive width, measuring 21 ft. to 36 ft. over a distance of 19 ft., is present in the track entry where the track serving the mantrip station junctions with the main line track. No additional roof support was installed in the area."

Citation No. 4229804 alleges a "significant and substantial" violation of the above standard and charges as follows:

> [e]xcessive widths, measuring 21 ft. to 44 ft. over a distance of 35 feet is present in the track entry where the track serving the slope junctions with the main line track. No additional support was installed in the area.

According to Inspector Williams, the two cited areas were "pretty much the same, just different locations." (Tr. 124-125). While the Respondent does not deny that the relevant roof control plan provides for a maximum entry width of 20 feet and that there were areas in excess of 20 feet, it nevertheless argues that, contrary to the allegations, additional roof support had in fact been installed as required. Inspector Williams himself conceded that both areas had "additional roof support in the form of resin bolts" (Tr. 90, 92, 104). He also acknowledged that the additional spot roof bolts exceeded what is required in the normal pattern and that, indeed, the bolting was "fairly extensive."

Inspector Williams also testified, however, that it was recognized in the mining industry that timbers and not additional roof bolts are to be used to provide the requisite additional support when the width of an entry is exceeded. Respondent provided no contrary evidence. I equate the inspector's testimony to that of the reasonably prudent person familiar with the factual

circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry. *See Alabama By-Products Corp.*, 4 FMSHRC 2128 (December 1982). Under the circumstances, I find that both violations are proven as charged.

I do not, however, find that the violations were "significant and substantial" or serious. While the operator did not provide additional roof support in the form of timbers, it did provide extra resin grouted roof bolts beyond what was required. Additional expert testimony would be required to determine whether the additional support provided by extra roof bolts was inadequate and the extent of the inadequacy. In addition, Inspector Williams testified in support of his findings only that "I think it is reasonably likely that should a roof failure occur, that quite possibly would affect everyone on the mantrip." This testimony is not sufficient to sustain a "significant and substantial" finding. Under the circumstances, the Secretary has failed to sustain her burden of proving that the violation was either "significant and substantial" or of high gravity. In addition, in light of the additional roof bolt support provided in this case, I find that operator negligence is somewhat reduced.

Citation No. 4225590

This citation alleges a violation of the standard at 30 C.F.R. Section 75.1722(a) and charges that "the discharge roller, serving the No. 10 belt conveyor was not provided with a mechanical guard, on the left side (facing outby), to prevent accidental contact with the live roller." At hearing, the Respondent admitted to the existence of the violation (Tr. 6-7). According to Inspector Williams, the discharge roller is some 4 feet long and 15 inches in diameter. When he issued the citation, the conveyors were operating and the roller was moving. He noted that a guard had not been provided and the unguarded area was 3 feet by 46 inches. He also noted that the mine floor in the area was wet and slick. The area of the violation would be periodically visited by cleanup crews and supervisory personnel as well as weekly electrical examiners. Chief Electrician Blackburn was in fact observed working only 10-12 inches from the pinch point. Inspector Williams opined that fatal injuries or dismemberment could result from the hazard.

The cited standard, 30 C.F.R. Section 75.1722, provides that "[g]ears; sprockets; chains; drive, head, tail, and take-up pulleys; flywheels; couplings, shafts; saw blades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

I agree with the assessment of Inspector Williams that the violation was "significant and substantial" and serious. I also conclude that the violation was the result of high operator negligence in light of the fact that the operator's agent was working only 10-12 inches from the exposed condition.

Citation No. 4225592

The above citation also alleges a violation of the standard at 30 C.F.R. Section 75.1722(a). It charges that a "mechanical guard was not provided for the pump motor coupling serving the Stampler coal feeder located on the 003-0 mmu."

The violation was not disputed by Respondent at hearing (Tr. 6-7). Inspector Williams noted that the Stampler coal feeder distributes coal to the conveyor. It is 15 feet wide, has a conveyor chain and crushes large rock. It is in operation whenever coal is being dumped on the conveyor. The coupler is located on the left side of the feeder 5 to 6 feet from the discharge end and rotates at 1750 RPM. Williams testified that the metal guard that was furnished was not present leaving an opening 7 inches high, 3 ½ inches wide and about 30 inches above floor level.

I find that the coupling at issue was one that "may be contacted by persons and which may cause injury to persons" and was not guarded as required by the standard. I find, however, that the exposed opening was so small, i.e., 3 ½ inches wide, that it is unlikely for there to have been any injury. Indeed, the inspector himself testified only that it was "conceivable" that someone could stumble and fall and stick his hand through the opening (Tr. 162). Under the circumstances, I find that the violation was not "significant and substantial" nor of high gravity.

The Secretary does not cite any evidence or theory of negligence in regard to this violation and indeed, because of the small size of the exposed opening, I find that the operator is chargeable with but little negligence in regard to this violation.

Citation No. 4225593

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. Section 75.604(b), and charges as follows:

> [a] permanent type splice, located in the energized trailing cable serving the light side, continuous mining machine on the 003-0 mmu, is not effectively insulated and sealed so as to exclude moisture. The cutter jacket was damaged so as to expose the base ground and insulated conductors."

The cited standard, 30 C.F.R. Section 75.604(b), provides that "when permanent splices in trailing cables are made, they shall be: . . . (b) effectively insulated and sealed so as to exclude moisture . . . .

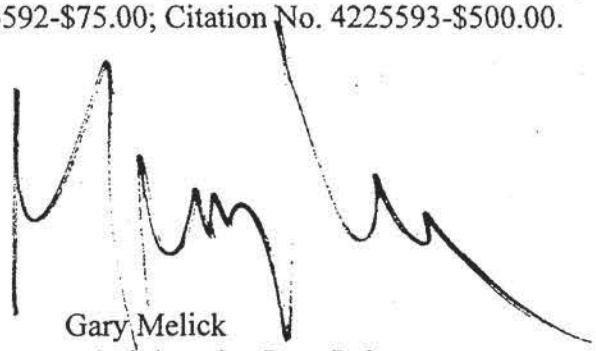
The violation is not disputed (Tr. 6-7). The subject trailing cable is between 500-650 ft. long and provides 995 volts to the continuous miner. It has an outer jacket and insulated copper wires inside. The outer jacket is about one 1/8 of an inch to 3/16 of an inch thick. Williams found the splice to be defective because of the general wear and damage to the outer jacket. There was only "wrap type" insulation over the splice and, although the conductor wires were insulated, you could see the copper ground wire exposed inside. Williams noted that the cable

may be lifted by hand to hang it or move it from exposure to other equipment. Williams further observed that the ground was wet and water is a good conductor. He opined that at some point, the condition could have resulted in a fatality by electrocution. He felt that the violation should have been known because the cable is required to be examined on a weekly basis. Williams subsequently opined that the violation could have existed as briefly as one shift.

Clearly, the violation was "significant and substantial" and serious. The Secretary in her brief again failed to address the issue of negligence so her theories are unknown. Since the issuing inspector conceded however, that the cited condition could have existed for as briefly as one shift, I do not find that the Secretary established significant negligence.

ORDER

Citation No. 4229801 is vacated. Considering all of the criteria under Section 110(i) of the Act, I find the following civil penalties appropriate and must be paid within 30 days of the date of this decision: Citation No. 4225596-$309.00; Citation No. 4225600-$1,100.00; Citation No. 4229802-$200.00; Citation No. 4229803-$400.00; Citation No. 4229804-$400.00; Citation No. 4225590-$300.00; Citation No. 4225592-$75.00; Citation No. 4225593-$500.00.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

Susan E. Foster, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215 (Certified Mail)

William Miller, Esq., Jackson & Kelly, P.O. Box 553, Charleston, WV 25322 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

JUL 2 5 1997

SUMMIT, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. CENT 95-108-RM
v.	:	Citation 4422929, 1/9/95
	:	Docket No. CENT 95-109-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Order 4422930, 1/9/95
	:	Docket No. CENT 95-110-RM
	:	Order 4422931, 1/9/95
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	
SUMMIT, INC., Respondent	:	Docket No. CENT 96-45-M A.C. No. 39-01284-05514 X52
CHARLES ROUNDS, employed by SUMMIT, INC., Respondent	:	Docket No. CENT 97-20-M A.C. No. 39-01284-05517 A X52
TOM LESTER, employed by SUMMIT, INC., Respondent	:	Docket No. CENT 97-21-M A.C. No. 39-01284-05518 A X52
DELVIN PRICE, employed by SUMMIT, INC., Respondent	:	Docket No. CENT 97-22-M A.C. No. 39-01284-05519 A X52
	:	Open Cut - Lead Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
John D. Austin, Jr., Esq., Austin & Movahedi, Washington, D.C. for Summit, Inc., and the individual Respondents.

