JULY 1998

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JULY 1998

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

Gary Morgan v. Arch of Illinois, Docket No. LAKE 98-17-D. (Judge Weisberger, June 10, 1998)

Secretary of Labor, MSHA v. Hubb Corporation, Docket No. KENT 97-302. Judge Weisberger, June 15, 1998)

BHP Copper Company, Inc. v. Secretary of Labor, MSHA, Docket No. WEST 98-189-RM. (Judge Manning, June 23, 1998)

No cases were filed in which review was denied

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

July 2, 1998

UNITED MINE WORKERS OF AMERICA on behalf of WILLIAM KEITH BURGESS, GLENN LOGGINS, DAVID McATEER, B. RAY PATE and OTHERS	:	
v.	:	Docket Nos. SE 96-367-D SE 97-18-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), MICHAEL J. LAWLESS, FRANK YOUNG, TOM MEREDITH, and JUDY McCORMICK	:	

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

DECISION

BY: Riley and Beatty, Commissioners[1]

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"), Administrative Law Judge Jacqueline Bulluck determined that the Department of Labor's Mine Safety and Health Administration ("MSHA") and its employees are not subject to suit for alleged violations of sections 103(g)(1) and 105(c)(1) of the Mine Act, 30 U.S.C. §§ 813(g)(1), 815(c)(1).[2] 19 FMSHRC 294 (Feb.

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[1] Commissioners Riley and Beatty are the only Commissioners in the majority on all issues presented.

[2] Section 103(g)(1) provides in part:

> Whenever a representative of the miners . . . has reasonable grounds to believe that a violation of this [Act] or a mandatory . . . standard exists, . . . such . . . representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the

1997) (ALJ). The Commission granted the petition for discretionary review filed by the United Mine Workers of America on behalf of William Keith Burgess, Glenn Loggins, David McAteer, B. Ray Pate and others ("UMWA"), challenging the judge's decision. For the reasons that follow, we affirm in part, reverse in part, and remand.

I.

Factual and Procedural Background

This case arose when the UMWA filed discrimination complaints on behalf of miners against MSHA and MSHA employees in two separate actions, Docket Nos. SE 96-367-D, and Docket No. SE 97-18-D. The Secretary of Labor moved to dismiss both complaints. 19 FMSHRC at 294-95. In her consideration of the Secretary's motions to dismiss, the judge treated as true the following allegations set forth in the complaints. *Id.* at 295 n.3.

Docket No. SE 96-367-D

On approximately May 24, 1996, David McAteer, chairman of the safety committee of

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> representative of miners . . . , and a copy shall be provided the operator . . . no later than at the time of the inspection . . . . The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists . . . . If the Secretary determines that a violation or danger does not exist, he shall notify the . . . representative . . . in writing . . . .

30 U.S.C. § 813(g)(1). Procedures for processing complaints under section 103(g) are set forth in 30 C.F.R. Part 43. Such procedures provide in part for informal review of negative findings, such as that an inspection or the issuance of a citation is unnecessary. *See* 30 C.F.R. §§ 43.6-.8.

Section 105(c)(1) provides in pertinent part:

> No person shall . . . interfere with the exercise of the statutory rights of any miner, [or] representative of miners . . . because such miner, [or] representative of miners . . . filed or made a complaint under or related to this [Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

30 U.S.C. § 815(c)(1).

UMWA Local Union 2245, and committee members William Keith Burgess and Glenn Loggins faxed a letter to MSHA District 11 Manager Michael J. Lawless stating their concerns regarding MSHA's alleged failure to adequately inspect Jim Walter Resources ("JWR") #4 Mine on schedule and MSHA's granting of extensions for various safety violations at the mine. 19 FMSHRC at 295; Compl. I at 2 ¶ 3. On approximately May 29, McAteer and Burgess were called out of the mine to attend an "accident investigation team pre-inspection meeting" at the mine site. Compl. I at 2 ¶ 4. Present at the meeting were "two MSHA supervisors, including Judy McCormick, seven MSHA inspectors, the mine manager, and a number of his subordinates." Am. Compl. at 2 ¶ 4. McCormick distributed a "sanitized," typed version of the letter faxed to Lawless, in which all names and references to individual miners had been omitted. 19 FMSHRC at 296. McCormick then proceeded to verbally chastise McAteer and Burgess for their criticisms of MSHA in such a way to make clear to Jim Walter Resources management the identity of the miners who had sent the letter. *Id.*

On August 30, 1996, the UMWA, on behalf of Burgess, Loggins, and McAteer, filed a complaint against MSHA, Lawless, McCormick, and the MSHA Assistant Manager for District 11, Frank Young, pursuant to section 105(c)(2) of the Mine Act.[3] In the complaint the UMWA alleged that MSHA officials had disclosed in violation of section 103(g) the identity of miners who sent the May 24 letter and, in so doing, had also interfered with the exercise of the complainants' rights in violation of 105(c)(1) of the Mine Act. Compl. I at 1, 3, 4.

Docket No. SE 97-18-D

In the spring and summer of 1996, UMWA representatives, including Local Union 8982 president B. Ray Pate, raised various safety and health concerns with MSHA District 11 Supervisor Tom Meredith, Lawless, and Young. 19 FMSHRC at 296. On approximately August 9, 1996, Lawless and Young met with UMWA representatives, including Pate, regarding the UMWA's complaints about District 11 staff and enforcement problems at mines within District 11. *Id.*

On approximately August 19, 1996, MSHA Inspector Allen Scott advised Pate that he had been informed by Supervisor Meredith that Pate, the Local Union 8982 Safety Committee (the "safety committee"), and all miners working at the U.S. Steel Concord Preparation Plant and associated facilities (the "Plant") could no longer telephone health and safety complaints into the MSHA office. *Id.*; Compl. II at 3 ¶ 8. Rather, complaints were to be written and hand delivered. 19 FMSHRC at 296.

On September 19 and 25, 1996, the UMWA filed section 105(c) complaints against MSHA, including Meredith, Lawless, and Young. 19 FMSHRC at 296. The UMWA alleged, in

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[3] Although the UMWA filed its complaint under section 105(c)(2), it is clear that it intended to file under section 105(c)(3). 19 FMSHRC at 295 n.1. The judge found the error to be immaterial, and that finding is not challenged on review. *Id.*

part, in the complaints that, during an investigation of the Plant on March 28, 1996, Meredith informed mine management of the identity of the miner representative who filed a complaint, that Meredith asked mine management for employment with the company, and that Meredith and District 11 personnel had conducted negligible enforcement or investigative action. 19 FMSHRC at 296; Compl. II, Attach. A at 1-2. In addition, the UMWA described the change of policy requiring complaints to be written and hand-delivered. Compl. II, Attach. A at 2. By letters dated September 23 and October 9, 1996, MSHA denied the UMWA's complaints. Compl. II, Attach. B.

On October 17, 1996, the UMWA, on behalf of Pate, the safety committee, and all miners working at the Plant, filed a complaint against MSHA, Meredith, Lawless, and Young pursuant to section 105(c)(2) of the Mine Act. In the complaint the UMWA alleged that Meredith's change of policy amounted to retaliation for the information provided by Pate and other UMWA representatives on August 9, in violation of section 105(c) of the Mine Act. Compl. II at 3-4 ¶ 9.

On October 23, 1996, the Secretary filed a motion to consolidate the proceedings (SE 96-367-D and SE 97-18-D) and to dismiss the complaints. Citing *Wagner v. Pittston Coal Group*, 12 FMSHRC 1178 (June 1990), *aff'd*, 947 F.2d 943 (table), 1991 WL 224257 (4th Cir. Nov. 5, 1991), the Secretary argued that the complaints against MSHA and the named individuals fail under principles of sovereign immunity. S. Mot. to Consolidate and Dismiss at 3-7.

The judge granted the Secretary's motion to consolidate and dismiss. 19 FMSHRC at 295. As to the motion to dismiss, the judge first concluded that the Commission's decision in *Wagner* required a holding that MSHA was immune from suit under principles of sovereign immunity. *Id.* at 297-98. The judge rejected the UMWA's argument that *Wagner* was not applicable on the basis that the miners' complaints in *Wagner* were oral and not protected by section 103(g)(1) of the Mine Act, while the instant written complaints were subject to the protections of section 103(g)(1). *Id.* at 297. The judge reasoned that while section 103(g)(1) prescribes procedures by which the Secretary shall maintain the confidentiality of miners who raise safety complaints in writing, section 105(c)(1) encompasses within its protection oral as well as written complaints. *Id.* Second, the judge concluded that *Wagner* also compelled the result that the individual employees of MSHA were immune from suit. *Id.* at 298. The judge found unavailing the UMWA's argument that MSHA employees are liable upon application of respondeat superior principles, reasoning that such a cause of action is not recognized under the Mine Act. *Id.* The judge found that, in any event, the conduct of the MSHA employees here is indistinguishable from the conduct of the MSHA employees in *Wagner*, and that the Fourth Circuit, applying principles of respondeat superior, had concluded that those employees had not exceeded the scope of their authority so as to be subject to liability. *Id.* at 299. Accordingly, the judge dismissed the UMWA's complaints. *Id.*

The Commission granted the petition for discretionary review subsequently filed by the UMWA and heard oral argument.

II.

Disposition

A. The Wagner Decisions

In *Wagner*, the Commission concluded that MSHA and MSHA officials are not "persons" subject to the provisions of section 105(c), dismissing those portions of Wagner's complaint alleging that MSHA and MSHA officials had violated section 105(c) of the Act by adopting a policy, which they enforced against Wagner, of disclosing to coal companies the names of miners who had reported safety violations. 12 FMSHRC at 1182, 1186-87. The Commission reached its conclusion by noting that the United States, as the sovereign, is immune from suit except as it consents to be sued and that waivers of immunity must be unequivocally expressed. *Id.* at 1184 (citing *Rushton Mining Co.*, 11 FMSHRC 759, 766 (May 1989)). The Commission reasoned that the Mine Act contains no such waiver of immunity from suit for MSHA and its employees under section 105(c). *Id.* at 1184, 1185.

The dissenting Commissioners in *Wagner* disagreed with the majority's conclusion that MSHA employees are immune from suit under the Mine Act in all circumstances. *Id.* at 1188. They noted that when an action is brought against individuals employed by MSHA, a different analysis is required. *Id.* Specifically, they reasoned that there must first be an examination to determine whether, in fact, the suit is in reality against the United States or against the individual, depending upon the nature of the relief sought. *Id.* They also stated that an MSHA official is subject to suit for specific relief if the official's actions are outside the scope of his authority or unconstitutional. *Id.* at 1189.

Wagner appealed only that portion of the Commission's decision holding that MSHA employees are not subject to suit. In an unpublished decision, the Fourth Circuit Court of Appeals first determined that "MSHA employees acting within the scope of their authority are agents of the sovereign, and therefore cannot be liable under section 105(c)," reasoning that "person" is defined without reference to governmental entities. 1991 WL 224257, at *2. The Court next examined whether the named MSHA employees "acted so far outside the scope of their statutory authority as to become 'persons' who may be individually liable for violating section 105(c)." *Id.* The Court concluded that, because section 105 contains no statutory guarantee of confidentiality regarding the identity of miners who inform MSHA of safety violations, there was no basis for a conclusion that the named MSHA employee exceeded his statutory authority by disclosing the identity of a miner. *Id.*

B. Whether MSHA is Immune from Suit under the Mine Act

The UMWA argues that MSHA should be held liable for Mine Act violations to the extent that it ratifies illegal conduct by its employees. UMWA Br. at 19-21. The Secretary responds that the plain meaning of section 105(c), established canons of statutory construction, and the Mine Act's legislative history support the judge's conclusion that Congress did not intend to subject MSHA to discrimination charges. S. Br. at 4-21.

The Commission has recognized that it "is a settled principle of federal law that the United States, as the 'sovereign,' is immune from suit except as it consents to be sued." *Rushton*, 11 FMSHRC at 765 (citing *Block v. North Dakota*, 461 U.S. 273, 280 (1983); *United States v. Mitchell*, 445 U.S. 535, 583 (1980)). "Waivers of sovereign immunity 'cannot be implied but must be unequivocally expressed,'" and "[o]nly Congress may waive sovereign immunity." *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)) (other citations omitted). The Supreme Court recently reiterated that a "waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996). The Supreme Court further emphasized that a "statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text; 'the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.'" *Id.* (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Therefore, the consideration of whether a waiver of sovereign immunity exists as to MSHA is limited to the text of the Mine Act.

Section 105(c)(1) provides in part that "[n]o person shall . . . interfere with the exercise of the statutory rights of any . . . representative of miners. . . because such . . . representative . . . filed or made a complaint under . . . this [Act]." 30 U.S.C. § 815(c)(1). The term "person" is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. § 802(f).

We reaffirm the Commission's holding in *Wagner*, 12 FMSHRC at 1184, that MSHA is not a "person" subject to the provisions of section 105(c). As the Commission noted in *Wagner*, "'[i]n common usage, the term person does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.'" *Id.* (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1974)). In addition, no governmental entity is specifically included within the definition of "person," although governmental entities are specifically referred to in other definitions in section 3. *Id.* For instance, section 3(a) defines "Secretary" as "the Secretary of Labor or his delegate," and section 3(n) defines "Administration" as "the Mine Safety and Health Administration in the Department of Labor." 30 U.S.C. § 802(a), (n).

Although the term "other organization" within the definition of "person" may be interpreted to include MSHA, another plausible interpretation would exclude MSHA, given the lack of specific reference. The D.C. Circuit Court of Appeals has explained that an "Act of Congress is not unambiguous, and thus does not waive immunity, if it will bear any 'plausible' alternative interpretation." *Department of Army v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) (citing *Nordic Village*, 503 U.S. at 34); *see also Hubbard v. Administrator, EPA*, 982 F.2d 531, 532-33 (D.C. Cir. 1992) (stating that Congress' intent to waive sovereign immunity is "unequivocally expressed" if it is "so clear and explicit as to brook no reasonable doubt"). Because the term "person" is capable of plausible alternative interpretations, either including or excluding MSHA, the Mine Act does not unequivocally express a waiver of MSHA's immunity from suit for alleged violations of section 105(c)(1).

Moreover, section 103(g)(1), upon which the UMWA also bases its complaint,[4] does not contain an express waiver of MSHA's immunity from suit. Section 103(g)(1) does not explicitly state the basis for the issuance of a citation for breach of the responsibilities in processing safety complaints, or the parties subject to liability. Any waiver of MSHA's immunity from suit would have to be impermissibly implied from the subsection. Accordingly, we affirm the judge's holding that MSHA as an agency is immune from suit under sections 105(c) and 103(g)(1) of the Mine Act, and affirm the judge's dismissal of the complaints against MSHA.

C. Whether MSHA Employees are Immune from Suit under the Mine Act

The UMWA argues that the Commission should overrule its holding in *Wagner* that MSHA employees are immune from suit under section 105(c) of the Mine Act in all circumstances. UMWA Br. at 2-3. It submits that MSHA employees should be subject to liability when their actions exceed the scope of their employment. *Id.*; UMWA Reply Br. at 15-17. The UMWA argues that, even if the Commission declines to modify *Wagner*, the present case is distinguishable because the complaints in *Wagner* were oral, unlike the written complaint at issue here, which would fall within the protection of section 103(g). UMWA Br. at 22-26. In addition, the UMWA contends that the officials' conduct here is more egregious because they were acting for personal motives, thus losing their protection under principles of respondeat superior. *Id.* at 24-26.

The Secretary responds that the judge properly dismissed the complaints against the MSHA officials. S. Br. at 11. She submits that the plain meaning of section 105(c) and the Mine Act's legislative history support the judge's conclusion that Congress did not intend to subject MSHA officials to discrimination charges. *Id.* at 11-21. The Secretary argues that even if the Commission decides that MSHA employees enjoy only qualified immunity, substantial evidence supports the judge's determination that the named MSHA officials were acting within the scope of their authority and were therefore immune from liability. *Id.* at 32-41. The Secretary,

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[4] The UMWA alleges that, in addition to a violation of section 105(c)(1), the disclosure of identities amounted to a separate violation of section 103(g). Compl. I at 1, 3, 4.

applying Alabama laws of respondeat superior, submits that the allegations in the complaints do not establish that the named officials were acting wholly for personal reasons, although they might have exercised poor judgment. *Id.* at 35-40.

Although the judge correctly applied Commission precedent, we conclude that it is appropriate to overrule the Commission's *Wagner* decision as it applies to MSHA officials. Therefore, we reverse the judge's determination that MSHA employees cannot be sued individually under the Mine Act. Our decision to overrule *Wagner* is based on the continuing development of case law, which recognizes an exception to sovereign immunity in some circumstances as it applies to federal officials.

As the dissenting Commissioners in *Wagner* recognized (12 FMSHRC at 1189), even in the absence of an explicit statutory waiver of liability against federal officials, a suit against an individual federal official for specific relief is not barred by sovereign immunity where the challenged actions of the official are beyond the official's statutory authority, that is, ultra vires, or unconstitutional. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 696-97 (1948); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). The doctrine of sovereign immunity does not apply in such cases because the conduct against which specific relief is sought is beyond the officer's power and, therefore, is not the conduct of the sovereign.[5] *Larson*, 337 U.S. at 690. This exception has gained wide recognition, including within Fourth Circuit and the circuits to which this case could be appealed.[6] *See, e.g.*, *Wagner*, 1991 WL 224257, at *2 (considering whether MSHA employees "acted so far outside the scope of their statutory authority" as to become individually liable); *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996); *Florida Dep't of Bus. Regulation v. Department of Interior*, 768 F.2d 1248, 1251-52 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Clark v. Library of Congress*, 750 F.2d 89, 103 (D.C. Cir. 1984).

