JULY 2000

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 2000

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

Reinjtes of the South, Inc., v. Secretary of Labor, MSHA, Docket No. CENT 99-152-RM. (Judge Weisberger, June 20, 2000)

There were no cases filed in which review was denied during the month of July:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 11, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 99-65-M and 99-66-M
GUILMETTE BROTHERS CORPORATION	:	

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

ORDER

BY: Marks, Riley, and Verheggen, Commissioners

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 1, 2000, Chief Administrative Law Judge David Barbour issued orders of default to Guilmette Brothers Corporation ("Guilmette") for failing to answer the petitions for assessment of penalty filed by the Secretary of Labor on November 9, 1999, or orders to respondent to show cause issued on December 16, 1999. The judge assessed civil penalties in these two proceedings totaling $3,629, as proposed by the Secretary.

On April 28, 2000, the Commission received a letter from George Guilmette, explaining that his wife had undergone a serious operation for cancer in December and that he had forgotten about the hearing date. Mot. Attached to his request are copies of the judge's default orders in these proceedings. Guilmette requests a hearing to contest these violations. The Secretary does not oppose Guilmette's request.

The judge's jurisdiction in this matter terminated when his decision was issued on February 1, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission received Guilmette's letter on April 28, 2000, after the judge's default orders had become final decisions of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). In the interest of justice, we reopen the proceedings, treat Guilmette's letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996).

Guilmette failed to respond to the Secretary's petitions and the judge's show cause orders because his wife was undergoing cancer surgery. It appears that Guilmette is a small, pro se operator. Under these circumstances, we find that Guilmette's failure to respond to the judge's show cause orders amounts to inadvertence or mistake. *See Northern Kansas Rock, Inc.*, 22 FMSHRC 486, 487-88 (Apr. 2000) (granting request to reopen where the operator failed to timely file because husband was undergoing medical treatment and surgery); *Tigue Construction Co.*, 21 FMSHRC 9, 10-11 (Jan. 1999) (granting operator's request where its vice president, who was the employee responsible for answering charges, unexpectedly underwent quadruple bypass surgery); *Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings where operator's safety director, who routinely handles MSHA violations, was home recovering from surgery).

Accordingly, we vacate the judge's default orders, grant Guilmette's motion, and reopen for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Beatty, dissenting:

On the basis of the present record, we are unable to evaluate the merits of Guilmette's position and would remand the matter for assignment to a judge to determine whether Guilmette has met the criteria for relief under Rule 60(b). *See Wolf Creek Sand & Gravel*, 21 FMSHRC 1, 1-2, 3 (Jan. 1999) (remanding to judge to determine whether operator's claim that it failed to timely file due to secretary's absence as a result of her husband's health problems met criteria for relief under Rule 60(b)); *Miller employed by Mid-Wisconsin Crushing Co.*, 16 FMSHRC 2384, 2385 (Dec. 1994) (remanding where the movant claimed he failed to timely file his hearing request due to secretary's absence because of her mother's terminal illness). We note that George Guilmette's explanation that, due to his wife's operation, he "forgot the date of the hearing" (Mot.), is seemingly incongruous with a default suffered as the result of the failure to file an answer to civil penalty petitions. We also note that Guilmette has failed to provide any affidavits or other sufficiently reliable documents to substantiate its allegations.

Mary Lu Jordan, Chairman

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. CENT 99-152-RM
	:	CENT 99-154-RM
REINJTES OF THE SOUTH, INC.	:	CENT 99-195-M
	:	CENT 99-335-M

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

DIRECTION FOR REVIEW AND ORDER

BY: THE COMMISSION

In these consolidated contest and 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"), Reinjtes of the South, Inc. ("ROS") filed with the Commission a motion to reopen and remand Administrative Law Judge Avram Weisberger's June 20, 2000, Decision Approving Settlement. For the following reasons we direct review in this case, vacate the judge's decision, and remand it to him for further proceedings.

ROS had agreed to settle the two citations at issue in the case by, among other things, paying the full $55,131 in penalties that was sought, and had signed a Stipulation and Motion to Approve Settlement Agreement and forwarded it to the Secretary of Labor. After doing so, however, and before the Secretary could sign the document and file it with the judge, ROS filed a Motion to Stay. Therein ROS requested the judge stay proceedings and postpone approval of the stipulation and settlement agreement until the United States Court of Appeals for the Fifth Circuit ruled upon the jurisdiction of the Department of Labor's Mine Safety and Health Administration over the alumina refining process, which is at issue in *In re: Kaiser Aluminum and Chemical Co.*, 5th Cir. No. 99-31072. Over the Secretary's objection, the stay was granted by the judge on January 6, 2000.

In a decision issued June 12, 2000, the Fifth Circuit panel hearing the *Kaiser* case ruled that MSHA has jurisdiction over alumina plants. Consequently, on June 15, 2000, the Secretary filed with the judge and served upon ROS a motion to lift the stay and approve the settlement

agreement. According to its motion to the Commission, ROS never consented to the Secretary's motion, and did not receive it until June 19, 2000. Mot. at 2 & n.3. The following day, before ROS could respond to the motion, the judge issued a decision lifting the stay and approving the settlement agreement.

ROS now requests that the Commission reopen the judge's decision and remand it to him in order that ROS can have the opportunity, provided for in the Commission's regulations, to file a response to the Secretary's motion. Mot. at 3. Because ROS and the operator in the *Kaiser* case have the same counsel, ROS states that it can represent that a petition for rehearing in the *Kaiser* case will be filed in the Fifth Circuit by July 27, 2000, and that it was thus premature for the stay to be lifted and the settlement approved. *Id.* at 3 & n.4. The Secretary has informed the Commission by letter that she does not oppose the relief ROS seeks.

ROS should have been afforded the opportunity to respond to the Secretary's motion before the motion was acted upon. *See* 29 C.F.R. § 2700.10(c) ("A statement in opposition to a written motion may be filed by any party within 10 days after service upon the party."). As the Secretary correctly pointed out in her letter, however, the judge's decision is not yet a final order of the Commission under section 113(d)(1) of the Mine Act. *See* 30 U.S.C. § 823(d)(1). Consequently, to grant ROS the relief it seeks we will treat its motion as a petition for discretionary review and grant review under Mine Act section 113(d)(2). 30 U.S.C. § 823(d)(2). We also vacate the judge's decision and remand the case to him so that ROS can file a response to the Secretary's motion and the judge can consider that response in ruling upon the relief requested by the Secretary.

Accordingly, this case is remanded to the judge for further proceedings consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2000

UNITED MINE WORKERS OF AMERICA, LOCAL UNION 2232, DISTRICT 20, on behalf of MINERS	:	Docket No. VA 99-79-C
v.	:	
ISLAND CREEK COAL COMPANY	:	

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

DECISION

BY: Marks and Riley, Commissioners

This is a compensation proceeding filed by Local Union 2232, District 20, United Mine Workers of America ("UMWA") against Island Creek Coal Company ("Island Creek"), pursuant to section 111 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 821 (1994) ("Mine Act" or Act).[2] The Department of Labor's Mine Safety and Health Administration

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

[2] Section 111 of the Act provides,

> 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. 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.

("MSHA") issued a withdrawal order under section 107(a) of the Act, 30 U.S.C. § 817(a), as a result of high methane readings in Island Creek's VP 8 Mine. Administrative Law Judge Avram Weisberger denied the application for compensation. 21 FMSHRC 1093 (Oct. 1999) (ALJ). The UMWA filed a petition for discretionary review which the Commission granted. For the reasons that follow, we reverse the decision of the judge and remand the proceeding for calculation of compensation owed to miners.

I.

Factual and Procedural Background

Island Creek operates the VP 8 Mine, an underground coal mine in southwestern Virginia. 21 FMSHRC 1093. On December 2, 1998, MSHA Inspector David Fowler examined three entries in the mine. *Id.* UMWA walk-around representative Billy Shelton and Island Creek mine safety inspector Michael Canada accompanied Fowler on the ride underground. *Id.* Fowler and Canada got off the ride and entered the return airway, while Shelton continued to the bottom of the Deskins B shaft to wait and pick them up. Tr. 14. Fowler and Canada each carried a digital methane detector. 21 FMSHRC at 1093. As they reached the No. 1 west development area, Fowler's methane detector registered 2.1 percent, while Canada's detector indicated 1.8 percent methane. *Id.* at 1093-94.

Fowler and Canada continued to walk further down the entry to determine the areas affected and to locate the source of the methane. *Id.* at 1094. At the No. 1 entry, east of the No. 19 seal, Fowler and Canada took additional methane readings, with Fowler's monitor indicating a level of 4.5 percent methane and Canada's several tenths of a percentage less. *Id.* and n.2. Shortly after 11:00 a.m., Shelton rejoined Fowler and Canada. Tr. 15. Fowler asked Shelton to retrieve Fowler's Riken methane detector from the vehicle in which the three had been riding. 21 FMSHRC at 1094. The Riken detector is more accurate than digital methane monitors. *Id.* Canada told Fowler that, if the Riken detector gave a methane reading of 4.5 percent, he would have to pull his miners based on Virginia law. *Id.*

At 11:30 a.m., Shelton returned with the Riken detector, which indicated that methane had accumulated to a level of 4.5 percent at the No. 2 development area. *Id.* Canada left Fowler and Shelton to telephone the mine dispatcher to notify him to withdraw the miners due to the high level of methane. *Id.* Fowler and Shelton continued south in the No. 1 entry and took readings as high as 10 percent in the No. 4 and 5 development areas. *Id.* They discovered that the plaster had fallen off the seals separating those areas from the gob, indicating a possible source of the methane. *Id.*

Around 12:00 noon, Canada rejoined Fowler and Shelton in the No. 4 development area. *Id.* Fowler took methane readings in the range of 8 to 9 percent. *Id.* Fowler then told Canada he was going to issue a section 107(a) withdrawal order, since he knew the origin of the methane

and the areas of the mine affected.[3] *Id.* and *id.* at 1098 n.4.

It was stipulated that, at 12:12 p.m., Fowler issued a section 104(a) citation[4] and a section 107(a) withdrawal order.[5] *Id.* at 1094 n.1, 1095. Fowler testified at trial that it was at that time that he determined the miners should be withdrawn. *Id.* at 1095. The order, which was reduced to writing after Fowler exited the mine, described the conditions warranting the issuance of the order and identified the areas affected by the withdrawal order as the No. 4 and 5 developments.[6] *Id.*; UMWA Ex. A. Sometime after 1:00 p.m., Fowler encountered some miners along the trackway inside the mine and told them to go outside until he could determine why the methane was being liberated. 21 FMSHRC at 1095; Tr. 71-73. Fowler told mine superintendent Terry Suder to make sure that everyone was out of the mine. 21 FMSHRC at 1095.

Island Creek continued to pay all the miners including any who evacuated to the surface in the hope that a correction to decrease the methane level would occur quickly but later released them to go home. Tr. 144-145. Island Creek Superintendent Suder estimated that it took 45 to 50 minutes to evacuate the miners from the mine. Tr. 145. At trial, the parties stipulated that the first miners exited the mine at approximately 1:30 p.m. 21 FMSHRC at 1095.

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[3] While Canada testified that Fowler did not ask him to withdraw miners from the mine, he did not deny that Fowler told him that he had a section 107(a) withdrawal order. Tr. at 118-20.

[4] The citation alleged a violation of 30 C.F.R. § 75.323(e), which prohibits methane levels exceeding 2 percent in a split of air. 21 FMSHRC at 1094 n.1. The citation was ultimately vacated. *Id.*

[5] Section 107(a), 30 U.S.C. § 817(a), provides, in relevant part,

> If, upon any inspection or investigation . . . , 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, . . . , 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.

[6] Fowler explained at trial that he referenced the No. 4 and 5 developments in the order because they were the direct source of the methane, but the order would cause everyone underground to be evacuated because of the explosive range of methane. Tr. 87-88.

Subsequently, the UMWA filed a complaint for compensation requesting 2 ½ hours compensation for 41 miners, which included the remaining time on the 8:00 a.m. to 4:00 p.m. shift. Compl. at 2 and Ex. C. Island Creek opposed the complaint, and a hearing was held.

In his decision, the judge relied on the Commission's decision in *Local Union 1261, District 22, UMWA v. Consolidation Coal Company*, 11 FMSHRC 1609 (Sept. 1989) ("*Local Union 1261*"), *aff'd sub nom. Local Union 1261 v. FMSHRC*, 917 F.2d 42 (D.C. Cir. 1990), which he concluded was controlling authority for the issues before him. 21 FMSHRC at 1095. The judge stated that the primary issue before him was "whether miners are entitled to compensation under . . . 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." *Id.* The judge found that at 11:30 a.m., Canada told the dispatcher to get everyone out of the mine due to elevated methane. *Id.* at 1097. The judge further found that, when MSHA inspector Fowler issued the section 107(a) withdrawal order, the order to evacuate the miners had already been given by Island Creek. *Id.* Therefore, the judge concluded that, under the holding of *Local Union 1261*, MSHA's withdrawal order did not effectuate the removal of the miners and, thus, no miners were working when Fowler issued the withdrawal order. *Id.* The judge rejected the UMWA's contention that Island Creek's decision to remove miners was made in anticipation of MSHA's issuance of a section 107(a) order in order to avoid liability for compensation of the miners. *Id.* at 1098. Accordingly, the judge dismissed the compensation proceeding. *Id.*

II.

Disposition

The UMWA argues the judge's finding that the miners were not working when MSHA issued its section 107(a) order is not supported by substantial evidence. UMWA Br. at 6. In support, the UMWA relies on the stipulation that the first miners withdrawn appeared on the surface at 1:30 p.m. and that it took 45 to 50 minutes for miners to exit the mine following the evacuation order. *Id.* at 6-7. Therefore, the UMWA contends that miners could only have begun exiting the mine after 12:30 and after the MSHA inspector issued the section 107(a) order. *Id.* at 7; Reply Br. at 3-5. Alternatively, the UMWA argues that the miners were still in the mine working, even if evacuating, when the section 107(a) order issued. UMWA Br. at 7-8. The UMWA further argues that, even if the miners were not working at the time the section 107(a) order issued, nevertheless they qualified for relief because they were "working during the shift when the citation was issued," as required by section 111. *Id.* at 8. The UMWA distinguishes the Commission's decision in *Local Union 1261* because there miners were withdrawn from the mine and paid for the remainder of their shift on a day prior to MSHA's arrival and withdrawal order. *Id.* at 9-11. Finally, the UMWA argues that the Commission should not allow an operator to withdraw miners in anticipation of a withdrawal order in order to avoid section 111 compensation liability. *Id.* at 11-13.

Island Creek responds that the UMWA inaccurately stated in its brief some of the facts regarding the timing of events at the mine. I.C. Br. at 4-5. Island Creek further argues that the essential facts in the case are not in dispute. *Id.* at 5-6. Island Creek contends that the disposition of this case is governed by the Commission's decision in *Local Union 1261*, that the judge correctly applied the decision to the facts of the case, and that the MSHA inspector did not bear the brunt of miner animus because it was the operator who withdrew the miners. *Id.* at 6-7. Finally, Island Creek argues that the record does not support the UMWA's speculation that the miners were evacuated from the mine so it could avoid section 111 compensation liability. *Id.* at 8-9.

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)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Section 111 of the Mine Act provides for compensation for the balance of a shift to miners who are "working during the shift" when a section 107 order issues if they are "idled" by the order. It is apparent that the miners in the VP 8 mine were working during the shift in which the withdrawal order issued. Our focus in this proceeding then is whether the miners were idled by the MSHA order. In the *Local Union 1261* decision, the Commission reviewed an earlier application of the requirement. The Commission stated that the term "idled" includes both a physical removal from the mine and a prohibition from entering the mine.[7] 11 FMSHRC at 1612 n.4 (citations omitted). The record in the instant proceeding does not reflect that either event had

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[7] The primary issue in *Local Union 1261* was whether miners were working during the shift when MSHA issued its withdrawal order or were on the next working shift. 11 FMSHRC at 1615-16. In addressing the requirement in section 111 that miners must be "idled," the Commission stated that, "We do not disavow the Commission's earlier interpretation of 'idled' . . . " *Id.* at 1615. *Local Union 1261* is therefore instructive on the meaning of "idled" in section 111. Island Creek further argues that *Local Union 1261* is controlling on the disposition of entitlement to compensation in this proceeding. However, that decision dealt with the entitlement of miners to shift compensation for the day MSHA issued an order closing the mine, when the operator had voluntarily closed its mine on the day before, thereby barring miners on subsequent shifts from entering the mine. *Id.* at 1611. The complaint for miner compensation in *Local Union 1261* therefore involved a markedly different set of facts and ultimately involved a different provision of section 111 ("second sentence compensation") than is involved in this proceeding ("first sentence compensation"). *See id.* at 1611-12.

occurred at the VP 8 mine prior to the section 107(a) withdrawal order.[8]

The factual underpinning of the judge's decision was that "the mine operator had voluntarily closed the mine for safety reasons prior to the issuance of an order described in section 111. . . ." 21 FMSHRC at 1095; *see also id.* at 1097. The judge found that Canada had contacted the mine dispatcher to evacuate the mine around 11:30 a.m. However, Canada's actions, while prudent and commendable, are not by themselves determinative of whether miners were idled as a result of his telephone call or as a consequence of the subsequent section 107(a) withdrawal order. Even if some miners were evacuated to the surface as a result of Canada's call, the record does not establish that all miners were evacuated or that those who were evacuated were barred from going back in the mine before Fowler issued the section 107(a) withdrawal order. Indeed, the testimony of Island Creek's own witness shows that, after mine superintendent Suder learned of the withdrawal order, sometime after 1:00 p.m., he called to release miners on the surface, who were still being held and paid by Island Creek. Tr. 142-44. Thus, the status of these miners was unchanged even after Island Creek ordered the evacuation of the mine. Consequently, the judge's determination that the mine was closed and that miners were idled prior to issuance of the withdrawal order is contrary to the overwhelming weight of record evidence.