Before: Judge Manning

These cases are before me on notices of contest filed by Summit, Inc. ("Summit") and petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Summit, Charles Rounds, Tom Lester, and Delvin Price, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. A hearing was held in Rapid City, South Dakota. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. FINDINGS OF FACT

A. Background

At about 1:50 a.m. on January 5, 1995, Tracy Millard was fatally injured when the east highwall of the mini-pit in the Open Cut-Lead Mine failed. Approximately 60,000 to 70,000 tons of rock engulfed the shovel that Mr. Millard was operating. Michael Wagner, a haul truck operator, was injured by the fall of ground.

The Open Cut Mine is a multiple bench, open pit gold mine owned by Homestake Mining Company of California ("Homestake"). The mine is in Lead, South Dakota. Within the Open Cut Mine there was an area known as the "mini-pit." The mini-pit was abandoned after the accident. The Open Cut Mine is pear-shaped and the mini-pit was at the north end of the pit where the stem is attached to the neck of the pear. (Ex. R-1). At the time of the accident, the Open Cut Mine was about 4,800 feet long north to south, 2,400 feet wide east to west, and 900 feet deep.

In the mini-pit, the east highwall was 80 feet high and the west highwall was about 40 feet high. The mini-pit was about 150 feet wide and 480 feet long. The mini-pit was in the deepest part of the mine. Because the mini-pit was narrow and the bench face on the east side was high, miners felt that they were working in a confined area and were more uncomfortable working there than in other areas of the pit. Mining methods in the mini-pit were the same as in the remainder of the Open Cut Mine. Highwalls are generally 80 feet high and benches are 30 feet wide. The geologic conditions are basically the same in both areas. The rock in the east highwall, the hanging wall, is rather solid and had been relatively stable over the life of the Open

Cut Mine. The rock in west highwall, the foot wall, is more unconsolidated with the result that sloughing often occurs. Homestake retained consultants to design and implement safety precautions to protect persons working near the west wall.

Summit is an independent contractor that extracts ore at the Open Cut Mine for Homestake. Summit began mining in the mini-pit in October 1994. The plan was to extract ore in the mini-pit from the 4900 level down to the 4840 level. Summit was mining the 4840 level at the time of the accident.

B. Events Preceding the Accident

The working face of the mini-pit was on the north side of the mini-pit. The face was removed in 20-foot lifts. Summit employees would drill and blast a designated area of the working face. Other Summit employees would remove the blasted material with a shovel and haul trucks. The shovel would work back and forth between the east and west highwalls loading trucks during a single shift. At the time of the accident, the working face was about 20 feet high and 137 feet wide.

On December 29, 1994, an area of the working face adjacent to the east highwall was blasted in the normal fashion. Part of the east highwall sloughed after the blast. Such sloughing following a blast was not an unusual event in the Open Cut Mine, but it had never occurred within the mini-pit. Summit followed its usual procedures in response to the sloughage; it scaled the affected area to remove loose material and then visually inspected the area to determine if any hazardous conditions remained.

On the afternoon of January 4, 1995, near the end of the day shift, Craig Hall, a senior geologist employed by Homestake, was in the mini-pit. As part of his normal work routine, Mr. Hall walks around the mine looking at the highwalls. He traveled through the mini-pit on a daily basis. When he observed the east highwall in the mini-pit at about 3:15 p.m., he thought that it looked "unusually straight." (Tr. 412). He reported this condition to his supervisor. The supervisor called Tom Lester, Summit's Mine Superintendent, to let him know about Hall's report. In addition, Mr. Hall personally advised Mr. Lester of his observation when he delivered the daily dig maps to Lester's office. At about 3:45 p.m., Hall told Lester that the east highwall in the mini-pit looked "extremely straight." (Tr. 415). He did not observe any cracks in the highwall or tell Mr. Lester that the highwall was dangerous.

Following his conversation with Mr. Hall, Mr. Lester got into his vehicle with Jack Atwater, the blasting superintendent, to inspect the east highwall. (Tr. 814). He first drove to the 4960 bench on the west side of the mini-pit. This bench was wide and was easily accessible. (Ex. R-1). From this vantage point, Messrs. Lester and Atwater looked across the mini-pit to the east highwall. The east highwall was about 150 feet to the east of them and the bench of the east highwall was about 20 feet below the bench on which they were standing. They could see the top of the east highwall bench and the face of the highwall. Lester testified that they did not see any cracks in the east highwall or the bench above the highwall. They then traveled down into the

mini-pit and examined the east highwall from the floor of the mini-pit. They spent about 30 minutes examining the east highwall from these two vantage points. Following his examination, Mr. Lester concluded that the east highwall was in stable condition and safe to work under. Because he did not see any problems with the east highwall, Mr. Lester did not tell Delvin Price, the night foreman, about his conversation with Mr. Hall or his examination of the east highwall. Mr. Lester left the mine soon after this examination.

Mr. Price arrived at the mini-pit at about 6:15 p.m., prior to the beginning of his shift, which started at 7:00 p.m. The foreman from the previous shift had turned on the light plant. The light plant was a set of spotlights stationed near the south end of the mini-pit near the east highwall. It illuminated the working face to the north, as well as the east and west highwalls. Price visually examined the east and west highwalls before the start of the shift. He used a spotlight on his Suburban when examining the walls. He did not go onto any of the benches above the highwalls when conducting his examination. As a result of his examination, he concluded that the highwalls were in good condition and safe to work under.

On the night of the accident, the shovel that Mr. Millard was operating was digging into the previously blasted working face. The record is not clear as to where he started working, but he may have started on the east side of the working face. Sometime around 8:00 p.m. on January 4, while the shovel was near the west highwall, material slid down the west highwall partially covering a tire on a haul truck. The truck was waiting to be loaded and had to be towed out from the rock slide. Mr. Price called Mr. Lester at his home to inform him of the rock slide. Messrs. Price and Lester decided that mining could safely continue in the mini-pit and that the shovel should start working closer to the east highwall. Lester called Chuck Rounds, Summit's vice president, at about 9:00 p.m. at his home and advised him of the rock slide. Mr. Rounds went to the mini-pit at about 10:00 p.m. He discussed the situation with Mr. Price and observed both highwalls in the mini-pit. The mini-pit was illuminated by the light plant. He did not see any unusual conditions in the highwalls that indicated to him that they were not stable. (Tr. 727).

Because of the narrowness of the mini-pit, each haul truck operator parked along one of the highwalls until it was his turn to be loaded by the shovel. Trucks could not park in the middle of the mini-pit because they would get in the way of trucks entering and exiting the area. Two truck drivers stopped parking along the east highwall at about 9:00 p.m. that night because they thought they could hear rocks falling on that highwall. They did not advise Mr. Price, their supervisor, of the falling rock. At about 12:30 a.m. on January 5, the crew took their "lunch" break. Mr. Wagner ate in Mr. Price's Suburban. Wagner told Price that the mini-pit was unsafe and that someone was going to get hurt. He had previously raised concerns to Mr. Price about the stability of the highwalls. He told Mr. Price that if the east highwall ever tips over, it could bury miners in the area. (Tr. 193). There was no specific conversation about truck drivers seeing rocks fall from the east highwall earlier on the shift. Mr. Price briefly inspected the highwalls after lunch and he did not see any problems. (Tr. 865).

At about 1:45 a.m., Wagner was next in line to be loaded. He observed material trickling off the east highwall. He backed his truck up to the shovel to be loaded. The shovel was next to

the east highwall and Wagner's truck was next to the shovel. As he was about to pull out after being loaded, the east highwall leaned out towards the west wall and crumbled. The shovel was completely buried and Wagner's truck was partially buried. As stated above, the shovel operator was killed and Wagner was seriously injured.

C. MSHA's Enforcement Actions

At the conclusion of its accident investigation, MSHA issued to Summit one section 104(d)(1) citation and two section 104(d)(1) orders. Each of these enforcement actions is discussed below. MSHA also conducted a special investigation. At the conclusion of the investigation, it filed civil penalty proceedings against the individual respondents under section 110(c) of the Mine Act. These proceedings are discussed below.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Charges Against Summit, Inc.

1. General Considerations

Two fundamental concepts must be kept in mind when analyzing the issues in these cases. First, the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

On the other hand, the fact that an accident occurs at a mine, such as a fall of ground, does not establish that the mine operator violated a safety standard. Conditions in a mine are dynamic and can quickly change. A fall of ground may occur despite the fact that an operator is taking all reasonable precautions to ensure that ground conditions are stable in accordance with MSHA's safety standards. In order to establish a violation, the Secretary cannot rely solely on the fact that an accident occurred, but must prove that the operator did not comply with the requirements of the safety standard.