In determining whether an officer's actions are ultra vires and exceed the scope of his authority, it is appropriate to consider whether the officer's conduct was based on a lack of delegated power.[7] *Dugan*, 372 U.S. at 622; *Larson*, 337 U.S. 690, 695. Official action is not invalid "if based on an incorrect decision as to law or fact, if the officer making the decision was

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[5] The UMWA's argument that MSHA is liable to the extent that it ratifies the illegal conduct of its employees must fail. If an MSHA employee is subject to suit for a violation of the Mine Act, it is because he has exceeded the scope of his delegated powers and cannot be said to be acting on behalf of his sovereign.

[6] The Secretary acknowledges that federal employees may be divested of sovereign immunity and held to act outside of the scope of their employment for "egregious" conduct. S. Br. at 26-27 n.12; Oral Arg. Tr. 24.

[7] The UMWA has made no allegations that the MSHA employees' conduct was unconstitutional.

empowered to do so." *Larson*, 337 at 695; *see also Aminoil U.S.A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1234 (9th Cir. 1982); 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3655, at 226 (2d ed. 1985). The Supreme Court in *Larson* explained that while an officer's actions may establish a wrong to the plaintiff, "it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign." *Larson*, 337 U.S. at 693. Therefore, scope of authority "turns on whether the [official] was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power." *United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986) (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 112 n.22 (1984)), *cert. denied*, 481 U.S. 1069 (1987); *see also Painter v. Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996); *New Mexico v. Regan*, 745 F.2d 1318, 1320 n.1 (10th Cir. 1984).

Finally, as the dissenting Commissioners in *Wagner* also recognized (12 FMSHRC at 1188), actions against individual federal officers may fail as actions against the sovereign if the relief requested operates against the sovereign. *Pennhurst*, 465 U.S. at 101 n.11; *Florida*, 768 F.2d at 1251. Courts make this determination by examining the issues and the effect of the judgment sought. *Florida*, 768 F.2d at 1251. An action is against the agency if the relief sought requires payment of monies from the Federal Treasury, or would restrain the government from acting, or compel it to act. *Id.*; *Larson*, 337 U.S. at 704; *Coleman v. Espy*, 986 F.2d 1184, 1189 (8th Cir. 1993).

In sum, we overrule the majority's holding in *Wagner* that MSHA employees are not subject to suit for Mine Act violations in any circumstances. We adopt the holding of the dissenting Commissioners in that case and reiterate their summary of governing principles:

> An MSHA official is subject to individual suit, and cannot raise a sovereign immunity bar, if his actions are unconstitutional, or conflict with and exceed the scope of his statutory or regulatory authority and amount to more than a mistake of law or fact in the exercise of delegated duties, and if the relief sought against the individual is not a claim against the United States Treasury, does not interfere with a government program or does not restrain the Government from acting or compel it to act.

12 FMSHRC at 1189. Moreover, in considering whether the alleged violative actions amounted to more than a mistake of law or fact, it is appropriate to consider whether the official's conduct was motivated by retaliatory intent. *Cf. Ramon by Ramon v. Soto*, 916 F.2d 1377, 1383 n.7 (9th Cir. 1989) (quoting *Yakima*, 806 F.2d at 860 ("At a certain point, 'a violation of a statute or regulation is so inconsistent with the agent's authority that he divests himself of sovereign immunity.'")).

Applying these principles, we agree with the Secretary that the UMWA has sought relief that in part operates against MSHA. S. Br. at 4-5 n.1. However, because the UMWA brought suit against MSHA in addition to the named individuals, we do not dismiss the case based upon the nature of the relief sought. If relief is appropriate, it shall be fashioned so as not to operate against MSHA.

We also agree with both parties that there is an insufficient record to determine whether the named MSHA officials' actions exceeded the scope of their authority and amounted to more than a mistake of law or fact in the exercise of delegated duties. *See* Oral Arg. Tr. 8-9, 32-33 (acknowledgments by counsels to both parties that evidence is insufficient to determine whether officials' actions were motivated by retaliatory intent). Accordingly, in Docket No. SE 96-367-D, we vacate the judge's dismissal of the complaints against McCormick, Lawless, and Young and remand for the development of a record on the allegations set forth in the complaint, as amended. The judge shall examine whether the actions of those named respondents who attended the May 29 meeting exceeded the scope of their statutory authority and amounted to more than a mistake of law or fact.[8] If the judge finds that any of the named MSHA officials are subject to suit, she shall consider whether such officials violated sections 103(g)(1) and 105(c)(1) and, if so, the judge shall order appropriate specific relief that does not operate against MSHA.

In Docket No. SE 97-18-D, we vacate the judge's dismissal of the complaint against Meredith, Lawless, and Young and remand for the development of a record on the allegations set forth in the complaint regarding the change of policy.[9] If the judge finds that any of the named MSHA officials are subject to suit, she shall consider whether such officials violated section 105(c)(1) and, if so, the judge shall order appropriate specific relief that does not operate against MSHA.

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[8] We caution the judge against adopting the reasoning of the Fourth Circuit in *Wagner*. The court did not consider the statutory guarantee of confidentiality set forth in section 103(g)(1) of the Mine Act. *See* 1991 WL 224257, at *2.

[9] The allegations in Attachment A to the complaint do not constitute separate causes of action against Meredith, Lawless, and Young for alleged violations of section 105(c). In its complaint, the UMWA stated that "Meredith's change in policy toward the Complainants" was the basis for its allegation of violation of section 105(c). Compl. II at 3-4. Evidence included in Attachment A may be considered only as relevant to the change in policy.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that MSHA is immune from suit and the dismissal of the complaints against MSHA. We vacate the judge's dismissal of the complaints against McCormick, Meredith, Lawless, and Young and remand for further proceedings consistent with this decision.

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Verheggen concurring in part and dissenting in part:

We concur in the decision of our colleagues, with the exception of their disposition regarding the complaints against Lawless and Young. We would affirm the dismissal of the complaints against Lawless and Young in Docket No. SE 96-367-D on the basis that the original and amended complaints fail to set forth any allegations of conduct by Lawless and Young that would constitute violations of sections 103(g)(1) or 105(c)(1). The violative conduct complained of occurred during the accident investigation team meeting on May 29, 1996. Compl. I at 2-3 ¶¶ 4-7. While Commissioners Riley and Beatty have directed the judge to "examine whether the actions of those named respondents *who attended the May 29 meeting* exceeded the scope of their statutory authority and amounted to more than a mistake of law or fact." slip op. at 10 (emphasis added). there are no allegations that Lawless and Young were present at that meeting. In fact, the UMWA filed an amended complaint to specifically delete its reference to Lawless' presence at the meeting, which it included in its original complaint. Compl. I at 2 ¶ 4; Am. Compl. at 2 ¶ 4. Accordingly, we believe that the action should be dismissed against Lawless and Young based upon the UMWA's failure to state a claim against them upon which relief can be granted. *Cf. UMWA v. Williamson Shaft Contracting Co.*, 3 FMSHRC 32, 33 (Jan. 1981).

We would also affirm the dismissal of the complaint against Lawless and Young in Docket No. SE 97-18-D because here, too, the UMWA has failed to state a claim against them upon which relief can be granted. The UMWA does not make any specific allegations concerning the manner in which Lawless and Young violated section 105(c). The UMWA alleges only that Lawless and Young met with UMWA representatives, including Pate, regarding the UMWA's complaints about enforcement in District 11, and that the named officials violated section 105(c)(1). Compl. II at 3-4 ¶¶ 7-9. Even taken as true, such allegations do not state a claim of discrimination under section 105(c), nor could such conclusory allegations of violation withstand a motion to dismiss. 2 James Wm. Moore, *Moore's Federal Practice* § 12.34[1][b] (Donald R. Coquillette et al. eds., 3d ed. 1998).

Mary Lu Jordan, Chairman

Theodore F. Verheggen, Commissioner

Commissioner Marks concurring in part and dissenting in part:

I concur in my colleagues' opinion, which overrules the *Wagner* decision and permits suit against MSHA officials under appropriate circumstances. In addition, I join the majority in vacating the judge's dismissal of the complaints against the named individuals. However, I believe that, if the record reveals that MSHA, as an agency, ratified the despicable acts that are alleged to have occurred in the two complaints at issue, then MSHA should be subject to suit and held accountable under the Mine Act for discrimination. Accordingly, I dissent.

Section 105(c)(1) of the Mine Act provides:

> 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, [or] representative of miners . . . in any . . . mine subject to this [Act] because such miner, [or] representative of miners . . . 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 . . . of an alleged danger or safety or health violation . . . , or because of the exercise by such miner, [or] representative of miners . . . on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. § 815(c)(1) (emphasis added).

If the conduct that is alleged to have occurred in this case had been performed by a person other than an MSHA official, there would be no dispute that a cause of action would lie under section 105(c) of the Mine Act. The two complaints allege interference with the rights and abilities of miners' representatives to make safety complaints to MSHA without fear of retaliation. The question in this case turns on whether MSHA qualifies as a person under the Mine Act. The word person is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. § 802(f). The majority has concluded that MSHA does not fall into the category of "other organization." I disagree.

Instead, I am persuaded by the reasoning of then Chief Administrative Law Judge Broderick in *Local 9800, UMWA v. Secretary of Labor*, 2 FMSHRC 2680, 2682-84 (Sept. 1980) (ALJ), who when faced with this question determined that "MSHA is a person under section 105(c) prohibited from discriminating against any miner." *Id.* at 2684. Judge Broderick relied on the legislative history of the Mine Act, which emphasizes that "the prohibition against discrimination applies *not only to the operator but to any other person directly or indirectly involved*" and also made it clear that section 105(c) was "to be construed expansively." 2 FMSHRC at 2683 (citing S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcommittee on

Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (emphasis added)). The judge pointed to the exception carved by the Supreme Court to express waivers of sovereign immunity when a statute was "intended to prevent injury and wrong." 2 FMSHRC at 2683 (citing *Nardone v. United States,* 302 U.S. 379, 384 (1937)). In addition, the judge found instructive Congress' curtailment of the doctrine of sovereign immunity in 5 U.S.C.§ 702, which does not apply to proceedings under the Mine Act but applies to other agencies and which states that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed . . . on the ground that it is against the United States . . . .

Against this backdrop of the diminishing strength of sovereign immunity, Judge Broderick relied on the fact that the alleged acts of discrimination were uniquely within the domain of this Commission and that miners would have no alternative forum to litigate infringement of safety rights. 2 FMSHRC at 2683-84. He accordingly permitted the UMWA's complaints to go forward against MSHA. *Id.* at 2686.

The majority, by requiring a literal waiver of sovereign immunity in the Mine Act, has frustrated Congressional intent to prohibit discrimination by any person or organization. As has been often recognized, "[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed." *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974). Certainly, an agency that is responsible for protecting the safety of miners should be held to the same standard of accountability as mine operators or other miners. Indeed, if the allegations in this case prove to be true, they highlight the need to limit the sovereign immunity of MSHA and to hold MSHA liable for its violations of the Mine Act.[1]

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[1] My conclusion that MSHA is not immune from suit applies to both the section 105(c)(1) and section 103(g) allegations. Section 105(c)(1) expressly contains a prohibition against any person interfering with the statutory rights, such as those contained in section 103(g), of a miner or representative of miners. In addition, the portion of section 103(g)(1) at issue is directed specifically and exclusively at the Secretary and requires that the Secretary ensure that "[t]he name of the person giving such notice . . . shall not appear in such copy or notification." Because Congress expressly fashioned the requirement at issue to apply to the Secretary, I am led to one inescapable conclusion — that Congress intended the Secretary to be liable under the Mine Act and waived sovereign immunity for MSHA's violations of the Act.

Accordingly, I hold that a cause of action has been stated against MSHA by the UMWA and I would not dismiss MSHA from the suit.

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

Judith Rivlin, Esq.
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

Administrative Law Judge Jacqueline R. Bulluck
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 8, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RONALD MAXEY	: : : :	
v.	:	Docket No. KENT 97-257-D
LEECO, INC.	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

On March 31, 1998, the Commission, upon consideration of the Petition for Discretionary Review ("PDR") filed by Leeco, Inc. ("Leeco"), directed review in this matter. The following day, Leeco filed a Motion to Withdraw Petition, stating that it had agreed to pay to the Secretary of Labor the penalty assessed by the judge and had entered into a settlement agreement with complainant Ronald Maxey. In an April 23, 1998, unpublished order, the Commission directed the parties to submit their settlement agreement for review before the Commission would treat the motion to withdraw the PDR as one to vacate the direction for review and dismiss the appeal.

Pursuant to their Joint Motion to Approve Confidential Settlement, and to Seal Record ("Joint Motion"), Leeco and Maxey have submitted their settlement agreement and request that, upon in camera review, it be approved and sealed. It is well established that oversight of proposed settlements in discrimination cases is committed to the Commission's sound discretion. *Secretary of Labor on behalf of Hopkins v. ASARCO, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997); *Reid v. Kiah Creek Mining Co.*, 15 FMSHRC 390, 390 (Mar. 1993); *Secretary of Labor on behalf of Gabossi v. Western Fuels-Utah, Inc.*, 11 FMSHRC 134, 135 (Feb. 1989); *Secretary of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 197, 198 (Feb. 1987). We have reviewed the settlement and, upon full consideration, we grant the Joint Motion, approve the settlement, and seal it in accordance with the parties' request.

Despite the fact that the parties have not objected to Commission review of their agreement, Commissioner Beatty, writing in partial dissent, questions our authority in general to

review settlement agreements in discrimination cases. He apparently views the authority of the Commission to review settlements of civil penalties under section 110(k) of the Act as exclusive, barring review of any other type of settlement made in any Commission proceeding. Section 105(c), however, empowers the Commission to grant such relief as it deems appropriate in discrimination cases. This broad grant of authority must of necessity include the authority to review settlement agreements arising under section 105(c), for if no such authority existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be severely curtailed,[1] a result at odds with the intent of the Mine Act.[2] All the more compelling a reason for Commission review of settlements is the chance of an agreement being made that is "inconsistent with the enforcement scheme of the Act." *Amax Lead Co. of Missouri*, 4 FMSHRC 975, 978 (June 1982).

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[1] The settlement reviewed in *ASARCO*, for example, indicated that the parties had failed to consider whether a monetary award to the complainant represented damages or back pay, a distinction with significant taxation consequences that could have left the complainant with much less of an award than he had ever contemplated. 19 FMSHRC at 2.

[2] *See* S. Rep. No. 95-181, at 37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) ("It is the Committee's intention 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 . . . .").

Accordingly, the Commission's direction for review is vacated and this proceeding is dismissed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, concurring in part, dissenting in part:

While I concur in the result reached by the Commission majority in its order vacating the pending petition for discretionary review and dismissing this proceeding, I write separately to state my views on what I consider to be a significant issue raised by the pending case — the scope of the Commission's authority to review and approve settlement agreements. I have serious questions about the source of the Commission's authority to review and approve settlements that relate not to the assessment of a civil penalty, but rather to negotiated back pay awards designed to resolve allegations of unlawful discrimination in cases arising under section 105(c)(2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), (3) (the "Mine Act").[1]

Congress has granted the Commission authority to review and approve settlements involving civil penalties. This statutory mandate can be found in the express language of section 110(k) of the Mine Act, which states that "[n]o [contested] proposed *penalty* . . . shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k) (emphasis added). This authority is also referenced in Rule 30 of the Commission's Procedural Rules, which states: "*In determining the amount of penalty*, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary or by any offer of settlement made by a party." 29 C.F.R. § 2700.30(b) (emphasis added). The legislative history of section 110(k), however, speaks *only* of the Commission's authority to approve the settlement of civil penalties, and contains no discussion of the Commission's new-found right to pass judgment on the propriety of a back pay settlement. Nor does any other provision of the Mine Act authorize the Commission to approve back pay settlements in cases arising under section 105(c) of the Mine Act.

My colleagues contend (slip op. at 2) that the Commission's authority to review settlement agreements in cases arising under section 105(c) "must of necessity" be derived from section 105(c), which grants the Commission authority "to take such affirmative action to abate [a section 105(c)] violation as [it] 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). In my view, however, the broad grant of authority in section 105(c)(2) to order appropriate relief for unlawful discrimination found in cases litigated before Commission cannot be properly relied upon to expand the scope of the Commission's authority to approve settlements, which are typically entered into before any determination of discriminatory conduct has been made, particularly in the absence of any indication by Congress that it intended to grant the Commission that authority. To the contrary, as noted above, the Commission's authority to

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[1] While my colleagues in the majority correctly note that the parties herein have not objected to Commission review of their agreement, I believe this has no relevance to the question of whether the Commission has the authority to review and approve settlements in discrimination cases. Certainly, the parties' assent to review could not sanction action by the Commission that otherwise would be outside the scope of its statutory authority.

approve settlements is discussed expressly only in section 110(k) in the context of settlement of a proposed penalty.

My colleagues also assert that, if no authority to review and approve section 105(c) settlements existed, the ability of the Commission and its judges to ensure that discriminatees are made whole would be "severely curtailed," contrary to the "intent of the Mine Act." Slip op. at 2. I believe, however, that the Secretary of Labor, who generally represents complainants in discrimination cases, is in the best position to ensure that discriminatees are made whole in section 105(c) cases that settle prior to a final Commission decision. Significantly, in this case, the Secretary did not object to the terms of the settlement between Maxey and Leeco. In cases where the Secretary is not a party, the miner likely will be represented by private counsel, or, in rare cases, proceed in the litigation pro se. Even in the latter case, I have confidence that miners understand, better than anyone else, the value of their labor when it comes to negotiating a back pay award.