As the Commission stated in *Local Union 1261*, "[A] miner who has been previously withdrawn from a mine can still be 'idled' by a subsequently issued withdrawal order in the sense that the miner is barred by the order from returning to work and that miners so idled may be entitled to compensation." 11 FMSHRC at 1615. Indeed, as Suder testified, until he found out about the withdrawal order, he expected that the miners who were held on the surface in pay status would be sent back into the mine. Tr. at 144-45. The Commission noted in *Local Union 1261* that an important legislative purpose in adopting section 111 was to insulate the mine inspector from any repercussions that might arise from the withdrawal of miners and temporarily depriving them of their livelihood. 11 FMSHRC at 1615 (citation omitted). Clearly, the section 107(a) withdrawal order, which directly resulted in the operator taking the miners out of pay status, embodied the precise harm that Congress was concerned about when it drafted section 111. Therefore, its application here to compensate miners, some of whom were out of the mine but still on mine property and being paid, is consistent with this legislative purpose.

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[8] While Commissioner Marks welcomes Commissioner Verheggen's joining in the result, he does not agree that the Commission's interpretation of the term "idled" needs to be disturbed. *See* slip op at 9-10. In his concurrence, Commissioner Verheggen correctly points out that the miners in this case, because they were paid by Island Creek for the time they spent exiting the mine and waiting on the surface, cannot be considered to have been "idled" under the terms of the statute until such time that they actually began to lose pay that they otherwise would have been due. *Id.* at 10. However, such an analysis only establishes the start of the first sentence compensation period; it does not answer the ultimate question this case presents, which is what caused the miners to be idled.

Further, Island Creek's earlier evacuation notice did not result in the complete withdrawal of miners from the mine and the cessation of all work activities. Following the mine's evacuation notice, Fowler met rank-and-file miners in the mine and had to tell them to leave, and he instructed mine superintendent Suder to make sure everyone was out of the mine.[9] 21 FMSHRC at 1095. Thus, we conclude that substantial evidence does not support the judge's determination that the mine had effectively closed prior to the Fowler's issuance of the section 107(a) withdrawal order.

Finally, Island Creek stipulated that miners did not exit the mine until 1:30 p.m. Given the testimony of Canada and Suder that it took 45 minutes to an hour to evacuate the mine (Tr. 108, 145), miners could not have begun evacuating the mine until 12:30 p.m. at the earliest, *after* the section 107(a) withdrawal order, which issued at 12:12 p.m. While this stipulation alone establishes entitlement of the miners to compensation, there is other record evidence that establishes that miners continued in pay status and were in the mine well after the Island Creek evacuation order, so that it is clear that they were affected by the MSHA order.

In short, given the judge's findings, the stipulation, and the testimony of Island's Creek's own witnesses, substantial evidence does not support the judge's ultimate finding that "the removal of the miners previously ordered to be withdrawn by Canada, was not effectuated by Fowler's order." 21 FMSHRC at 1097. Rather, the evidence supports only one conclusion — that the miners were "idled" by the withdrawal order issued by Fowler and, therefore, are entitled to compensation for the remainder of the shift.

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[9] It is evident from the record that this group of miners was not a repair crew authorized under section 104(c) of the Act, 30 U.S.C. § 814(c), because such a crew must be assigned by the operator to "eliminate the condition described in the [section 107(a) withdrawal] order." Canada testified that, when he told mine superintendent Suder about the section 107(a) withdrawal order, Suder was shocked and surprised to learn of the order. Tr. 128-29. Thus, Suder could not have ordered the repair of a problem, based on the order, about which he was unaware. In any event, Canada and Fowler ordered the miners out of the mine. Tr. 128-29.

III.

Conclusion

For the foregoing reasons, we reverse the decision of the administrative law judge and remand the case to the judge for calculation of the compensation due miners for the 2 ½ hours of the shift during which they were idled by the section 107(a) withdrawal order.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Commissioner Verheggen, concurring in result:

Like my colleagues in the majority, I would reverse the judge's decision in this matter and remand the case for calculation of the compensation and interest due the miners. I write separately, however, because the grounds on which I base my decision differ from those of my colleagues, as I explain below.

The provisions of the first sentence of section 111 of the Mine Act at issue here provide that when miners are idled by an imminent danger order, they "shall be entitled . . . to full compensation by the operator at their regular rates of pay for the period they are idled" during the shift when the order was issued. 30 U.S.C. § 821. Section 111 was intended to ensure that:

> [M]iners who are withdrawn from a mine because of the issuance of a withdrawal order shall receive certain compensation during periods of their withdrawal. This provision . . . is not intended to be punitive, but recognizes that miners *should not lose pay because of . . . an imminent danger* which was totally outside their control. It is therefore a remedial provision . . .

S. Rep. No. 95-181, at 47 (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 634-35 (1978) (emphasis added). In my view, given the clear purpose of section 111 to recompense miners for pay lost as a result of an imminent danger order, miners are "idled" for purposes of determining their eligibility for section 111 pay when they in fact actually cease being paid — when they are, in other words, "taken off the clock" because an imminent danger order has been issued.

My interpretation of section 111 differs somewhat from my colleagues, who view the term "idled" as including "both a physical removal from the mine and a prohibition from entering the mine." Slip op. at [5]. But here, Island Creek *continued to pay* its miners who were held on the surface in the hope that the problem which caused elevated methane levels would be corrected. Tr. 144-45. Mr. Suder testified:

> A . . . We thought, you know, if this is just a small item, we can correct it and we can get back to work. Until I found out the particulars, we held the men.
>
> Q Okay. And since you held them, you paid them until they were released to go home?
>
> A Yes.

Id.

By 1:30 p.m. on the day in question, the problem was not corrected, and the miners were barred from reentering the mine because of the section 107 order in force by then[10] — and this is when Island Creek discontinued paying the miners and released them to go home. Tr. 144-45. I also note that the UMWA's complaint requests 2½ hours of compensation, i.e., for the period from 1:30 p.m. to 4:00 p.m., the remaining time on the 8:00 a.m. to 4:00 p.m. shift when the miners were sent home. Compl. at 2 and Ex. C. The purpose of section 111 is to recompense *lost pay*, regardless of whether miners have been physically removed from the mine and are prohibited from reentering it. Thus, whether evacuation of the miners had been ordered in this case before the section 107 order was issued is irrelevant. The relevant question is instead whether the miners have, in fact, lost compensation, to which they otherwise would have been entitled, as a result of the section 107 order.[11]

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[10] I believe this answers the question Commissioner Marks poses in his footnote responding to my concurrence, i.e., "the ultimate question this case presents, which is what caused the miners to be idled." Slip op. at [6 n.8]. At the time the miners were taken off the clock at 1:30 p.m., Island Creek could have continued paying them to wait for the methane problem to be corrected — in which case, the miners would not have been "idle" for purposes of section 111. When the company opted instead to discontinue paying the miners and release them to go home (Tr. 144-45), at that time, all the miners would have been able to do was wait because the section 107 order in force by then barred them from going back underground. In other words, the circumstances surrounding "the start of the first sentence compensation period" (slip op. at 6 n.8) in turn establish "what caused the miners to be idled" in this case.

[11] In *Local Union 1261, Dist. 22, UMWA v. FMSHRC*, the District of Columbia Circuit opined in essence that to be idled for purposes of section 111, miners would have to be "'on-the-job in the mine.'" 917 F.2d 42, 47 (D.C. Cir. 1990). I do not believe that the interpretation I offer here of the first sentence of section 111 is inconsistent with this holding. Although the miners being held at the surface at the VP 8 Mine were not "in the mine" in the sense that they were underground, they were certainly still on the mine property. Moreover, the miners were "on-the-job" insofar as they were still being paid, albeit paid to do nothing but wait for further orders, a not uncommon situation for workers to be in on mine sites — or on any other job site of any description. As for the Commission case which the D.C. Circuit was reviewing, *Local Union 1261, Dist. 22, UMWA v. Consolidation Coal Co.*, 11 FMSHRC 1609 (Sept. 1989), I agree with my colleagues that it "involved a markedly different set of facts and ultimately involved a different provision of section 111 . . . than in involved in this proceeding." Slip op. at [5 n.7].

I thus find that the miners in this case, who were barred from reentering the mine by the section 107 order, then "idled" when taken off the clock, are entitled to compensation under section 111, and I join my colleagues in reversing the judge and remanding the case to him so that he may calculate an award of compensation and interest.

Theodore F. Verheggen, Commissioner

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July 31, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA-99-11-R
ISLAND CREEK COAL COMPANY	:	

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

DECISION

BY THE COMMISSION:

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that Island Creek Coal Company ("Island Creek") did not violate 30 C.F.R. § 75.1725(c)[2] when a miner performed maintenance work on a conveyor belt while standing on another conveyor belt which was not blocked against motion. 20 FMSHRC 1395, 1399 (Dec. 1998) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determination. For the reasons that follow, the judge's decision stands as if affirmed.

I.

Factual and Procedural Background

On September 20, 1998, Ronnie Maggard, a maintenance foreman at Island Creek's VP 8 underground coal mine, told Charles Miller, a rock dust motorman, to add oil to a speed reducer

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[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

[2] Section 75.1725 states in pertinent part: "(c) Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 75.1725(c).

which was part of the drive mechanism of the 5-A conveyor belt. 20 FMSHRC at 1395-96. He did not instruct Miller to make sure the belt was locked and tagged out,[3] even though it was company policy to have belts locked and tagged out during maintenance or repair work. Tr. 53, 76, 155. Miller asked Thomas Ray, an electrician, to assist in the task. 20 FMSHRC at 1396. The 5-A belt was located above the 5-B belt and dumped material onto it. *Id.*; Jt. Ex. 1. Ray stood on the 5-B belt, which had been deenergized, in order to pump oil into the speed reducer which was attached to the 5-A belt and located 4 to 5 feet above the 5-B belt. *Id.* Neither belt was locked and tagged out. *Id.* The 5-B belt was unexpectedly energized, traveling 400 feet, and carrying Ray with it before it was stopped. *Id.* Ray injured his hand and as a result was still unable to return to work as of the date of the hearing, November 12, 1998. *Id.* at 1395-96.

Following an investigation of the accident, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of section 75.1725(c). The order alleged that the violation was significant and substantial ("S&S")[4] and involved a high level of negligence by the operator. Gov't Ex. 1. The operator contested the order and the matter proceeded to hearing before Judge Weisberger.

The judge found that Island Creek did not violate section 75.1725(c). 20 FMSHRC at 1397-99. He concluded that, based on the plain meaning of the standard, it did not apply to the 5-B conveyor belt on which the miner stood because no maintenance or repairs were being performed on that belt. *Id.* at 1397. The judge also rejected the Secretary's claim that, because maintenance work was performed on the belts while they were not locked and tagged out, Island Creek violated the standard. *Id.* at 1398-99. The judge concluded that the standard requires machinery undergoing maintenance or repairs to be blocked against motion but does not require it to be locked and tagged out. *Id.*

II.

Disposition

The Secretary argues that the judge erred in finding that Island Creek did not violate section 75.1725(c) when the miner stood on the 5-B conveyor belt and performed maintenance to the 5-A conveyor belt. S. PDR at 8-10. She contends that the judge incorrectly determined that

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[3] Under regulations covering electrical equipment, the term "locked and tagged out" as used in 30 C.F.R. §§ 56.12016, 56.12017, 75.511, and 77.501 means that the power is turned off by switching the breaker and a lock and tag is placed on the cathead of the equipment so the power cannot be turned on. Tr. 49-50, 73-74; S. Post-Hearing Br. at 4 n.1.

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

the term "on" in the standard does not refer to machinery on which a miner stands while performing repairs or maintenance to other machinery. *Id.* at 8-10. The Secretary also argues that, because the 5-A and 5-B belts formed an integrated unit, the judge erred in finding that the standard did not apply to the 5-B belt when the miner performed maintenance on the 5-A belt. *Id.* at 11-12. Further, she contends that the judge erred in failing to accept the Secretary's interpretation that belts undergoing maintenance or repairs must be deenergized and locked and tagged out, at least when they are not otherwise blocked against motion. *Id.* at 13-16.

Noting that the original order alleged that it violated the standard because the 5-B belt was "not blocked against motion" (IC Br. at 2; Gov't Ex. 1), and that the Secretary did not move to modify the order to assert the "lock and tag out" argument, Island Creek argues that the issue of whether it violated section 75.1725(c) when it failed to lock and tag out the belts is not properly before the Commission. IC Br. at 2. On the merits, Island Creek argues that the plain meaning of section 75.1725(c), as well as case law and MSHA policy, support the judge's finding that the standard does not require machinery to be locked and tagged out during maintenance or repairs. *Id.* at 5-10. It contends that the judge correctly found that the standard does not apply to machinery on which a miner stands to perform maintenance or repairs on other machinery. *Id.* at 11-13. Further, Island Creek argues that the judge correctly determined that the 5-A and 5-B belts were discrete and separate units. *Id.* at 14.

Commissioners Riley and Verheggen on different grounds would affirm the judge's decision that Island Creek did not violate section 75.1725(c). Chairman Jordan and Commissioner Marks would reverse the judge's decision. Under *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501, 1505 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

III.

Separate Opinions of Commissioners

Commissioner Riley, in favor of affirming the decision of the administrative law judge:

For the following reasons, I conclude that the judge properly determined that Island Creek did not violate 30 C.F.R. § 75.1725(c) when maintenance was performed on the conveyor belts while they were not locked and tagged out.

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

of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

I conclude that the language of section 75.1725(c) is not clear when applied to the facts of this case. In such situations as here involving an ambiguous standard, the Secretary has on numerous occasions asserted that the Commission and its judges must examine her interpretation of the standard and give deference to that interpretation if it is reasonable. S. PDR at 6-8; *see, e.g.*, *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1143 (Oct. 1998) (Secretary arguing deference due to her reasonable interpretation of standard); *Harlan Cumberland Coal Co.*, 19 FMSHRC 1521, 1523 (Sept. 1997) (same). Island Creek was cited for failing to block against motion the 5-B belt on which the miner stood while performing maintenance to the 5-A belt. Gov't Ex. 1. Section 75.1725(c) requires machinery to be "blocked against motion" when maintenance is performed "on" it. It is not clear whether the term "on" in the standard only refers to machinery "to which" maintenance is performed (i.e., the 5-A belt) or also includes machinery "upon which" a miner stands (i.e., the 5-B belt) while performing maintenance to other machinery. Because the standard is not clear in this case, the Commission and its judges must defer to the Secretary's interpretation of the standard, provided her interpretation is reasonable. *See Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192-93 (Mar. 1998) (holding that where "the standard is ambiguous rather than plain," the Commission "must consider whether the Secretary's interpretation . . . is reasonable.").

I conclude that the Secretary's interpretation of the standard is unreasonable, inconsistent, and wrong. She erroneously argued to the judge that "blocked against motion" in the standard means "locked and tagged out" when applied to conveyor belts and that the operator violated the standard because it failed to lock and tag out the 5-A and 5-B belts. S. Post-Hearing Br. at 4-5. The Secretary's interpretation is not consistent with the language of the regulation. She defines the term "locking and tagging out" as "a procedure by which a lock and tag are put on the cathead of a belt at the power source [to ensure] that after the power is turned off on a belt, no one else can turn the power back on." S. PDR at 13. However, this "locked and tagged out" requirement is not mentioned in section 75.1725(c) and there is no indication from the regulatory history of the standard (*see* 37 Fed. Reg. 11777 (1972) (proposed rule); 38 Fed. Reg. 4974 (1973) (final rule)) that "blocked against motion" means "locked and tagged out."

The Secretary's interpretation of section 75.1725(c) is contrary to the Mine Act's goal of protecting the safety of miners. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994) ("A safety standard 'must be interpreted so as to harmonize with and further . . . the objectives of' the Mine Act.") (quoting *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984)). Under the Secretary's interpretation, even if machinery is deenergized and locked and tagged out, an employee performing maintenance or repairs to the machinery may still be in danger from the unexpected movement of the machinery due to the release of stored mechanical, hydraulic, pneumatic, or other form of energy. *See* 29 C.F.R. § 1910.147 (Occupational Safety and Health Administration regulations for the control of hazardous energy during servicing and maintenance of machinery). Thus, the Secretary's interpretation of the standard does not adequately protect the safety of miners during maintenance or repair work. However, such protection can be better achieved if, as stated in section 75.1725(c), the machinery is deenergized and "blocked against motion" to prevent the unexpected movement of the machinery.[1]

The Secretary's interpretation of the standard is also unreasonable because she erroneously attempts to apply an electrical procedure, the "locked and tagged out" requirement, to mechanical non-electrical work. "Lock and tag out" procedures are specifically required in several MSHA regulations (*see* 30 C.F.R. §§ 56.12016, 56.12017, 57.12016, 57.12017, 75.511, 77.501), but these involve work on electrical equipment where there is a danger of electrical discharge. "Blocked against motion" procedures are also used in several MSHA regulations (*see* 30 C.F.R. §§ 56.14105, 57.14105, 75.1725(c), 77.404(c)) but these involve mechanical maintenance or repair work. In the instant case, the miner performed mechanical work when he added oil to the speed reducer on the 5-A belt. 20 FMSHRC at 1396. The Secretary does not argue and there is no record evidence to indicate that the miner was exposed to the danger of electrical discharge when he added oil to the speed reducer. Furthermore, the preamble to the 30 C.F.R. Part 75 final rules, which cover mandatory safety standards for electrical and mechanical equipment, states that section 75.1725 covers "mechanical equipment" rather than electrical equipment. 38 Fed. Reg. at 4975.

The electrical nature of the "locked and tagged out" requirement is supported by case law. In *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1190, 1192-93 (9th Cir. 1982), the court held that the Secretary should have applied a "blocked against hazardous motion" standard (30 C.F.R. § 55.14-29 (1979) (now 30 C.F.R. § 56.14105)) to mechanical work involving the removal of wedged rocks from a drop chute at a metal mine instead of applying a "lock out" requirement (30 C.F.R. § 55.12-16 (1979) (now 30 C.F.R. § 56.12016)) intended for work on electrically-powered equipment. Similarly, the Commission in *Mettiki Coal Corp.*, 13 FMSHRC 760, 766 (May 1991), stated in dictum that the Secretary should have applied a "blocked against

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[1] I concur with Commissioner Verheggen (slip op. at 10 n.5) that it is troubling that my colleagues voting in favor of reversing the judge (slip op. at 15) place great significance on the operator's internal policies requiring lock and tag out procedures when they conclude that section 75.1725(c) requires the conveyor belts to be locked and tagged out. This is particularly troubling because the operator's policies are clearly at odds with the plain meaning of the standard at issue.

motion" standard (30 C.F.R. § 77.404(c)) to the mechanical repair of a speed reducer on a conveyor belt at a surface coal mine instead of applying a "locked and tagged out" standard (30 C.F.R. § 77.501) intended for electrical work on electric distribution circuits and equipment. Indeed, the Secretary's refusal to acknowledge applicable case law making this distinction between mechanical equipment that must be "blocked against motion" and electrical equipment that must be "locked and tagged out," led to the first Equal Access to Justice Act (5 U.S.C. § 504) award by the Commission. *Ray, employed by Leo Journagan Construction Co.*, 20 FMSHRC 1014 (Sept. 1998).