2. Citation No. 4422929

a. Violation

On January 9, 1995, MSHA Inspector Gary Grimes issued Citation No. 4422929 alleging a violation of 30 C.F.R. § 56.3200. The citation states, in part:

> The night shift supervisor was made aware of possible hazardous conditions at the east highwall mini-pit during the lunch break ... on 01-15-95. An employee reported to the supervisor of his concern working under the 80-foot east highwall. No corrective action was taken by the night supervisor and the employees were allowed to continue work in the mini-pit area. A miner was fatally injured at approximately 1:50 a.m. ... when the east wall failed and fell on the shovel operator.

Inspector Grimes determined that the violation was of a significant and substantial nature ("S&S") and was caused by Summit's unwarrantable failure. Section 56.3200 provides, in part, that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The Secretary proposes a penalty of $25,000 for the alleged violation.

In her brief, the Secretary argues that ground conditions created a hazard to persons as early as January 4, 1995, and that no action was taken to correct them. The Secretary alleges that the hazardous conditions included: (1) the narrowness of the mini-pit; (2) the height of the east highwall; (3) the near vertical nature of the east highwall; (4) the fact that a failure occurred on the west highwall six hours prior to the fall on the east highwall; and (5) the fact that the operator failed to investigate the cause of the west highwall failure prior to moving the crew to the east side of the mini-pit.

The Secretary contends that there were numerous warnings that hazardous conditions existed in the mini-pit that Summit failed to heed. First, Mr. Wagner asked Mr. Price on a number of occasions if the east highwall could be taken down to eliminate the hazard. Second, the east highwall sloughed in two areas of the mini-pit on December 29, 1994. Third, Mr. Lester was advised by Mr. Hall that the east highwall in the mini-pit looked straighter than normal on the afternoon of January 4. Fourth, the west highwall sloughed earlier in the shift on the evening of January 4. Fifth, two truck drivers stated that they heard loose rock moving on the east highwall and stopped parking their trucks along that highwall on the evening of January 4. Finally, Wagner told Mr. Price during his lunch break at 12:30 a.m. on January 5 that the mini-pit was not safe.

The first condition that the Secretary contends created a hazard was the narrowness of the mini-pit. I find that the Secretary did not establish that this condition created a hazard that violated the safety standard. There is no question that all employees felt uncomfortable working in the mini-pit because it was only about 150 feet wide. But this condition did not create a specific safety hazard. If the mini-pit had been 900 feet wide, the shovel would still have to be near the east highwall when digging the working face in the area adjacent to that highwall. The shovel was no closer to the east highwall at the time of the accident than it would have been if the west highwall were not so close. The bucket of the shovel would still need to reach the blasted muck adjacent to the highwall when each lift was removed from the mini-pit. Mr. Wagner testified that the shovel operator was digging from the working face and not the toe of

the east highwall when the accident occurred. (Tr. 219). I credit this testimony. Likewise, Mr. Wagner's truck would have been no further from the shovel when he was being loaded if the mini-pit were wider. The bucket of the shovel must be able to reach the truck to dump its load.

The only specific problem created by the narrowness of the mini-pit concerns traffic congestion. When waiting to be loaded, trucks had to park closer to the highwalls than they would if the mini-pit were wider. While this fact could put the trucks close to the zone of danger in the event of a fall of ground, it did not contribute to a hazardous ground condition. Accordingly, I reject the Secretary's argument that the narrowness of the mini-pit created or contributed to the alleged violation.

The second alleged hazard cited by the Secretary is the height of the east highwall. It is undisputed that the east highwall was about 80 feet high. The mine's plan calls for 80-foot highwalls and 30-foot benches. This height was the standard throughout the Open Cut Mine. Although the metal/nonmetal safety standards do not provide for the submission of mine plans to MSHA, the highwall/bench plan used at the Open Cut Mine was well known to MSHA and had not been cited in the past.

As stated above, the strata of the east highwall had been relatively stable at the mine. Nothing in the record suggests to me that Summit should have been put on notice that the 80/30 highwall plan would not be safe in the mini-pit. Although the sloughage that occurred on December 29 after blasting could indicate that the highwall presented some problems, Summit scaled the area after the sloughage and then examined the highwall. In addition, there is no indication that this sloughage occurred because of the height of the highwall. It appears to have been caused by the fact that the working face adjacent to the highwall had been blasted. I find that the Secretary did not establish that the height of the east highwall created or contributed to a hazardous ground condition.

Another factor relied upon by the Secretary is the sloughage that occurred on the west highwall prior to the failure on the east highwall. As stated above, the east and west highwalls are part of different geologic formations. There is no dispute that the structure of the rock is different. Based on the evidence, I find that the two events are unrelated. That is, the fact that the west highwall failed earlier on the shift did not make it more likely that the east highwall would fail. The Secretary cited Summit for failing to correct hazardous conditions on the east highwall, not the west highwall nor the mini-pit in general. Thus, the fact that the west highwall failed does not help establish a violation. The Secretary also asserts that Summit created a hazard to persons because it allowed mining to continue without investigating the cause of the sloughage on the west highwall. As stated above, the Secretary did not cite Summit with respect to any hazards created by the west highwall. In addition, Summit examined both highwalls after the sloughage. Mr. Rounds visited the mini-pit and management determined that it was safe to continue mining. The sloughage occurred at the bottom of the west highwall; it was not a general failure of the highwall itself. The west highwall contained unconsolidated material that slid down near the bottom.

The final factor relied up by the Secretary is the near vertical nature of the east highwall. Mr. Hall advised Mr. Lester that the east highwall looked extremely straight on the afternoon prior to the accident. Miners working in the mini-pit also advised management that the highwall was straight. Several miners testified at the hearing that the east highwall tipped out at the top towards the west highwall. Mr. Lester admitted that the highwall was "nearly vertical" and not in conformance with the "three-quarter-to-one design." (Tr. 831). He believed, however, that the east highwall in the mini-pit "looked as good as or better than any bench and highwall in the pit." (Tr. 830).

I find that the east highwall was nearly vertical on the day of the accident. There is some testimony that the top of the east highwall tipped out towards the west. Messrs. Hall, Price, and Lester did not observe any tipping. The issue is whether the vertical nature of the highwall created a "hazard to persons," as that term is used in the safety standard. MSHA's accident investigation revealed that the beds in the east highwall where the accident occurred were nearly vertical. (Tr. 359-60). Mr. Ferriter testified that the presence of a vertical highwall in an area where the bedding planes were also nearly vertical created a hazard. *Id.* He compared the situation to standing a deck of cards up on one end. He stated that the highwall was not very stable and was prone to fall. I credit his testimony in this regard. Photographs taken after the accident, such as photo 11 in the Technical Support Report, illustrate the vertical nature of the bedding planes. (Ex. G-8, photo 11).[1]

In addition, the highwall failure occurred in an area where the "east wall of the mini-pit was engineered into the main pit area." (Tr. 435). This area was referred to as a "nose" at the hearing. A nose is a "corner ... where you have a change in the highwall angles...." *Id.* Because of the presence of this nose, the east highwall was not as well supported in the vicinity of the accident. (Tr. 373-75; Ex. G-8 Figure 2, photo 11). I find that the nose contributed to the instability of the highwall.

The Secretary established that the near-vertical condition of the east highwall in conjunction with the vertical bedding plane and the presence of a nose in the area created a hazard to persons working in the mini-pit. Summit did not take any steps to take down or scale

---

[1] The Technical Support Report contains a number of statements which are inaccurate. For example, the conclusion section of the report states that the area of the working face adjacent to the east highwall was "a secondary, or even an emergency, workplace activated in the dark on a cold January night after rock debris from a slope failure impacted operating equipment on a nearby ... work place at the west side...." This section further states that the fact that "this work place was activated in the dark of night due to an ore production crisis casts doubt on the validity of a pre-shift inspection...." (Ex. G-8 page 6). There is no support in the record for either of these conclusions. As discussed above, the east side of the working face adjacent to the highwall was an integral part of the working place and was not "activated" due to a "production crisis" after the west highwall sloughed. In addition, both highwalls were examined several times on January 4 before dark.

back the highwall. Accordingly, I find that the Secretary established a violation of section 56.3200.

Summit argues that the Secretary failed to establish a violation. First, it argues that the citation fails to state with particularity what hazard existed on the night shift. The citation simply states that management was made aware of a possible hazardous condition when a truck driver stated that he was concerned about working in the mini-pit. It argues that the citation fails to allege that there were known or observable hazards that were not corrected. I agree that the citation is not well drafted, but it does give notice of the condition cited. The MSHA inspector believed that the east highwall was hazardous and that Mr. Price had been advised of the hazards. The Secretary is not required to set forth in a citation all of the evidence she will rely upon in prosecuting the case. The citation provided Summit with sufficient information to present a defense. While the citation could have provided more detail, I find that it put Summit on notice of the nature of the alleged violation.