My colleagues in the majority state that oversight of proposed settlements in discrimination cases is committed to the Commission's sound discretion, citing *Secretary of Labor on behalf of Hopkins v. Asarco, Inc.*, 19 FMSHRC 1, 2 (Jan. 1997), and several other prior cases. In *Asarco*, as in several of the other decisions, the Commission cited *Pontiki Coal Corp.*, 8 FMSHRC 668, 674-75 (May 1986), for the proposition that "[o]versight of proposed settlements is committed to the Commission's sound discretion." 19 FMSHRC at 2. Significantly, however, *Pontiki* did not involve a settlement of a discrimination claim, but rather a judge's determination that the amount of a *penalty* agreed to by the Secretary and the operator was an inadequate assessment for the four violations involved in that case. 9 FMSHRC at 673, 678. After reviewing *Pontiki*, and the cases cited by my colleagues, however, I have serious reservations about the Commission's authority to review back pay settlements. In *Asarco* and the other cases cited, the Commission, relying on *Pontiki*, has taken an increasingly expansive role in reviewing settlement agreements, which has led it to evaluate the propriety of negotiated back pay awards and other related matters in cases arising under section 105(c) of the Act.[2] This expansion in the scope of the Commission's authority to review settlements has evolved without any analysis or discussion by the Commission of the source of its legal authority to take a more expansive role in this area. Likewise, my colleagues offer no explanation of the source of the Commission's authority to review settlement agreements in discrimination cases other than to opine that such authority "must of necessity" be derived from section 105(c). Slip op. at 2. In my view, this unexplained expansion of an otherwise narrowly-defined statutory authority to approve settlements of civil penalties has led the Commission into areas not envisioned by Congress, resulting in an unjustified delay in allowing parties to enjoy the benefits of the bargain that they negotiate, as has occurred in this case.

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[2] For instance, in *Asarco*, the Commission directed the settling parties to clarify the issue of whether the operator's agreed-upon payment to the complainant was a net amount to be paid to the miner directly, or whether deductions were first to be taken out of the payment. 19 FMSHRC at 2.

Because of my initial concerns about the Commission's authority to review and approve the type of settlement involved in this case, I declined to join in the unpublished order of the Commission majority dated April 23, 1998, directing the parties to submit their settlement agreement for review by the Commission. Rather, as I stated in my joint dissent (with Chairman Jordan) to that order, I then would have granted the unopposed motion of Leeco, Inc., to withdraw its petition for discretionary review, and dismissed the appeal, without requiring the parties to submit their settlement agreement to the Commission for its review and approval. In retrospect, I continue to believe that this was the appropriate course to have followed in this case, which would have avoided the continuation of what I consider to be an unjustified expansion in the scope of the Commission's authority to approve settlements, as well as a delay of over 2 months in the implementation of the settlement agreement negotiated by the parties.

Robert H. Beatty, Jr., Commissioner

Distribution

Marco M. Rajkovich, Jr., Esq.
Julie O. McClellan, Esq.
Wyatt, Tarrant & Combs
250 West Main Street, Suite 1700
Lexington, KY 40507

MaryBeth Bernui, Esq.
Office of the Solicitor
U.S. Department of Labor
2002 Richard Jones Rd., Suite B-201
Nashville, TN 37215

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 10, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. KENT 98-231
	:	A.C. No. 15-15845-03541
P&P INC. OF KENTUCKY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 12, 1998, the Commission received from P&P Inc. of Kentucky ("P&P") a request to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by P&P.

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

P&P asserts that its late filing of a hearing request to contest the proposed penalties for the violations alleged in Citations Nos. 4020604, 4007060, and 4490920 was due to miscommunication between the operator and its counsel. Mot. at 1. According to P&P, the Secretary of Labor's Mine Safety and Health Administration ("MSHA") issued 21 citations following a fatal accident at the Martiki Mine on September 19, 1997. *Id.* at 2. P&P contends that on October 30, 1997, it filed a notice to contest 19 of those citations, and that on

February 12, 1998, MSHA filed proposed assessments as to all but the three citations here at issue. *Id.* P&P asserts that it timely contested each of those proposed assessments. *Id.* P&P alleges that on March 27, it received MSHA's proposed assessments on the remaining three citations, and that on April 10, P&P forwarded a copy of this proposed assessment to its counsel. *Id.* P&P asserts that on June 3, MSHA issued it a notice indicating that the proposed assessments for those three citations had become final. *Id.* at 3. The operator submits that it and its counsel each believed the other would send the notice of contest, and, as a result, the notice of contest was not timely sent. *Id.* at 2. P&P explains that due to this misunderstanding, its hearing request was not received by MSHA until June 11 — 45 days after the 30-day deadline. *Id.* P&P asserts that it is entitled to relief under Fed. R. Civ. P. 60(b)(1) and 60(b)(6).

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

The record indicates that P&P intended to contest the three citations here at issue and that, but for an apparent lack of coordination with its counsel, it likely would have timely submitted the hearing request and contested the proposed penalty assessments for these citations. In the circumstances presented here, P&P's late filing of a hearing request qualifies as inadvertence or mistake within the meaning of Rule 60(b)(1). *See Peabody*, 19 FMSHRC at 1614-15 (granting operator's motion to reopen when failure to timely submit notice of contest resulted from lack of coordination between mine and operator's counsel); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation).

Accordingly, in the interest of justice, we grant P&P's unopposed request for relief and reopen these penalty assessments that became final orders with respect to Citation Nos. 4020604, 4007060, and 4490920. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Mark N. Savit, Esq.
Ruth L. Ramsey, Esq.
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Donna E. Sonner, Esq.
Office of the Solicitor
U.S. Department of Labor
2002 Richard Jones Road, Suite B-20
Nashville, TN 37215

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 14, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 97-113-R
CANTERBURY COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") charging Canterbury Coal Company ("Canterbury") with violating 30 C.F.R. § 90.102(a)[1] when it transferred a Part 90 miner,[2] without his written consent, to a position on a different shift rotation in a low dust area of

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[1] Section 90.102(a) reads as follows:

> Whenever a Part 90 miner is transferred in order to meet the respirable dust standard in § 90.100 . . . , the operator shall transfer the miner to an existing position at the same coal mine on the same shift or shift rotation on which the miner was employed immediately before the transfer. The operator may transfer a Part 90 miner to a different coal mine, a newly-created position or a position on a different shift or shift rotation if the miner agrees in writing to the transfer.

[2] A Part 90 miner is a miner who has been classified under section 90.3 as showing evidence of the development of pneumoconiosis and "who has exercised the option . . . under

the mine. Administrative Law Judge Gary Melick concluded that Canterbury violated section 90.102(a) and affirmed the citation. 19 FMSHRC 957 (May 1997) (ALJ). The Commission granted Canterbury's petition for discretionary review challenging the judge's decision. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Russell Bollinger was a 46 year-old miner who had worked underground for approximately 21 years. Tr. 22-23. In May 1991, he started working at Canterbury's DiAnne Mine, an underground coal mine in Pennsylvania. Jt. Stip. 6; S. Br. at 2. In October 1994, he became an underground construction foreman at the mine. Jt. Stip. 8. As underground construction foreman, Bollinger worked a three-shift rotation, working on a different shift each week. Jt. Stip. 9. The times and rotation order of his shifts were 11:00 p.m. to 8:00 a.m., 3:00 p.m. to 12:00 midnight, and 7:00 a.m. to 4:00 p.m. Jt. Stip. 10. In May 1995, his chest was x-rayed and his personal physician informed him that he tested positive for pneumoconiosis. Tr. 24, 26; Gov't Ex. 1. He showed his doctor's report to the safety director at Canterbury; however, the company made no changes in his job duties and did not sample his job for dust exposure. Tr. 25. In two subsequent conversations, Bollinger told Canterbury management that he was concerned about dust exposure from his job and asked to be transferred to a position where he would be exposed to less coal dust. Tr. 28. However, Canterbury did not transfer him and no dust samples were taken at his position. *Id.*

Approximately 5 or 6 months after his first positive x ray, Bollinger had a second x ray and the results were forwarded to MSHA. Tr. 26; Jt. Ex. 2. By letter dated August 5, 1996, MSHA informed Bollinger that he was eligible to exercise his right under 30 C.F.R. Part 90 to work in a low dust area with concentrations not exceeding 1.0 mg/m^3 of air (the "dust standard"), as required by 30 C.F.R. § 90.100.[3] 19 FMSHRC at 958; Gov't Ex. 1. MSHA informed Canterbury by letter dated August 28, 1996, that Bollinger was exercising his Part 90 right to work in an area which complied with the dust standard. Jt. Stip. 5.

Bollinger requested that he remain at the position of underground construction foreman and be sampled for dust exposure. Jt. Stip. 14. Canterbury informed MSHA of Bollinger's

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§ 90.3 . . . to work in an area of a mine where the average concentration of respirable dust . . . is continuously maintained at or below 1.0 milligrams per cubic meter of air, and who has not waived these rights." 30 C.F.R. § 90.2.

[3] Section 90.100 states in pertinent part:

> [T]he operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which the Part 90 miner is exposed at or below 1.0 milligrams per cubic meter of air.

request and took five dust samples of his position as required by 30 C.F.R. § 90.207(a). Jt. Stip. 15. The sampling showed an average dust concentration of 1.5 mg/m^3, which exceeded the dust standard. Jt. Stip. 16. Based on these results, MSHA cited Canterbury for a violation of the dust standard. *Id.*

Bollinger was not qualified for the only other position, general assistant, which existed at the mine on his three-shift rotation. Jt. Stips. 17, 20-22. Canterbury did not attempt to reduce the dust exposure at Bollinger's position. Jt. Stip. 19. Instead, it decided to transfer him to the position of mine examiner, which entailed examining and maintaining air courses in the mine. Jt. Stips. 24-25. Three dust samples were taken of mine examiner positions at the mine prior to Bollinger's transfer. Jt. Stip. 24-26. The sampling showed an average dust concentration of 0.9 mg/m^3, which complied with the dust standard. Jt. Stip. 26. Canterbury altered the work schedule of the mine examiner position so it would be on the same shift rotation that Bollinger worked as an underground construction foreman. Jt. Stip. 24. On November 5, 1996, it transferred Bollinger to his new position as mine examiner and on November 6, it notified MSHA of the transfer. Jt. Stips. 27-28. Five dust samples were taken of Bollinger's new position and the average dust concentration was 4.0 mg/m^3, well above the dust standard. Jt. Stips. 29-30.

At a meeting held between Canterbury management and MSHA officials, it was decided to eliminate the air course maintenance duties of Bollinger's job as mine examiner in an attempt to reduce his dust exposure. Tr. 50-53. After this modification, Bollinger's position was again sampled and the average dust concentration was 1.28 mg/m^3, which exceeded the dust standard. Jt. Stips. 32-33.

On February 3, 1997, without obtaining Bollinger's written consent, Canterbury transferred him to the position of shuttle car operator on a different shift rotation. Jt. Stips. 34, 37-38. Canterbury had notified MSHA by letter dated January 31, 1997, of the planned transfer. Jt. Stip. 35. Dust samples of his new position indicated an average concentration of 1.0 mg/m^3, which complied with the dust standard. Jt. Stips. 39-40. Canterbury advised MSHA of the sample results by letter dated February 11. Jt. Stip. 41. On March 20, MSHA issued a citation to Canterbury charging that it violated section 90.102(a) when it changed Bollinger's shift rotation without his written consent. Jt. Stips. 42-43. On April 1, Canterbury changed the shift of the general (non-face) mechanic position at the mine to match Bollinger's original three-shift rotation and then transferred him to that position. Tr. 19-20; Jt. Stip. 59; Jt. Ex. 14. Subsequently, MSHA terminated the citation against Canterbury. Tr. 19; Jt. Stip. 58; Jt. Ex. 13.

Canterbury challenged the citation and the case went to hearing. In his decision, the judge concluded that section 90.102(a) clearly does not allow an operator, in order to comply with the dust standard, to transfer a Part 90 miner, without his written consent, to a position on a different shift rotation. 19 FMSHRC at 959. Accordingly, he affirmed the citation. *Id.*

II.

Disposition

Canterbury argues that the judge erred in affirming the citation. C. Br. at 20. It contends that section 90.102(a) does not address the issue presented by this case — whether a mine operator can transfer a miner to a position on a different shift rotation in order to comply with the dust standard when there is no existing position on the same shift rotation. *Id.* at 5, 17-19. It further argues that the Secretary's interpretation of the standard is not entitled to deference because it is unreasonable and contrary to the intent of Congress as expressed in the underlying provisions of the Mine Act. *Id.* at 7-9. Canterbury asserts that it could not transfer Bollinger as required by section 90.102(a) because a position on his shift rotation was not available at the mine. *Id.* at 5, 10. It argues that, in order to comply with the dust standard, it had to transfer him to a different shift rotation, and, as a consequence, his transfer did not violate section 90.102(a). *Id.* at 5-6, 9-10, 19. Canterbury also asserts that Bollinger's transfer falls within an exception in MSHA's Program Policy Manual, Vol. V, Part 90, section 90.102(a), at 210 (July 1, 1988) (the "PPM"), to the shift transfer restrictions in section 90.102(a). *Id.* at 6-7.

The Secretary argues that the judge correctly held that Canterbury violated section 90.102(a). S. Br. at 11. She contends that the standard clearly and unambiguously prohibits the transfer of a Part 90 miner, in order to comply with the dust standard, to a different shift rotation without the miner's written agreement. *Id.* at 7-8. The Secretary also argues that section 90.102(a) provided Canterbury with alternative ways to comply with the dust standard but that Canterbury failed to use these alternatives. *Id.* at 17-19. She further asserts that the exception in the PPM to the shift transfer restrictions of section 90.102(a) does not apply to Bollinger. *Id.* at 11-13.

The principle question on review is whether Canterbury violated section 90.102(a) when it transferred Bollinger, without his written consent, to a position on a different shift rotation to comply with the dust standard. The Commission has determined that, where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). "In determining the meaning of regulations, the Commission thus utilizes 'traditional tools of . . . construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44-45 (D.C. Cir. 1990)).

Section 90.102(a) states that an "operator may transfer a Part 90 miner to . . . a position on a different shift or shift rotation if the miner agrees in writing to the transfer." It is undisputed that, in order to meet the dust standard, Canterbury transferred Bollinger to a position on a different shift rotation without his written consent. Jt. Stips. 34, 38. Based on the plain meaning of the regulation, we conclude that Canterbury violated section 90.102(a) when it transferred Bollinger to a different shift rotation without his written agreement.

The language of the Mine Act and the regulatory history of the standard support this plain meaning approach. The main purpose of Title II of the Mine Act is to protect miners from pneumoconiosis by reducing "to the greatest extent possible" their exposure to respirable dust. 30 U.S.C. § 841(b). To this end, section 203(b) of the Mine Act, 30 U.S.C. § 843(b), established interim mandatory standards, which gave miners with pneumoconiosis the option of reducing their exposure to respirable dust by allowing them to transfer to positions with lower dust concentrations. However, those standards did not require operators to obtain a miner's written consent, before transferring him to a different shift rotation, in order to comply with the maximum allowable dust concentrations.

In 1980, MSHA noted that few Part 90 qualified miners were exercising their rights to transfer because many of them were concerned about possible repercussions to their work duties, wages, and shift reassignments. 45 Fed. Reg. 80,760, 80,763 (1980). Responding to concerns about the effectiveness of the Part 90 program, MSHA issued final mandatory standards for section 203(b) by amending Part 90. *Id.* at 80,760. The new mandatory standards provide that Part 90 miners should not be exposed to average dust concentrations greater than 1.0 mg/m^3. 30 C.F.R. § 90.100. They also require that operators obtain Part 90 miners' written consent when transferring them to different shift rotations to comply with the dust standard. 30 C.F.R. § 90.102(a). *See Mullins v. Beth-Elkhorn Coal Co.*, 9 FMSHRC 891, 897 (May 1987) (an operator can transfer a Part 90 miner to a position on a different shift rotation, which complies with the dust standard, provided "the miner agrees in writing.").

Notwithstanding the foregoing, Canterbury contends that section 90.102(a) does not address the situation where a Part 90 miner must be transferred to comply with the dust standard but there is no existing position on the same shift rotation at the mine. C. Br. at 5. It argues that, in order to comply with the dust standard, it had to transfer Bollinger to a different shift rotation. *Id.* at 5, 10. However, as the judge correctly pointed out, Canterbury did not have to violate the regulation in order to comply with the dust standard. 19 FMSHRC at 959. For example, it could have complied with the dust standard by improving the dust concentration at Bollinger's original position[4] or it could have attempted to obtain Bollinger's written consent before transferring him to a different shift rotation.[5] Regardless of the alternatives open to Canterbury, however, it is clear from section 90.102(a) that it was prohibited from transferring Bollinger to a different shift rotation without his written consent. *Id.*

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[4] In the Federal Register preamble, the Secretary stated that, to comply with the dust standard, an operator could transfer a Part 90 miner according to section 90.102(a) or it could "implement control measures to lower the concentration of respirable dust in the position currently held by the affected miner . . . ." 45 Fed. Reg. at 80,761.

[5] There is no explicit record evidence indicating that the operator asked for Bollinger's written consent.