Like the Queen of Hearts in Lewis Carroll's *Alice In Wonderland*, who could change the law on a whim and then arbitrarily decide whose head would roll for unforeseeable and thus unavoidable offenses, the Secretary stands before the Commission demanding that we endorse the unsupportable proposition that in section 75.1725(c), which covers the maintenance or repair of mechanical equipment, "blocked against motion" really means "locked and tagged out," as used in sections 56.12016, 56.12017, 57.12016, 57.12017, 75.511, and 77.501, which apply to electrical equipment. Because the Secretary's underlying assumption that section 75.1725(c) requires machinery to be "locked and tagged out" is unreasonable, it is not necessary to analyze the reasonableness of her interpretation that the standard applies to the 5-B belt upon which the miner stood when performing maintenance to the 5-A belt. Such an analysis would have included interpretative questions such as whether, for the purposes of section 75.1725(c), the two conveyor belts were sufficiently integrated structurally and functionally to form a single piece of equipment (a "belt system"), or, if they were not a single piece of equipment, whether the term "on" in the standard means "located upon" the machinery as well as "performing maintenance or repairs to" the machinery.

Having found the meaning of section 75.1725(c) to be ambiguous and having rejected the Secretary's interpretation of the standard as being clearly unreasonable, I turn next to what I refer to as the "order argument," raised by Chairman Jordan and Commissioner Marks (slip op. at 13-14), that the judge's finding of no violation should be reversed because the original order stated that the operator violated the standard because the belt was not "blocked against motion"[2] (Gov't

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[2] Although the term "blocked against motion" in the order (Gov't Ex. 1) is the same as the term used in the standard, the Secretary's assertions about the meaning of the term have confused the issue. The Secretary did not call the inspector to testify as to his reasons for issuing the order. The only indication in the record of MSHA's definition of the term "blocked against motion" as used in the order was provided by the Secretary who claimed it means "locked and tagged out." S. Post-Hearing Br. at 4-5. Thus, it is not clear whether, when the inspector issued the order, he meant the term to mean any method to prevent the motion of the belt or only the "locked and tagged out" procedure asserted by the Secretary. Given the Secretary's unreasonable interpretation of the term "blocked against motion" which the judge correctly rejected (20 FMSHRC at 1398) and given the confusion surrounding the meaning of the term in the order, I disagree with Chairman Jordan and Commissioner Marks (slip op. at 13-14, 18) that the use of the term "blocked against motion" in the order is a sufficient basis for reversing the judge's decision.

Ex. 1) and the record evidence shows that the belt was not blocked against motion. Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), provides that, except for good cause shown, an issue cannot be considered on review unless it was raised before the judge. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319 (Aug. 1992). Despite having every opportunity to do so, the order argument was never raised before the judge because the Secretary always maintained that the operator violated section 75.1725(c) by failing to lock and tag out the belts. S. Post-Hearing Br. at 4-5. Section 113(d)(2)(A)(iii) of the Mine Act also provides that "review shall be limited to the questions raised by the petition." *Asarco, Inc.*, 14 FMSHRC 1323, 1326 (Aug. 1992). The Secretary never raised the order argument in her petition. Thus, I conclude that the order argument is not before the Commission because it was not explicitly raised before the judge or on petition to the Commission. Nor do I think it was implicitly raised because the Secretary explicitly defined "blocked against motion" to mean "locked and tagged out." S. Post-Hearing Br. at 4-5; *see Beech Fork*, 14 FMSHRC at 1319-21 (finding issue not on review because it was not explicitly or implicitly raised before judge).

The judge correctly analyzed the instant case according to the "locked and tagged out" interpretation of the standard argued before him by the Secretary and correctly found it to be erroneous. Although my analysis differs from that of the judge, I affirm his decision in result that the operator did not violate section 75.1725(c) when maintenance was performed on the conveyor belts while they were not locked and tagged out.

By failing to block the machinery against motion, Island Creek's actions were obviously unsafe and my decision in no way condones its actions. It is unfortunate that the Secretary has complicated what might have been a simple case. By again confusing blocking mechanical equipment against motion with locking and tagging out electrical equipment, she continues to muddle the law at the expense of miner safety.

James C. Riley, Commissioner

Commissioner Verheggen, in favor of affirming the decision of the administrative law judge:

In its July 1982 decision in *Phelps Dodge Corp. v. FMSHRC*, the Ninth Circuit highlighted the Secretary's misguided approach to ensuring the safety of miners performing mechanical repairs. 681 F.2d 1189 (9th Cir. 1982). In that case, the Secretary applied to *mechanical* repairs a standard designed to ensure the safety of miners performing *electrical* repairs. *Id.* at 1191-93. Calling the Secretary's enforcement action "an abuse of discretion" (*id.* at 1193), the court observed that the cited standard was "directed to abatement of the danger of electric shock" and did not "address the hazards arising from the accidental movement of electrical equipment while mechanical work is being done thereon" (*id.* at 1192).

Now, almost 18 years later, the instant case, *Island Creek Coal Co.*, underscores the truth of the old adage that the more things change, the more they stay the same. Here, a miner, Thomas Ray, was performing *mechanical* work on a belt drive mechanism. 20 FMSHRC 1395, 1395-96 (Dec. 1998) (ALJ). Ray was assisting another miner, Charles Miller, with adding oil to a speed reducer. *Id.* at 1396. When the belt on which Ray was standing was accidentally activated, it carried Ray 400 feet, resulting in serious injury to him. *Id.* Miller and Ray's work entailed no risk whatsoever of electric shock.

MSHA cited Island Creek under the correct standard, 30 C.F.R. § 75.1725(c), which in my opinion clearly required that the machinery on which Miller and Ray were working be "blocked against motion." Yet inexplicably, the Secretary based her enforcement action against Island Creek on the fact that Miller and Ray had not locked and tagged out the belt on which they were working. At the hearing and in her post-hearing brief, the Secretary argued that, with regard to conveyor belts, the term "blocked against motion" in section 75.1725(c) means "locked and tagged out," and that Island Creek violated the standard because it did not lock and tag out the belts. S. Post-Hearing Br. at 4-5; Tr. 24-26. Island Creek also addressed this contention in its post-hearing brief and the judge fully considered it in his decision. IC Post-Hearing Br. at 16-18; 20 FMSHRC at 1397-98.[1] In other words, the basis for the Secretary's enforcement action is that the belt was not locked and tagged out, which the Secretary described as an "electrical plug [being] pulled from a power source and a lock [being] put on the plug itself, thus preventing it from being plugged back in." S. Post-Hearing Br. at 4 n.1. She also defined the term to mean "a procedure by which a lock and tag are put on the cathead of a belt at the power source [to ensure] that after the power is turned off on a belt, no one else can turn the power back on." S. PDR at 13.

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[1] I disagree with Island Creek's contention that, because MSHA's order did not state that Island Creek failed to lock and tag out the belts, and because the Secretary did not move to modify the order to assert her "lock and tag out" argument, that argument is not properly before the Commission. The parties litigated the lock out/tag out issue at trial, and it is well established that "Rule 15(b) of the Federal Rules of Civil Procedure . . . permits [trial and appellate] adjudication of issues actually litigated by the parties irrespective of pleading deficiencies." *See Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997).

It hardly bears stating that section 75.1725(c) does not require equipment to be locked and tagged out.[2] The term is not mentioned in section 75.1725(c), nor is it defined in any MSHA regulation or by the Mine Act. Instead, the standard requires that when machinery undergoes maintenance or repair, it must be (1) de-energized and (2) "blocked against motion." The term "blocked against motion" is not defined in the MSHA regulations or the Mine Act. Under ordinary usage,[3] the term "to block" means "to render . . . unsuitable for passage or progress by obstruction," and the term "motion" means "passing from one place . . . to another." *Webster's Third New Int'l Dictionary* (1986) at 235, 1475. Therefore, the term "blocked against motion" means obstructing passage from one place to another. There is no indication from the plain meaning of section 75.1725(c) that, when applied to conveyor belts, "blocked against motion" may only be satisfied by locking and tagging out. The Secretary also did not present any evidence at trial to show that the only way to block a belt against motion is to lock it and tag it out.[4]

I also find compelling the clause of section 75.1725(c) that allows blocks against motion to be removed "where machinery motion is necessary to make adjustments." I fail to see how any such adjustments could feasibly be made if the machinery were locked and tagged out. Nor has the Secretary explained this contradiction to her position. More importantly, I find that the Secretary's enforcement strategy in this case could well pose significant hazards to the safety of miners in other situations. It is a matter of common sense that some machinery, no matter how carefully locked and tagged out, could, if not blocked against motion, move under the simple force of gravity (if not other forces, such as stored mechanical energy), and so injure a miner. I am thus in complete agreement with the concern expressed by Commissioner Riley that "[t]he

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[2] Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

[3] In the absence of an express regulatory definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

[4] Lock and tag out procedures are required by some MSHA regulations (*see, e.g.*, 30 C.F.R. §§ 56.12016, 56.12017, 57.12016, 57.12017, 75.511, 77.501), but these deal specifically with electrical equipment rather than mechanical equipment such as conveyor belts. MSHA regulations require "blocked against motion" procedures when performing mechanical repairs or maintenance to equipment (*see, e.g.*, 30 C.F.R. §§ 56.14105, 57.14105, 75.1725(c), 77.404(c)).

Secretary's interpretation of section 75.1725(c) is contrary to the Mine Act's goal of protecting the safety of miners." Slip op. at 5. Locking and tagging out is no substitute for blocking against motion when mechanical repairs are performed.[5]

All these points lead me to the conclusion that, just as in *Phelps Dodge*, the Secretary has attempted to fit a square peg into a round hole, even though a round peg was ready at hand. I find this inexplicable because it is an attempt to graft an *electrical work safeguard* onto a standard which applies to *mechanical* work, a lock and tag requirement that simply does not appear in the plain language of section 75.1725(c). This case is an example of the Secretary attempting to "prosecute citizens for violating a regulation that does not exist." *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1341 (D.C. Cir. 2000).

The Secretary's confusion of electrical and mechanical standards is also at odds with Commission precedent. In *Mettiki Coal Corp.*, the Secretary cited the operator of a surface coal mine for an improperly functioning lock out device for a belt on which miners were making mechanical repairs to a speed reducer. 13 FMSHRC 760, 762 (May 1991). Although the operator was not required to have the lock out device engaged when an MSHA inspector discovered that it was not working (*id.* at 765-66), the Commission nevertheless recognized that when mechanical repairs are performed

> . . . [a] lock out of the equipment or circuit is not required. Thus, when mechanical repairs are being made to mechanical equipment and there is no danger of contacting exposed energized electrical parts, MSHA requires only that the power be turned off and the machinery be blocked against motion.

Id. at 766.

The Commission addressed similar confusion over mechanical and electrical work in *Ray, employed by Leo Journagan Construction Co.*, 20 FMSHRC 1014, 1016 (Sept. 1998), where in an underlying proceeding, an individual was cited for failing to lock and tag out a crusher under mechanical repair. In *Ray*, a four-member majority stated that "[t]here is an urgent

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[5] I find troubling the suggestion made by my colleagues voting in favor of reversing the judge that we ought to accept locking and tagging out belts on which repairs are being performed because of the "universal acceptance of a lock and tag out policy by everyone affiliated with Island Creek who appeared at the hearing." Slip op. at 15. I fail to see how any such policy, however enthusiastically or universally endorsed by an operator, can be used as guidance in a case such as this when the policy is at odds with the plain language of the standard at issue. Indeed, I find this suggestion of my colleagues particularly puzzling in light of the fact that they do not hesitate to find a violation of the standard's plainly stated requirement that machinery must be blocked against motion. They leave hanging the question of how their holding squares with Island Creek's policy.

need for the Secretary to clarify what precautions are necessary when employees unclog a crusher," including the applicability and feasibility of lockout procedures in situations where mechanical repairs necessitate "jogging" a machine to see if repairs have been successful. *Id.* at 1026.

I find it unfortunate here that where the Secretary could simply have argued before the judge that the operator violated section 75.1725(c) because it failed to block the belts against motion, she chose instead to erroneously argue that the "blocked against motion" requirement was equivalent to a "lock and tag out" requirement developed for electrical work. This error might have been understandable had it been made by an inspector in the field. Yet it is the Secretary's counsel, at both trial and appellate levels, that has made this error. I am troubled by the Secretary's apparent failure to distinguish *mechanical* standards from *electrical* standards, a point that ought to have been settled 18 years ago with the Ninth Circuit's *Phelps Dodge* decision.[6]

Apparently, the Chairman and Commissioner Marks do not share my concerns regarding the Secretary's confused approach in this case. They state that "the terms of [section 75.1725(c)] must be enforced as they are written." Slip op. at 13. They then proceed to write an opinion in which they would so enforce the standard against Island Creek. Their approach is at odds, however, with the manner in which the Secretary chose to enforce section 75.1725(c) in this case. It is not the role of the Commission to usurp the Secretary's enforcement role under the Mine Act and prosecute a violation — which is essentially what my colleagues suggest we do. To the contrary, Congress established the Commission to, among other things, "develop a uniform and comprehensive *interpretation* of the law . . . [to] provide guidance to the Secretary in enforcing the [Mine Act]." *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm. Before the Senate Comm. on Human Resources*, 95th Cong. 1 (1978) (emphasis added). Congress explicitly charged the Commission "with the responsibility . . . for reviewing the enforcement activities of the Secretary." *Id.* I am not prepared, as my colleagues are, to ignore the problems posed by the Secretary's litigation posture in this case. I find that it is more appropriate to attempt to guide the Secretary to a more reasonable and realistic appreciation of the distinction between mechanical and electrical standards.

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[6] Similarly, in the *Ray* case, the Secretary did not address *Phelps Dodge* — "indeed, in her posthearing brief, [she] chose to ignore the case altogether." 20 FMSHRC at 1025. The Secretary lost her case against Ray, and also was ordered to pay his legal bills. *Id.* at 1029.

Accordingly, I find that the judge's conclusion that Island Creek did not violate section 75.1725(c) is correct, albeit on grounds different from those upon which the judge relied. I would thus affirm his decision.

Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Marks, in favor of reversing the judge:

According to the plain meaning of section 75.1725(c), an operator must take two actions to insure that miners are protected from accidental equipment start-ups when repairs on machinery are performed: (1) turn off the power and (2) ensure that the machinery is blocked against motion.[1] Unless it does both, the operator is in violation of the standard.

In order to pump oil into the drive mechanism of the 5-A conveyor belt, Thomas Ray stood on the 5-B belt, which was located 4 to 5 feet below. 20 FMSHRC 1395, 1396 (Dec. 1998) (ALJ). Coal on the 5-A belt dumped into the 5-B belt. *Id.*; Jt. Ex. 1. There is no dispute that at some point during the repair, the power on the 5-B belt was turned on. 20 FMSHRC at 1396. It is also undisputed that the 5-B conveyor belt was not blocked against motion. *See* IC Br. at 4 ("when the 5-B belt started to move" Ray was carried on the top). The accidental start up of the belt caused Ray to be carried a distance of 400 feet and to sustain injury to his hand. 20 FMSHRC at 1396.

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). Both the plain meaning of the regulation and the order at issue clearly state the nature of Island Creek's violation here[2] — failure to block a belt against motion. 30 C.F.R. § 75.1725(c); Gov't Ex. 1 at 1 (belt was not "blocked against motion").

Although the Secretary has argued both below and on review that the regulation required Island Creek to lock and tag out the belt during maintenance work (S. PDR at 13-16), we are not bound by the Secretary's theory in making our determination as to whether Island Creek violated the standard. We cannot let the Secretary's more complicated litigation posture obfuscate the straightforward fact that Island Creek simply did not block the 5-B belt against motion, as

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[1] Section 75.1725(c) states that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments." 30 C.F.R. § 75.1725(c).

[2] Although we agree with Commissioner Riley that part of the regulation is ambiguous (because the words "on machinery" can mean machinery "to which" maintenance is performed, or "upon which" a miner stands to perform it), Riley opinion, slip op. at 4, this does not render the "turn off the power" and "blocked against motion" language ambiguous. Rather, that language should still be interpreted according to its plain meaning. *See American Train Dispatchers Ass'n v. ICC*, 54 F.3d 842, 848 (D.C. Cir. 1995) (deference to agency interpretation of term contained in regulation only appropriate where meaning of that term is ambiguous).

required by the regulation.[3] Consequently, it was unnecessary for the judge, and remains unnecessary for this Commission, to rule on the Secretary's contention that the regulation required the operator to lock and tag out the machinery.[4]

The Commission routinely refuses to examine contentions of the parties that are not necessary for the resolution of the case before it. *See, e.g.*, *Arch of Kentucky*, 20 FMSHRC 1321, 1327 n.7 (Dec. 1998); *Extra Energy, Inc.*, 20 FMSHRC 1, 8 n.11 (Jan. 1998); *Fort-Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1516 n.6 (Sept. 1997). Neither the judge nor our colleagues provide any reason to depart from this bedrock principle of jurisprudence, and we can discern none on our own.

We do not agree with Commissioner Riley that we are prohibited from addressing the plain meaning of the regulation because the Secretary failed to raise it before the judge. Riley opinion, slip op. at 6-7. The order was admitted into evidence, and clearly charges, using the language of the regulation, that "[t]he 5-B conveyor belt drive was not blocked against motion." *See* Gov't Ex. 1 at 1.[5] To refuse to consider the order as written, as both our colleagues do, runs directly counter to the Mine Act's directive that we issue a decision "affirming, modifying, or vacating the Secretary's . . . order." 30 U.S.C. § 815(d). Consequently, we find Commissioner Verheggen's commentary that we are somehow acting outside our proper role in this case unpersuasive. *See* Verheggen opinion, slip op. at 11.