Second, Summit argues that the citation relies on the fact that there was a fall of ground to establish a violation rather than on credible evidence that a hazardous condition existed prior to the fall. It contends that the Secretary failed to produce any evidence that a specific, hazardous condition existed prior to the accident. As stated above, I determined that the Secretary did produce evidence that a specific hazardous condition existed prior to the accident. Clearly, it was the accident that brought MSHA to the mine, but it did not rely solely on the fact that an accident occurred to establish the violation. More importantly, I did not base my finding of a violation on the fact that there was a fall of ground. Instead, I conclude that the Secretary established that, on January 4 and 5, 1994, the near vertical nature of the east highwall created a hazard to persons working in the mini-pit, taking into consideration the geologic structure of the area.

Third, Summit contends that there can be no violation of section 56.3200 if an examination of the ground conditions fails to reveal any hazard. It relies in part on Judge Gary Melick's decision in *Malvern Minerals, Co.*, 11 FMSHRC 2382, 2385 (November 1989). I respectfully disagree with Judge Melick's analysis because the Mine Act holds mine operators strictly liable for violations of the Act. The highwall created a hazard to persons and the fact that this hazard may have been difficult or impossible to detect is not a defense but is taken into consideration when assessing the negligence of the operator.

Finally, Summit maintains that Inspector Grimes determined that he would issue the citation before he arrived at the mine. It argues that this demonstrates bias and further supports its argument that the citation was issued because there was a fall of ground. Proceedings before the Commission are *de novo*. My function is to determine whether the Secretary established a violation, not to evaluate or review the conduct of MSHA personnel. Thus, even if the inspector determined that he would issue the citation before he arrived, the citation is valid if the Secretary establishes the elements of the alleged violation.

b. Significant and Substantial

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is important in this case: whether it was reasonably likely that the hazard contributed to would result in an injury. This element does not require the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury is reasonably likely. In this case the Secretary established that the nearly vertical condition of the east highwall created a hazard that was reasonably likely to result in an injury, assuming continued normal mining operations. As stated above, the presence of a vertical highwall in an area where the bedding planes were also nearly vertical created a hazard. (Tr. 359-60). It was reasonably likely that the highwall would fail as a result of this condition and that someone would be seriously injured.

c. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has held that "a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

The Secretary relies on a number of factors when arguing that the violation was a result of Summit's unwarrantable failure. First, she contends that the sloughage that occurred on December 29 should have put Summit on notice that hazardous conditions existed on the east wall of the mini-pit. She argues that because this was the only time that the east wall had failed in the mini-pit, Summit was put on notice that the highwall was not stable. Second, the Secretary contends that Mr. Hall's warning about the vertical nature of the highwall should have alerted Summit to take steps to ensure that the highwall was stable. Third, she maintains that Summit should have tried to identify the cause of the sloughage that occurred on the west highwall earlier in the shift. Fourth, two truck drivers heard rock moving from the east highwall at about 9:00 p.m. during the shift. Although they did not notify Mr. Price of this condition, the Secretary states that he should have been able to make the same observations. Finally, the Secretary argues that Mr. Wagner warned Mr. Price that the east highwall presented a hazard on at least two occasions.

I find that the violation was not the result of Summit's unwarrantable failure. While it is true that the events relied upon by the Secretary occurred, in each instance Summit took reasonable steps in response. The east highwall sloughed after blasting on December 29. As

described above, Summit examined and scaled the area to make sure that it was stable. Although the east wall had not previously sloughed in the mini-pit, such sloughing had occurred after blasting in other areas of the Open Cut Mine. The mini-pit had been operating for a only a few months. As stated above, the sloughage on the west highwall earlier in the shift had no bearing on the cited condition on the east highwall. In addition, Mr. Price and Mr. Rounds examined the highwalls after this sloughage and determined that they were safe to work under.

The Secretary also relies upon the fact the Mr. Hall warned Mr. Lester that the east highwall looked "unusually straight" on the afternoon of January 4. The Secretary states that a "thorough examination of the east highwall was mandated, which would include closely observing the top of the highwall...." (Sec. Br. at 13). There is no dispute that Mr. Lester did not go on the bench at the top of the east highwall to examine the bench and highwall from that position. The question is whether he was required to do so to perform an adequate examination. The Secretary's principal concern is that Summit failed to take steps to determine whether tension fractures were developing on the bench above the east highwall. She believes that telltale signs of an unstable highwall are always present preceding a massive failure such as the one that occurred at this mine. Mr. Ferriter testified as follows:

> If you're going to have an unstable highwall, in my experience, you will always see telltale signs. You will see tension fractures starting to form; sometimes days, sometimes weeks, sometimes longer, before the actual failure occurs. But if you don't go up [on the bench] and look, of course, you don't know if these things are developing or not.

(Tr. 352). He further testified that he could not "envision a case where you would not see some signs of instability." (Tr. 353). The Secretary contends that Summit's failure to inspect the bench and take down the unstable highwall constitutes an unwarrantable failure.

Mr. Lester examined the east highwall on the afternoon of January 4 in response to Hall's observation. He spent about 30 minutes examining the highwall from the west side of the mini-pit and from the floor of the mini-pit. He did not ignore the situation. His examination demonstrates that he was concerned about Mr. Hall's observation. After his examination he concluded that the east wall "looked as good as or better than any wall on the pit." (Tr. 817).

The question is whether the failure to examine the bench above the east highwall shows that the violation was the result of Summit's unwarrantable failure, given the particular circumstances present on the afternoon of January 4. It was not the practice at the mine to examine benches for cracks. The Secretary does not have a regulation requiring the examination of benches to look for tension fractures or cracks. The purpose of benches is to catch falling rocks. They are designed to protect miners working in the pit from the danger of falling rocks. If a bench becomes filled with fallen rock, MSHA expects the operator to clean the bench so that it can continue to function as a catch bench. (Ex. G-4). Prior to the accident, MSHA inspectors did not go on benches to check for cracks or other signs of instability at the Open Cut Mine. (Tr.

160, 712). Mr. Lester considered it to be unsafe to walk onto this bench because of the danger of falling rock. (Tr. 722-23). Other highwalls and benches were above this bench so a miner on the bench would face a danger of being struck by falling rock. (Ex. R-1).

I find that, under these circumstances, the failure to examine the bench above the east highwall did not demonstrate aggravated conduct. The east highwall was generally stable at the mine. It was the west highwall that historically presented stability problems. The fact that the east highwall was straighter than normal was cause for concern, but mine management responded by examining the wall for about 30 minutes. It did not appear to be unstable at that time. The vertical nature of the highwall does not mean that it was inherently hazardous. (Tr. 937). The structure of the rock formation including the bedding plane contributed significantly to the hazard. The actions taken by Messrs. Lester and Atwater were reasonable given the history at the mine.[2]

Management was not in a position to know that the structure of the rock formation was vertical in the east wall in the area immediately adjacent to the working face. Mr. John Head, a mining engineer, testified that the bedding in the east highwall is generally stable because it is a locked system in that the "beds essentially weigh down on one another and keep themselves in position." (Tr. 904). It is unlikely that the relatively vertical plane that was visible after the accident was observable prior to the accident. (Tr. 906-09; Ex. G-8 photos 11, 13 -15). Thus, it would appear that the accident was caused in large part by a particular deformation in the area that was not readily observable during an examination of the highwall.

The Secretary also relies on the concerns raised by Mr. Wagner about conditions in the mini-pit. It is clear that miners, including Mr. Wagner, felt confined in the mini-pit. Mr. Wagner raised concerns about the highwalls, including the east wall, on at least two occasions. He asked Mr. Price if the east highwall could be taken down to eliminate any hazard. He felt that the wall was "crumbly" and not very stable. (Tr. 174). During the lunch break before the accident, Mr. Wagner told Price that the east wall was not safe to work under. (Tr. 193). In response to these concerns, Mr. Price examined the east highwall numerous times. He did not ignore the concerns, but simply disagreed with Mr. Wagner's assessment of the hazard after looking at the highwall. He believed that the east highwall was safe. Mr. Price was not aware that two truck drivers heard rocks rolling off the east highwall after about 9:00 p.m. on January 4. These

---

[2] I do not credit Mr. Ferriter's sweeping generalization that tension cracks will always develop on the bench several days or more before a large highwall failure. (Tr. 386-87). He admitted that his conclusion was empirical and was based on interviewing people after accidents. (Tr. 393-96). Based on these interviews he concluded that there were "almost always" indications of the failure ahead of time. (Tr. 394). I credit the testimony of Mr. Head that the telltale signs of a highwall failure may occur minutes before the fall. (Tr. 924). The events will play out differently depending on the nature of the rock, the geology of the area, whether the failure originated near the top or bottom of the highwall, and other factors. Tension cracks may or may not have been present on the bench on January 4.

drivers did not raise any concerns with him during the lunch break. Although it was dark at the time he conducted his examination following his conversation with Wagner, Price examined the highwalls using the light plant and his spotlight on a regular basis. MSHA does not prohibit operating open pit mines when it is dark.