Canterbury also argues that Bollinger's transfer to a different shift rotation is covered by an exception in the PPM to the shift transfer restrictions of section 90.102(a). C. Br. at 5-7. The PPM states in pertinent part:

> The operator may transfer a Part 90 miner without regard to . . . [the] shift limitations [of section 90.102(a)] *if the respirable dust concentration in the position of the Part 90 miner complies with the dust standard, but circumstances require changes in job assignments at the mine*. Reductions in workforce or changes in operational methods at the mine may be the most likely situations which would affect job assignments.

PPM at 210 (emphasis in original). Canterbury contends that Bollinger's transfer falls within this exception. C. Br. at 6-7. It insists that the lack of an appropriate existing position on Bollinger's original shift rotation is a situation similar to a workforce reduction or change in operational methods. *Id.* However, it is plain from the language of the exception that it only applies when the Part 90 miner's position complies with the dust standard but the operator needs to transfer the miner for reasons unrelated to compliance with the dust standard. PPM at 210; *see also* 45 Fed. Reg. at 80,761, 80,766. Because Bollinger's original position as underground construction foreman and his subsequent position as mine examiner were in violation of the dust standard, the exception clearly does not cover his transfer to the position of shuttle car operator on a different shift rotation.

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Canterbury violated section 90.102(a).[6]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[6] In light of our disposition, we do not need to address Canterbury's concerns that some bumping may occur under Part 90, which may cause animosity between miners (C. Br. at 13), or the Secretary's interpretation that "existing position" means any position normally found in the coal mining industry (S. Br. at 9-13).

Distribution

Joseph A. Yuhas, Esq.
1809 Chestnut Avenue
P.O. Box 25
Barnesboro, PA 15714

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

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 27, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 94-381
	:	WEVA 95-100
CANNELTON INDUSTRIES, INC.,	:	WEVA 95-101
CHARLES PATTERSON, and GEORGE RICHARDSON	:	

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

These consolidated civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involve a citation issued to Cannelton Industries, Inc. ("Cannelton") alleging an unwarrantable and significant and substantial ("S&S") violation of 30 C.F.R. § 75.400[1] for failure to clean up an accumulation of coal under a conveyor belt, and related allegations that Charles Patterson and George Richardson, shift foremen for Cannelton, were personally liable under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), for knowingly authorizing the violation. Administrative Law Judge T. Todd Hodgdon concluded that Cannelton violated section 75.400 and that the violation was S&S and the result of unwarrantable failure. 18 FMSHRC 651, 654-59 (Apr. 1996) (ALJ). He also concluded that Patterson and Richardson knowingly authorized the violation by not taking steps to have the accumulation cleaned up. *Id.* at 659-61. For the reasons that follow, we affirm the judge's finding of violation, vacate his unwarrantable failure and section 110(c) findings, and remand for further proceedings.

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[1] Section 75.400 states:

> 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.

I.

Factual and Procedural Background

On March 1, 1994, Michael Hess, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a quarterly inspection of Cannelton's Stockton Mine (Portal Nos. 1 and 130), an underground coal mine in Kanawha County, West Virginia. 18 FMSHRC at 652; Gov't Ex. 1. At that time, Cannelton was constructing a new section to reroute its No. 3 conveyor belt, and coal was being mined at the face, loaded into shuttle cars, and dumped into a temporary feeder on the conveyor belt. 18 FMSHRC at 652; Tr. 250-52, 259, 325-27. While inspecting the conveyor belt, Hess found an accumulation of dry, loose coal and coal dust that measured approximately 10 feet square and 4 feet deep, which was in contact with the belt and roller. 18 FMSHRC at 652-53; Tr. 41-44, 49-50; Gov't Exs. 1 & 5 at 3. The accumulation was located under the V-scraper, a device that removes coal from the bottom, or return, belt. 18 FMSHRC at 652-53 & n.1; Tr. 60, 181-82, 256-57, 325, 384. Upon reviewing the preshift-onshift mine examination reports, Inspector Hess found that, under the section entitled "Violations and other Hazardous Conditions Observed and Reported," the No. 3 belt V-scraper had been reported as "dirty" or "needs clean[ing]" on every shift during the previous 2 weeks with no indication that any corrective action had been taken. 18 FMSHRC at 653; Tr. 45-46, 50, 53, 66; Gov't Exs. 1, 9 & 15. As shift foremen, both Patterson and Richardson had reviewed and countersigned the preshift-onshift reports. 18 FMSHRC at 658, 660; Gov't Exs. 9 & 15.

Based on the foregoing, Inspector Hess issued Cannelton Citation No. 4195028,[2] pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging an unwarrantable and S&S violation of section 75.400 for failure to clean up the accumulation. 18 FMSHRC at 653. Subsequently, the Secretary of Labor proposed a civil penalty assessment of $3,600 against Cannelton. *Id.* at 661; Gov't Ex. 6. In addition, following a special investigation, the Secretary proposed civil penalty assessments of $2,000 each against Patterson and Richardson, pursuant to section 110(c) of the Mine Act, alleging that, by countersigning the preshift-onshift reports and

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[2] Citation No. 4195028 states:

> Management showed a high degree of negligence by allowing loose dry coal to accumulate under the No. 3 belt conveyor to a point where the loose coal was in contact with the belt. The coal accumulation measured approximately 10 feet in width, 10 feet in length and 4 feet in height. This condition was reported in the pre-shift mine examination report since 2/15/94 on each shift with no corrective actions taken. A fire hazard is present with a moving conveyor belt running in loose dry coal.

Gov't Ex. 1.

failing to take corrective action, they knowingly authorized the violation. 18 FMSHRC at 653, 659-61; Gov't Exs. 11 & 12. Cannelton, Patterson, and Richardson challenged the proposed assessments.

Following an evidentiary hearing, the judge concluded that Cannelton violated section 75.400, that the violation was S&S, and that it resulted from Cannelton's unwarrantable failure to comply with the standard. 18 FMSHRC at 654-59. He also concluded that Patterson and Richardson knowingly authorized the violation by not taking steps to have the accumulation cleaned up. *Id.* at 659-61. In analyzing the issue of violation, the judge found that "there is no dispute that an accumulation of coal, as described by Inspector Hess, existed in the area of the V-scrapper [sic] on the No. 3 belt." *Id.* at 654. The judge further found that the accumulation had grown over a 2-week period of time. *Id.* at 654-55. He based this finding on the testimony of Dwight Siemiaczko, Lee Tucker, and Sheldon Craft, the belt examiners who had noted that the No. 3 belt V-scraper was dirty in the preshift-onshift reports throughout the 2-week period. *Id.* The judge discredited the testimony of Patterson, Richardson, and Mickey Elkins, the shift foremen, that the accumulation had happened a short time before the inspector arrived. *Id.* at 655-56. In crediting the testimony of the belt examiners over that of the shift foremen, the judge stated:

> The three foremen theorized that the accumulation discovered by Hess was the result of a shuttle car hitting the spill board at the belt feeder which in turn knocked the belt out of alignment and caused most of the coal to fall directly onto the bottom belt where it remained until it was removed by the V-scrapper [sic]. They believed that this must have happened a short time before the inspector arrived.
>
> I find that the accumulation developed over a two week period as described by Siemiaczko, Tucker and Craft. There is no evidence that any of them had any reason not to tell the truth. Nor was there any indication at the hearing that they were not credible.
>
> On the other hand, Richardson and Patterson not only have the responsibility for defending the company, but face personal liability as well. Their self-serving statements are not persuasive when compared with the other evidence in the case. Furthermore, there is no evidence to corroborate their speculation.

Id. at 655. With regard to the issues of unwarrantable failure and section 110(c) liability, the judge found that, because Patterson and Richardson had countersigned the preshift-onshift reports, Cannelton had been placed on notice that greater efforts were necessary for compliance and Patterson and Richardson had known about the accumulation. *Id.* at 658-61. He also found that Cannelton, Patterson, and Richardson did not make any effort to clean up the accumulation.

Id. at 658-61. The judge assessed civil penalties of $3,600 for Cannelton and $500 each for Patterson and Richardson. *Id.* at 661-62. The Commission granted the petition for discretionary review ("PDR") subsequently filed by Cannelton, Patterson, and Richardson challenging the judge's decision.

II.

Disposition

Cannelton, Patterson, and Richardson argue that the judge's determinations are contrary to law and not supported by substantial evidence. PDR at 1; CP&R Br. at 1. The contestants assert that the judge erred in crediting the belt examiners based solely on their "employment status." PDR at 5-7; CP&R Br. at 5-9; CP&R Reply Br. at 1-6. They also assert that the judge failed to address the testimony of Elkins, a former foreman who testified that, 3½ hours prior to the inspection, the accumulation was smaller than when the inspector cited it. PDR at 6, 8; CP&R Br. at 7, 10-11 (citing Tr. 321-24). In addition, the contestants assert that the judge erred in finding that no evidence supports the foremen's "speculation" as to the cause of the accumulation. PDR at 6-7; CP&R Br. at 7-8; CP&R Reply Br. at 5-6 n.3. They further contend that the judge erred in finding that the notations in the preshift-onshift reports were sufficient to provide notice of the accumulation and that the judge confused the testimony of Elkins and Patterson regarding cleanup efforts. PDR at 8-9; CP&R Br. at 8-9; CP&R Reply Br. at 6-15.[3]

The Secretary responds that substantial evidence supports the judge's determinations. S. Br. at 5-19. She asserts that the judge did not credit the testimony of the belt examiners based only on their "employment status," but that his determination is buttressed by the foremen's personal interests in the outcome of the case. *Id.* at 5-12. The Secretary also maintains that the judge considered Elkins' testimony but gave greater credence to the testimony of the belt examiners that the accumulation had developed during the 2 weeks prior to the inspection. *Id.* at 11-12 n.4. Similarly, she asserts that the judge considered evidence supporting the foremen's "speculation" as to the cause of the accumulation but gave it little credence because it was

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[3] Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(f), 29 C.F.R. § 2700.70(f), provide that Commission review is limited to the questions raised in a granted petition for discretionary review. In their petition for discretionary review, Cannelton, Patterson, and Richardson focus on the judge's factual findings on which he based his ultimate conclusions regarding the issues of violation, unwarrantable failure, and section 110(c) liability, without expressly challenging those conclusions. *See* PDR at 4-9. The contestants merely request that the Commission reverse the judge's "decision." *Id.* at 6, 9. We construe the contestants' petition to request reversal of the judge's conclusions regarding the issues of violation, unwarrantable failure, and section 110(c) liability. However, we admonish petitioners and counsel to adhere to the requirements of the Mine Act and the Commission's procedural rules. Because the contestants do not challenge the judge's findings related to his S&S conclusion, that issue is not before the Commission. *See id.* at 4-9.

uncorroborated. *Id.* The Secretary further contends that the notations in the preshift-onshift reports, along with the foremen's observance of some amount of accumulation prior to the inspection, provided the contestants sufficient notice of the violative condition and that their failure to ensure that it was cleaned up amounted to aggravated conduct. *Id.* at 14-18.

A. Violation

The Commission has held that section 75.400 "is violated when an accumulation of combustible materials exists." *Old Ben Coal Co.*, 1 FMSHRC 1954, 1956 (Dec. 1979). Although the Commission has recognized that "some spillage of combustible materials may be inevitable in mining operations" (*id.* at 1958), we have held that a violative accumulation exists "where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (Oct. 1980) (footnotes omitted).

Here, the contestants do not dispute that a sizable accumulation was present when the citation was issued. The accumulation measured approximately 10 feet in length, 10 feet in width, and 4 feet in depth. Tr. 41. Moreover, Inspector Hess testified that this amount of loose coal and coal dust would likely cause a fire because the belt and roller running in contact with the coal was a potential source of ignition. Tr. 43, 49-52. The fact that the coal was damp beneath the surface did not render it incombustible because, as the judge noted, it could dry out and ignite. 18 FMSHRC at 657 (citing *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 969 (May 1990); *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985)). In light of the quantity of the accumulation at the time the citation was issued, we conclude that substantial evidence[4] supports the judge's finding that Cannelton violated section 75.400. Accordingly, we affirm the judge's conclusion.

B. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04;

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

Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission "has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the 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 & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994) (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)).

Substantial evidence supports the judge's finding that the accumulation was extensive. *See* 18 FMSHRC at 653-54. Inspector Hess testified the accumulation measured approximately 10 feet square and 4 feet deep. Tr. 41. Substantial evidence also supports the judge's finding that Cannelton, through its foremen, had been placed on notice by the preshift-onshift reports that greater efforts were necessary for compliance with the regulation. *See* 18 FMSHRC at 658-59. Such reports are relevant in demonstrating that an operator had notice that greater efforts were necessary to assure compliance with section 75.400. *See Peabody*, 14 FMSHRC at 1262. On virtually every shift during the 2 weeks prior to the inspection, the No. 3 belt V-scraper had been reported in the preshift-onshift reports as "dirty" or "needs clean[ing]" under the section entitled "Violations and other Hazardous Conditions Observed and Reported." Gov't Exs. 9 & 15. Patterson, Richardson, and Elkins reviewed and countersigned the preshift-onshift reports during this period and they acknowledged that the notations indicated that an accumulation existed. *Id.*; Tr. 315-16, 333, 335-36, 366, 379, 395, 402, 425-26. Thus, although the belt examiners did not notify the foremen orally of the accumulation, we conclude that Cannelton received notice that greater efforts were necessary to keep the No. 3 belt V-scraper clean.

With regard to the length of time the violative condition existed, however, we believe that the judge failed to address relevant testimony in finding, based on his credibility determination, that the accumulation had grown for 2 weeks prior to the inspection. *See* 18 FMSHRC at 653-56, 658. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) ("*Dust Cases*") (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Initially, we find unavailing the contestants' argument that the judge's consideration of the foremen's personal interests was inappropriate in making his credibility determination. A judge may evaluate numerous factors in determining witness credibility, including the motivation of and relationship between witnesses. *Huston v. Secretary of Health and Human Servs.*, 838

F.2d 1125, 1132 (10th Cir. 1988); *NLRB v. Pyne Molding Corp.*, 226 F.2d 818, 819 (2d Cir. 1955); *Defosse v. Secretary of Health and Human Servs.*, 670 F. Supp. 1078, 1080-81 (D. Mass. 1987). However, the judge may not reject testimony strictly on the basis of a relationship between a witness and a party to the proceeding. *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4th Cir. 1974). In this case, we conclude that the judge did not reject the foremen's testimony solely on the basis of their employment relationship with Cannelton. Although the judge recognized that "Richardson and Patterson not only have the responsibility for defending the company, but face personal liability as well," he found their testimony "not persuasive when compared with the other evidence in the case." 18 FMSHRC at 655. Therefore, we conclude that the judge's consideration of the foremen's personal interests is not a basis on which to overturn his credibility determination.

Nevertheless, we agree with the contestants that the judge failed to address Elkins' testimony that, 3½ hours prior to the inspection, the accumulation was smaller than when the inspector cited it. *See id.* In considering the foremen's theory that the accumulation had developed a short time before the inspector arrived, the judge recognized that Elkins "had walked the belt about [3½] hours before the citation was issued and although he observed a fairly large accumulation, it was not the size of the one found by Hess and it was not touching the belt or rollers." *Id.* However, the judge rejected the foremen's theory, in part, due to their self-interest, a basis not applicable to Elkins, who had since left the company and, therefore, was not responsible for defending it, and who was not facing personal liability. *See id.*; Tr. 317-18. The judge specifically discredited the testimony of Patterson and Richardson without supplying any reasons for discounting Elkins' testimony.

The substantial evidence standard of review requires that a fact finder weigh all probative record evidence and that a reviewing body examine the fact finder's rationale in arriving at his decision. *Amax Coal Co.*, 18 FMSHRC 1355, 1358 n.7 (Aug. 1996). In order for the Commission to effectively perform its review responsibility, a judge must analyze and weigh the relevant testimony, make appropriate findings, and explain the reasons for his decision. *Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 18 FMSHRC 2096, 2101 (Dec. 1996). Commission Procedural Rule 69(a) also requires that a judge's decision "include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). In light of the judge's failure to address Elkins' testimony, we cannot effectively review his finding, based on his credibility determination, that the accumulation had grown for 2 weeks prior to the inspection. Thus, we vacate the judge's finding and remand the matter for further consideration. We direct the judge to consider Elkins' testimony and make a credibility determination with respect to Elkins.

We also agree with the contestants that the judge erred in finding that there is no evidence to corroborate the foremen's "speculation" as to the cause of the accumulation. In discrediting the foremen's testimony, the judge stated "[n]o one testified . . . that the belt was out of alignment, that coal was observed traveling from the feeder to the V-[scraper] on the bottom belt or that the belt was re-aligned after the accumulation was discovered." *See* 18 FMSHRC at 655-

56. However, the record indicates that both Richardson and Inspector Hess observed coal coming off the belt at the time they discovered the accumulation. Tr. 46-47, 62, 273-74. Hess acknowledged that "the only way that [he] could conceive of the coal getting on the bottom belt" was from the No. 3 belt feeder. Tr. 63-64. The belt examiners also corroborated this view. Siemiaczko testified that he assumed that the accumulation was caused by either a "feeder misaligned on the belt" or a splice in the belt. Tr. 136, 149. Tucker stated that he thought that the accumulation was caused by "spillage from the feeders . . . onto the bottom belt." Tr. 194. Craft also stated that he thought that the accumulation was caused by "the feeder dump[ing] on the belt. Tr. 226. Moreover, Richardson testified that, after discovering the accumulation, he telephoned the section boss, Steve Dean, and told him to shut down and reset the feeder. Tr. 274-75, 312. For the purpose of our unwarrantable failure analysis, a key question is the duration of the violative condition, not its specific cause. However, evidence of the cause of the accumulation may corroborate Elkins' testimony that the accumulation was larger 3½ hours after he had observed it. We thus vacate the judge's finding that no evidence supports the foremen's "speculation" as to the cause of the accumulation, and remand the matter for further consideration insofar as the cause of the accumulation may be relevant to the length of time that it had existed.