We also disagree with Commissioner Riley's statement that the Secretary never raised this argument in her petition. Riley opinion, slip op. at 7. In fact, the Secretary's petition was carefully drafted to explicitly include the more global "blocked against motion" argument as part of the "lock and tag out" theory that applied to the specific situation at Island Creek. S. PDR at 14 n.4 ("[I]n the mine in this case, locking and tagging out is the only viable method for blocking against motion. . . . [T]his is not a case where the operator argued that it had blocked the belts against motion in some way other than locking and tagging out."); *see also id.* at 13 ("The Secretary's interpretation of the standard . . . [requires] that belts on which miners are working be deenergized *and* locked out, at least where, as here, the belts are not otherwise blocked against motion"); *id.* at 15 n.5 ("The operator in this case neither locked and tagged the belts against motion, nor tried to block them in some other way.").

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[3] Commissioner Riley is incorrect when he claims that we "conclude that section 75.1725(c) requires the conveyor belts to be locked and tagged out." Riley opinion, slip op. at 5 n.1. Nothing in our opinion can be reasonably read to support such a statement.

[4] Consideration of the Secretary's position is better left to a case in which the operator can reasonably contend that its machinery *was* "blocked against motion," but not locked and tagged out. This is not such a case.

[5] In fact, Island Creek calls attention to this language in its brief, complaining that the Secretary should have modified the order to reflect her "lock and tag" out theory. IC Br. at 2.

In addition, we are frankly puzzled by, and thus briefly comment on, our colleagues' indignation regarding the Secretary's "lock and tag out position," indignation that leads them to vacate the order at issue here. Charges that the Secretary's interpretation "does not adequately protect the safety of miners," Riley opinion, slip op. at 5, or that it impermissibly applies an electrical procedure to mechanical work, *id.*, Verheggen opinion, slip op. at 9-11, are truly perplexing given the consistent assertions by Island Creek's miners, foremen, and counsel, that locking and tagging out the belts was precisely what Island Creek's safety policies required. Miners Ray, Charles Miller, and Tommy Proffit all testified that they had been told to lock and tag out belts. Tr. 40, 55, 59, 74, 102. In fact, Miller and Proffit even stated that they had been told by Island Creek management that this was a legal requirement. Tr. 76, 102. Island Creek foremen Elmer Deel and Ronnie Maggard verified that the company's policy required miners to lock and tag out belts. Tr. 120, 156-57. Notes from Island Creek safety meetings confirm that this was the procedure taught to miners. IC. Ex. 1.[6] At the hearing, Island Creek's counsel also asserted that this mine "require[s] a higher standard of care from their employees . . . [and] as a matter of practice, we do require for mechanical work that the equipment be locked and tagged out." Tr. 31.

In fact, locking and tagging out the belts is the only feasible manner of blocking the belts against motion (the actual regulatory requirement) that is mentioned in the entire record of this case. There was universal acceptance of a lock and tag out policy by everyone affiliated with Island Creek who appeared at the hearing. There is also a complete lack of record evidence both as to why it might be dangerous and how the belts could otherwise be blocked against motion. Accordingly, our colleagues' assertion that a lock and tag out policy does not adequately protect miner safety (Riley opinion, slip op. at 5; Verheggen opinion, slip op. at 9-10), constitutes a finding without record support.

Although Island Creek failed to insure that the 5-B belt was blocked against motion, and therefore failed to comply with the explicit mandate contained in section 75.1725(c), our inquiry cannot end here. Island Creek also contends that it was unreasonable for the Secretary to apply section 75.1725's requirements to the 5-B belt, the one upon which Ray was standing. The operator argues that since the maintenance was performed on the 5-A belt, only that belt came under the purview of the regulation while Ray added oil to the speed reducer. IC Br. at 11. The

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[6] The notes from the safety meeting of December 1, 1997, state that:

> Belts can be very dangerous if correct work habits are not followed and if we do not lock and tag the cathead out at the power source when we are going to work on any belt for any reason. No work shall be started on any belt until it is verbally confirmed that the belt has been properly locked and tagged out.

IC. Ex. 1 at 6.

judge agreed with Island Creek that the standard only applied to the 5-A belt. 20 FMSHRC at 1397.

It is this section of the regulation that we find ambiguous, because the requirement that "repairs or maintenance shall not be performed *on* machinery" does not make clear whether it is restricted to machinery that is being repaired, or also includes machinery on which a miner is standing to perform the repair. If a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 966-69 (June 1992) (examining whether Secretary's interpretation was reasonable).

The Secretary interprets section 75.1725(c) to apply both to machinery on which miners stand to perform repair or maintenance work, and to the machinery to which the repair or maintenance work is being performed. S. PDR at 8. The Secretary argues that to repair one piece of equipment, miners must sometimes position themselves on or adjacent to another piece of equipment. *Id.* at 9-10. In light of this fact, she maintains that the fundamental protective objective of section 75.1725(c) can only be realized if it is interpreted to also apply to machinery with which miners come into contact during repair work. *Id.* She urges the Commission to reject a restrictive interpretation of the standard that would protect miners only from the dangers caused by the accidental movement of machines undergoing the repair, but would leave them vulnerable to the equally harmful safety hazards of adjacent machinery. We find this approach eminently reasonable.[7]

In *Walker Stone Co. v. Secretary of Labor*, 156 F.3d. 1076 (10th Cir. 1998), the Tenth Circuit eschewed the narrow approach to the standard urged by Island Creek here. In that case, a

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[7] The Secretary also contends that the regulation applies to both the 5-A and 5-B belts because the definition of the word "on" means both "upon" (or "on top of machinery") and "to" machinery. S. PDR at 8-9. This is a permissible reading of the regulation, and thus is entitled to deference. *See Island Creek Coal Co.*, 20 FMSHRC 14, 18-19, 23 (Jan. 1998). The judge erred by framing the question as asking whether the fact that Ray stood on the 5-B belt constituted maintenance of that belt (20 FMSHRC at 1397) improperly focusing on the word "maintenance" instead of the word "on."

miner removing rocks which had clogged the crusher was killed when the crusher was accidentally restarted. *Id.* at 1079. Walker Stone was cited under a standard almost identical to the one at issue in this case.[8] The operator first maintained that the standard was inapplicable because removing rocks could not constitute repair or maintenance work. Alternatively Walker Stone contended that even if the work was considered repair or maintenance, the standard was still inapplicable "because the work was actually being performed on the rocks rather than on the crusher." *Id.* at 1082. The court rejected that literal approach, endorsing instead the Commission's broad reading of the standard as "consistent with the safety promoting purposes of the Mine Act," and one that avoided "anomalous results." *Id.*

Under the approach urged by Island Creek, miners repairing equipment would be protected from accidental movement by the equipment undergoing repair but would have no protection from the accidental movement of equipment they might find it necessary to stand upon or lean against in order to perform the repair or maintenance work. Their protection under the standards would therefore depend on the location of the equipment needing the repair or maintenance. The less accessible the equipment being repaired, the less protection would be afforded by the standard. We reject an interpretation that would lead to such an absurd result. *See Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998) (to avoid absurd results, explosives training standard must be interpreted to require training in the type of explosives actually used); *aff'd in pertinent part*, 170 F.3d 148 (2d. Cir. 1999); *Consolidation Coal Co.*, 15 FMSHRC at 1557 (judge's construction of an escapeway standard could lead to absurd results).

In this case, the Secretary also maintains that the 5-B belt was an integral part of the 5-A and 5-B belt transfer point, and that the work performed by Ray should be considered a repair of the entire belt transfer machine, which contains 5-B. S. PDR at 11-12. A careful review of the evidence regarding these belts indicates that they formed an almost seamless unit, with the belts mounted contiguously. *See* Joint Ex. 2A-2D, 2G. Furthermore, testimony at trial demonstrated that the miners performing the maintenance work believed that, at least at the transfer point area, the belts formed one unit. Ray testified that he did not check to make sure that the 5-B belt was locked and tagged out before he started his maintenance work on the speed reducer because "[w]e were working there all day. . . . I didn't stop to consider that this was a new order, new job . . . . I just thought it was a continuation of what we were doing." Tr. 40.[9] Miller testified that he did not verify whether the 5-B belt was deenergized "[b]ecause [he] made an assumption that — being that work was already being done at that speed reducer, [he] just made an assumption that it was already locked out." Tr. 73.

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[8] Walker Stone was cited under 30 C.F.R. § 56.14105, the surface mine counterpart to section 75.1725(c), which applies to underground coal mines. 156 F.3d at 1079.

[9] Testimony revealed that the prior work in that area was replacement of a broken roller on the 5-A belt drive. Tr. 36, 96-7, 119.

In construing the identical regulation in *Arch of Kentucky, Inc.*, 13 FMSHRC 753, 756 (May 1991), the Commission recognized that "[t]he purpose of section 75.1725(c) is to 'prevent, to the greatest extent possible, accidents in the use of [mechanical] equipment.' . . . A safety standard should be construed to effectuate its purpose." (citations omitted). We agree and would reverse the judge's decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 11, 2000

BLADES CONSTRUCTION PRODUCTS, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. YORK 98-81-RM
	:	Citation No. 7714696; 8/4/98
v.	:	
	:	Docket No. YORK 98-82-RM
	:	Citation No. 7714697; 8/4/98
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	Docket No. YORK 98-83-RM
	:	Citation No. 7714698; 8/5/98
	:	Steuben Crushed Stone-Div./ Blades Construction Products
	:	Mine ID No. 30-00214
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. YORK 98-58-M
	:	A.C. No. 30-00214-05512
v.	:	
	:	Docket No. YORK 99-4-M
BLADES CONSTRUCTION PRODUCTS, Respondent	:	A. C. No. 30-00214-05514
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. YORK 99-56-M
	:	A. C. No. 30-00214-05516 A
	:	Docket No. YORK 99-57-M
v.	:	A. C. No. 30-00214-05517 A
RONALD G. THURSTON & JAMES P. EMO, employed by BLADES CONSTRUCTION PRODUCTS, Respondents	:	Steuben Crushed Stone-Div./ Blades Construction Products

DECISION

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Dept. of Labor, New York, New York, on behalf of the Secretary of Labor; L. Joseph Ferrara, Esq., Jackson & Kelly, Washington, D.C., and John F. Klucsik, Esq., Devorsetz, Stinziano, Gilberti, Heintz & Smith, P.C., Syracuse, NY, on behalf of Blades Construction Products, Ronald G. Thurston and James P. Emo.

Before: Judge Melick

These consolidated civil penalty proceedings are before me pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act," charging Blades Construction Products (Blades) and James P. Emo and Ronald G. Thurston as agents of Blades, with violations of mandatory standards. The general issue before me is whether there were violations of the cited standards. Other issues include whether certain violations were "significant and substantial," whether certain violations were caused by the "unwarrantable failure" of Blades and whether certain violations were "knowing" violations committed by Emo and/or Thurston as agents of a corporate mine operator within the meaning of Section 110(c) of the Act. If violations are found to have been committed and if those violations are found to have been "knowingly" committed by Emo and/or Thurston as agents of a corporate operator, then appropriate civil penalties must also be assessed utilizing the relevant criteria under Section 110(i) of the Act.

Before and during hearings the parties reached partial settlements and Blades agreed to pay the proposed civil penalties with respect to Citation Nos. 7707523, 7707524, 4432879, 7714696, 7714697 and 7714698. Without objection, the Secretary also amended her petition for civil penalty in Docket No. York 98-58-M, by including therein Citation No. 4288449. The parties thereafter also agreed to a settlement of that citation and Blades agreed to pay the proposed penalty in full. Considering the representations and documentation submitted in these cases, I conclude that the proferred settlement is acceptable under the criteria set forth in Section 110(i) of the Act. Accordingly an order directing payment of the agreed penalties will be incorporated in this decision. The Secretary has also unilaterally vacated Citation Nos. 4432875 and 4432880, and has modified Citation No. 4432873 to delete the "significant and substantial" finding originally made therein.

Citation No. 4432873

This citation, as modified, alleges a violation of the standard at 30 C.F.R. § 58.620, without "significant and substantial" findings, and charges as follows:

> The Joy air track drill operator was drilling dry on the northside upper bench. Water was available but not being used. There were no other effective dust control measures being used as required. Heavy dust concentrations were observed extending above the drill mast head. The drill operator was wearing a

Moldex 2200 dust mask that was not properly fit tested.

The cited standard, 30 C.F.R. § 58.620, provides as relevant hereto that "holes shall be collared and drilled wet, or other effective dust control measures shall be used, when drilling non-water-soluble material."

Inspector William Korbel of the Department of Labor's Mine Safety and Health Administration (MSHA) visited the Steuben Crushed Stone Mine on February 19, 1998, in response to a miner's hazard complaint. Korbel initially met with quarry foreman Ronald Thurston at the scale house. From that location Korbel observed drilling in progress above the north face. There was heavy dust around the drilling mast and, after approaching the drill at the top of the bench he found that the operator had been drilling "dry."

The driller told Korbel that this was only his second day on this drill, that he had never been told not to drill dry and that he had never been told to use water. According to Korbel, Thurston also admitted that he did not warn the driller about the need to use water while drilling and told Korbel that water would freeze if he used it.

In its post-hearing brief Blades admits to the violation and now questions only the issue of negligence and the appropriate penalty. The Secretary did not address these issues in her post-hearing brief so that neither her theories of negligence nor the amount of penalty she now proposes, based on her modified citation, are known. I nevertheless find that the violation was the result of high negligence. Indeed, Blades now acknowledges that Thurston knew he was drilling dry but in an attempt to mitigate its negligence Blades argues that water could not have been used because of freezing temperatures. This argument provides no justification for the violation however, since, as Inspector Korbel observed, anti-freeze could have been utilized to prevent freezing. Moreover, according to former Blades drill operator Darrell Rice, Blades had on past occasions used a 50/50 mixture of methanol and water to keep the water from freezing. Blades also argues that the drillers were told to remove themselves from the drill rig while drilling. While this evidence could serve to reduce the dust exposure to miners and therefore, reduce the gravity of the violation, it provides no mitigation of Blades' negligence in committing the violation herein. Under these circumstances it is clear that an agent of the operator, Ron Thurston, intentionally violated the cited standard.

As noted, the Secretary has modified this citation to delete her "significant and substantial" findings and to allege that an "injury or illness" was "unlikely." While the Secretary has not addressed the issue of gravity in her brief, in light of the above modifications and thereby the implicit discrediting of her own evidence on this issue, I conclude that the violation was of low gravity.

Citation No. 4432874

Neither the violation charged in Citation No. 4432874 nor the Secretary's "significant and substantial" findings relating thereto are now challenged. In its post-hearing brief Blades now

questions only the negligence findings and the appropriate penalty. The citation at issue alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.15005 and charges as follows:[1]

> The joy driller was observed changing steel standing about 3 ½ feet from a 37 ft. dropoff. He then went to the edge (standing within 1 ft. of the edge/dropoff) and picked up a stone. He was brought back from the edge and stated his safety belt and line was back at the plant. When persons work where there is a danger of falling and are not using a safety belt and line, it is considered an imminent danger condition.

The cited standard, 30 C.F.R. § 56.15005, provides as relevant hereto that "safety belts and lines shall be worn when persons work where there is danger of falling."

From a position below the highwall Inspector Korbel observed the driller standing within a body length of the edge of the wall without a safety belt. At that location the wall had a 37-foot drop-off. Proceeding to the top of the bench, Inspector Korbel observed what he deemed to be the driller's footprints only 3 ½ feet from the edge. From that location Korbel also observed the driller pick up a rock from within one foot of the edge. In the presence of Thurston, Korbel asked the driller if he had been told to wear a safety belt near the edge and the driller responded in the negative. Blades now acknowledges that the standard was violated when the drill operator approached to within one foot of the highwall without wearing fall protection. I find that the standard was also violated when the drill operator also approached to within 3 ½ feet of the highwall, as alleged.

Korbel opined that this admitted violation was "significant and substantial." While this finding is no longer challenged it is appropriate to nevertheless review the basis for such a finding. 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 safety 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,

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[1] A "Section 107(a)" imminent danger order was also issued in conjunction with this citation. The order was not however contested within the time frame set forth in Section 107(e)(1) of the Act and the validity of that order is therefore not before me in this civil penalty proceeding. In any event Blades noted in its post-hearing brief that it no longer disputes the imminent danger finding therein.

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

See also Austin Power Inc. 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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).

Clearly, the presence of the drill operator within 3 ½ feet and one foot of the edge of a 37-foot highwall without a safety belt constitutes a "significant and substantial" violation of the cited standard and a violation of high gravity. I disagree with the Secretary, however, that the violation was the result of high negligence. The Secretary bases her argument in this regard on purported admissions by Quarry Foreman Thurston that the drill operator was required to drill holes within seven feet of the edge of the highwall but had not been given instructions to wear a safety belt while drilling nor warned against approaching the edge of the highwall without a safety belt. The Secretary further argues that the drill operator had limited experience of two days drilling with only brief instructions and was working alone on a surface that was uneven and wet with moisture.

The drill operator, Robert Clark, stated to an MSHA investigator however that he had in fact been trained in the use of a safety belt and line and had in fact been warned by Mine Superintendent James Emo not to work near the edge. Thurston testified moreover that he had trained Clark for about nine hours and that he and Emo had both warned Clark to stay away from the highwall. In addition, Thurston provided Clark with a seven foot pipe to measure the placement of drill holes and to keep him from approaching closer than seven feet from the edge of the highwall. I further find credible the evidence that Clark had not in fact been changing the drill steel manually.

However, while I conclude that Clark was not strictly required by his job duties to approach closer than seven feet of the highwall, he was nevertheless within sufficient proximity of the highwall to warrant the need for fall protection. It is reasonably foreseeable that the driller could trip or stumble from a distance of seven feet from the edge of the highwall thereby placing him in danger of falling. This evidence is weighed in conjunction with the credible evidence that Blades had provided Clark with fall protection training and that Clark had been issued a safety belt and line which he wore on a daily basis in his normal job of crusher operator, where there were fall hazards. In addition, on February 18 and February 19, Emo and Thurston provided more than nine hours of task and safety training to Clark and Clark was told to "stay away from the face." Within this framework of evidence I find Blades chargeable with only moderate negligence.

Citation No. 4432876

This citation, issued pursuant to Section 104(d)(1) of the Act,[2] alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3130 and, as modified, charges as follows:

> Mining methods used on the pit northwest upper bench exceeded the capacity of the equipment being used. The 62 to 65 foot high face is fractured with a large amount of loose visible along the entire height and 410 foot length. On April 30, 1996, a similar condition on a 43 foot high face resulted in a lost time accident. This is an unwarrantable failure.