For the reasons set forth above, I conclude that the Secretary did not establish that the violation was caused by Summit's aggravated conduct. I find that the violation was the result of Summit's ordinary negligence rather than indifference, intentional misconduct, or a serious lack of reasonable care.

3. Order No. 4422930

a. Violation.

Inspector Grimes also issued Order No. 4422930 alleging a violation of 30 C.F.R. § 56.3130. The order states, in part:

> The east highwall ... in the mini-pit ... failed burying the ... shovel and partially burying a ... truck on the 4840 bench. Mining methods being utilized did not maintain the wall, bank, and slope stability at the east highwall, mini-pit area. An 80-foot east highwall was formed as the mini-pit mining progressed deeper and the wall failed at approximately 1:50 a.m. 01-05-95....

Inspector Grimes determined that the violation was S&S and was caused by Summit's unwarrantable failure. Section 56.3130 provides, in part, that "[m]ining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks." The Secretary proposes a penalty of $30,000 for the alleged violation.

The Secretary argues that Summit was required to provide additional benching on the east highwall to maintain wall, bank, and slope stability. Summit used 80-foot benches in the Open Cut Mine. She believes that since the mini-pit was narrower, lower benches were necessary. The Secretary further contends that by not providing access to the bench above the highwall, Summit was unable to maintain the highwall. Summit's equipment could not maintain the highwall from the pit floor because the equipment could only reach 25-28 feet and, thus, could not keep the highwall scaled. Changing weather conditions, blasting, vibrations from equipment, and other factors can cause material within the highwall to become loose or unstable requiring additional steps to maintain the highwall. The Secretary contends that Summit failed to use mining methods that would allow such additional steps to be taken. In short, Summit's mining methods precluded routine maintenance of the highwall.

The fact that the mini-pit was narrower did not mandate that lower benches be installed. As stated with respect to Citation 4422929, the narrowness of the mini-pit was not a contributing

factor in the accident. The highwall would have failed even if the mini-pit were 900 feet wide and the shovel would have been buried if the failure occurred while the shovel operator was removing muck in an area adjacent to the highwall. Nevertheless, it is uncontradicted that Summit was not following its mine plan in the mini-pit. Mr. Lester testified that the east highwall was nearly vertical and not in conformance with the "three-quarter-to-one design." (Tr. 831). Although Summit may have intended to follow the mining methods used in the remainder of the Open Cut Mine, it failed to do so. The mining method used on the east wall of the mini-pit did not maintain the stability of the wall. As discussed above, the vertical nature of the highwall coupled with the vertical angle of the bedding plane and the nose in the area of the accident created a hazard to miners. These conditions existed at the time of the accident because the mining methods being used did not maintain the stability of the east highwall.

In addition, a bench was present above the east highwall and access was not provided to allow the bench and upper portion of the highwall to be maintained. Although the old haul road that formed the bench was not filled with fallen rocks, Summit did not provide any means for the bench to be cleaned. Summit's mining methods prevented the bench from being cleaned or the upper highwall from being scaled. A program policy letter requires mine operators to maintain one bench immediately above the area where miners work in a condition adequate to retain rock that may slide, ravel, or slough onto the bench from above. (Ex. G-4).

For the reasons set forth above, I find that the Secretary established that Summit failed to use mining methods that would maintain the stability of the highwall in the area where the accident occurred. Accordingly, I find that the Secretary established a violation of section 56.3130.

Summit argues that the Secretary failed to establish a violation. First, it argues that the order does not state the manner in which Summit failed to use mining methods to maintain wall stability. It states that the order fails to set forth what mining method was faulty or omitted. As with the previous citation, the order is not well drafted, but it does give sufficient notice of the charge. The inspector believed that the mining methods used by Summit did not maintain slope stability on the east highwall. The Secretary is not required to set forth all the facts she will rely upon to establish a case at the hearing. The order presented sufficient information to put Summit on notice of the charge.

Second, Summit argues that the Secretary simply relied on the fact that there was a fall of ground to establish a violation. As I stated with respect to the citation, I base my decision on the evidence presented at the hearing and not on the fact that there was a fall of ground.

Third, Summit argues that Inspector Grimes determined that he would issue the order before he reviewed the facts to determine if there was a violation. As I discussed with respect to the citation, I find that the Secretary established the elements of a violation and suggestions of bias are largely irrelevant.

Finally, Summit argues that this order must be merged into the citation because the Secretary may not issue multiple citations for the same violation. It contends that the two safety standards, when applied to the facts of this case, do not impose "distinct duties" upon the mine operator. (Summit Br. 42). Although the citation and order arise out of the same facts, the two safety standards impose distinct duties. Section 56.3200 requires that hazardous ground conditions be taken down or supported before work is permitted in the area. Section 56.3130 requires operators to adopt and use mining methods that maintain wall, bank, and slope stability where persons work. The standards are related but they impose different requirements. *Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). Accordingly, I reject Summit's argument.

b. Significant and Substantial

I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC at 3-4. The third element of the test is important here. Summit and Homestake developed a mining method that was designed to provide for highwall stability. Summit deviated from this method on the east highwall of the mini-pit by using mining methods that produced a nearly vertical highwall. The Secretary established that the nearly vertical condition of the east highwall created a hazard that was reasonably likely to result in an injury, assuming continued normal mining operations. While vertical highwalls do not always create a hazard, the slope of the highwall in the mini-pit contributed to a safety hazard in this instance, as discussed above. It was reasonably likely that the highwall would fail as a result of this condition and that someone would be seriously injured. In addition, Summit used a mining method that did not allow the bench above the east wall to be cleaned or the upper areas of the highwall to be scaled. Assuming continued mining operations, it was reasonably likely that this condition would result in an injury of a reasonably serious nature. If the bench became full, falling rocks could easily fall onto workers below. Moreover, failure to maintain access to the bench prevented Summit from scaling the top of the highwall, creating a hazard that miners would be injured by loose material falling from the highwall.

c. Unwarrantable Failure

The Secretary relies on many of the same factors to establish Summit's unwarrantable failure with respect to this order as she relied upon with respect to the previous citation. These factors include the narrowness of the pit, the sloughage that occurred on December 29, and the inability to gain access to the bench above the east highwall. In addition, the Secretary contends that conditions in the mini-pit had changed in the weeks prior to the fall, warranting a review of the methods currently in use, including the distance between the benches. She argues that management was aware of the changing conditions that routinely take place with freeze and thaw cycles. She maintains that the concerns raised by Mr. Hall provided notice that other methods were required to maintain wall stability. She points to the measures that Summit and Homestake developed to monitor conditions on the west highwall to ensure its stability. The Secretary states that there "was simply no legitimate excuse for management's failure to take some action to

ensure that the mining methods in use in the mini-pit would maintain wall, bank, and slope stability." (Sec. Br. at 27-28).

I find that the Secretary did not establish that the violation was the result of Summit's unwarrantable failure, for reasons that are essentially the same as set forth with respect to Citation No. 4422929. The Secretary's analysis puts too much weight on the fact that the accident occurred, rather than on the conditions that existed prior to the accident. For example, changes caused by freeze and thaw cycles would always be present in the winter. Summit had been mining under those conditions using 80-foot highwalls for years without any major highwall failures. Thus, rain and freeze/thaw cycles were a normal condition of mining that would not require Summit to re-evaluate its mining methods.

In addition, Mr. Hall regularly traveled around the mine and delivered dig maps to Mr. Lester's office at the end of the day shift. Mr. Hall testified that prior to the accident, he visited the mini-pit on a daily basis and that he had not observed any problems with the east highwall. (Tr. 427). He stated that the west wall contained geology that was "dynamically changing" due to folds in its structure, but the east wall was comparatively simple. (Tr. 439). He did not observe anything unusual in the geology of the east wall of the mini-pit on January 4. (Tr. 419, 428). I find that Summit's failure to shut down the mini-pit on January 4 until it could re-evaluate its mining method because Mr. Hall observed that the east wall was straighter than normal does not constitute aggravated conduct. Although Mr. Lester had been given notice that the east wall was straighter than normal, he personally examined the highwall and determined that it was safe to work under. In addition, the bench was not full of fallen rock or in need of cleaning. Summit's failure to comply with the standard constituted ordinary negligence not an unwarrantable failure. Accordingly, the order is modified to a section 104(a) citation.