Finally, with regard to Cannelton's cleanup efforts, the judge failed to mention relevant testimony in finding that Cannelton did not make efforts to eliminate the violative condition. *See* 18 FMSHRC at 658-59. Richardson testified that, on every shift, there were two men working on the belts who would shovel, rock dust, and clean up around the drives and V-scraper. Tr. 264-65, 270. He explained that, because the V-scraper was a problem area and it was reported as dirty in the preshift-onshift reports, his men automatically knew to clean it. Tr. 266, 270, 314. Richardson also stated that, upon learning that the V-scraper was dirty, he directed his men to stop there and, if excessive coal was present, to clean it up. Tr. 282, 298-99. Richardson remembered having to realign the feeder two or three times during the 2 weeks prior to the inspection in order to correct spillage problems, and he testified that the coal was cleaned up each time. Tr. 289-90. Elkins also testified that Cannelton employed men whose job was to keep the belt clean. Tr. 352. He testified that, when an accumulation at the V-scraper reached the height of the belt, he would send men with shovels to remove some of it and that, during the 2 weeks prior to the inspection, he directed his men to do so. Tr. 338-39, 344-45, 363. Patterson also testified that he had two men assigned to cleaning belts on every shift. Tr. 376-77, 387, 396. Patterson testified that, during the 2 weeks prior to the inspection, he observed three accumulations at the V-scraper, one of which he specifically assigned his belt cleaners to clean up and the others which he shoveled himself. Tr. 386-92, 396, 407-08. Patterson explained that his men attempted to get a scoop to the area to clean up the accumulation but that the area was extremely wet and muddy so they were unable to do so. Tr. 408-10. Then, he directed the men to shovel the accumulation and he saw them shoveling before he left. Tr. 410, 412. Patterson testified that the two men shoveled the area for approximately 2½ hours and then men working on the next shift, for whom Elkins was the foreman, finished cleaning and rock dusted the area. Tr. 412, 420-21, 423.

We conclude that the judge failed to consider the testimony of Patterson, Richardson, and Elkins regarding their efforts to clean up the accumulation.[5] Such remedial efforts are relevant to the unwarrantable failure evaluation and should have been considered by the judge. *See, e.g., Peabody*, 14 FMSHRC at 1263-64; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1933-34 (Oct. 1989). We therefore vacate the judge's finding that Cannelton did not make efforts to eliminate the violative condition, and remand the matter for further consideration of the evidence adduced during the hearing on this issue. If, on remand, the judge determines that Cannelton made efforts to clean up the accumulation, he shall also evaluate such efforts insofar as they may be relevant to the length of time that the accumulation had existed.

Our decision to vacate the judge's unwarrantable failure finding should not be construed as advocating or encouraging operators to allow accumulations of coal to exist on a belt line. We fully recognize the seriousness of this particular violation and do not wish to downplay its significance. At issue here, however, is not whether a violation of section 75.400 occurred, or if the violation was S&S. Instead, the issue on review is a more narrow one that requires us to focus on whether the operator's conduct rises to the level of unwarrantable failure. On this point, we are guided by established precedent that, to properly make this determination, a judge must fully evaluate the operator's conduct in accordance with certain factors identified by the Commission to determine whether a violation is unwarrantable. The factor that is particularly germane on this appeal is the operator's efforts to eliminate the violative condition.

As discussed previously, the judge found that Richardson and Patterson did not make any specific attempts to have the accumulation cleaned up. 18 FMSHRC at 658. Based on our review of the record, this finding is contradicted by certain evidence adduced during the hearing. The judge appears to have failed to consider relevant testimony of Cannelton's witnesses concerning their efforts to clean up the accumulation. Accordingly, we believe our responsibility is to vacate the judge's decision, and remand the case with an instruction that the judge consider and evaluate this testimony and determine whether it influences his prior finding that this violation was unwarrantable.

Unlike our dissenting colleagues, we will not ourselves attempt to determine here whether the evidence of cleanup efforts by Cannelton was sufficient to warrant elimination of the unwarrantable failure designation, or whether aggravated or intentional misconduct occurred. In our view, the determination is more appropriately made by the judge, who, as the trier of fact, had a previous opportunity to observe the witnesses directly, and is therefore in the best position to evaluate this testimony and determine whether, if credited, it requires a reversal of his previous finding that this violation was unwarrantable. We believe this approach is preferable to that taken by the dissenters, who elect to invade the province of the judge and evaluate the record testimony on their own and conclude that the judge's failure to consider it was mere "harmless

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[5] We note that, as the contestants point out (CP&R Reply Br. at 6-9), the judge appears to have confused the testimony of Elkins and Patterson regarding the unsuccessful attempt to clean up the accumulation. 18 FMSHRC at 658-59.

error," based on their opinion that, even if credited, the evidence did not reflect a cleanup effort "reasonably designed to eliminate the accumulation." Slip op. at 15 n.4.[6] We believe that our approach ensures that due process of the law is afforded to all parties in making this crucial determination.

In sum, we vacate the judge's determination that the violation was the result of Cannelton's unwarrantable failure, and remand for findings of fact related to the length of time that the accumulation had existed and Cannelton's cleanup efforts.[7] The judge shall also make new findings for any of the six penalty criteria set forth in section 110(i) of the Mine Act,

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[6] In concluding that any efforts taken by Cannelton to clean up the accumulation were unreasonable and ineffectual, and therefore cannot provide a basis for a finding that the violation was not unwarrantable, our colleagues cite to their separate opinion in *Peabody Coal Co.*, 18 FMSHRC 494, 501 (Apr. 1994) (Chairman Jordan and Commissioner Marks, concurring in part and dissenting in part). In their opinion in *Peabody*, however, while Chairman Jordan and Commissioner Marks agreed with the Commission majority that the judge failed to appreciate the significance of water as a dust control measure in finding that the operator's respirable dust violation was unwarrantable, they indicated that they would have instead vacated the judge's determination and remanded for further analysis, based upon their unwillingness to conclude that the record could not support an unwarrantable failure finding. *Id.* In that case, our dissenting colleagues criticized the Commission majority for taking the type of approach they propose to follow here — declining to allow the judge the opportunity to determine, in the first instance, whether his analytical error warrants a reversal of his unwarrantability determination, based upon their conclusion that the record can only support one conclusion.

[7] In vacating the judge's determination of unwarrantable failure we are not attempting to downplay the seriousness of a violation alleging an accumulation of coal or coal dust in an underground mining environment. Instead, our focus here is to determine if the operator's conduct rises to the level of unwarrantable failure. To properly make this determination, the judge must evaluate this conduct in accordance with the factors utilized by the Commission to determine whether a violation is unwarrantable.

30 U.S.C. § 820(i),[8] that are affected by his findings of fact and reassess the civil penalty against Cannelton.

C. Section 110(c) Liability

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory safety or health standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly where he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992). Here, we conclude that the judge erred in reaching his section 110(c) conclusions by failing to consider evidence regarding the foremen's efforts to eliminate the violative condition.

We have already concluded that the record supports the judge's finding that Patterson and Richardson, agents of Cannelton,[9] possessed actual knowledge of the accumulation problem by way of the preshift-onshift reports. Slip op. at 6. However, as we have determined, the judge failed to consider Patterson's and Richardson's testimony regarding their efforts to clean up the accumulation. Because an agent's actions following his awareness of a violative condition are

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[8] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

[9] At the hearing, the parties stipulated that Patterson and Richardson were agents of Cannelton. Tr. 18-19.

critical to the section 110(c) analysis, we vacate the judge's determination that Patterson and Richardson are liable under section 110(c) and remand for findings of fact related to the foremen's cleanup efforts. In the event the judge finds section 110(c) liability, he shall reassess the civil penalty or penalties based on the section 110(i) criteria as they apply to individuals. *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 823 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997).

III.

Conclusion

For the foregoing reasons, we affirm the judge's determination that Cannelton violated section 75.400, vacate his determinations that the violation resulted from unwarrantable failure and that the foremen are liable under section 110(c), and remand for further consideration consistent with this opinion.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting in part:

It is clear from the record in this case that an extensive accumulation of coal existed for at least 2 weeks at the Cannelton mine, in violation of 30 CFR § 75.400.[1] It is also clear from the record that Cannelton officials were indifferent to this violation, simply because it was a smaller accumulation than those they personally considered dangerous. Because we agree with the judge's conclusion that Cannelton's conduct was "inexcusable," 18 FMSHRC 651, 659 (Apr. 1996) (ALJ), we would affirm his finding that the violation was a result of the operator's unwarrantable failure.

The majority does not dispute the judge's finding that the accumulation was extensive, measuring approximately 10 feet square and 4 feet deep. Slip op. at 6. In fact, the inspector testified that when the violation was abated, *8 to 12 tons* of coal were removed. Tr. 54 (emphasis added). Even one of the Cannelton foremen estimated that 6 to 8 tons of coal were taken away to abate the violation. Testimony of Richardson, Tr. 306. The majority also agrees with the judge's conclusion that Cannelton was placed on notice of the violation by preshift-onshift reports. Slip op. at 6. Nonetheless, despite overwhelming evidence provided by those same reports that the accumulation had existed for at least 2 weeks, and despite clear proof that any efforts to eliminate the accumulation were ineffectual at best and half-hearted at worst, the majority declines to affirm the judge's finding of unwarrantable failure.

Our colleagues in the majority insist that a remand is necessary to permit the judge to make a credibility determination with respect to Elkins, slip op. at 7, to ascertain the duration of the violation. This is an unnecessary exercise for two reasons. First, the judge decided the question of duration when he found that the accumulation existed for 2 weeks, crediting the testimony of the two fire bosses and a general laborer. 18 FMSHRC at 655. While explicitly crediting this testimony over that of Richardson and Patterson, in making this finding he also implicitly credited their testimony over that of Elkins. *See Fort Scott Fertilizer - Cullor, Inc.*, 19 FMSHRC 1511, 1516 (Sept. 1997) (concluding that the judge implicitly credited miner's testimony that he was not aware of brake problems).

More importantly, a remand is unnecessary because of the staggering amount of evidence demonstrating that the accumulation had developed over a 2-week period. Thirty-five preshift

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[1] Although we agree with the majority that the judge properly found an accumulation violation, slip op. at 5, we fear that the majority's discussion of the violation may create the incorrect impression that some level of accumulation is permitted under the standard. This is not consistent with Commission case law. In defining an accumulation in *Utah Power & Light Co., Mining Div.*, 12 FMSHRC 965, 968 (May 1990), the Commission emphasized that it was "Congress' intention to *prevent*, not merely to minimize, accumulations" and that section 75.400 was "directed at *preventing accumulations in the first instance*, not at cleaning up the materials within a reasonable period of time after they have accumulated." *Id.* (citing *Old Ben Coal Co.*, 1 FMSHRC 1954, 1957 (Dec. 1979) (emphasis added).

reports written during that 2-week period indicated that the No. 3 belt V-scraper was "dirty" or "need[ed] clean[ing]." Gov't Ex. 9. On 34 of those reports, the condition was reported as "continued," indicating that it had previously existed. Tr. 316, 335-36. After reviewing these reports (many of which he had countersigned) during the trial, Elkins was asked whether he denied "that there was an accumulation at the No. 3 belt near the V-scraper from February 14th to march [sic] the 1st." Tr. 336. He replied, unequivocally, "No, ma'am. I do not." *Id.*

In addition to the preshift reports, which we find compelling, the testimony of the preshift examiners makes clear that this accumulation increased over a period of 2 weeks, and was not suddenly created just before the inspection. Dwight Siemiaczko testified that "from February 14th, . . . it grew in size from that day to March 1." Tr. 130. Lee Tucker stated that the accumulation occurred "[o]ver the extended period of time . . . . I think the two weeks that we're talking about that's recorded in the book." Tr. 195.[2] Clearly, substantial evidence supports the judge's finding that this accumulation slowly grew over a 2-week period, and did not suddenly emanate 3 hours before the inspection.[3]

In remanding the case for further consideration of Cannelton's efforts to clean up the accumulation, the majority fails to recognize the deeply disturbing principle underlying Cannelton's action (or inaction). The reigning operating procedure at this mine was that the foremen tolerated coal accumulations up to a certain amount. They were simply complacent about accumulations smaller than those they personally considered dangerous. This classic indifference to a dangerous ignition source is the prototype of an unwarrantable failure.

The testimony of the foremen illustrates their blase attitude. For example, Elkins, when asked what he considered a "manageable" amount of coal accumulation, stated "[t]welve inches or so." Tr. 363. He readily admitted passing by the relevant area 3½ hours before the inspection and observing a 4 by 4 foot accumulation that was 18 to 24 inches deep. Tr. 322. When asked when he would require miners to go to the area to shovel, he stated "[o]nce it [the accumulation] got to a height that concerned me," which, he subsequently admitted, was when it was 6 to 8 inches from the belt. Tr. 338-39. A remand is not necessary to determine the credibility of this witness. Even accepting his testimony concerning the size of the accumulation, his failure to exert reasonable efforts to eliminate it supports the unwarrantable failure determination.

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[2] The majority speculates that Siemiaczko's and Tucker's statements that the accumulation may have been caused by a problem with the feeder could corroborate Elkins' testimony about the size of the accumulation. Slip op. at 7-8. However, their testimony indicates that even if that was the cause, the accumulation nonetheless developed over a 2-week period.

[3] Although we need not reach the issue, we note that an unwarrantable failure designation for an accumulation of this size might be supported even if the duration were 3 hours instead of 2 weeks.

Richardson, when asked what he considered an excessive amount of coal requiring cleanup, stated, "[A]n excessive amount of coal, it could be anything. It's according to how high your belt is," and suggested that it needed to touch the rollers. Tr. 283. He bluntly testified that:

> If there was a mound of coal there, [at the scraper] it presented no problem. . . . [Y]ou could have, like I told you, 14 to 16 inches of coal, I would think nothing of it if I had a place over here that had a coal spillage in it or something else wrote up that I needed the men to work on. That would be put on the last of my list. And if they got down to it, good. If not, it would be passed on.

Tr. 307.

Patterson testified that he only saw spillage two times at the No. 3 belt, and that both times it was 2 or 2½ feet high, 4 feet by 6 feet. Tr. 389. When asked if he considered either of the 2 or 2½ foot high accumulations hazardous, he stated that he did not. *Id.*

In sum, the operator's baseline was that at least a foot of coal needed to accumulate before it made sense to worry about it. It is not surprising, therefore, that Cannelton's cavalier attitude towards accumulations resulted in only the most perfunctory of efforts to eliminate it. The evidence cited by the majority in support of its decision to vacate the judge's finding that Cannelton did not make efforts to clean up, slip op. at 8, reveals lackluster attempts more indicative of Cannelton's nonchalant attitude about the accumulation than of a sincere effort to remove it. Even crediting the evidence on which the majority relies, substantial evidence indicates that Cannelton's cleanup attempt was woefully inadequate.

First, foreman Richardson testified that he never asked for additional personnel to clean up the area. When asked if he thought he needed additional help, he replied: "Not until I got the violation 'cause I never seen any problem there that I needed to shut down a section or anything to pull extra people in." Tr. 304. Although he asserted that men worked to remove the accumulation, he could not state how often or when this work was performed. Tr. 299.[4] In addition, miners Siemiaczko and Craft testified that they were unaware of any effort to clean up the accumulation during the 2 weeks prior to the inspection. Tr. 140-41, 227-28. Also, the

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[4] Patterson testified that he did shovel the accumulation once himself. Tr. 387. He also testified that he assigned two men to clean belts and that on one occasion he specifically assigned his belt cleaners to clean up the accumulation at the V-scraper, Tr. 386-92, although he failed to note these cleanup efforts in the examination books. Tr. 412, 422-23. Thus, the judge's finding that "neither Richardson nor Patterson . . . made any specific attempt to have it [the accumulation] cleaned up, 18 FMSHRC at 658, is an overstatement, but it constitutes harmless error in light of Cannelton's overwhelming failure to initiate a cleanup reasonably designed to eliminate the accumulation.

inspector testified that nobody was cleaning up the accumulation when he arrived on the scene. Tr. 60.

The facts of this case are strikingly similar to those in the recent Commission case *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), in which the Commission affirmed the judge's decision upholding an unwarrantable failure designation on an accumulations violation. As in this case, *Amax* involved an extensive accumulation that existed for several shifts preceding the issuance of the order. We rejected Amax's defense that because the day shift manager's decision to send only one miner to clean up the accumulation was based on a good faith (although mistaken) belief that this would be effective, the violation should not be designated unwarrantable. *Id.* at 851. We emphasized that "the operator's good faith belief must be reasonable under the circumstances." *Id.* We held that the preshift examiner's incorrect assessment of the spill was not reasonable in light of the size of the accumulation. Similarly, we find that here, Cannelton's efforts — even including those cited by the majority as the basis for its remand — were clearly unreasonable and patently ineffectual. *See Peabody Coal Co.*, 18 FMSHRC 494, 501 (Apr. 1996) (Chairman Jordan and Commissioner Marks, dissenting in part) ("[T]he success or failure of an operator's effort to achieve compliance is a factor that must be considered in deciding whether the operator acted reasonably and in good faith.").