The cited standard, 30 C.F.R. § 56.3130, provides as follows:

> Mining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned task. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes.

The Commission has held that the standard at issue incorporates a "performance-oriented" approach so that it is "broad enough to apply to the wide variety of conditions encountered." The Commission further explained that the appropriate test in interpreting and applying such broadly worded standards is not whether the operator had explicit prior notice of a

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[2] Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

specific prohibition or requirement, but whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Secretary v. Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367 (March 1993).

The Secretary appears to argue that there was a violation of the cited standard under either of two theories. The Secretary argues under her first theory, that the large amount of loose material found by Inspector Korbel on the bench below the upper west highwall and Korbel's observations that the face was fractured and unconsolidated, corroborated by the testimony of expert Terry Hoch that the wall was unstable, is in itself evidence that the mining methods were inadequate to maintain wall stability. Under her second theory, the Secretary maintains that the benches were not suitable for the available maintenance equipment at the mine property.

I find that the Secretary has met her burden of proving a violation under her first theory and in light of these findings it is not necessary to reach her second theory. It is undisputed that the upper west face was 62 to 65 feet high and 410 feet long and that the adjacent bench was approximately 40 feet wide. Inspector Korbel testified credibly that he found a large amount of loose unconsolidated material on the bench and heard material falling during his inspection. He also observed that the face was severely fractured. Terry Hoch, a mining engineer and chief of MSHA's roof control division, visited the subject quarry on July 13, 1999, accompanied by a technician and Inspector Korbel. Based on his firsthand observations of the material and strata in the west highwall at that time, photographs of various portions of the highwall taken in February of 1998, the testimony of Inspector Korbel that material had been falling off the highwall and evidence that a freeze-thaw cycle was then occurring, Hoch concluded that the highwall was unstable on February 19, 1998. Hoch concluded that the presence of tension cracks at the brow, falling material and the height of the benches in relation to the overall structure indicated its instability. He noted in particular that such tension cracks are a precursor to failure. Because of Hoch's particular expertise I give his testimony significant weight and I therefore conclude that mining methods had not been used to maintain the stability of the cited highwall.

In light of the credible evidence that miners traveled and worked along the bench below the cited highwall, i.e., Rice prepared to drill there and Emo traversed the bench to examine the highwall, I find that they were thereby exposed, and others would continue to be exposed, to the potentially fatal hazard of falling rocks. It is clear therefore that the violation is proven as charged and was "significant and substantial" and of high gravity.

The Secretary also alleges that the violation was the result of Blades' "unwarrantable failure" to comply with the cited standard. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or

a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

In addition, in *Mullins and Sons Coal Company*, 16 FMSRHC 192, 195 (February 1994), the Commission set forth number of factors indicative of unwarrantability, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order.

In this regard I give particular weight to the testimony of former drill operator Darrell Rice. Rice began working at the Steuben Crushed Stone Quarry in May 1968. He was primarily a driller but also worked with loaders and crushers and performed some maintenance. On February 16, 1998, only three days before the citation herein was issued, Rice was told by foreman Thurston to drill a shot below the west face. Rice testified that "he did not like the looks of the face." The bench there was only 40 feet wide and because of the freezing and thawing he did not want to work in that area. He asked Thurston if he could work in another area but Thurston refused the request stating that there was no other work. Presumably rather than work under conditions he considered hazardous, Rice then told Thurston that he was sick with the flu, went home and never returned. Rice also testified that he frequently observed stress fractures at other highwalls after shots had been fired. The photographs in evidence also clearly show the obvious nature of the stress fractures above the west wall.

Within this framework of evidence it is apparent that a number of the factors set forth in the *Mullins* case were extent herein including evidence that the violative conditions extended over a large area, that the operator's agent Ron Thurston was given specific notice of the hazard three days before the order was issued, that, in light of the narrow width of the bench, the conditions were particularly dangerous, and that the operator made no effort to abate the hazardous conditions after it was specifically notified of them by drill operator Darrell Rice. Accordingly there can be no question that the violation was the result of unwarrantable failure and high negligence.

In reaching these conclusions I have not disregarded Blades' argument that, because MSHA had not previously cited the upper west face in spite of its many inspections over the 13-years preceding the instant citation, it had not been placed on official notice that MSHA had any problems with its mining methods on the upper west face. I cannot agree however with Blades' premise that the upper west face had not changed since the MSHA inspections. Indeed, the credible evidence shows that such a highwall is dynamic and constantly changing from the cycles of freezing and thawing, from loose material falling off the face, from the development and expansion of tension cracks and from other disturbances such as explosions.

Order No. 4432877

This order, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3200, and charges as follows:

> Ground conitions*[sic]* on the pit northwest upper bench create a fall of material hazard to persons. The 62 to 65 foot highface is fractured with a large amount of loose visible along the entire length (410 ft.) and height (62 - 65 ft.). The area had been mucked using a Caterpillar 988 and fallen loose was now present near the toe as was loose observed falling. Most loose ranged from about 6" X 6" X 4" to about 12" X 10" X 8". There were fresh pickup tire tracks nearby and on April 30, 1996, a lost time accident occurred near a 43 ft. face. This is an unwarrantable failure.

The cited standard, 30 C.F.R. § 56.3200, provides as follows:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

The evidence supporting this order is largely the same as previously discussed in support of Citation No. 4432876. It is based in large part again upon the testimony of Inspector Korbel and expert witness Terry Hoch, and corroborated by the photographs in evidence. Korbel testified credibly that the citation was issued because of the amount of loose material and the presence of pillars/chimneys along the west face and tension cracks along the brow of the highwall. Korbel testified that he also found loose material along the brow which also presented a hazard to workers below. Mining engineer Terry Hoch also testified that tension cracks at the brow of the highwall were a red flag and a sign of impending failure. According to Hoch the tension cracks could have been caused by overblasting and backbrake which would loosen the natural joints in the rock. In addition, Hoch testified that such cracks indicate both vertical and horizontal movement of the material. It was Hoch's opinion that the area of such tension cracks should be dangered off until an assessment of the cracks can be made and before any further mining activity. Clearly the failure of Blades to have taken down or supported such hazardous conditions constituted a violation of the standard as charged.

The rationale for sustaining the "significant and substantial" findings with respect to Citation No. 4432876 also apply equally hereto. Accordingly I find that the instant violation was also "significant and substantial" and of high gravity. The rationale for sustaining the unwarrantability findings with respect to Citation No. 4432876 also applies equally to this Order. Under the circumstances I find that this violation was similarly caused by unwarrantable failure and high negligence.

Citation No. 4432878

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.3401, and charges as follows:

While a person was visually checking ground conditions in the pit, there was no testing for loose ground being conducted. A 62 to 65 foot face on the northwest upper bench contains a large amount of loose that was observed working with some falling. Testing ground conditions would present an imminent danger for the person conducting the examination as most loose on the bench ranged from about 6" X 6" X 4" to about 12" X 10" X 8". There were fresh pickup tire tracks in this area.

The cited standard, 30 C.F.R. § 56.3401, provides as follows:

> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travel ways shall be examined weekly or more often if changing ground conditions warrant.

Because the cited standard is broadly worded the standard of review is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific requirement of the standard. *Cyprus Tonapah Mining Co.*, 12 FMSHRC 2409 (November 1990). The instant citation was issued by Inspector Korbel based on Thurston's admission on February 19, 2000, that no testing had been performed and that he did not know how to conduct testing to determine the presence of loose material. In addition, the existence of loose unconsolidated material, the fact that Korbel heard loose material falling and observed chimneys and tension cracks at the brow of the highwall indicate that proper testing had not in fact been performed. Mining engineer Terry Hoch testified that the appearance of tension cracks indicated the need for monitoring to determine the extent of any ground movement.

Under the circumstances the violation is clearly proven as charged and was also clearly "significant and substantial." Korbel's credible testimony that injury from the cited conditions was reasonably likely in the event of falling material and that such injury could be fatal (to persons working or travelling on the relatively narrow bench below) is entitled to significant weight. The violation was accordingly also of high gravity.

I find that operator negligence should appropriately be characterized as high. The operator had been placed on notice of the potentially hazardous conditions by Darrell Rice only three days before the citation was issued, no efforts were made to correct these conditions and the condition was quite serious. See *Mullins and Sons Coal Company*, 16 FMSHRC at 195.

Civil Penalty Criteria

Operator's History of Previous Violations:

The record shows that Blades had a history of 14 violations between January 28, 1996 and January 27, 1998, and eleven of those violations were without a "significant and substantial" designation and with minimal $50.00 penalties (Government Exhibit No. 14). I find this to be a low to moderate history.

Appropriateness of the Penalty to the Size of the Business of the Operator

It has been stipulated that the size of Blades is "26,513 hours worked per year" and that the size of the subject mine is "15,908 hours worked per year." The operator and the subject mine are therefore small in size.

Whether the Operator was Negligent

This criteria has been discussed separately with respect to each charging document.

The Gravity of the Violation

This criteria has been discussed separately with respect to each charging document.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

It is not disputed that the operator demonstrated good faith in attempting to achieve rapid compliance.

The Effect on the Operator's Ability to Continue in Business

It has been stipulated that payment of the assessed penalties will not affect the operators ability to continue in business.

Alleged Section "110(c) violations"

Section 110(c) of the Act provides that whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. 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 (January 1982), *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. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly when 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 (August 1992).

There is no dispute in these cases that Ronald Thurston and James Emo were agents of corporate operator, Blades Construction Products. Thurston was first charged herein with committing a knowing violation of the standard at 30 C.F.R. § 56.15005, the same violation discussed previously under Citation No. 4432874. That citation charged as follows:

> The joy driller was observed changing steel standing about 3 ½ feet from a 37 feet dropoff. He then went to the edge (standing within 1 feet of the edge/dropoff) and picked up a stone. He was brought back from the edge and stated his safety belt and line was back at the plant. When persons work where there is a danger of falling and are not using a safety belt and line, it is considered an imminent danger condition.

The credible evidence demonstrates however that Thurston had not anticipated that driller operator Clark would have approached as close to the edge of the highwall as alleged. Thurston credibly explained his belief that there was no reason for Clark to have been closer than seven feet from the edge of the highwall. Moreover, Thurston spent some nine hours personally task training and overseeing Clark on February 18 and 19. Thurston also told Mr. Clark "to stay away from the wall," and was present when Emo instructed him never to stand with his back to the wall. Both supervisors also instructed Clark how to set up his drilling equipment in relation to the five-by-seven shot pattern and where to position himself. Thurston also provided Clark with a seven foot pipe to enable him to measure the placement of the drill holes without approaching close to the highwall. Moreover, Thurston credibly testified that by the morning of February 19, he was satisfied that Clark was exhibiting basic competence in drilling and had understood his warning to stay away from the wall.

Under all the circumstances I find that the Secretary has not sustained her burden of proving that this was a "knowing" violation. Accordingly, the charges in this regard against Thurston must be vacated.

Ronald Thurston and James Emo are charged in Docket Nos. York 99-56-M and York 99-57-M, respectively, with "knowing" violations on February 19, 1998, of the standard at 30 C.F.R. § 56.3130 as charged in Citation No. 4432876. As modified, that citation charges as follows:

> Mining methods used on the pit northwest upper bench exceeded the capacity of the equipment being used. The 62 to 65 foot high face is fractured with a large amount of loose visible along the entire height and 410 foot length. On April 30, 1996, a similar condition on a 43 foot high face resulted in a lost time accident. This is an unwarrantable failure.

On the facts of this case I find that Thurston, but not Emo, acted "knowingly" within the meaning of Section 110(c) of the Act. As previously stated, the applicable test is whether the person in a position to protect safety and health 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.

In this regard the testimony of former Blades employee Darrell Rice is undisputed that on February 16, 1998, only three days before the citation at bar was issued, he was directed by foreman Ron Thurston to drill a shot below the west face. However, because of the narrow width of the bench and because of the freezing and thawing of material in the highwall Rice found the conditions hazardous and he refused to perform that work. It is further undisputed that he brought these hazardous conditions to the attention of Thurston when he asked for alternate work. Thurston failed to correct these conditions and refused this request for alternate work. It may reasonably be inferred that the conditions of the upper west face remained essentially the same or had further deteriorated from freeze-thaw cycling, until February 19 when the citation was issued.

As previously noted, these conditions were described as including severe fractures along the entire west face at the edge of the west wall brow area and pillars and chimneys leaning out over the face. Inspector Korbel also credibly testified that he heard loose material falling off the highwall. As also previously noted, mining engineer Terry Hoch, after viewing photographs of conditions observed by Inspector Korbel on February 19, 1998, and considering his own observations of materials at the mine site and the testimony of Korbel, confirmed that the upper west face wall was unstable on February 19, 1998. The expert testimony of Hoch is, as previously noted, entitled to significant weight.

Within the above framework of evidence it is clear that Thurston, as quarry foreman, was in a position to protect the safety of persons working and travelling below this highwall and that he failed to act on the basis of information from Mr. Rice that gave him knowledge or reason to know of the existence of violative conditions on the highwall. Accordingly, I find that he acted "knowingly" within the meaning of Section 110(c) of the Act.

In reaching this conclusion, I have not disregarded Thurston's argument that the choice of mining methods was not his responsibility and that therefore he was not a corporate agent for purposes of the charges at issue. Thurston misconstrues the nature of the "Section 110(c)" charges however. It is undisputed that Blades was a corporate mine operator and that, as its quarry foreman, Thurston was an "agent" of that operator. His liability under Section 110(c) is based upon the fact that he was in a position to protect safety and failed to act on the basis of information that gave him knowledge or reason to know of the existence of a violative condition. *See Kenny Richardson,* 3 FMSHRC at 16.

There is no evidence however that James Emo was informed of the complaint Darrell Rice made to Thurston regarding the hazardous condition of the west face on February 16th. Without such specific notice, Emo's judgment concerning the conditions of the cited wall and the

mining methods used at that location could very well have been clouded by his knowledge of the past failure, over 13 years of inspections, by MSHA to have cited these mining methods. While it may be true that Emo should nevertheless have known of the hazardous conditions, that standard of proof is insufficient to support a "knowing" violation. *See e.g., Virginia Crews*, 15 FMSHRC 2103 (October 1993).

Civil Penalty - *Ronald Thurston*

Thurston's History of Violations

There is no evidence that Thurston has any previous history of violations.

Appropriateness of the Penalty to the Size of the Business

The Commission held in *Sunny Ridge Mining Co.*, 19 FMSHRC 254 (February 1997), that, as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth.

In this regard it has been stipulated that Thurston has an income of $566.00 per week after taxes and that he has no other assets or income (Tr. 963-965). The penalty assessed herein is appropriate considering this evidence.

The Effect on the Ability to Continue in Business

The Commission also held in the *Sunny Ridge Mining Co.*, case that, as applied to an individual, the relevant inquiry is whether the penalty will affect the individual's ability to meet his financial obligations. Referring again to stipulations, there is no evidence that the penalty assessed herein would affect Mr. Thurston's ability to meet his financial obligations.

The Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

It is not disputed that good faith was demonstrated in attempting to achieve rapid compliance.

The Gravity of the Violation

As previously noted, the violation was of high gravity.

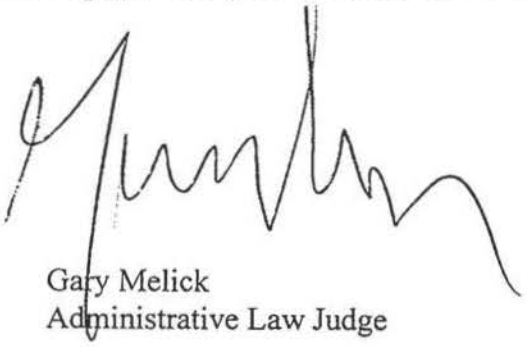
Negligence

As previously noted, the violation was the result of high negligence.

ORDER

I. Citation Nos. 4432875 and 4432880, are vacated. Citation Nos. 7707523, 7707524, 7714696, 7714697, 7714698, 4432879 and 4288449, are affirmed and Blades Construction Products is directed to pay the agreed penalties of $535.00, for the violations charged therein within 40 days of the date of this decision. Citation Nos. 4432873, 4432874, 4432876 and 4432878 and Order No. 4432877 are affirmed, and Blades Construction Products is directed to pay civil penalties of $150.00, $337.00, $800.00, $147.00 and $1,000.00, respectively for the violations charged therein within 40 days of the date of this decision.

II. The charges herein against James Emo under Section 110(c) of the Act, are hereby vacated. The charges herein against Ronald Thurston under Section 110(c) of the Act which are based on the violation charged in Citation No. 4432874 are hereby vacated. The charges herein against Ronald Thurston based on the violation charged in Citation No. 4432876 are hereby affirmed and said Ronald Thurston is directed to pay a civil penalty of $350.00 within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 12, 2000

FARRELL-COOPER MINING COMPANY, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	:	Docket No. EAJ 2000-1
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Formerly CENT 2000-6-R CENT 2000-7-R Heavener East Mine 34-01815

ORDER OF DISMISSAL

Before: Judge Hodgdon

This case is before me on an Application for Attorney's Fees and Expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, and the Commission's implementation of the Act in Commission proceedings, 29 C.F.R. § 2704.100 *et seq*. The parties, by counsel, have filed a motion to dismiss the application, in accordance with 29 C.F.R. § 2704.305, because they have reached a settlement of the matter. In settling the case, the Secretary has agreed that "Ground Control Plans do not require the approval of MSHA in order to be deemed filed with the Agency as required by 30 C.F.R. § 77.1000-1" and, without admitting that the Applicant is eligible for attorney's fees and expenses under EAJA, agreed "to pay the Applicant $8,500.00 in full settlement of Applicant's claims in this matter ."

Having considered the representations and documentation submitted, I conclude that the settlement is appropriate under the EAJA. Accordingly, good cause having been shown, the motion is **GRANTED** and this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 12, 2000

EAGLE ENERGY, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 98-72-R Order No. 7166391; 3/11/98
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 98-73-R Order No. 7166392; 3/11/98
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 98-123 A.C. No. 46-07711-03674
v.	:	Mine No. 1
EAGLE ENERGY, INCORPORATED, Respondent	:	

DECISION

Appearances: Howard N. Berliner, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; James Bowman, Conference and Litigation Representative, Mine Safety and Health Administration , Mount Hope, West Virginia, for the Petitioner;
David J. Hardy, Esq., Julia K. Shreve, Esq., Jackson & Kelly, Charleston, West Virginia, for the Respondents.