4. Order No. 4422931

Inspector Grimes also issued Order No. 4422931 alleging a violation of 30 C.F.R. § 56.3401. The order states, in part:

> Miners were allowed to work on the 4840 bench on 1/5/95, even though management failed to adequately examine ground conditions at the east highwall prior to work commencing after weather conditions, prior blasting, and other conditions warranted. This violation is part of a failure to conduct adequate examinations that contributed to the failure of the east highwall on 1/5/95, which resulted in the death of a miner. An adequate examination of the east highwall would have determined that possible evidence was visible and that the east highwall was progressively deteriorating, endangering the miners performing their assigned duties on the 4840 bench. Adequate ground examinations of the east highwall were warranted to protect the miners regularly required to work in the area.

Inspector Grimes determined that the violation was S&S and was caused by Summit's unwarrantable failure. Section 56.3401 provides, in part, that "[a]ppropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift." The Secretary proposes a penalty of $20,000 for the alleged violation.

The Secretary argues that the issue is whether the visual examinations of the east highwall made by Summit management were sufficient to meet the requirements of the standard. The Secretary contends that a highwall cannot adequately be examined from the ground. She maintains that an adequate examination must include a check for tension cracks and that the only method to check for such cracks is to examine the bench above the highwall.

I agree with the Secretary's description of the issue. If the standard required Summit to examine the bench above the east highwall for cracks or other signs of a potential failure, then the standard was violated. Summit visually examined the east highwall on numerous occasions on January 4 and 5, as described in detail above. At no time, however, did anyone travel to the bench above the highwall to look for cracks. Indeed, easy access was not provided to that bench.

The standard requires that designated persons examine and, where applicable, test ground conditions in areas where work is to be performed, after blasting, and as ground conditions warrant. The Secretary does not contend that testing was required. Section 56.3401 is a general standard designed to be applied in many situations. The fact that the highwall failed does not establish that a proper examination was not conducted. *Asarco, Inc.* 14 FMSHRC 941, 945-47 (June 1992). An examiner may have a concern about a particular area of a highwall, examine the area and determine that it is safe. If subsequent events reveal that the area was not adequately supported, there may be a violation of section 56.3130 or 56.3200, but that fact does not establish that the examination was inadequate. In cases where there has been a fall of ground, the burden of proof does not shift to the operator to prove that an adequate examination was conducted. *Id.* at 947.

Section 56.3401 does not mention highwalls much less require that benches be examined. This standard is simple and brief in order to be broadly adaptable to a wide variety of circumstances. The Commission held that adequate notice of the requirements of a broadly worded standard is provided if a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Co.*, 13 FMSHRC 1341, 1343, (September 1991). The safety standard must "give the person of ordinary intelligence a reasonable opportunity to know what is [required], so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Summit has been examining the highwalls of the Open Cut Mine, including the mini-pit, by visually observing them from the floor of the pit since the mine was opened in 1985. There is no evidence that anyone had ever traveled onto a bench in order to look for tension cracks during

an examination of a highwall under section 56.3401. In addition, there is no evidence that any MSHA inspectors traveled onto a bench to determine whether tension cracks were present. I was unable to find any Commission or administrative law judge decisions that discuss this issue. Apparently, this is a case of first impression.

Applying the reasonably prudent person test, described above, I find that, as a general matter, the safety standard does not require operators to examine benches for tension cracks during their regular examinations of highwalls. The Secretary did not establish that such examinations are a practice in the mining industry or that MSHA issues citations when an operator fails to include such examinations as part of its regular procedure under section 56.3401 at open pit mines. The Secretary's *Program Policy Manual* does not discuss this issue, and the Secretary did not introduce any other evidence that she generally requires operators to examine benches for tension cracks. A reasonably prudent person would not know that such examinations are regularly required under the safety standard.

The issue is whether the particular conditions that existed on January 4 triggered a requirement for such an examination. Would a reasonably prudent person have recognized that an examination of the bench was required under the standard given the state of the east highwall? Summit management knew that the highwall was nearly vertical and was, thus, not in compliance with the mine's design specifications. Management also knew or should have known that the crew was working in the vicinity of a nose on the east highwall where the wall of the Open Cut turned into the mini-pit. Management also knew that miners working in the pit voiced concern about the stability of the east highwall.

As stated above, Mr. Lester examined the highwall following his conversation with Mr. Hall from two vantage points, a location across from and slightly above the east highwall, and the floor of the pit. Although he could see the bench above the east highwall when looking across the mini-pit from the east side, he would not have been able to see small tension cracks. Price examined the east highwall at the beginning of the shift and following Mr. Wagner's comments during the lunch break. In addition, Mr. Rounds examined the highwalls when he came to the mine following the sloughage on the west wall. All three men determined that the highwall was stable. The fact that subsequent events proved that they were wrong does not establish that their examination was not adequate.

I find that the Secretary did not establish that an examination of the bench above the highwall was required on January 4 under the standard. The record establishes that a reasonably prudent person faced with the conditions that existed at the time of the accident would have conducted examinations of the highwall in accordance with the mine's normal procedures and, once it was determined that the highwall was safe, would have determined that it was not necessary to travel to the bench above the highwall to look for tension cracks. Benches are designed to catch falling rock and the Secretary did not show that it is the practice of mine operators to go onto benches when examining highwalls under the cited safety standard. Traveling onto benches that are below other highwalls presents a hazard of being struck by falling rock.

As stated above, the Secretary's witnesses testified that an examination for tension cracks along the bench was crucial because cracks always develop on the bench a few days or more before a massive highwall failure. Assuming that to be true, I cannot understand why the Secretary does not specifically mandate such examinations when circumstances warrant. The Secretary has not issued any guidelines to the mining industry stating that such examinations are required under the standard. The Secretary introduced a program policy letter concerning wall, slope, and bank stability under section 56.3130. This letter states that operators must maintain one bench above an area where miners work "in a condition adequate to retain material that may slide, ravel, or slough onto the bench from the wall, bank, or slope." (Ex. G-4). Neither this program policy letter nor any other such guideline suggests that examinations be conducted for tension cracks. It appears that no contested citations have been issued alleging that an operator failed to conduct such an examination. If such examinations are of such a critical nature, the Secretary should issue a program policy letter or other interpretative rule setting forth, in at least general terms, when such examinations are required under the standard. 5 U.S.C. § 553(b)(A).

For the reasons set forth above, I find that the Secretary did not meet her burden of proof with respect to Order No. 4422931 and the order is vacated.

B. Charges Against the Individual Respondents

MSHA conducted a special investigation. At the conclusion of the investigation, it filed civil penalty proceedings against the individual respondents under section 110(c) of the Mine Act. The Secretary proposes: (1) a penalty of $5,000 against Mr. Rounds for the alleged violations set forth in Order Nos. 4422930 and 4422931; (2) a penalty of $4,500 against Mr. Lester for all three alleged violations; (3) and a penalty of $3,250 against Mr. Price for all three alleged violations.

The District of Columbia Circuit recently summarized the case law interpreting section 110(c) of the Mine Act, as applicable here. *Freeman United Coal Mining Co. v. FMSHRC,* 108 F.3d 358, 362-64 (1997). To establish liability under section 110(c), the Secretary is required to show that the person charged demonstrated aggravated conduct, as distinguished from ordinary negligence. *BethEnergy Mines,* 14 FMSHRC 1232, 1245 (August 1992). A finding of ordinary or high negligence will not, by itself, support a violation of section 110(c). *Freeman United* at 364.

I find that the Secretary did not establish that Charles Rounds, Tom Lester, or Delvin Price violated section 110(c) of the Mine Act. That section provides that whenever a corporate operator violates a safety standard, "any director, officer, or agent ... who knowingly authorized, ordered, or carried out such violation" may be held liable. I find that Messrs. Rounds, Lester and Price were agents of Summit. As set forth above, Summit violated sections 56.3200 and 56.3130. I found, however, that these violations were the result of Summit's ordinary negligence. The Secretary did not establish that the violations were caused by Summit's

unwarrantable failure. I specifically determined that the violations did not result from the aggravated conduct of Summit management.

It is not disputed that the three individual respondents charged by the Secretary were the key management officials who made the determination to extract ore in the mini-pit on the evening of January 4, 1995, without making any changes to the east highwall. It does not appear that other management officials were involved in this decision. Based on the evidence presented at the hearing, I find that the violations were not the result of the aggravated conduct of Mr. Rounds, Mr. Lester, or Mr. Price. My reasons for this finding are set forth in section II.A. of this decision. At most, they were moderately negligent. Accordingly, they did not "knowingly violate" 30 C.F.R. §§ 56.3200 or 56.3130.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Summit was issued 65 citations and orders between March 1978 and July 1995. (Ex. G-1). I also find that Summit was a medium-sized mine operator that employed between 90 and 100 people who worked on one of the two ten hour shifts. (Stipulation). I find that the civil penalty assessed in this decision will not affect Summit's ability to continue in business. The Secretary has not alleged that Summit failed to timely abate the citation and order. I find that both violations were significant and substantial in nature, were serious, and were the result of Summit's moderate negligence. Based on the penalty criteria, I find that a penalty of $18,000 is appropriate for Citation No. 4422929 and a penalty of $22,000 is appropriate for Citation No. 4422930.