The Commission's decision in *Peabody Coal Co.*, 14 FMSHRC 1258 (Aug. 1992) is also instructive. In that case, in which we affirmed an unwarrantable failure determination, the judge credited the inspector's testimony that an extensive accumulation of coal had existed for up to 1 week. *Id.* at 1261-62. Entries for seven of the eight preshift examinations made prior to the inspection described problems with accumulations or spilling in the relevant area. *Id.* at 1262. The Commission noted that the preshift reports showed not only that the operator had prior notice of an accumulation problem, but also demonstrated "that greater efforts were necessary to assure compliance with section 75.400." *Id.* In addition, we acknowledged that Peabody's failure to remedy the spilling problem was a proper consideration in the unwarrantable failure determination, and that the judge was correct to consider the inspector's testimony that, as in this case, at the time of the inspection no one was attempting to remove the accumulation. *Id.* Finally, in *Peabody*, the judge found that only one miner was assigned to clean the area, and she had other responsibilities. *Id.* at 1263. He concluded that this effort was not sufficient to effectively remedy the cited accumulation, a finding which the Commission agreed supported his determination that Peabody engaged in aggravated conduct. *Id.* Thus, substantial evidence amply supports the judge's finding that Cannelton engaged in aggravated conduct constituting an unwarrantable failure.

We also agree with the judge's determination that Patterson and Richardson are liable under section 110(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson,* 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). The majority does not dispute the judge's finding that these two foremen had *actual* knowledge of the accumulation, due to the preshift-onshift reports noting

such conditions, which they signed. Slip op. at 11. Foreman Richardson signed 35 reports at issue and foreman Patterson signed 9 of those reports. Gov't. Ex. 9. Despite determining that these foremen had actual knowledge of a persistent accumulation, the majority incorrectly remands the section 110(c) issue for further findings related to the foremen's cleanup efforts. Such a remand is unnecessary because the record is replete with references regarding their abject *failure* to adequately eliminate the accumulation. *Supra* at 13-14. No cleanup efforts were recorded in the examination books. Tr. 293-94. The inspector testified that he had no knowledge of any attempts by them to clean up the accumulation. Tr. 100-02. The only evidence of Patterson's cleanup efforts is negligible, *see supra* at 14 n.3, and Richardson could not cite one specific instance in which his miners cleaned up the relevant area. Tr. 298-99. Thus substantial evidence supports the judge's finding that these individuals knew of the violative condition and failed to take effective steps to remedy condition. When substantial evidence supports a judge's finding, we are required under the Mine Act to affirm it. 30 U.S.C. § 823(d)(2)(A)(ii)(I).[5]

In *Prabhu Deshetty*, 16 FMSHRC 1046 (May 1994), the Commission found a general mine foreman liable under section 110(c) under facts less egregious than those presented here. There, for 8 working days, the foreman signed the belt examiner's report, which had indicated that the belt was dirty or needed cleaning, but took no steps to verify that the accumulations were cleaned up. *Id.* at 1050-51. Similarly, Patterson and Richardson failed to take effective steps to remedy the accumulation problem when they were made aware by the preshift reports, which they signed, that the problem existed.

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[5] The majority has apparently overlooked the posture of this case as it stands before us — the judge determined that the operator engaged in unwarrantable failure and that Patterson and Richardson were liable under section 110(c). Accordingly, we have not invaded the province of the judge as our colleagues suggest, but, in accordance with Mine Act section 113, have only reviewed the record to see whether substantial evidence supports those determinations. Having satisfied ourselves that substantial evidence supports the judge's determinations, we vote to affirm them.

Accordingly, we would affirm the judge's determinations that the accumulation violation was a result of unwarrantable failure, and that Patterson and Richardson are liable under section 110(c) for knowingly authorizing, ordering, and carrying out the violation.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Distribution

David J. Hardy, Esq.
Jackson & Kelly
1600 Laidley Tower
P.O. Box 553
Charleston, WV 25322

Cheryl C. Blair-Kijewski, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety and Health Review Commission
Office of the Administrative Law Judge
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 28, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 98-308-M
	:	A.C. No. 04-04950-05528
WESTERN AGGREGATES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 23, 1998, the Commission received from Western Aggregates, Inc. ("Western Aggregates"), a letter dated June 22 requesting that the Commission reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Western Aggregates.

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

In the June 22 letter, John Trembley, Plant Manager at Western Aggregates, asserts that Western Aggregates' failure to timely file a hearing request to contest proposed penalties resulted from its mistaken mailing of the request to a "payment lockbox" of the Department of Labor's Mine Safety and Health Administration ("MSHA") in Pittsburgh, Pennsylvania, rather than to MSHA's Civil Penalty Compliance Office in Virginia. Western Aggregates attached to the June 22 letter various documents, including a letter dated May 21, 1998, from Western Aggregates to

MSHA's Civil Penalty Compliance Office, a Federal Express "Sender Activity Summary" showing that a delivery sent by Western Aggregates was received at MSHA's payment lockbox on April 1, 1998, and a response letter from MSHA to Western Aggregates dated June 11, 1998. According to its May 21 letter, Western Aggregates mailed a hearing request on March 31 to MSHA's payment lockbox in Pennsylvania. MSHA's June 11 response letter alleges that on March 3, 1998, MSHA mailed a notice of proposed penalties to Western Aggregates, that the operator received the notice on March 6, and that the proposed penalties became final on April 5. MSHA also indicates in the letter that because Western Aggregates was unable to present a copy of the hearing request and the Federal Express "Sender Activity Summary" did not indicate what was sent in the package, the operator was required to pay the proposed penalties and associated costs.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995).

On the basis of the present record, we are unable to evaluate the merits of Western Aggregates' position. As indicated in MSHA's June 11 letter, the Activity Summary does not indicate what Western Aggregates sent to MSHA's lockbox in Pittsburgh. In the interest of justice, we remand the matter for assignment to a judge to determine whether Western Aggregates has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

John Trembley, Plant Manager
Western Aggregates, Inc.
P.O. Box 829
Marysville, CA 95901

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

Chief Administrative Law Judge Paul Merlin
Federal Mine Safety and Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

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

JUL 6 1998

LOCAL 1702, DISTRICT 31, UNITED MINE WORKERS OF AMERICA (UMWA), on behalf of 141 miners, Applicant	:	COMPENSATION PROCEEDING
v.	:	Docket No. WEVA 98-10-C
CONSOLIDATION COAL COMPANY, Respondent	:	Blacksville No. 2 Mine Mine ID No. 46-01968

DECISION

Appearances: Richard Eddy, United Mine Workers of America, District 31, Fairmont, West Virginia, on behalf of Applicant; Elizabeth S. Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This Compensation Proceeding is before me pursuant to Section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.*, the "Act" upon the application filed by the United Mine Workers of America, Local 1702, District 31 (UMWA), against the Consolidation Coal Company (Consol). The UMWA seeks compensation for 141 of its members employed at the Blacksville No. 2 Mine, who were allegedly idled by a withdrawal order issued by the Secretary of Labor pursuant to Section 107(a) of the Act.[1]

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[1] Section 107(a) of the Act provides as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under Section 110.

The subject order, No. 3492298, issued by Inspector Joseph Migaiolo, of the Department of Labor's Mine Safety and Health Administration (MSHA), on May 15, 1997, at 8:17 a.m., alleges as follows:

> A 107(a) Order is being issued for the 75 longwall section and affected area due to a failure of the bleeder system which has shown excessive methane at the tailgate area which has retreated to between 12 and 13 block markers. Management has been experiencing longwall methane monitoring of 2% + for the past two shifts at tail. Readings as high as 2.7 - 3.0 were recorded by management by methane detectors at tail. Air at the tail is returning from the gob down the tailgate. The longwall Shear experienced greater than 2.0% which deenergized the system at least twice on the day shift on 05/14/97, however, methane detection by hand held showed .4 - .5% CH4 and a split at tail to gob. Due to a progressive methane build up this order is issued for control purposes until the operator prepares a plan and complies with the [illegible word]. The operator experienced excessive methane on 5/14/97 at the tail and also on the midnite shift of 5/15/97. As such the operator discontinued operation on the longwall and deenergized the power from the affected area. The day shift has been idled.

The order was terminated at 6:30 p.m., on May 15, 1997 (Applicant's Exhibit No. 1, Pg. 3). Consol subsequently contested the order before this Commission, but on February 26, 1998, the Secretary vacated the order on the grounds that it was issued in error (Applicant's Exhibit No. 1, Pg. 4). There is no dispute that for purposes of compensation under the first two sentences of Section 111 of the Act, it is irrelevant whether or not the requisite order was issued in error or has been vacated.

Applicant asserts that because this order idled the miners on the day shift on May 15, 1997, those miners are entitled to compensation pursuant to the first sentence of Section 111. That sentence provides as follows:

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

Applicant further maintains that because the order also idled the miners on the afternoon shift on May 15, 1997, those miners are entitled to compensation pursuant to the second sentence of Section 111. That sentence provides as follows:

If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift.

It is undisputed in this case that the day shift on May 15, 1997, was scheduled to work from 8 a.m. to 4 p.m., and that the afternoon shift on that date was scheduled to work from 4 p.m. to 12 midnight. It is further undisputed that the operator decided at approximately 3:30 a.m., on May 15, 1997, to make a major air change in the mine pursuant to 30 C.F.R. § 75.324. In accordance with that regulation, Consol was required to evacuate all non-essential persons and remove electrical power until such time as the affected areas had been inspected and found safe. It is undisputed that all affected miners had accordingly been withdrawn by 8 a.m., before the issuance of the order, and the mine did not return to full production until May 16, 1997. Both the May 15 day shift and afternoon shift miners were advised by Consol not to appear for work in light of its prior voluntary idlement of the mine.

The present controlling authority for the issues at bar is *Local Union 1261, District 22, UMWA v. Consolidation Coal Company*, 11 FMSHRC 1609 (1989), *Aff'd sub nom. Local Union 1261 v. FMSHRC*, 917 F.2d 42 (D.C. Cir. 1990). As in the case at bar, the issue therein was whether miners are entitled to compensation under the first and second sentences of Section 111 when the mine operator has voluntarily closed the mine for safety reasons prior to the issuance of an order described in Section 111 but where such an order is subsequently issued.

The Commission in that case, at 11 FMSHRC at 1613 - 1614, held as follows:

> The meaning of the first two sentences of section 111 is clear. If a specified withdrawal order has been issued, "all miners working during the shift when such order was issued who are idled by such order" are entitled to compensation for the remainder of their shift. (Emphasis added). If the order is not terminated prior to "the next working shift, all miners on that shift who are idled by such order" are entitled to compensation for up to four hours. (Emphasis added). The language is in nowise qualified. Thus, to be entitled to shift compensation, a miner must either be working during the shift when the specified order was issued and have been idled by the order or, if the order is not terminated prior to the next working shift, must be on the next working shift.
>
> Here, the preconditions for entitlement to shift compensation were not met. At the time the order was issued, no miners were working nor had they been since the previous evening at which time Consol had voluntarily withdrawn all miners in order to guarantee their safety. Therefore, none of those for whom compensation is claimed were "working during the shift when . . . [the] order was issued." Further, Consol advised miners on the other two shifts that "the mine is idled until further notice." [Citation omitted]. Therefore, none of those for whom

compensation is claimed were on "the next working shift." (Emphasis added.) [Footnote omitted]. We therefore hold that the claimants, not having met these plainly stated prerequisites, were not eligible to be compensated.

The Court of Appeals, on review, held that the Commission's interpretation limiting the phrase "working during the shift," to miners actually working when the order is issued, was a reasonable interpretation. Local Union 1261, 917 F.2d at 47.

The Commission majority explained the rationale for its decision as follows:

Apart from the plain wording of the statute, there are also practical considerations. A statute should not be construed in a way that is foreign to common sense or its legislative purpose. Sutherland Statutory Construction §§ 45.09, 45.12 (4th ed. 1985). As discussed, the Mine Act involves a balancing of the interest of mine operators, and miners, with safety being the preeminent concern. Section 2 of the Mine Act specifies at the outset that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource - the miner," and section 2(e) adds that "the operators of such miners with the assistance of the miners have the primary responsibility to prevent the existence of [unsafe and unhealthful] conditions and practices in such mines." The Mine Act was not intended to remove from an operator the right to withdraw miners from a mine for safety reasons. While MSHA has the authority to order such withdrawal, it does not have that power exclusively.

* * * * *

Thus, apart from the fact that no miners were present in the mine when the MSHA closure order was issued, it is apparent that the safety first edict of section 2 was observed conscientiously by the mine operator here and that it would be a departure from the clear intent and purpose of the Mine Act to penalize the operator for voluntarily idling miners for their own protection. To impose such liability could conceivably encourage less conscientious operators in similar circumstances to continue production, at risk to the miners, until the MSHA inspectors arrived to issue a control order idling the miners. We do not believe that the Mine Act was intended to stifle such safety conscious actions by operators, as Consol took here. [Footnote omitted].

The purpose and scope of shift compensation can also be determined by another important concern expressed by Congress in adopting section 111 in its specific terms: insulating the mine inspector from any repercussions that might arise from his withdrawing miners and temporarily depriving them of their livelihood. A key passage from the Report of the Senate Committee setting forth

the rationale for the miners' compensation provision concludes by stating, "[t]his provision will also remove any possible inhibition of the inspector in the issuance of closure orders." Leg. Hist. at 635. This convinces us that Congress intended shift compensation rights to arise only when the physical removal of miners is effectuated by the inspector himself so that the inspector in carrying out his enforcement duties is not inhibited or distracted by workplace considerations wholly extraneous to the protection of miners.

11 FMSHRC at 1614-15

Applicant argues, however that the instant case is distinguishable from the *Local Union 1261* case in that here, it maintains, Consol attempted to avoid Section 111 liability by withdrawing miners in anticipation of withdrawal action by MSHA. The Commission in that case appeared to suggest that this might be a possible distinguishing factor. *See Local Union 1261*, fn6 at pp. 1614-1615. However, even assuming, *arguendo*, that this could be a distinguishing factor, I find insufficient evidence that Consol withdrew the subject miners other than for their safety and for compliance with the withdrawal requirements under 30 C.F.R. § 324. On the facts of this case Consol could reasonably not have anticipated the issuance of an imminent danger or other prerequisite withdrawal order. Indeed, the Secretary herself subsequently vacated her withdrawal order in this case admitting that she had issued it in error, presumably for insufficient evidence.

As Consol notes in its brief, the air flow condition existing on the 7S longwall was not, in any event, of such a nature as to lead management to anticipate a closure order involving any area of the mine. While methane in excess of 1 percent required the section to be deenergized and the condition corrected, there was no particular need to notify MSHA. Consol did in fact deenergize the section and corrected the condition and, as evidenced by the absence of citations for safety violations, the response was adequate.

Applicant also maintains that Consol was cognizant of a ventilation problem on the 7S section for two weeks prior to May 15, 1997, and should accordingly have anticipated an order from MSHA. While there is evidence that the power had been taken off the longwall several times in the two week period before May 14th, due to methane, there is no evidence that Consol was aware of any imminent danger or violative condition. Moreover, the reverse airflow problem apparently was not discovered until May 14th. Safety Committeeman Michael Eddy testified that he was not aware of any problem with reverse air flow in the longwall tailgate entry before that afternoon. Moreover, Mine Superintendent Edward Pride believed that the reverse air flow condition in the tailgate entry had not existed prior to the 14th because it was checked daily by the mine foremen.

Applicant further maintains that even though Consol may not have had actual knowledge that an MSHA inspector would visit the mine it nevertheless should have expected such a visit when Safety Committeeman Michael Eddy, notified the foreman of the 7S longwall section in

the early hours of the May 14, afternoon shift, that he was excusing himself from work to go on union business. However, since Eddy could have conducted any number of activities while on "union business" it does not reasonably follow that an MSHA inspector would appear and issue a withdrawal order. Morever, Consol did not thereafter immediately idle the mine well in advance of the day shift as one would expect under Applicant's theory. Rather, Consol continued trying to correct the condition on the 7S section during the afternoon shift of May 14, 1997, and into the midnight shift on May 15, 1997. Applicant's proposed inference is therefore not reasonable nor is there a rational connection between the evidentiary fact (that Eddy went on "union business") and the ultimate fact to be inferred (that an MSHA inspector would thereafter appear and issue a withdrawal order). *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148 (November 1989).

Under all the circumstances, I conclude that when Consol took the prudent action of withdrawing the miners, which was also consistent with the requirements of 30 C.F.R. § 324, it could reasonably not have anticipated the issuance of any withdrawal orders by the Secretary. Therefore, within the framework of Commission precedent, supported by the U.S. Court of Appeals for the D.C. Circuit, I conclude that the Applicant herein cannot prevail. Clearly, none of the subject miners were "working during the shift" within the scope of this legal interpretation and there is insufficient evidence to conclude that Consol withdrew the subject miners in anticipation of withdrawal action by the Secretary. The UMWA's reliance upon the earlier Commission decision in *Peabody Coal Company*, 1 FMSHRC 1785 (1979) and the dissenting Commissioners in *Local Union 1261*, is also misplaced. Indeed, the U. S. Court of Appeals for the D.C. Circuit agreed with the dissenting commissioners in *Local Union 1261*, that the majority had departed from the reasoning and result of *Peabody Coal Company*, 1 FMSHRC 1785 (1979), and had, therefore, effectively overruled that decision. In the earlier *Peabody* case, the Commission had expressedly rejected the operator's argument that the Act provides first sentence compensation only for miners actually at work when a withdrawal order issues. *Local Union* 1261, 917 F.2d at 46-47.

ORDER

Compensation Proceeding Docket No. WEVA 98-10-C is DISMISSED.