Before: Judge Feldman

These contest and civil penalty matters concern a petition for assessment of civil penalty filed by the Secretary of Labor (the Secretary) against the respondent, Eagle Energy, Incorporated (Eagle Energy), pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 820(a). The petition seeks to impose a civil penalty of $3,000 for each of two 104(d)(2) orders issued as a result of a February 26, 1998, inspection of the 2 North section of Eagle Energy's Mine No. 1. Specifically, the orders cite alleged violations of the Secretary's mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) that require adequate preshift and onshift examinations for the purpose of detecting and remedying hazardous conditions.

The hearing in these proceedings was conducted in Charleston, West Virginia, over ten days, in three sessions, from September 14 to September 17, 1999, December 7 to December 9, 1999, and February 15 to February 17, 2000.[1] Eagle Energy has stipulated that it is a large mine operator that is subject to the jurisdiction of the Act.

I. Statement of the Case

These proceedings concern 104(d)(2) Order Nos. 7166391 and 7166392 issued by Mine Safety and Health Administration (MSHA) Inspector Thurman L. Workman as a consequence of his February 26, 1998, inspection of Eagle Energy's No. 2 North section located in its Mine No. 1. During the course of his February 26, 1998, inspection, Workman observed ten roof conditions that he determined to be unsupported kettlebottoms at various locations in the 2 North section's mine roof.[2] Three of the kettlebottoms were spray painted in orange paint. As discussed below, kettlebottoms are fossilized remains of trees, often circular or oval in shape, that are present in the mine roof, and that require supplemental support because they are capable of falling without warning.

Upon completing his inspection, Workman reviewed the preshift and onshift examination reports for the 2 North section beginning with the preshift examination on the hoot owl shift (11:00 p.m to 7:00 a.m.) on February 24, 1998, through the preshift examination for the February 26, 1998, night shift, that was conducted during the day shift at 1:30 p.m. on February 26, 1998. During this period from February 24 through February 26, 1998, 17 preshift and onshift examinations were conducted. However, Workman noted that no entries, notations or comments concerning the ten hazardous roof conditions that he had observed in the 2 North section had been made by any of the three section foreman performing the preshift and onshift examinations during those days.

In its defense, Eagle Energy asserts the cited conditions were not hazardous kettlebottoms. Although it maintains the conditions were not hazardous, Eagle Energy contends the conditions did not become visible until immediately prior to Workman's inspection because of roof sloughage that had occurred as a result of mountain bumping. For the reasons discussed below, Eagle Energy's defense is not supported by the record and must be rejected.

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[1] References to the hearing transcript for the September, December and February sessions will be designated as volumes "I, II and III", respectively, followed by the transcript page number.

[2] Although Workman observed ten alleged kettlebottoms, Workman only cited nine kettlebottoms in 104(d)(2) Order Nos. 7166391 and 7166392. Eagle Energy concedes one of the cited conditions was a kettlebottom. (*Eagle Energy Br.* at p. 8). It was the condition supported by a roofbolt through the center. The Secretary alleges it was supported inadequately.

II. Preliminary Findings of Fact

On February 26, 1998, at approximately 2:50 p.m., James Kerns, a maintenance foreman, was fatally injured as a result of a rib roll accident in the 2 North section of Eagle Energy's Mine No. 1. The fatal accident occurred in the 27th crosscut between the first and second entries, inby survey spad 2669. (Gov. Ex. 19). Shortly thereafter, Eagle Energy alerted MSHA's Mount Hope District Office that a fatality had occurred, and an MSHA investigative team was dispatched to the mine. MSHA personnel, as well as State of West Virginia Office of Miners' Health, Safety and Training personnel, arrived at the Mine No. 1 at approximately 5:00 p.m. Among the MSHA investigative personnel that went underground to the No. 2 North section were inspectors Thurman L. Workman, Vaughan Gartin and supervisory inspector Terry D. Price. The federal and state investigators were accompanied by Eagle Energy Vice-President Larry Ward, superintendent Terry Walker and night shift foreman Roger Lovejoy.

MSHA personnel, West Virginia personnel and Eagle Energy officials went underground in several groups and met at the No. 2 North section dumping point/feeder location, located outby survey spad 2665 in the No. 2 entry at the 26th crosscut. The investigators were divided into inspection teams, each team being comprised of at least one federal investigator, one state investigator, and one management official. While one team traveled to the accident site, the other individuals waited at the dumping point.

At approximately 6:50 p.m., while the first investigating team was at the accident site, Price walked from the dumping point area in the No. 2 entry through the 26th crosscut towards the No. 3 entry. At that time Price heard sounds he attributed to mountain bumping. Mountain bumping is common in the mining industry. It occurs as a result of movement or slippage in the earth's strata above caused by weight shifts as a consequence of coal removal, particularly from longwall mining below. (Tr. I, 1264-66). Miner's representative Keith Casto, who was underground with Price during the evening of February 26, 1998, opined the mountain bumping at that time was "super light" and that he "didn't see nothing falling off the roof, or nothing." (Tr. II, 232-33).

While Price was walking towards the No. 3 entry, Workman traveled from the dumping point through the 26th crosscut towards the No. 1 and No. 2 entries. Workman then doubled back along the 26th crosscut towards the No. 3 entry whereupon Workman observed a kettlebottom, with a roof bolt through the center, located in the 26th crosscut between the No. 2 and No. 3 entries. (2(c) in Gov. Exs. 1, 2; Gov. Ex 19; Joint Ex. 1, photos 11, 12; Tr. I, 284-87). This kettlebottom was also observed by Price. (Tr. I, 1267).

Kettlebottoms are fossilized remains of tree trunks that are cylindrical or oblong in shape and sometimes protrude from the mine roof. Although most often cylindrical or oblong, Kettlebottoms have various shapes and do not all look alike. Kettlebottoms may be surrounded by a ring of coal, or, they maybe surrounded by slickensided material that consists of smooth and highly polished planes of weakness that are primarily found in mines containing shale roof rock. Some kettlebottoms may be partially surrounded by coal and partially slickensided. Price explained the nature and dangers of kettlebottoms, and their need of supplemental support :

> Kettlebottoms are an indication of a roof abnormality. A well supported mine roof consists of being supported with roof bolts. And generally what happens is you get a consolidated beam that each individual layer by itself is weak. But if you put all these layers together, you build a stronger beam. That, in turn, supports the roof above so it doesn't fall in on the mine entry where the mine entry has been taken out. What a kettlebottom does is it interrupts that beam structuring process and it weakens the roof. Now, the problem with kettlebottoms is that it's tied into nothing. It's slickensided or [slick and sides] and the coal reams together and they have no strength. It's just there and they have no strength. Now, when the weight of a kettlebottom overcomes its ability of the tension to hold it in from the slickenslide, it falls out. Or it can fall without warning if it is not supported.

(Tr. I, 1110-1111). Virtually all of the witnesses agreed that kettlebottoms are a common occurrence in Eagle Energy's Mine No. 1. (*See e.g.*, Tr. II, 204, III, 1067). Kettlebottoms are sometimes identified with spray paint or chalk to alert the roof bolter that additional support is required. (Tr. II, 215, 272).

Given the above explanation by Price, it is clear that a roof bolt and plate in the center of a kettlebottom is ineffective because such support will not prevent the kettlebottom from dropping out of the roof. Rather, Workman and miners' representative Casto explained the proper method of supporting a kettlebottom is to secure headers or straps to the outer perimeter of a kettlebottom to make certain the kettlebottom will not separate from the surrounding roof structure. (Tr. I, 124-27, II, 204-06). Thus, Workman and Price concluded the kettlebottom with the roof bolt and plate through the center, located in the 26th crosscut between the No. 2 and No. 3 entries, was a hazardous condition.

After observing the roof bolted kettlebottom, Workman returned to the dumping point where he saw Pete Hendricks, President of Massey Coal Services, Eagle Energy's parent company. Workman and Price, accompanied by Casto, next walked approximately 27 feet inby the dumping point where they observed three oblong or round kettlebottoms at survey spad 2665 that were each painted in their entirety with orange spray paint and had the letters "CUZ" spray painted next to them. (2(d) in Gov. Exs. 1, 2; Gov. Exs. 11(A) - (E); Tr. I, 292, 296, 308). One of the kettlebottoms appeared to have an orange painted centerline drawn through it. (Gov. Ex. 11(A)). A centerline is drawn on the mine roof of an entry, before the next cut in the entry is taken, to ensure that the continuous miner proceeds in a straight direction.

Workman walked back to Hendricks at the dumping point. Workman pointed to the painted kettlebottoms he and Casto had just observed, and Hendricks, using his cap lamp, looked up at the roof from the dumping point and acknowledged that he saw them. (Tr. I, 297-300). Workman specifically asked Hendricks, who then was sitting on the end of the feeder tailpiece, if he had seen the three unsupported, painted kettlebottoms. Workman testified Hendricks replied, "T. L. [Workman], I pay my people to support them (sic) kettlebottoms." (Tr. I, 224-25, 293-94, 298).

Ward testified that, after the conditions in the No. 2 entry inby the feeder had been pointed out by Workman, he looked at the painted roof conditions and instructed safety manager Jeffrey Bennett to danger-off the area. Ward stated that he had the area dangered-off until he would have the opportunity to get a better look at the area. (Tr. III, 1052-53, 1096-97).

Workman asked MSHA's lead investigator, Vaughn Gartin, to photograph the painted kettlebottoms. Gartin had used all of his film at the accident site. However, Gartin borrowed some film from a state investigator and photographed the painted cluster of kettlebottoms. (Gov. Exs. 11(A)-(E); Tr. I, 310, 314). Although Gartin did not have enough film to photograph the other kettlebottoms observed by Workman, photographs of the cited conditions were taken by Bennett on November 21, 1998. The photographs were taken to illustrate the cited conditions shortly before the No. 2 section of the mine was scheduled to be abandoned. Bennett's photographs, and accompanying photo log, were admitted in evidence as a joint exhibit. (Joint Ex. 1; Tr. I, 442-43, 444, 1329).

After his conversation with Hendricks, Workman traveled back in the 26th crosscut toward the No. 1 entry. Workman observed an unsupported egg-shaped kettlebottom in the 26th crosscut approximately half way between the No. 1 and No. 2 entries. (1(b) in Gov. Exs. 1, 2; Gov. Ex. 19; Tr. I, 294, 301, 354).

Workman then traveled inby with the second investigative team. The team traveled up the No. 2 entry to the accident site in the 27th crosscut between the No. 1 and No. 2 entries. Workman took contemporaneous notes as he was walking around the No. 2 section. (Gov. Ex. 5; Tr. I, 358). Workman returned to the dumping point to confer with Gartin and other investigators about their preliminary accident investigation findings. At that time, Workman was instructed to conduct a Triple A inspection to determine the conditions in the No. 2 section inby from the dumping point to the working faces. (Tr. I, 364).

Workman, accompanied by Denver Gunnoe, a State of West Virginia inspector, walked up the No. 1 entry and noted a roundish-oblong kettlebottom approximately six to nine inches in diameter, inby survey spad 2669. (1(a) in Gov. Exs. 1, 2; Gov. Ex. 19; Tr. I, 370). Workman continued to walk through the 27th crosscut from the No. 1 entry into the No. 2 entry. There, at the intersection of the 27th crosscut and the No. 2 entry, just inby survey spad 2668, Workman observed an unsupported "sunflower-shaped" kettlebottom "with jageddy (sic) edges" that was approximately six to nine inches in diameter. (2(a) in Gov. Exs. 1, 2; Gov. Ex. 19; Tr. I, 385-86).

Workman next traveled inby survey spad 2668 in the No. 2 entry towards the face. Workman noted another unsupported kettlebottom located approximately 25 feet inby spad 2668 that was similar in size and shape to the other kettlebottoms. (2(b) in Gov. Exs. 1, 2; Gov. Ex. 19, Joint Ex. 1, photos 7, 8; Tr. I, 392-93). Workman did not observe additional kettlebottoms inby the last open crosscut (the 27th crosscut) toward the faces in the No. 2 and No. 3 entries. However, in returning outby in the No. 3 entry, Workman saw another unsupported kettlebottom just outby spad 2666 that was round in shape and approximately six to ten inches in diameter.

(Gov. Ex. 19; Tr. I, 406-07). However, this kettlebottom was not cited by Workman in the subject 104(d)(2) orders.

Workman traveled down the 27th crosscut and turned in an outby direction in the No. 1 entry. There, in the No. 1 entry, outby the 26th crosscut near spad 2664, Workman spotted another unsupported kettlebottom, similar in size and shape to the kettlebottom found outby spad 2666. (1(c) in Gov. Exs. 1, 2; Gov. Ex 19; I, 410). Thus, Workman observed a total of ten kettlebottoms, nine of which were cited in 104(d)(2) Order Nos. 7166391 and 7166392. Price testified that he also traveled the 2 North section and personally observed all of the kettlebottoms listed in Workman's 104(d)(2) orders. (Tr. I, 1144, 1175, 1216, 1268-86).

Having completed his inspection, Workman traveled with Gunnoe up the No. 2 belt entry to the mine elevator, arriving on the surface at approximately 10:30 p.m. (Tr. I, 410, 412). At approximately 11:00 p.m., a meeting was held to discuss the investigative findings. The participants at the meeting were MSHA inspectors Workman, Price and Gartin, state inspector Gunnoe, and Eagle Energy/ Massey Coal officials President Pete Hendricks, Vice-President Larry Ward, superintendent Terry Walker and night shift foreman Roger Lovejoy.

At the meeting, Workman issued 104(a) Citation No. 4400559 to Walker for a violation of the mandatory safety standard in 30 C.F.R. § 75.202(a) as a result of inadequate roof and rib support in the 2 North section.[3] (Gov. Ex. 14; Tr. I, 537). Workman based Citation No. 4400559 on his observations of numerous unsupported kettlebottoms inby the dumping point as well as his observations of loose, unsupported coal ribs, and entry widths exceeding the 20 feet wide entries in Eagle Energy's approved roof control plan. (Tr. I, 546).

To abate Citation No. 4400559, the next day, on February 27, 1998, Ward instructed safety director Jeffrey Bennett to paint any area of the roof that "looked slickensided." (Tr. III, 1195-97). Bennett painted numerous areas of the 2 North section roof in orange spray paint similar to the paint that had been used on the three conditions inby the feeder. The areas painted were then supported by installing roof bolts and headers around the outer perimeter of the painted areas. (Joint Ex. 1). Ward considered these conditions to be non-hazardous irregularities that were identified by Bennett and supported solely for the purpose of abatement. Citation No. 4400559 was terminated on March 2, 1998, by MSHA Inspector Andrew J. Nunnery after the cited unsupported kettlebottoms were fortified with roof bolts and headers. (Tr. I, 538-39).[4]

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[3] Section 75.202(a) provides:

> The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

[4] To support its claim that the cited conditions were not hazardous, Eagle Energy asserts MSHA permitted "the cited area to be traveled without impediment on February 27, 1998, up until the issuance of [104(d)(2) Order Nos. 7166391 and 7166393] on March 11, 1998 . . ., " despite MSHA's assertion that the kettlebottoms could fall at any moment. (*Eagle Energy Br.* at p. 14). Eagle Energy is mistaken. Mine operations were suspended after the February 26 fatality. The cited kettlebottoms were supported as early as February 28, 1998, when Ward instructed

Ward testified that Citation No. 4400559 was not contested, and that the civil penalty for this citation was paid "just purely for economic reasons." (Tr. III, 1115-16).

The following day, on February 27, 1998, Workman and Price returned to Eagle Energy's No. 1 Mine and inspected the preshift and onshift examination mine books. (Gov. Ex 5, p.14; Tr. I, 680). Workman and Price inspected the examination reports for the preceding three days from February 24 through February 26, 1998. (Gov. Ex 13(h)-13(w); Tr. I, 684, 1371). The section foremen conducting the preshift and onshift examinations during this period were Larry Saunders, Thomas Fisher and Carter Miles. During this period they conducted 17 examinations. Not one of the ten conditions in the 2 North section that Workman and Price had determined was a kettlebottom, including any of those painted in orange color inby the feeder, was noted by Saunders, Fisher or Miles. These three individuals maintain they did not observe any kettlebottoms during their examinations, and they all testified that they were unaware of any painted roof conditions located inby the feeder in the No. 2 entry.

Upon further investigation, Workman concluded that the areas where the cited kettlebottoms were located were mined as early as the day shift on February 24, 1998. Workman's conclusion is based on a mine advancement map prepared by Ward that provides the chronology for the advancement of the working faces in the 2 North section from the day shift on February 24, 1998, until the day shift on February 26, 1998. (Gov. Exs. 9(a), 10). Specifically, regarding the painted cluster of kettlebottoms in the No. 2 entry, Ward stated that area was mined sometime during the day shift on February 24, 1998. (Tr. III, 1089-90).

Consequently, Workman concluded Eagle Energy had repeatedly violated the mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) that require hazardous conditions to be noted during preshift and onshift examinations. (Gov Exs. 1, 2). Section 75.360(b) provides, in pertinent part:

> (b) The person conducting the preshift examination shall examine for hazardous conditions . . . at the following locations:
>
> (1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.
>
> (2) Belt conveyors that will be used to transport persons during the oncoming shift and the entries in which these belt conveyors are located.

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his management staff "to clear up the violations [cited in 104(a) Citation No. 4400559]." (Tr. III, 1059-60). Ward used management personnel because "the workforce [was] off due to the fatality." (Tr. III, 1060). Citation No. 4400559 was terminated at 4:35 a.m. on March 2, 1998, after the kettlebottoms were supported. (Gov. Ex. 15).

> (3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.
>
> * * *
>
> (10) Other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.

Section 75.362(a)(1) provides, in pertinent part:

> At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions . . . .

On March 11, 1998, approximately two weeks after the fatality, Workman issued 104(d)(2) Order Nos. 7166391 and 7166392 to Larry Ward for alleged "perfunctionary" (sic) preshift and onshift examinations.[5] (Gov. Exs. 1, 2). The orders alleged the cited violations were significant and substantial (S&S) in nature and attributable to Eagle Energy's unwarrantable failure.