VI. ORDER

Citation No. 4422929 is **MODIFIED** to a section 104(a) citation by deleting the unwarrantable failure designation and reducing the level of negligence to moderate. As modified, the citation is **AFFIRMED**. Order No. 4422930 is **MODIFIED** to a section 104(a) citation by deleting the unwarrantable failure designation and reducing the level of negligence to moderate. As modified, the citation is **AFFIRMED**. Order No. 4422931 is **VACATED**. The civil penalties brought against Charles Rounds, Tom Lester, and Delvin Price in CENT 97-20-M, 97-21-M, and 97-22-M are **VACATED**.

Summit Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $40,000.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

John D. Austin, Austin & Movahedi, 1001 Pennsylvania, Suite 301, Washington, DC 20004 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 2 9 1997

OHIO VALLEY TRANSLOADING COMPANY,	: CONTEST PROCEEDINGS
Contestant	:
v.	: Docket No. LAKE 96-158-R
	: Order No. 3500861; 8/22/96
SECRETARY OF LABOR,	:
MINE SAFETY AND HEALTH	: Docket No. LAKE 96-159-R
ADMINISTRATION (MSHA),	: Order No. 3500862; 8/22/96
Respondent	:
	: Mine ID No. 33-00000
	: Powhatan Transportation Center

DECISION

Appearances: William Althen, Esq., Smith, Althen and Heenan, Washington, D.C., for the Contestant;
Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for the Respondent.

Before: Judge Melick

These consolidated Contest Proceedings are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, *et seq.*, the "Act," to challenge a citation and a "failure to abate" withdrawal order issued by the Secretary of Labor to the Ohio Valley Transloading Company (Transloading Company). The Transloading Company is charged with violations of Section 103(a) of the Act for twice denying entry to an inspector for the Mine Safety and Health Administration (MSHA) at its Powhatan Transportation Center (PTC).[1] The underlying issue in these cases is whether the Secretary has jurisdiction under the Act to inspect

[1] Section 103(a) of the Act provides, in relevant part, that "[f]or the purpose of making any inspection or investigation under this Act, the Secretary, . . . with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal . . . mine."

the PTC. It is stipulated that if the Secretary had such jurisdiction on the dates in question then the citation and order at issue should be affirmed.[2]

It is not disputed that in order to establish jurisdiction the Secretary must show that the PTC was, during relevant times, a "coal mine" under the Act. Under Section 3(h)(2) of the Act, coal mine "means an area of land and all structures, facilities, machinery, tools, equipment, sheds, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom coal preparation facilities". More particularly, at issue herein, is whether the PTC was involved in "work of preparing the coal". The term "work of preparing the coal" is defined in Section 3(i) of the Act as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing such coal as is usually done by the operator of the coal mine".

The activities occurring at the PTC during relevant times are not in dispute. The PTC is located on an area of land adjacent to the Ohio River. Bituminous coal, which has already passed through a processing plant, is received at the facility by rail, truck and river barge. No breaking, sizing, crushing, washing, or drying occurs at the PTC and, indeed there is no physical change to the coal. Most of the coal received at the PTC comes from the Powhatan No. 6 mine. This coal is received either by train or truck and is dumped in a hopper. It is then conveyed by belt directly to barges in the Ohio River where it is loaded and shipped to customers, primarily electric utilities.

---

[2] The citation at bar, No. 3500861, charges as follows:

On August 22, 1996, Robert Visnic, Transportation Manager, refused to allow Joseph F. Facello and William A. McGilton, authorized representatives of the Secretary, entry into the Powhatan Transportation Center for the purpose of conducting an inspection of the facility pursuant to Section 103(a) of the Act. Mr. Visnic stated that MSHA was being denied entry based on the operator's belief that this facility is not subject to MSHA jurisdiction.

The order at bar, No. 3500862, charges as follows:

On August 22, 1996, after the expiration of a reasonable time allowed to comply , Robert Visnic, Transportation Manager, continued to deny Joseph A. Fellico and William A. McGilton, authorized representatives of the Secretary, the right of entry into the Powhatan Transportation Center, for the purpose of conducting an inspection of the facility in accordance with requirements of Section 103(a) of the Act.

Coal is also received at the PTC from third party sources by truck and river barge. Coal delivered by river barge is transferred by crane into a hopper and further transported by conveyor to a stacker tube. From the stacker tube the coal is stored in a stockpile and, when needed, this coal is placed onto a belt. Powhatan No. 6 Coal may also be transported at the same time on the same belt and loaded onto river barges. Third party coal arriving by truck may also be simultaneously dumped with Powhatan No. 6 coal onto the conveyor and loaded onto river barges for delivery to customers.

According to Richard Rice, manager of marketing and sales for the Ohio Valley Coal Company (owner of the Powhatan No. 6 Mine) and Vice President of the American Coal Sales Company (owner of the PTC), with the exception of coal from the Maple Creek Mine, the third party coal is so poor in quality it would not meet the contract specifications for its utility customers. This third party coal must therefore be admixed with Powhatan No. 6 coal. (Tr. 133-134). According to Rice, the third party coal (with the exception of Maple Creek coal) is purchased for "economic reasons". It is cheaper than Powhatan No. 6 coal. Thus the cheaper coal from third party sources is loaded together with the more expensive Powhatan No. 6 coal to improve profits (Tr. 133-136). Rice further noted that under the agreements between the Ohio Valley Coal Company and its utility customers, PTC cannot ship third party coal alone. Accordingly, Foreman Visnic will adjust by computer the volume of coal dumped onto the conveyor from third party sources based on the amount of other coal coming into the PTC. Visnic therefore decides how much third party coal to load onto the conveyor from the stockpile and to be loaded onto the barges for delivery. Rice told Assistant MSHA District Manager Robert Crumrine sometime in 1995 that "you can call it mixing if you want to" in reference to this operation. (Tr. 227).

Robert Murray, President of the Transloading Company, opined that no preparation occurs at the PTC. In Murray's opinion coal is not mixed or co-mingled but is merely conveyed or transloaded. He maintains there is no intent to process coal.

It is therefore undisputed that the PTC performs the functions of loading bituminous coal onto barges at its Ohio River facility and storing coal received from third party sources at a stockpile before further transporting this coal by conveyor to river barges. Recently in *RNS Services, Inc. v. Secretary of Labor and FMSHRC*, No. 96-3245 (3rd Cir., May 29, 1997), the Circuit Court reaffirmed that the storage and loading of coal is a critical step in the processing of minerals extracted from the earth in preparation for their receipt by an end-user, and the Mine Act was intended to reach all such activities. See also *Pennsylvania Electric Company v. FMSHRC,* 969 F.2d 1501(3rd Cir., 1992).

The undisputed evidence in this case also clearly demonstrates that the "mixing" of bituminous coal has taken place at the PTC within the meaning of Section 3(i) of the Act. The term "mix" is defined in Webster's Third New International Dictionary (unabridged), 1986, as synonymous with "mingle, co-mingle, blend, merge", etc. The merging or co-mingling of third party coal with Powhatan No. 6 coal at the PTC therefore clearly constitutes "mixing". Under the

circumstances the PTC is clearly within the jurisdiction of the Act and MSHA has the authority under Section 103(a) of the Act to enter and conduct inspections at that facility.

The Commission in *Secretary v. Oliver M. Elam, Jr. Company,* 4 FMSHRC 5 (January 1982) also found, in determining Mine Act jurisdiction, that a facility would more likely come within the Act's jurisdiction if the coal was prepared by the subject facility to meet customers' specifications or to render the coal fit for a particular use. In this case it is acknowledged that third party coal (except for that received from the Maple Creek Mine) was of such poor quality as not to be capable in itself to meet the contract specifications of the utility customers. Accordingly, it was necessary to combine that coal with coal from the Powhatan No. 6 mine to improve the quality of the coal to meet the specifications of the utility power plants. For this additional reason it is clear that the PTC was a "mine" within the meaning of the Act and that MSHA therefore had jurisdiction to inspect that facility.

ORDER

Citation No. 3500861 and Order No. 3500862 are affirmed and these Contest Proceedings are dismissed.