Gary Melick
Administrative Law Judge

Distribution:

Richard Eddy, United Mine Workers of America (UMWA), District 31, 310 Gaston Avenue, Fairmont, WV 26554 (Certified Mail)

Elizabeth Chamberlin, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, SUITE 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

JUL 15 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 97-154-M
	:	A.C. No. 34-00026-05597
v.	:	
	:	Docket No. CENT 97-155-M
BLUE CIRCLE, INCORPORATED, Respondent	:	A. C. No. 34-00026-05598
	:	Docket No. CENT 97-156-M
	:	A. C. No. 34-00026-05599
	:	Docket No. CENT 97-157-M
	:	A. C. No. 34-00026-05600
	:	Docket No. CENT 97-158-M
	:	A. C. No. 34-00026-05601
	:	Tulsa Plant

DECISION ON REMAND APPROVING SETTLEMENT

Before: Judge Melick

These cases are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the cases. Modification and vacation of certain citations and a reduction in overall penalties to $8,848.00, have been proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of $8,848.00, within 30 days of this order.

Gary Melick
Administrative Law Judge

Distribution:

Mary K. Schopmeyer, Esq., Office of the Solicitor, U.S. Dept. of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202

Daniel J. Haupt, Conference & Litigation Representative, U.S. Dept. of Labor, Mine Safety and Health Administration (MSHA), 1100 Commerce St., Room 4C50, Dallas, TX 75242

C. Gregory Ruffennach, Esq., 450 East 3rd Avenue, Durango, CO 81301

/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 15 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 96-21-M
Petitioner	:	A. C. No. 44-00040-05559
v.	:	
	:	Eastern Ridge Lime Company, L P
EASTERN RIDGE LIME COMPANY, L P,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

This matter is before me based on a remand order issued by the Commission on July 2, 1998, for further consideration consistent with the decision in the case issued by the United States Court of Appeals for the Fourth Circuit (*Eastern Ridge Lime, L P* v. *FMSHRC* No. 97-1579 (4th Cir. April 13, 1998). In its decision, the Courts of Appeals remanded "for further fact finding and analysis of the penalties to be assessed" (slip op. at 7).

In order to clarify my previous decision, (19 FMSHRC 398 (February 1997)), and upon reconsideration , I find that, in assessing a penalty, and evaluating the level of gravity of the cited violations, it is not necessary to make a specific finding of causation. The high level of gravity is based on the fact that the violation contributed to a fatal roof fall. Further, in evaluating a penalty, I place most weight on my finding that, for the reasons discussed in the original decision, the level of Respondent's negligence constituted aggravated conduct. Specifically, the record establishes that Respondent repeatedly ignored the warnings of its workers regarding observed unsafe conditions. Accordingly, I reiterate my initial findings regarding the penalty to be assessed.

It is **ORDERED** the Respondent shall pay a total civil penalty of $85,000 for the violations cited in Order No. 4289773 and Citation No. 4389772.

Avram Weisberger
Administrative Law Judge

Distribution:

Yoora Kim, Esq., Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Suite 420, Arlington, VA 22203 (Certified Mail)

Thomas B. Weaver, Esq., John F. Cowling, Esq., Armstrong, Teasdale, Schlafy & Davis, One Metropolitan Square, Suite 2600, St. Louis, MO 63102-2740

dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

JUL 17 1998

INLAND STEEL MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 98-4-RM
	:	Citation No. 7809287; 9/5/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 98-5-RM
ADMINISTRATION (MSHA),	:	Citation No. 7809288, 9/9/97
Respondent	:	
	:	Minorca Mine
	:	Mine ID No. 21-02449
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-45-M-A
Petitioner	:	A.C. No. 21-02449-05611
v.	:	
	:	Minorca Mine
INLAND STEEL MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: L. Joseph Ferrara, Esq., Jackson & Kelly, Washington, D.C., for Contestant/Respondent;
Christine M. Kasak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondent/Petitioner.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty filed by Inland Steel Mining Company against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Inland Steel, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance to it of two citations alleging violations of the Secretary's mandatory health and safety standards. The petition seeks a penalty of $1,328.00 for the contested violations. For the reasons set forth below, I vacate one citation, modify and affirm the other, and assess a penalty of $50.00.

Background

The Minorca Mine is an open pit, taconite[1] mine in St. Louis County, Minnesota, operated by Inland Steel. On September 5, 1997, while conducting a semi-annual inspection of the mine, MSHA Inspector Leon Mertesdorf issued two citations alleging violations of section 56.20011 of the Secretary's regulations, 30 C.F.R. § 56.20011. Citation No. 7809287 alleges that:

> At the South side of the Plant Electric Shop, there was a Service road that passed along said shop that was [a] travel route from the Fines Crusher and other associated shops. There was a Fifth Wheel Semi-Trailer used for storage parked at the said location, South of the Plant Electric Shop, which was a hazard to any vehicles traveling from the lower plant site. The said Trailer front end was raised by placing blocks under the dolly wheels. The height of the trailer was 51 inches from the roadway/ground that was graded up to the trailer. The hood of a pickup truck was 48 inches, and could travel under the raised trailer. The trailer supports/dollies were 10 feet back from the end of the raised end of the trailer, that was parked with the front facing South. The traffic traveled from the South and curved toward the left/West. There was no barricade or even a warning to prevent travel under [the] raised trailer.

Citation 7809288 alleges that:

> At the bottom floor of the Flux Plant of the Pellet Plant, there was an Over-head Crane with a Repair Bay below that was not barricaded while an employee was inspecting and working with hand tools on the said over-head crane, and the hand tools could be dropped upon persons below. The area was not barricaded or warning placed at the entrance to said Service bay, to prevent persons from entering below a hazardous condition that would alert that person of conditions that were unaware to them.

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[1] "Taconite" is "[a] local term used in the Lake Superior iron-bearing district of Minnesota for any bedded ferruginous chert or variously tinted jaspery rock, esp. one that enclosed the Mesabi iron ores (granular hematite); an unleached iron formation containing magnetite, hematite, siderite, and hydrous iron silicates (greenalite, minnesotaite, and stilpnomelane). The term is specif. applied to this rock when the iron content, either banded or disseminated, is a least 25%." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 560 (2d ed. 1997) (*DMMRT*).

Section 56.20011 requires, in pertinent part, that: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches."

A hearing was held on March 31, 1998, in Duluth, Minnesota. The parties also submitted post-hearing briefs in the cases.

Findings of Fact and Conclusions of Law

Citation No. 7809287

Inspector Mertesdorf had been to the mine twice before the inspection in this case, once for an accident investigation and in March 1997 for a previous semi-annual inspection. He testified that as he drove up the road toward the trailer, "[e]verything looked different than I had seen it before and I couldn't understand how I could have missed something like this before" in March. (Tr. 37-38) He stated that the difference was that

> [T]he trailer was higher and there was -- the road was graded off entirely underneath the trailer and you couldn't find the road edge like it normally was. There used to be a road edge where the, you know, where a grader goes along the road. You'd leave a lip and there was kind of a washout there before. And this is all graded over.

(Tr. 38.) The inspector later explained that the edge or lip that he was referring to was grader windrow.[2] He contended that "the hazard would be to possibly run underneath [the trailer]." (Tr. 40.)

The company's evidence indicated that the trailer had been in the same location since 1988 and there had not been any traffic incidents involving it. Mr. Gus Josephson, Inland's Staff Safety and Environmental Engineer, further testified that the roadway up to and on either side of the trailer was graded twice weekly and that any windrow resulting from the grading was not intended to serve as a berm along the road. He contended that any hazard involving the trailer was immediately obvious.

The issue in this citation is whether the hazard perceived by the inspector, driving underneath the trailer, was "immediately obvious." The Commission has held that although something may be "readily observable" and "very much in plain sight" the hazard associated may not be obvious. *American Materials Corp.*, 4 FMSHRC 415, 481 (March ~~1992~~ 1982). However,

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[2] "Windrow" is a "ridge of soil pushed up by a grader or bulldozer." *DMMRT* at 628. "Windrow" is incorrectly reported as "windroll" throughout the transcript.

this is not such a case. I conclude that any hazard involving the trailer, and particularly the hazard of driving underneath it, is immediately obvious to someone approaching the trailer on the frontage road.

The old saying that "a picture is worth a thousand words," applies to this citation. I base my decision mainly on Respondent's Exhibit B-1, a picture of the scene. In the picture it is clear that the trailer is not hidden from the roadway; anyone approaching it can see it from a long way off. Nor does it appear that the roadway goes under the trailer. The roadway plainly goes on either side of it. Even if one were not concerned with driving under the trailer, one would still stay clear of the trailer to avoid hitting it.

I find that the evidence strongly supports the Respondent's contention that any hazard involving the trailer would be "immediately obvious" to employees and that, therefore, no barricade or warning sign was required. Accordingly, I will vacate the citation.

Citation No. 7809288

In August 1997, Inland contracted with Lakehead Constructors to build a new overhead flux mill crane in the Flux Plant. While the construction project was proceeding, Inland flagged or blocked with tape all access ways to the work area. On the morning of September 9, 1997, the employee performing the preshift inspection in the area noted that the entrances to the work area were still blocked with tape at 7:30 a.m. However, when the inspection party arrived at the area, between 10:00 a.m. and 11:00 a.m., the tape blocking one of the doors was no longer up, but was found lying on the ground partially under the wheel of a basket-lift truck belonging to Lakehead. A Lakehead employee was on the crane checking the tightness of the bolts with a torque wrench at the time. Although there is no direct evidence as how the tape came down, it seems clear that someone maneuvering the Lakehead truck had knocked it down.

Inland has stipulated that the citation sets out a violation of the Secretary's rules. Nevertheless, it argues that the citation should be vacated because the Secretary abused her discretion in issuing a citation to both Inland and the independent contractor. The company maintains that the Secretary's failure to follow the guidelines set out in *III MSHA Program Policy Manual*, Part 45, at 6 demonstrates this abuse of discretion. I do not agree and find that the Secretary did not abuse her discretion in this case.

The Commission has recently summarized the law in this area, as follows:

> The Commission and various courts have long recognized that, under the Mine Act's scheme of strict liability, an operator, although faultless itself, may be held liable for the acts of its independent contractor. *Bulk Transp. Services, Inc.*, 13 FMSHRC 1354, 1359-60 (September 1991); *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981). In instances of

multiple operators, the Secretary has "wide enforcement discretion" and may proceed against an operator, independent contractor, or both. *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249 (February 1997), *aff'd per curiam*, No. 97-1392 (4th Cir. January 8, 1998); *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). The Commission has determined that "its review of the Secretary's action in citing an operator is appropriate to guard against abuse of discretion." *W-P Coal Co.*, 16 FMSHRC 1407, 1411 (July 1994). A litigant seeking to establish an abuse of discretion bears the heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on an improper understanding of the law. *Mingo Logan*, 19 FMSHRC at 249-50 n.5.

The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary's discretion, including the operator's day-to-day involvement in the mine's operation (*Mingo Logan*, 19 FMSHRC at 250, *W-P*, 16 FMSHRC at 1411), whether the operator is in the best position to affect safety (*Bulk*, 13 FMSHRC at 1361) and whether the enforcement action is consistent with the purpose and policies of the Act (*Old Ben Coal Co.*, 1 FMSHRC 1480, 1485 (October 1979)). In addition, the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied. *See, e.g., Bulk*, 13 FMSHRC at 1360; *Mingo Logan*, 19 FMSHRC at 250. While failure to satisfy the criteria is not fatal to an enforcement decision (*Mingo Logan*, 19 FMSHRC at 250), the Commission has relied upon satisfaction of the criteria in concluding that there was no abuse (*e.g., Bulk*, 13 FMSHRC AT 1360).[4]

[4] The Commission has repeatedly recognized that the Guidelines are policy statements and not binding on the Secretary. *Mingo Logan*, 19 FMSHRC at 250; *D.H. Blattner & Sons, Inc.*, 18 FMSHRC 1580, 1586 (September 1996), *appeal docketed*, No. 96-70877 (9th Cir. Oct. 21, 1996).

Extra Energy, Inc., 20 FMSHRC 1, 5-6 (January 1997).

In this case, Inland, not Lakehead, had assumed the responsibility for barricading the entrances to the area where the crane was being installed, from the beginning. Having taken on that responsibility, it follows that Inland should also be responsible for the violation when the

blocking ribbon came down. In addition, since the crane was being constructed in Inland's building, Inland clearly was in the best position to affect safety by preventing access to the area in which the crane was being erected. Furthermore, the barricades were clearly for the benefit of Inland's employees who may have to walk through the area, not Lakehead's employees who were already working in the blocked off area. Accordingly, I conclude that the Secretary properly cited the operator for this violation.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act 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).

As in most cases, the issue here is whether the third criterion has been met, that is, whether the violation contributed to a hazard which would be reasonably likely to result in an injury. The inspector testified that he found this violation to be S&S because he believed that the employee tightening the bolts on the crane could drop his torque wrench and it could hit someone below.

In order for this to occur, there would have to be a confluence of events which happened simultaneously. First, someone would have to enter the area through the one door at which the blocking ribbon had been knocked down. Second, the employee would have to drop the wrench. Third, the person entering the area would have to be below the employee dropping the wrench. Fourth, the wrench would have to hit the person below. The evidence indicates that one or two Inland employees per shift were likely to be in the area. The evidence further establishes that the job of "torquing" the bolts took about two hours and then work on the crane was complete.

Considering all of these factors, I conclude that it was not reasonably likely that an injury would occur in this situation. Accordingly, I will modify the citation to delete the "significant and substantial" designation.

Negligence

The inspector determined that Inland's negligence for this violation was low because "when [the Lakehead employee is] climbing about on a crane he should have also made sure that this area was roped off below." (Tr. 67.) I agree that the contractor's employee should have made sure that the area was blocked off. This is particularly true since he apparently was the one who knocked down the tape in the first place. I disagree, however, with the inspector's assessment of negligence. In view of the fact that Inland's preshift inspection had verified that the tape was still in place and that the tape was not taken down by an Inland employee, I conclude that Inland was not negligent at all in this instance and will modify the citation.

Civil Penalty Assessment

The Secretary has proposed a penalty of $309.00 for Citation No. 7809288. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the criteria, the parties have stipulated that the "Minorca Mine worked in excess of 600,000 hours during the period January 1, 1996 - December 31, 1996." (Jt. Ex. 1.) Therefore, I conclude that it is a large mine. The Assessed Violation Report indicates that 189 violations had occurred at the mine in the 2 years preceding these violations. (*Id.*) I find this to be in the average range for a mine this size and, thus, it neither aggravates nor mitigates a penalty. Inland did not present any evidence that a penalty would have an adverse effect on its ability to remain in business, so I conclude that it would not. I have already found that the violation was not S&S, so its gravity is not serious, and I have already found that the company was not negligent. The evidence indicates that the Respondent demonstrated good faith in achieving rapid compliance after being informed of the violation. Taking all of these factors into consideration, I conclude that a penalty of $50.00 is appropriate for this violation.

ORDER

Accordingly, Citation No. 7809287 in Docket Nos. LAKE 98-4-RM and LAKE 98-45-M-A is **VACATED** and Docket No. LAKE 98-4-RM is **DISMISSED**; and Citation No. 7809288 in Docket Nos. LAKE 98-5-RM and LAKE 98-45-M-A is **MODIFIED** by deleting the "significant and substantial" designation and reducing the level of negligence from "low" to "none" and is **AFFIRMED** as modified. Inland Steel Mining Company is **ORDERED**

TO PAY a civil penalty of **$50.00** within 30 days of the date of this decision. On receipt of payment, Docket Nos. LAKE 98-5-RM and LAKE 98-45-M-A are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

L. Joseph Ferrara, Esq., Jackson & Kelly, 2401 Pennsylvania Avenue, N.W., Suite 400, Washington, DC 20037 (Certified Mail)

Christine M. Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604 (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

July 20, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 98-49-M
Petitioner	:	A. C. No. 40-00053-05515
v.	:	
	:	
HOOVER INCORPORATED,	:	Murfreesboro Quarry & Mill
Respondent	:	

DECISION

Appearance: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of Petitioner;
Granville S. R. Bouldin, Jr., Esq., Bouldin & Bouldin, Murfreeesboro, Tennessee, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against Hoover, Incorporated (Hoover) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801(e) *et. seq.*, the "Act," seeking a civil penalty of $252.00, for one violation of the mandatory standard at 30 C.F.R. § 56.7012.

The citation at bar, Citation No. 4898682, alleges a "significant and substantial" violation of the cited standard and charges as follows:

> The Ingersoll Rand DM25 SP Drill, company #509009 was left unattended while it was in operation. The drill operator was measuring the depth of holes previously drilled and away from the drill cab. There was a front-end loader and operator working below the bench where the drill was operating approximately 38 feet below. In *[sic]* event that the drill were to unexpectedly malfunction, and since it was close to the edge of the bench, it could topple over and land where the loader was operating resulting in possibly a fatality. While in operation, drills shall be attended at all times.

The cited standard, 30 C.F.R. § 56.7012, requires that "[w]hile in operation, drills shall be attended at all times."

The subject mine is a surface limestone extraction and crushing operation. The limestone is drilled and blasted. It is then loaded onto trucks and taken to the crusher. Mining is performed by creating benches. According to Inspector E. G. Duarte, of the Department of Labor's Mine Safety and Health Administration (MSHA), the subject drill was operating on a bench in the quarry area and the closest person to the drill was its operator who was measuring drill holes on the bench 150 to 180 feet away. According to Duarte, the drill at this time was drilling the hole closest to the edge of the 38 foot highwall and a front end loader was operating below the bench. Duarte approached the drill operator and asked if anyone was at the drill. The drill operator responded in the negative. Duarte did not observe anyone else on the bench at the time.