As noted below, Eagle Energy asserts the conditions observed by Workman and Price were non-hazardous "roof irregularities" that were obscured by slate until mountain bumping occurred shortly before Workman's inspection. Eagle Energy contends the mountain bumping caused roof sloughage that exposed the cited conditions. However, Workman and Price noted continuous miner bit marks on, and in the immediate vicinity of, the cited conditions reflecting that the conditions were exposed during the mining cycle. (Tr. I, 346-47, 351, 594, 989, 1001, 1198). Miners' representatives Casto and James Bias also testified bit marks indicated the kettlebottoms were exposed during mining. (Tr. II 248, 302, 304-05, III, 212, 301-04).

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[5] Although the subject 104(d) orders allege the preshift and onshift examinations were perfunctory in nature, the Secretary need only establish that the examinations were inadequate to prevail on the issue of the fact of the violations.

Moreover, Workman, Price and Casto observed no evidence of loose roof plates, or, roof sloughage on the mine floor, that would indicate the roof conditions were exposed as a result of mountain bumping.

III. Eagle Energy's Defense

a. The cited conditions were not kettlebottoms

Eagle Energy contends that, with the exception of the bolted kettlebottom cited by Workman, the remaining cited conditions were not kettlebottoms. Eagle Energy relies on the expert testimony of Dr. Vincent Scovazzo, an engineer with a doctorate degree in geomechanics. Scovazzo examined the roof of the 2 North section on November 23, 1998, nearly nine months after MSHA's February 1998 accident investigation. Scovazzo's description of a kettlebottom is consistent with the descriptions of Price and Workman. Scovazzo testified that kettlebottoms are "easy to identify." (Tr. III, 515). They are the remains of casts of tree trunks that are circular or cylindrical in shape. This circular or near circular formation is totally or partially rimmed in coal with slickensides on the rim. Although slickensides is a characteristic of a kettlebottom, Scovazzo testified that slickensides also occur when rock is compacted at different rates, and he opined that slickensided rock was strong enough to hold together. (Tr. III, 592-93).

Scovazzo testified that all of the cited roof conditions he observed on November 23, 1998, were not kettlebottoms with the exception of the bolted kettlebottom cited by Workman which is "probably a kettlebottom." (Tr. III, 576). Scovazzo characterized the three painted roof conditions inby the feeder as "some sort of abnormality" or "roof irregularity." (Gov. Ex. 9(B), p. 2; Tr. III, 561). Scovazzo's contemporaneous notes taken during his observations refer to "irregularities" that "could be kettlebottoms." (Gov. Ex. 9(B), p. 3). Although Scovazzo stated he used the term "irregularity" as a "convenience" and that these irregularities were "[t]o me . . . just a normal mine roof," Scovazzo had no explanation for why the three roof conditions inby the dumping point were spray painted, describing the paint as "somebody's doodling." (Tr. III, 572, 878). In this regard, Scovazzo provided the following testimony about the photographs in Government Exhibit 11 depicting the painted roof conditions:

> Court . . . I'm talking about the three distinct circles [painted on the roof inby the dumping point]. One [circle] is through the centerline and then there is what we've described as a protrusion and an abnormality, whatever that means.
>
> Scovazzo: That being said, when I see all this paint on the ceiling, to me, somebody's doodling .
>
> Court: You think those are doodles?
>
> Scovazzo: Yes. Because a lot of them - - - a lot of the circles go around things that there's nothing there as we discussed yesterday.

Court: All right. So [if shift foreman] Lovejoy testified that [area] was dangered-off. It was dangered-off because of the doodles?

Scovazzo: I have no idea.

(Tr. III, 427-28, 877-88). Scovazzo's doodling explanation was essentially adopted by Ward who opined, "it all look[s] like graffiti." (Tr. III, 1137-38).

Finally, although Scovazzo testified he used a mason's hammer to determine if the material inside the formations was different from the material outside, the photographs taken by Bennett in Joint Exhibit 1 reveal that Scovazzo's examination of the cited conditions was limited by the paint applied by Bennett, as well as by the headers that were installed over the perimeter of the formations. In addition, observation of the roof was also limited by rock dust.

Day shift section foremen Saunders, evening shift section foreman Fisher, and "hoot-owl" section foreman Miles, who performed the preshift and onshift examinations from February 24 through February 26, 1998, as well as shift foreman Lovejoy, superintendent Walker, and Vice-President Ward, all denied the conditions cited by Workman were kettlebottoms. Saunders, Fisher and Miles also denied having seen the three painted roof conditions inby the dumping point during their examinations. Similarly, all three section foremen denied painting, or even seeing, the centerline that is painted through one of the cited conditions in the No. 2 entry inby the dumping point. (Gov. Ex. 11(A), (B), (C) and (E)). Although Saunders testified continuous miner operators and other miners sometimes paint centerlines, Bias and Casto, and Lovejoy, testified mine foreman are responsible for drawing centerlines. (Tr. II, 248, 386, III, 62, 445). Saunders was the day shift foreman on February 24, 1998, when the area containing the painted roof conditions observed by Workman was mined.

With respect to the nature of the cited conditions, Lovejoy opined the cited conditions were "visual irregularities" as distinguished from "structural irregularities." (Tr. III, 368-69). However, Lovejoy admitted there are roof irregularities that require supplemental support. (Tr. III, 383-84). In fact, Lovejoy conceded that one of the cited painted roof conditions that appears to be protruding from the roof with cracks around it 'could very well be' hazardous. (Tr. III, 428-32). Lovejoy also conceded he could not tell if the painted areas inby the dumping point photographed in Gov. Ex. 11 were kettlebottoms because the conditions were obscured by the paint. (Tr. III, 435-36). Superintendent Walker opined the cited conditions "looked like just slick pieces of rock where the slate had just dropped off them," but they were not kettlebottoms. (Tr. II, 575).

b. The cited conditions were not visible prior to February 26, 1998

Even if the cited conditions were kettlebottoms, Eagle Energy asserts the conditions were not detectable when the pertinent preshift and onshift examinations were conducted from February 24 through February 26, 1998, because they were under the mine roof's surface. In this regard, Eagle Energy argues that, "[s]ince the Secretary has no witnesses to establish that the alleged kettlebottoms were visible during the pertinent time period, the Court must look to the Respondent's witnesses to establish if the roof conditions were visible." (*Eagle Energy Br.* at p. 24). Thus, Eagle Energy heavily relies on the exculpatory testimony of Fisher, Saunders and Miles that adequate examinations were conducted, and, that there were no visible kettlebottoms, including the three painted conditions inby the dumping point. For example, Eagle Energy notes that Saunders testified he "takes his time and occasionally hammers the roof to detect if there is any loose material." (Tr. II, 363-64).

Given the testimony of Eagle Energy management that they were unaware of the cited conditions, Eagle Energy contends that the roof formations cited in Workman's 104(d)(2) orders were not noted on preshift or onshift examinations because they "became more visible on February 26, 1998, because of the geological events of the day." (*Eagle Energy Br.* at p. 25). Specifically, Eagle Energy argues that mountain bumping on February 26, 1998, caused obscured roof conditions to become visible to Price and Workman because of roof sloughage.

It is unclear how Eagle Energy's roof sloughage theory applies to the three painted roof conditions. Moreover, the cited kettlebottom that was bolted in the center obviously existed for several shifts preceding Workman's inspection.

IV. Further Findings and Conclusions

a. Fact of Occurrence of the Violations

The threshold issue is whether the conditions cited by Workman were hazardous kettlebottoms that required supplemental support. In addressing this issue, I note that Eagle Energy has made two damaging admissions. First, I credit Workman's testimony that Pete Hendricks, president of Eagle Energy's parent corporation, acknowledged seeing the kettlebottoms and stated, "that's what I pay my people to do is support these kettlebottoms." (Tr. I, 297-98). Second, Eagle Energy did not contest, and has paid the civil penalty for, 104(a) Citation No. 4400559 issued by Workman on February 26, 1998, for hazardous roof conditions, including kettlebottoms in the 2 North section. I cannot ignore the fact that Eagle Energy has paid a civil penalty for the same roof conditions it now contends did not exist. Ward's explanation, that Citation No. 4400559 was not contested "for economic reasons," does nothing to lessen the evidentiary significance of this admission.

Notwithstanding the above admissions, the evidence amply supports the conclusions of Workman, who has 45 years of experience in the mining industry, and Price, who has 27 years of mining experience, that the cited conditions were kettlebottoms. In reaching this conclusion I note that Scovazzo testified kettlebottoms are easy to identify. Moreover, kettlebottoms are common in West Virginia and, more importantly, they are a common occurrence in Eagle Energy's Mine No. 1. In this regard, Casto testified without contradiction "there is (sic) kettlebottoms throughout Eagle Energy's mines. . . . They are everywhere." (Tr. II, 204). Significantly, Scovazzo's description of a kettlebottom comports with the descriptions provided by Price and Workman. It is noteworthy that Price and Workman had an opportunity to view the cited conditions before they were spray painted for abatement purposes and/or supported with headers that conceal substantial portions of the slickensided outer perimeters of the formations. In this regard, Ward testified:

> Your Honor, we put up probably 100 additional bolts to make sure we covered everything. I mean, if it had small slickensided areas we put up bolts because we were trying to cover everything. . . . Anything like (sic) looked slickensided we tried to cover.

(Tr. III, 1196).

Finally, Scovazzo's doodling explanation, and Ward's graffiti conclusion, with respect to the three painted circles in the No. 2 entry, are, to be charitable, unavailing. The conclusions of Scovazzo and Ward are particulary suspect in view of Ward's instructions to Bennett to danger-off the area inby the feeder. Moreover, Ward instructed Bennett to highlight the cited conditions using the identical method of orange spray paint that was used inby the feeder. (Tr. III, 1195-97). Shift foreman Lovejoy also testified that he used orange spray paint to highlight some of the cited conditions. (Tr. III, 363-64, 408-12). Thus, when viewed in context, Scovazzo's doodling theory negatively impacts on his credibility as an expert witness. *United States v. Cutler*, 58 F.3d 825, 836 (2nd Cir. 1995) (bias of an expert witness is a proper matter to be considered in determining the weight to be given to expert testimony). *See also Sartor v. Arkansas Natural Gas*, 321 U.S. 620, 627-28 (1944); *Webster v. Offshore Food Serv.*, 434 F.2d 1191, 1193 (5th Cir. 1970); *Massey v. Gulf Oil*, 508 F.2d 92, 94 n.1 (5th Cir. 1975) *cert. denied*, 423 U.S. 838 (1975). In addition, based on the testimony concerning the characteristics of kettlebottoms, I find the photographs of the cluster of three painted conditions in Gov. Ex. 11, as well the photographs taken by Bennett in Joint Ex. 1, support, rather than detract from, the determinations of Workman and Price that the cited conditions were kettlebottoms.

Since it is undisputed that kettlebottoms are hazardous conditions that require supplemental support, it follows that the failure to note visible kettlebottoms during preshift and onshift examinations constitutes a violation of the cited mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). However, the issue of duration remains. For, if the conditions were obscured by slate and revealed because of mountain bumping that occurred immediately prior to Workman's inspection , the conditions could not have been noted by the preshift and onshift examiners.

In addressing the issue of duration, I note that it is not surprising that Eagle Energy's section foreman and other management personnel have denied knowledge of unsupported kettlebottoms, including those painted inby the dumping point, given the fact that a fatal roof accident had just occurred. Thus, I cannot infer that the kettlebottoms were not observable simply because Eagle Energy's witnesses deny that they were seen. For, in the final analysis, at least three of the cited roof conditions were seen prior to Workman's arrival - - - by the person who painted them.

Nevertheless, the burden of proof that the kettlebottoms were visible and should have been noted by the preshift and onshift examiners remains with the Secretary. However, the Secretary does not have to prove, as Eagle Energy suggests, when the cited roof conditions were exposed. Rather, the Secretary must show "that it was more likely than not" that the conditions observed by Workman were visible during the relevant 15 preshift and onshift inspections beginning with the onshift conducted on the day shift of February 24, through the preshift for the night shift conducted on February 26, 1998. *Enlow Fork Mining Company*, 19 FMSHRC 5, 13, n.10 (January 1997).

In this case, the question of the duration of the unsupported kettlebottoms must be resolved by circumstantial evidence. In this regard, the Commission has recognized that the Secretary may establish a violation by inference. *Mid-Continent Resources*, 6 FMSHRC 1132 (May 1984). However, the inference must be inherently reasonable, in that there must be a rational connection between the collateral evidentiary facts and the ultimate fact to be inferred. *Id.* at 1138.

Here, the Secretary relies on several collateral evidentiary facts to infer that the painted cluster of kettlebottoms was exposed during the day shift on February 24, 1998, when that area of the No. 2 entry was mined. Namely, the centerline, normally drawn by the section foreman after an entry is mined, was painted through one of the three painted kettlebottoms. In addition, there were continuous miner bit marks in the kettlebottoms indicating the formations were exposed when the area was mined. Finally, the roof plates in the vicinity of the painted kettlebottoms were tight to the roof, and there was no evidence of roof sloughage on the floor to indicate the conditions had been recently exposed because of mountain bumping.

In sum, the collateral facts relied upon by the Secretary consisting of a centerline, bit marks, tight roof plates, and no roof sloughage, clearly provide a rational basis for inferring the painted cluster of kettlebottoms in the No. 2 entry was exposed during the normal mining cycle on the day shift of February 24, 1998. Similarly, the same evidentiary facts with regard to bit marks, tight roof plates and no evidence of roof sloughage, support the conclusion that the remaining cited unpainted roof conditions were exposed during the normal mining cycles between February 24 and February 26, 1998. Having established, through circumstantial evidence, that it "is more likely than not" that the cited kettlebottoms existed as early as the day shift on February 24, 1998, the Secretary has demonstrated the preshift and onshift examiners' repeated failures to note them from February 24 through February 26, 1998, constitute violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1).

It should be noted that Eagle Energy's circumstantial case, that mountain bumping was responsible for revealing each and every kettlebottom cited by Workman immediately prior to Workman's arrival at the mine, stretches credulity and must be rejected. In this regard, Ward conceded, while mountain bumping may affect a particular section of a roof on a case-by-case basis, it was a stretch to conclude that mountain bumping was the sole explanation for all of the kettlebottoms that were observed by Workman. (Tr. III, 1150-1154). Moreover, excluding the painted kettlebottoms for a moment, Eagle Energy's mountain bumping speculation does not address the relevant bit marks and tight roof plates, or, the cited kettlebottom with the roof bolt in the center.

To support its mountain bumping explanation, Eagle Energy relies on a statement made by Workman during an April 21, 1998, health and safety conference that was made in response to Ward's belief that "slate could obscure kettlebottoms." (Tr. III, 1230). At trial, Workman explained, when he was at the safety conference, he agreed with Ward that "slate could obscure kettlebottoms because there's nothing impossible, [although] it might be incredible." (Tr. III, 1230-31). Workman's acknowledgment that slate "could" have obscured all of the cited kettlebottoms, based on his assumption that anything was remotely possible, does not support Eagle Energy's circumstantial case that it was more likely than not that the cited conditions had been obscured.

Returning our attention to the painted cluster of kettlebottoms, Eagle Energy has failed to present evidence concerning when, and by whom, the cluster was painted. Rather, Eagle Energy suggests that these kettlebottoms may have been exposed by mountain bumping, and then painted, only minutes before the fatal accident occurred at approximately 2:50 p.m. on February 26, 1998. This theory is rejected as implausible.

Moreover, under the well settled "missing witness" evidentiary rule, the failure of a party to call a known non-hostile person who has direct knowledge of a fact in issue raises the inference that the testimony would be unfavorable to that party. *Richardson on Evidence,* § 92 at 65-68, 10th (ed. 1973). *York v. American Telephone & Telegraph*, 95 F.3d 948 (10th Cir. 1996); *Wilson v. Merrell Dow Pharmaceuticals*, Inc, 893 F.2d 1149, 1150 (10th Cir. 1990); *Borror v. Herz*, 666 F.2d. 569, 573 (3rd Cir. 1981); *NLRB v. Laredo Coca-Cola Bottling Co.*, 613 F.2d 1338 (5th Cir. 1980); *NLRB v. Dorn's Transportation Co.*, 405 F.2d 706 (2nd Cir. 1969). In *Wilson v. Merrell Dow*, the Court recognized the four factors that must be present to infer that a missing witness's testimony would have been adverse to a party. The four factors are:

> (1) the party must have the power to produce the witness, *see, e.g., Sutton*, 732 F.2d at 1492; 2 J. Wigmore, Evidence Trials at Common Law § 286 J. Chadbourn rev. ed. 1979 & Supp. 1989;
>
> (2) the witness must not be one who would ordinarily be expected to be biased against the party; *see id.* § 287, at 202 & n. 1;

> (3) the witness's testimony must not be "comparatively unimportant, or cumulative, or inferior to what is already utilized" in the trial, *see id.* § 287, at 202-03 (emphasis omitted); and
>
> (4) the witness must not be equally available to testify for either side, *see, e.g.*, *Sutton*, 732 F.2d at 1492; *Quad Constr., Inc. v. William A. Smith Contracting Co.*, 534 F. 2d 1391, 1394 (10th Cir. 1976); 2 J. Wigmore, *supra*, at § 288.

893 F.2d at 1151 (footnote omitted).

Here, Eagle Energy had exclusive access and control of the 2 North section from February 24 through February 26, 1998. Eagle Energy must be held accountable for knowing who painted the centerline on the roof that runs through one of the cited painted kettlebottoms. (*See* Gov. Ex. 11). Having failed to call that individual subjects Eagle Energy to the adverse inference that the cited conditions were painted, contemporaneous with the centerline, during the mining cycle on the day shift on February 24, 1998. I am cognizant that the missing witness rule requires that the missing witness must be known. In this case the missing witness is known, or should be known, to Eagle Energy - - - he is the employee who was responsible for painting the centerline in the No.2 entry photographed in Gov. Ex. 11. Such knowledge is exclusively available to Eagle Energy because the centerline was painted by its foreman, or at its foreman's direction. *United States v. Caccia*, 122 F.3d 136, 139 (2nd Cir. 1997) *quoting Unites States v. Rollins*, 487 F.2d 409, 412 (2nd Cir. 1973) (availability of missing witness depends on relationship to the parties). Eagle Energy cannot escape the adverse inference simply by denying that it knows the identity of the employee who was responsible for painting the centerline, regardless of whether its ignorance is feigned or real. (Tr. II, 245-46, 254-57). Any other conclusion would eviscerate this important evidentiary rule.

b. Significant and Substantial

A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria as follows:

> We have explained further that the third element of the *Mathies* formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

Resolution of whether a particular violation of a mandatory safety standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC 1125, 1130 (August 1985). Thus, consideration must be given to, both the time frame that a violative condition existed prior to the issuance of citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (November 1998); *Halfway, Inc*, 8 FMSHRC 8, 12 (January 1986).