Gary Melick
Administrative Law Judge
703-756-6261

Distribution:

William I. Althen, Esq., and William K. Doran, Esq., Smith, Heenan & Althen, 1110 Vermont Ave., N.W., Washington, D.C. 20005 (Certified Mail)

Maureen M. Cafferkey, Esq., Office of the Solicitor, U.S. Dept. of Labor, 881 Federal Bldg., 1240 East Ninth Street, Cleveland, OH 44199 (Certified Mail)

/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

July 30, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 97-140
Petitioner	:	A. C. No. 01-01322-04075
	:	
v.	:	No. 5 Mine
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	

ORDER DENYING MOTION TO REOPEN

This case is before me pursuant to the Commission's order of remand dated June 2, 1997.

The Secretary issued a notice of proposed penalty assessment against the operator and the operator filed a request for hearing. However, the request was filed 5 days late. The operator seeks to have the matter reopened and the Solicitor opposes.

The operator's brief represents that the delay was caused by following reasons: a recent influx of citations and orders, an unusually heavy caseload, current corporate downsizing with elimination of many positions, many other responsibilities for its attorney, and misplacing the file in this case and not putting the case on the attorney's calendar. The operator seeks relief under Rule 60 (b)(1) and (6).

In her brief the Solicitor argues that the reasons advanced by the operator are insufficient to justify granting relief. She states that the operator is a large corporation which routinely deals with citations issued by the Mine Safety and Health Administration (hereafter referred to as "MSHA"). Accompanying the brief is an affidavit of the Chief of MSHA's Civil Penalty Compliance Office stating that since January 1996, the operator has filed five other untimely requests for hearing, that it did not seek reopening in three of them and that in two of them reopening was granted.

Section 105(a) of the Act, 30 U.S.C. § 815(a), provides that an operator has 30 days within which to notify the Secretary that it wishes to contest the citation or proposed assessment. If within 30 days of receipt of the Secretary's notification, the operator fails to notify the

Secretary that it intends to contest the citation or proposed assessment, the proposed assessment becomes a final order of the Commission. Id. The Commission has held that it has jurisdiction to decide whether final judgments can be reopened. Jim Walter Resources, Inc., 15 FMSHRC 782 (May 1993).

Commission Rule 1(b) provides that 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). In its June 2 order in this case, the Commission stated that it possesses jurisdiction to reopen uncontested assessments which have become final under section 105(a), supra, and that these determinations are made with reference to Federal Rule 60(b). Federal Rule 60(b)(1) provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect * * *. The 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.

Federal Rule 60 (b) (6) which allows the filing of a motion at any time provides as follows:

> [A]ny other reason justifying relief from the operation of the judgment.

The motion to reopen in the instant matter was filed within one year.

In Pioneer Investment Services Company v. Brunswick Associates Limited Partnership, 507 U. S. 380 (1993), the Supreme Court recognized that Bankruptcy Rule 9006(b)(1), which contains the same "excusable neglect" standard as Rule 60(b)(1), grants a reprieve for out-of-time filings delayed by "neglect". 507 U. S. at 388. In interpreting this provision, the Court first turned to the ordinary meaning of "neglect", which it said was to give little attention or respect to a matter or to leave undone or unattended to, especially through carelessness. Id. The Court said that the word "neglect" therefore, encompassed both simple, faultless omissions to act and, more commonly, omissions caused by carelessness. Id. The Court further held that absent sufficient indication to the contrary courts assume that Congress intends words in its enactments to carry their ordinary contemporary common meaning. Id. Consequently, based on the plain meaning of neglect, the Court rejected an inflexible approach that would exclude every instance of inadvertent or negligent omission. Id. at 394-395.

With respect to the meaning of excusable neglect the Court in Pioneer stated as follows:

> Because Congress has provided no other guideposts for determining what sorts of neglect will be considered "excusable," we conclude that the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include,. . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395.

Many Courts of Appeals have acknowledged and followed the test set forth in Pioneer. U. S. v. Hooper, 9 F.3d 257 (2nd Cir. 1993); Matter of Christopher, 35 F.3d 232 (5th Cir. 1994); U. S. v. Clark, 51 F.3d 42 (5th Cir. 1995); Reynold v. Wagner, 55 F.3d 1426 (9th Cir. 1995); City of Chanute, Kansas v. Williams Nat. Gas Co., 31 F.3d 1041 (10th Cir. 1994); Information Systems and Networks Corp. v. U.S., 994 F.2d 792 (Fed. Cir. 1993). See also, In Re SPR Corp., 45 F.3d 70 (4th Cir. 1995). Although Pioneer was a case that arose under the bankruptcy rules, it has been applied beyond the context of bankruptcy to other situations where pertinent rules contain the same standard of "excusable neglect". U. S. v. Hooper, supra at 259; U. S. v. Clark, supra at 44; Reynold v. Wagner, supra at 1429; Information Systems and Networks Corp. v. U. S., supra at 796. In this context it has been recognized that the client is bound by the acts and omissions of its counsel. Pioneer 507 U. S. at 396-397; Nichols v. G.D. Searle & Co., 991 F.2d 1195, 1202 (4th Cir. 1993).

Applying the criteria of Pioneer, I conclude that relief cannot be granted in this case. The operator alleges that it is laboring under an unusually heavy caseload. However, it has furnished no data to support this contention and no information to show that the number of cases it now has exceeds prior levels of activity. Such a showing is essential in light of the fact that the total number of actions pending before Commission Judges has been declining. In addition, the operator's excuses of corporate downsizing and multiple responsibilities for its counsel cannot serve as a basis for relief. It appears that the operator has consciously decided to allocate fewer resources to mine safety litigation. Whatever the merits of that decision may be in other contexts, in the instant matter the operator must live with the consequences of its intentional actions. After considering all the circumstances, I determine that on balance the equities do not favor the operator. In Pioneer, petitioner's counsel was late in part because he was experiencing upheaval in his practice due to his withdrawal from his law firm. However, the Court said that it gave

little weight to that circumstance and stated that the client must be held accountable for the acts and omissions of its attorney. Pioneer, 507 U. S. at 396-397. Following Pioneer, it has been held that oversight due to corporate restructuring did not constitute excusable neglect. United States v. RG & B Contractors, 21 F.3d 952 (9 Cir. 1994). If corporate downsizing were accepted as grounds for relief here, it would have to be accepted in all cases involving this operator for the foreseeable future.

This conclusion is also consistent with Commission precedent. The Commission has held that the mere fact an operator is involved in bankruptcy and cost cutting does not provide a basis for relief. Green Coal Company, Inc., 18 FMSHRC 1594 (September 1996). The Commission also rejected confusion over cases and the absence of the owner as reasons for reopening. The Pit, 16 FMSHRC 2033 (October 1994). And like the Courts, the Commission has held that the client is bound by the actions of its attorney. Cannelton Industries, Inc., 18 FMSHRC 1597 (September 1996).

The Commission has allowed reopening, but the overriding consideration in almost all those cases was the absence of counsel for the operator. A. H. Smith Stone Company, 11 FMSHRC 796, 798 (May 1989); C&B Mining Company, 15 FMSHRC 2096, 2097 (Oct. 1993). In its remands the Commission has considered the absence of counsel in the forefront of relevant reasons that could justify reopening. Kelley Trucking Company, 8 FMSHRC 1867, 1868 (Dec. 1986). See also, CG&G Trucking, Inc., 15 FMSHRC 193 (Feb. 1993); Mustang Fuels Corporation, 13 FMSHRC 1061, 1062 (July 1991); James D. McMillen, Employed by Shillelagh Mining Company, 13 FMSHRC 778, 779 (May 1991). I previously allowed reopening under the principles of Pioneer in a case involving a small pro se operator. R B Coal Company, 17 FMSHRC 2153 (November 1995).

In its motion the operator seeks relief under Rule 60(b) (1) and (6). This request is unfounded. It is well established that these subparagraphs are mutually exclusive. Pioneer, 507 U. S. at 393; Information Systems and Network Corporation, supra at 796. The Commission has likewise recognized that relief is not available under both sections simultaneously. Lakeview Rock Products, Inc., 19 FMSHRC 26 (January 1997).

So too, the Solicitor does not appear conversant with applicable law. She cites a 1950 decision by the Supreme Court which dealt with Rule 60(b) (6). Ackermann v. United States, 340 U.S. 193. Nowhere does she cite Pioneer or any of the cases that follow it. Nor does she evidence any awareness of the differences between subparagraphs (1) and (6). The Solicitor's reference to the fact that since January 1996 the operator has been late five times in seeking reopening is not helpful. In two cases, MSHA reopened and the operator dropped the remaining three. No information was given regarding the circumstances of these cases.

In light of the foregoing, it is **ORDERED** that the motion to reopen be **DENIED**.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail & Telecopied)

Yoora Kim, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 400, Arlington, VA 22203

Douglas N. White, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 414, Arlington, VA 22203

R. Stanley Morrow, Esq., Jim Walter Resources, Inc., P. O. Box 133, Brookwood, AL 35444

/gl

* U.S. GOVERNMENT PRINTING OFFICE:1997-417-508/83376