It is undisputed that photographs (Gov. Exhs. 3A through 3G) accurately depict the drill at issue but in no way represent the location or conditions present at the time of the citation. According to Duarte, the drill's operating controls are located inside its enclosed cab. In order to reach the controls the operator in this case therefore would have had to walk or run 150 to 180 feet, open the cab door and climb into the cab. Within this framework of evidence I have no difficulty in concluding that the cited drill was in operation while not attended within the meaning of the cited standard.

Respondent appears to claim that the cited standard is unconstitutionally vague in that a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, would not recognize a hazard warranting corrective action within the purview of the regulation at issue. *Alabama By-Products Corporation*, 4 FMSHRC 2128, 2129-2130 (December 1982). However, even Respondent's superintendent, Kenneth Vanderpool, acknowledged, in reference to attending the drill, that the drill operator "wouldn't have no business" going as far as even 75 feet from an operating drill. Thus, even if there could be some ambiguity in the application of this standard to other factual situations, there is no ambiguity in its application to this Respondent on the fact of this case where the credible evidence shows that the drill operator was 150 to 180 feet from the drill.

In reaching this conclusion, I have not disregarded the testimony of drill operator Nathan Nickens that he was standing next to the dust collector within eight to ten feet of the drill when inspector Duarte "appeared." This apparent conflict with Inspector Duarte's testimony may be explained by the likelihood that Duarte observed Nickens before Nickens was aware of Duarte's presence. In any event, I find the inspector's testimony to be the more credible in this regard. I note on the face of the citation, which would have been prepared contemporaneously with his observation of the violation, the inspector reported that the drill operator was in fact measuring the holes previously drilled away from the cab. This is consistent with his testimony at hearing. While it would have been more helpful if the inspector had reported the 150 to 180 foot distance in his contemporaneous notes and had produced those notes at hearing I nevertheless attribute greater weight to the inspector's observations corroborated to some extent by his contemporaneous citation.

The Secretary also maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement 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 hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *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, 916-17 (June 1991).

On the facts of this case I do not find the Secretary has met the third element of the *Mathies* formula. Duarte testified that he was concerned about the hazards of the drill toppling over the edge of the 38 foot highwall onto the front end loader working below. According to Duarte, there were two ways this could happen. First, he maintained that if the drill steel hangs in the hole, the drill "might possibly" jerk from the vibration and rotate over the edge of the highwall. However, Duarte had no specific anecdotal evidence of such an event and the Secretary failed to establish that he had the necessary qualifications to calculate the forces necessary to move this multi-ton drill sufficient to rotate it over the edge of the highwall. Clearly such a conclusion could only be reached based upon sophisticated computations and an understanding of the principles of physics. Duarte's qualifications in this regard were not established. Without having either specific anecdotal evidence or the expertise necessary for making the requisite computations, I can give but little weight to the inspector's testimony. In addition, Hoover safety director, Jerry Rogers, testified that even if the drill steel would hang up, it would not produce sufficient force to rotate a several-ton drill.

The second hazard Duarte described related to an incident wherein the ground on the bench gave way and the drill operator, who was in the cab of the drill, was killed when the drill toppled over the highwall. The Secretary 's position in this regard is irrational, however, since non-compliance with her reading of the standard would place the drill operator in a safer position outside of the cab. In the case of the illustrated fatality, compliance with the standard would likely place the drill operator in a hazardous position inside the cab.

The Secretary also cites testimony of Respondent's witnesses to establish the gravity of the violation. In particular, she cites the testimony of Respondent's witnesses that an unattended drill can blow a hydraulic hose causing failure of the hydraulic system or causing the drill motor to burn out. However, the Secretary failed to note that the same witness doubted "very seriously" that a fire would result if the motor became overheated because there were "gauges on there that would cause it to shut down." Considering the absence of credible evidence to support her findings I must conclude that the Secretary has failed to sustain her burden of proving that the violation was "significant and substantial" or of significant gravity.

The Secretary has failed to present evidence or argument regarding negligence and the size of the operator, two other criteria under section 110(i) of the Act. Examination of the operator's prior history of violations (Gov. Exh. No. 2) does not show a serious pattern or any prior violation of the standard at issue herein. The violation was abated, according to the citation, when the drill operator returned to the drill cab. Under the circumstances, I find that a civil penalty of $25.00, is appropriate for the violation at issue.

ORDER

Citation No. 4898682 is AFFIRMED and Hoover Incorporated is directed to pay a civil penalty of $25.00, within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Dept. of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

Granville S.R. Bouldin, Jr., Esq., Bouldin & Bouldin, 122 North Church Street, P.O. Box 811, Murfreesboro, TN 37133-0811 (Certified Mail)

Mr. Jerry Rogers, Safety Superintendent, Hoover Incorporated, P.O. Box 1700, LaVergne, TN 37086 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

JUL 27 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-27
Petitioner	:	A. C. No. 46-01433-04242
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Loveridge No. 22 Mine

DECISION

Appearances: Lynn A. Workley, Conference & Litigation Representative, U.S. Dept. of Labor, Morgantown, West Virginia, on behalf of Petitioner; Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 *et. seq.*, the "Act," seeking a civil penalty of $506.00, for one violation, on September 10, 1997, of 30 C.F.R. Section 75.323(b)(2)(ii). The general issue before me is whether Consol violated the cited standard as alleged, and if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

The citation at bar, Citation No. 3492989, as amended, alleges as follows:

> In the number two bleeder entry off the number one entry of 4-Left, there is an accumulation of methane. The No. 2 bleeder entry starts at station number 99 block of the 4-Left number one entry. When tested on the right side of the continuous miner, 1.5% methane was found in a measurement greater than 12 inches from the roof, face and ribs. The section foreman was notified and Mr. Pichardo did no [*sic*] remove the electrical power from the equipment in the affected area in a timely manner.

The cited standard, 30 C.F.R. Section 75.323(b)(2), provides in relevant part as follows:

> (2) When 1.5 percent or more methane is present in a working place or an

intake air course, including an air course in which a belt conveyor is located, or in an area where mechanized mining equipment is being installed or removed -

(i) Everyone except those persons referred to in § 104(c) of the Act shall be withdrawn from the affected area; and

(ii) . . . electrically powered equipment in the affected area shall be disconnected at the power source.

Thomas May, Sr., is an experienced coal mine inspector for the Mine Safety and Health Administration (MSHA) with additional industry experience and two years of college education. On September 1, 1997, at about 8 a.m., he began his inspection at the Loveridge No. 22 Mine, accompanied by Consol safety inspector Richard Moats and representative of miners, Carol Liston. Later in the morning as they approached the No. 2 entry, the mining crew withdrew the continuous miner and began shutting down for lunch. May proceeded toward the face to check the airflow and test for methane. To perform these tests in a tight space he had to move the ventilation tubing. May detected 1.5% methane, again repositioned the ventilation tubing and again detected 1.5% methane. May then informed Moats that he had encountered 1.5% methane.

According to May, Moats then proceeded to the face and performed his own methane check. He extended the ventilation tube and held it on his shoulder. May testified that he was unable to see precisely where Moats obtained his methane reading because his view was obstructed. He later testified that Moat's reading was not as close to the face as his own. According to May, Moats then momentarily left the area and returned, telling Liston that he needed a ventilation tube at the face. Sometime during the course of these events, Moats told May that he had obtained a 1.3% methane reading. Moats then appeared to cut the power on the miner. May saw however, that a light was still activated on the miner and told Moats that the power should be cut at the power center. Moats purportedly responded that Pichardo, the section foreman, would take care of it. Pichardo then appeared, took his own methane test and told May that he had obtained a .9% methane reading. May maintains that he told Pichardo that he had obtained a 1.5% reading and that he needed to cut the power at the power center. Pichardo then immediately walked to the power center and cut the power.

Within this framework of credible evidence it is clear that there was a violation of the cited standard when 1.5% methane was discovered by Inspector May at the face, an agent of the operator was notified of this and yet power at the power center was not cut for a period of approximately 15 minutes. While the violation may indeed have been caused by the inspector himself when admittedly moving the ventilation tubing at the face, it is now well-established that operators are liable for violations of the Act without regard to fault. *Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982); *Allied Products Co., v. FMSHRC*, 666 F.2d 890 (5th Cir. 1982); *Fort Scott Fertilizer-Culler, Inc.*, 17 FMSHRC 1112 (July 1995).

In reaching these conclusions, I have not disregarded the testimony of Consol's witnesses, Moats, Pichardo and Richardson. Their testimony does not, however, negate the existence of the violation. For example, Moats admits that he did not cut the power at the power center when informed of the existence of 1.5% methane and only attempted to cut the power to the continuous miner. However, Moats claims he tried to tell Pichardo to remove the power at the power center but Pichardo, who is hard of hearing, apparently did not hear him. Moats also promptly attempted to remove the methane by having additional tubing installed and, according to Moats, the methane level was thereby reduced to 1.1% within one to two minutes. The testimony of Pichardo and Richardson also mitigates operator negligence and gravity. After being informed of a potential problem, Pichardo checked the left side of the miner for methane and obtained only a .9% reading. Pichardo also noted that accumulations of methane would likely be on the left side since the ventilation tubing pulls the air out of the right side. In addition, Pichardo testified that when Inspector May told him that he had obtained a 1.5% methane reading and wanted the power off, he in fact cut the power within two minutes - - the time it took him to walk to the power center. Assistant Mine Superintendent Richardson corroborated that once Richardson told Pichardo that he needed to remove the power at the power center he did so.

In evaluating the evidence I conclude that the Secretary's evidence regarding the amount of time between the inspector's notification of the violative condition to the operator's agent, Richard Moats, and the action by Pichardo to cut the power at the power center is the more credible. The inspector estimated that time to have been about 15 minutes. (Gov. Exh. No. 2, Pg. 5). I do, however, credit the operator's testimony that the inspector had adjusted the ventilation tubing before taking his methane tests, and that their own readings were below 1.5%. Thus, Consol officials could reasonably have believed the inspector's readings were not valid and that the methane level was actually below the 1.5% threshold set forth in the cited standard. Their prompt efforts to obtain additional ventilation tubing to clear the methane should also be considered in evaluating negligence. Nevertheless, it is clear that once methane at 1.5 % was found and Consol was informed of this through its agent Richard Moats, the power should have immediately been cut at its source.

The Secretary also maintains that the violation was "significant and substantial" and of high gravity. 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 hazard contributed to will result in an injury, and

(4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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, 916-17 (June 1991).

On this issue, as with all issues, I am constrained by the evidence of record. In this regard, I find the record evidence inadequate to establish the third element of the *Mathies* test. Critical parts of the inspector's testimony in this regard were ambiguous and somewhat confusing. Moreover, his use of the terms "possibly" and "possibilities" where the standard is "reasonable likelihood" makes it impossible to meet the third element. *See Amax Coal Company*, 18 FMSHRC 1355 (August 1996). His testimony on this issue was in part as follows:

> The fact of having the methane accumulation in the face, the auxiliary fan for one is still running. In changing the tube, when you increase the distance from the face to the ventilation device from the end of the tubing, you also increase the possibility of methane accumulation. You use the spad gun which can create a spark. You're working with tubing that has dust in it. You're dragging the tubing, carrying it up there, you get coal, rock inside the tubing. When you put it on the existing tubing, that sucks it back into the fan. Possibilities of spark from the fan itself.

Considering all of the criteria under Section 110(i) of the Act, I find that a civil penalty of $100.00, is appropriate.

ORDER

Citation No. 3492989 is AFFIRMED without a "significant and substantial" designation and the Consolidation Coal Company is directed to pay a civil penalty of $100.00 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Lynn A. Workley, Conference & Litigation Representative, U.S. Dept. of Labor, Mine Safety and Health Administration (MSHA), 5012 Mountaineer Mall, Morgantown, WV 26505 (Certified Mail)

Elizabeth S. Chamberlin, Esq., Consol Inc., Consol Plaza, 1800 Washington Road, Pittsburgh, PA 15241-1421 (Certified Mail)

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868
July 30, 1998

BRAUNTEX MATERIALS, INCORPORATED,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. CENT 98-154-RM
	:	Citation No. 4444397; 9/5/97
v.	:	Docket No. CENT 98-155-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA)	:	Citation No. 4444398; 11/14/97
Respondent	:	Docket No. CENT 98-156-RM
	:	Citation No. 4109013; 11/14/97
	:	Brauntex Materials
	:	Mine ID 41-02743

ORDER OF DISMISSAL

Before: Judge Merlin

The issue presented for determination is whether these cases were timely filed.

The cases were received on June 9, 1998, by the Mine Safety and Health Administration and forwarded to this Commission where they were received on June 10, 1998.

Citation No. 4444397 (Docket No. CENT 98-154 RM) was issued on September 5, 1997, under section 104(a) of the Mine Act, 30 U.S.C. § 814(a). It was modified on November 14, 1997, and November 26, 1997. An order of termination was issued on April 12, 1998.

Citation No. 4444398 (Docket No. CENT 98-155-RM) was issued on November 14, 1997, under section 104(d)(1), 30 U.S.C. § 814(d)(1). It was modified on November 21, November 26, December 4 and December 18, 1997. An order of termination was issued on April 12, 1998.

Citation No. 4109013 (Docket No. CENT 98-156-RM) was also issued on November 14, 1997, under section 104(d)(1), supra. It was modified on November 21, November 26 and December 18, 1997. An order of termination was issued on April 12, 1998.

Section 105(d) of the Act, 30 U.S.C. § 815(d), provides that within 30 days of the receipt thereof an operator may contest the issuance or modification of an order or citation.

The operator alleges that it received the termination orders on May 12, 1998, and argues that a termination is the same as a modification for purposes of deciding timeliness. Under the operator's approach, its filing on June 9, 1998, fell on the 28th day.

The termination orders dated April 12, 1998, contain the name of the individual upon whom service was made. I take judicial notice that service is customarily made on the day the citation or order is issued. Even if service had been by mail, it would not have taken 30 days, absent some unusual circumstance. The operator has submitted nothing to support its claim that it did not receive orders of the termination until May 12, 1998, and I, therefore reject it. On this basis, I find these cases were untimely filed.

Moreover, even if the receipt date for the termination orders is accepted as May 12, the operator cannot prevail. The operator attempts to treat terminations and modifications as though they are interchangeable and in this way have the 30 days begin to run upon receipt of the terminations. However, the Act makes clear that they are not the same. Section 105(d) which as already noted, gives operators the opportunity to contest citations/orders and modifications of them, also gives a miner and miner representative the opportunity to contest the issuance, modification or termination of an order. If modifications and terminations were the same, there would be no need to separately identify terminations. Clearly, the Act does not give operators the right to challenge terminations, whereas miners and their representatives are given that right. Commission regulations follow the distinction between modifications and terminations. 29 C.F.R. § 2700.20.

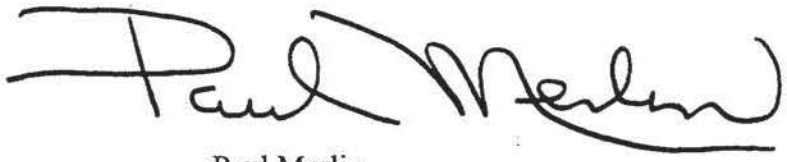
Commission case law also makes clear that modifications and terminations are separate and distinct actions. In Nacco Mining Company, 11 FMSHRC 1231, (July 1989), the Commission expressly stated that a modification differs from a termination, explaining that termination occurs when the Secretary determines that the cited condition has been abated. 11 FMSHRC at 1236. The Commission further said that depending on the nature of a modification, the substantive effect of the underlying enforcement action may or may not be changed, but that the enforcement action remains in effect as modified. Id. Subsequently, in Wyoming Fuel Company, 14 FMSHRC 1282 (August 1992), the Commission reiterated that termination was merely an administrative action used to indicate to an operator that it had successfully abated the cited violation and was no longer subject to a potential withdrawal order for failure to abate under section 104(b), 30 U.S.C. § 814(b). 14 FMSHRC at 1288.

In light of the foregoing, I conclude that the date of termination is not the date from which the 30 day contest begins to run.

It is well established that contests by operators of citations and orders must be brought within 30 days or be dismissed. Island Creek Coal Co. v. Mine Workers, 1 FMSHRC 989 (August 1979); Alexander Brothers, 1 MSHC 1760 (1979); Old Ben Coal Co., 1 MSHC 1330 (1975); Consolidation Coal Company, 1 MSHC 1029 (1972); M.A. Walker Co., Inc., 19 FMSHRC 897 (May 1997); Asarco, Incorporated, 16 FMSHRC 1328 (June 1994); C and S Coal Company, 16 FMSHRC 633 (March 1994); Diablo Coal Company, 15 FMSHRC 1605 (August 1993); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Prestige Coal Co., 13 FMSHRC 93 (January 1991); Big Horn Calcium, 12 FMSHRC 463 (March 1990); Rivco Dredging Corporation, 10 FMSHRC 889 (July 1988); Allentown Cement Company, Inc., 8 FMSHRC 1513 (October 1986); Industrial Resources, Inc., 7 FMSHRC 416 (March 1985); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); See also, ICI Explosives USA, Inc., 16 FMSHRC 1794 (August 1994).

Accordingly, regardless of which termination date is used, these cases are untimely filed. On this ground also they must be dismissed.

In light of the foregoing, it is **ORDERED** that these cases are **DISMISSED**.



Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Daniel Diaz, Jr., Esq., Plunkett & Gibson, Inc., P. O. Box BH002, San Antonio, TX 78201

Stephen E. Irving, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

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