Thus, the fundamental question is whether the repeated failure of Eagle Energy's preshift and onshift examiners to note hazardous roof conditions that required supplemental support during the relevant 15 examinations of the 2 North section substantially contributed to the cause and effect of a roof fall accident. Virtually every one of the Secretary's, as well as Eagle Energy's, witnesses, including Scovazzo, agreed that kettlebottoms are hazardous roof conditions that require supplemental support. For, example, Ward, Eagle Energy's Vice-President, testified, "[i]t's common knowledge in the mining industry that kettlebottoms are a hazard and should be treated as such." (Tr. III, 1106). A 1992 information circular on coal mine groundfall accidents, published by the U.S. Department of the Interior, Bureau of Mines, and proffered by the Secretary, notes there is an abundance of kettlebottoms in southern West Virginia and eastern Kentucky that have "been responsible for numerous injuries and fatalities." (Gov. Ex., p. 8). An Atlas of Coal Geology introduced in evidence by Eagle Energy states kettlebottoms can fall without warning causing injuries or fatalities and that "identification [of kettlebottoms] and subsequent support during mining is critical." (Resp.'s Ex. 3, p. 2).

Thus, it is undisputed that the slickensided material surrounding kettlebottoms could cause kettlebottoms to fall from the roof at any moment without warning. (Tr. III, 373). Significantly, the three painted kettlebottoms were only approximately 27 feet inby the feeder. The feeder area is not a remote area of a mine. Rather, it is one of the more heavily traveled areas of a mine. (Tr. III, 1124-25). Thus, the location of some of the cited kettlebottoms increased the exposure of miners to a roof fall accident. In addition, the likelihood of an event causing serious injury, *i.e.,* a kettlebottom fall, contributed to by the subject violations, was heightened by the presence of mountain bumping.

Although the mass of a particular kettlebottom cannot be determined because it is concealed by the roof, kettlebottoms can be very heavy and are capable of inflicting serious, if not fatal, injuries. Given the fact that kettlebottoms can unexpectedly fall at any time, the Secretary has demonstrated that there is a reasonable likelihood that the roof hazard contributed to by Eagle Energy's repeated inadequate preshift and onshift examinations will result in injury, and, that that injury will be reasonably serious, if not fatal, in nature. Accordingly, the Secretary's S&S designations for the cited 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) violations shall be affirmed.

c. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.,* 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

The Commission has identified various factors in determining whether a violation is unwarrantable, including the extent of the violative condition, the length of time that it has existed, whether the violation is obvious, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Windsor Coal Company*, 21 FMSHRC at 1000; *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (August 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596 1603 (July 1984). The Commission also considers whether "the violative condition . . . poses a high degree of danger." *Windsor Coal Company*, 21 FMSHRC at 1000; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992). The Commission's indicia for determining whether a violation is attributable to an operator's unwarrantable failure will be taken in turn.

i. Extent of the Violative Condition

The degree of negligence associated with the preshift and onshift examiners' failure to note hazardous roof conditions is directly related to the extent of the hazardous conditions. Although the cited conditions were extensive, in that there were nine cited kettlebottoms, I am not unmindful that the cited conditions were relatively small in size, ranging from approximately six to twelve inches in diameter. Conditions that are readily apparent when being observed in a photograph utilizing a flash attachment, may escape scrutiny in the normal mining environment using a cap lamp. Thus, given the relatively small size of the cited conditions, ordinarily, I would be hesitant to attribute their lack of disclosure to high negligence.

However, here, the painted kettlebottoms convinces me that Eagle Energy is entitled to no such benefit of the doubt. The bit marks and centerline reflect the kettlebottoms were revealed and painted during the mining cycle on the day shift of February 24, 1998. Yet, despite being painted to highlight the fact that supplemental support was required, the conditions went repeatedly unnoted during approximately 15 preshift and onshift examinations. Under such circumstances, even the failure to note hazardous conditions that were marked for remedial action during the course of one preshift or onshift examination may constitute unwarrantable conduct. Consequently, the Eagle Energy's inaction in the face of highlighted hazardous roof conditions supports the Secretary's unwarrantable charge.

ii. Duration

As previously discussed, the evidence with respect to the painted cluster of kettlebottoms in the No. 2 entry reflects the cited conditions existed as early as the day shift on February 24, 1998. The purpose of preshift and onshift examinations is to identify hazardous conditions that require remedial action. Eagle Energy's failure to note any of the cited hazardous roof conditions, including the painted conditions, in the 15 preshift and onshift examinations conducted from foreman Larry Saunders' onshift examination between 7:30 a.m. and 3:30 p.m. on February 24, through the last preshift examination conducted by Saunders at 1:30 p.m. during the day shift on February 26, is indicative of an unwarrantable failure.

iii. Whether the Violation was Obvious and its Degree of Danger

Some of the cited roof hazards were spray painted in reflective orange paint. This method of painting is commonly used by Eagle Energy to alert personnel to the fact that there are kettlebottoms that need additional roof support. As previously noted, this method of spray painting was used by Bennett to highlight the cited conditions that needed supplemental support for the purposes of abatement of Workman's 104(a) Citation No. 4400559. In addition, there was an apparent centerline drawn through one of the cited painted roof conditions. Despite the orange paint and centerline, all of the cited conditions were repeatedly overlooked by foremen conducting preshift and onshift exams. Such repeated oversights were extremely dangerous given the unpredictable nature of kettlebottoms.

iv. History of Previous Violations

The evidence reflects Eagle Energy was cited for 14 violations of 30 C.F.R. §§ 75.360(b) and 75.362(a)(1) during the 18 month period prior to the issuance of the March 1998, orders in issue. Absent evidence concerning the nature and extent of these violations, I am unable to determine whether Eagle Energy's compliance history should have placed it on notice that greater efforts were required to ensure the adequacy of its preshift and onshift examinations.

As a final matter, Eagle Energy's purported lack of knowledge about when, why, and by whom, the three circles and two lines photographed in Gov. Ex. 11 were painted on the roof of the No. 2 entry is troubling.[6] An operator is responsible for the training, supervision and discipline of its employees. Eagle Energy's reported complete lack of knowledge about the painted conditions in the No. 2 entry adversely impacts on the adequacy of its supervision and training, and further evidences an indifference indicative of unwarrantable conduct. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982); *Western Fuels - Utah, Inc.*, 10 FMSHRC 256, 261 (March 1988). Thus, the evidence clearly reflects the requisite unjustifiable conduct to support an unwarrantable failure. Accordingly, 104(d)(2) Order Nos. 7166391 and 7166392 will be affirmed.

V. Civil Penalty

It is well settled that the Commission assesses civil penalties *de novo* and is not bound by the Secretary's proposed assessments. *Topper Coal Co.,* 20 FMSHRC 344, 350 n.8 (April 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 291, (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). Here, the Secretary urges me to impose a civil penalty greater than the $3,000 civil penalty initially proposed by the Secretary for each of the 104(d) orders in issue. (*Secretary's Br.* at p. 34).

In determining the appropriate civil penalty to be assessed, Commission Rule 30, 29 C.F.R. § 2700.30, requires the Judge to consider the statutory criteria set forth in 110(i) of the Mine Act, 30 U.S.C. § 820(i). Section 110(i) provides, in pertinent part, in assessing civil penalties:

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

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[6] The photographs in Gov. Ex. 11 depict two painted lines on the roof. The evidence reflects one line was drawn as a centerline, and the other line was drawn as a belt hanger line.

a. Size of Operator and Ability to Remain in Business

The parties have stipulated that Eagle Energy is a large operator and that the maximum $55,000 penalty that can be imposed under 30 U.S.C. § 820(a) will not affect Eagle Energy's ability to remain in business.

b. Negligence

With respect to negligence, while the evidence may be insufficient to warrant a finding of a willful disregard, there is ample evidence to suggest a reckless disregard given Eagle Energy's repeated disregard of hazardous roof conditions in a heavily traveled area of the mine that were highlighted for additional roof support.

c. Gravity

The gravity penalty criteria contained in section 110(i) requires an evaluation of the seriousness of the violation. *Hubb Corporation*, 22 FMSHRC 606, 609 (May 2000) *citing Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (September 1996); *Sellersburg*, 5 FMSHRC at 294-95. In evaluating the seriousness of a violation, the Commission focuses on "the affect of a hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. Here, unsupported portions of roof that could fall at any moment, located in a heavily traveled area of the mine, were permitted to exist even after they had been identified by orange spray paint. If the cited roof abnormalities were to fall from the roof, there is a reasonable likelihood that serious, if not fatal, injuries will occur. Consequently, the cited violations are of extremely serious gravity.

d. History of Previous Violations

During the period September 1, 1996, through February 28, 1998, Eagle Energy was cited for approximately 453 violations, including 14 violations of the mandatory safety standards in 30 C.F.R. §§ 75.360(b) and 75.362(a)(1). (Gov. Ex 3). In applying the history of prior violations penalty criterion, the Commission has noted that it is the operator's general history of violations, not just its history of similar violations, that should be considered. *Cantera Green*, 22 FMSHRC 616, 623 (May 2000) (citations omitted). Eagle Energy's history of 453 violations during the approximate 18 month period preceding the issuance of the subject 104(d) orders constitutes an extensive violative history.

e. Good Faith Efforts at Abatement

There is no evidence to suggest that Eagle Energy did not endeavor to timely abate the cited violations.

When considering the penalty criteria in their entirety, I agree with the Secretary that the evidence in this case warrants a higher penalty than the $3,000 civil penalties initially proposed. It is one thing to overlook relatively small hazardous roof conditions during preshift and onshift examinations. However, Eagle Energy has offered no plausible evidence to justify, or otherwise mitigate, its failure to note the highlighted hazardous roof conditions in close proximity to the dumping point. Accordingly, the evidence establishes a compelling case for raising the proposed civil penalty. Consequently civil penalties of $6,000 shall be imposed for each of the 104(d) orders in issue in these proceedings.

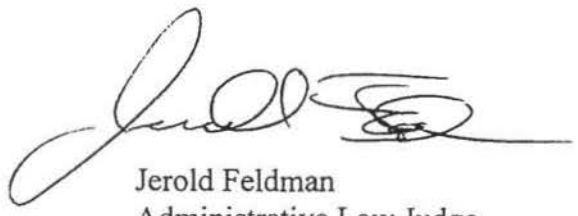
As a final note, I have exercised restraint. Obviously, even a doubling of the proposed civil penalty, given Eagle Energy's large operator size, will not have a significant financial impact. However, hopefully, this relatively small increase in penalties will have a deterrent effect and will encourage future compliance.

ORDER

Accordingly, **IT IS ORDERED** that 104(d)(2) Order Nos. 7166391 and 7166392 **ARE AFFIRMED**.

Consequently , **IT IS FURTHER ORDERED** that Eagle Energy, Inc.'s contests of 104(d)(2) Order Nos. 7166391 and 7166392 **ARE DENIED.**

IT IS FURTHER ORDERED that Eagle Energy, Inc., shall pay a total civil penalty of $12,000 in satisfaction of 104(d)(2) Order Nos. 7166391 and 7166392. Payment shall be made within 40 days of the date of this decision. Upon timely payment of the $12,000 civil penalty, **IT IS ORDERED** that the contest proceedings in Docket Nos. WEVA 98-72-R and WEVA 98-73-R, and the civil penalty matter in Docket No. WEVA 98-123, **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2000-43-M
Petitioner	:	A.C. No. 36-07953-05503
v.	:	
	:	Docket No. PENN 2000-94-M
ROBERT FIELDS,	:	A.C. No. 36-07953-05504
	:	
Respondent	:	Robert Fields Quarry

DECISION

Appearances: John Strawn, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Arthur D. Agnellino, Esq., Abrams & Agnellino, Athens, Philadelphia, for the Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging violations by Robert Fields (Fields) of 30 C.F.R. §§56.15001, 56.18010.

On April 14, 1999 Richard J. Schilling, an MSHA surface specialist inspected the Robert Fields Quarry, a flagstone operation. William Kithcart, who was on the site, identified himself as the foreman. Schilling asked Kithcart "... about the first aid materials ... ." (Tr. 21.), and the latter told him that they recently opened up and that the kit that they had was stolen sometime during the time that they were not in operation. A stretcher was available and convenient to the working areas.

Schilling issued a Citation alleging a violation of 30 C.F.R. §56.15001 which provides, as pertinent, as follows: "[a]dequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas."

Alfred Kithcart, the father of William Kithcart, indicated that he took over the quarry in 1999, and that prior to that time he and his son worked the quarry with his uncle. He said that he obtained full control of the operation in the Spring of 1999. According to Kithcart, on April 14, when Schilling inquired of him regarding blankets, he told Schilling that there were blankets on the site, but they were not in plastic bags. Further, according to Alfred Kithcart, the blankets were located in a sleeper attached to a tractor, and in automobiles on the site. Also, according to Alfred Kithcart, an unlocked camper owned by his uncle and located on a hill on the site, contained his uncle's blanket, stretcher, and kit.

Schilling was not shown any first-aid materials when he made an inquiry of William Kithcart who identified himself as the foreman. Nor was William Kithcart aware, at the time cited, that there were any first-aid materials on the site. Also, although Alfred Kithcart testified, in essence, that there were first-aid materials in an unlocked camper on the site, it appears that these materials did not belong to the operator. Moreover, Alfred Kithcart, aside from merely asserting that first-aid materials were in a camper, did not indicate the last time, prior to April 14, that he had actually observed the first-aid kit. Nor did he testify regarding the specific contents of the kit, or the condition and quantity of the items therein.

Within this context, I find that although there were blankets and a stretcher convenient to working areas, there were no "adequate first-aid materials". I thus find that Fields violated section 56.15001 supra.

According to Schilling, the violation was significant and substantial. He indicated that without a first-aid kit, should a miner suffer a broken bone on the site, the failure to immediately immobilize the broken bone with a splint and bandages could lead to a compound fracture. Also, the lack of a first-aid kit containing compresses and bandages could result in significant loss of blood should a miner get seriously cut. In this connection, he noted the presence of injury-causing hazards such as the moving parts of mobile equipment, and the possibility of a miner being caught between items of mobile equipment. He also noted that particles that fly off stone when cut as part of the normal operation, could cause injuries. According to Schilling, an amputation of a limb could result due to exposure to the blade of the saw used in normal operations. In addition, when stone is split by hand as part of the normal operations, small particles fly off which could hit a person. Schilling indicated that the area was wet creating a hazard of a person falling. Additionally, Schilling opined that the heavy material being mined could fall when a person is moving it, or "[W]ith the skid - steer - loaders, you could get caught between, or back into, or even the materials being shift off the forks" (sic) (Tr. 29).

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(l). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*,

3 FMSHRC 825 (April 1981).

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

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

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

Based on the testimony of Schilling, I find that it has been established that there was a violation of a mandatory standard, and that the lack of a first-aid kit contributed to the hazard of worsening the effect of an injury by not being able to provide some type of first-aid as quickly as possible. Regarding the third and fourth elements set forth in Mathies supra, I note Schilling's testimony as set forth above, and his further testimony that no one currently trained in first-aid was available at the site. However, he not describe in detail the specific nature of all steps of Fields' operation. Nor did he describe with any specificity the teeth of the saws used in this operation.

On the other hand, a telephone was located 150 yards from the pit working area, and 400 yards from the re-cut building where some stone is cut. An ambulance service was located only a few minutes drive from the site. William Kithcart had received first-aid training when he served in the military in 1993, and Alfred Kithcart, had also received first-aid training while in the military, and received weekly first-aid training while working as a mechanic.

I give more weight to the testimony of Alfred Kithcart regarding the condition of the

equipment at the site due to the specifics in his testimony. I also note that this testimony was not contradicted or impeached.

Further, the "highwall" at the site was only 5 feet high and, according to Alfred Kithcart's testimony, that was not contradicted or impeached, all work on the flagstone was performed on a flat surface. Also, according to his uncontradicted and unimpeached testimony, the saws used at the site to cut the flagstone did not have any teeth but contained diamond chips which cut the flagstone material by means of abrasion and water, rather that than by cutting. There is no evidence of any injuries at the site that required treatment by a physician.

Within the above context, I find that the third and fourth elements set forth in Mathies, supra, have not been established. Thus I conclude that it has not been established the violation was significant and substantial.

Considering the testimony of Alfred Kithcart, that he and his son were the only permanent workers at the site, that the mine was a seasonal operation, that the three other persons who worked at the site on occasion were his children, I find that the size of the operation was small. Also, I note that only three citations had been previously issued regarding the operation of the site, and none were issued subsequent to the time that William and Alfred Kithcart took over the operation in 1999. Also, considering the factors that an ambulance service was nearby, that there is no history of serious injuries at the site, that the likelihood of a serious injury was not too great considering the fact that the highwall at the site was only 5 feet high, that the saws used at the site did not have any teeth, and that the material worked on was on a flat surface, I find that the level of gravity of the violation was relatively low. Further, inasmuch as the mine was not in operation, that its first-aid materials had been stolen over the previous winter when the mine was not in operation, that one of the two permanent workers at the site, Alfred Kithcart, believed that first-aid materials owned by his uncle were located on the site, that both the permanent workers on the site had some degree of first-aid training, I find that the level of Fields' negligence was relatively low. Further, considering Alfred Kithcart's testimony, that was not contradicted or impeached, that after the Citation had been issued, blankets on the site were put in plastic bags, and that upon receipt of the Citation at issue, a first-aid kit was purchased containing ace bandages, gauze, band-aids, sterile packs, and tape, I find that Fields acted in good faith in abating the Citation at issue. Taking into account all the above factors, I conclude that a penalty of twenty-five dollars ($25.00) is appropriate for this violation.

Schilling also cited Fields for violating 30 C.F.R.§56.18010, which requires that an individual capable of providing first-aid shall be available on all shifts, and shall be currently trained. Fields conceded that when cited, there was no one available on the site who was currently trained in first-aid. I thus find that Fields did violate Section 56.18010 supra.

According to Schilling, the factors that he set forth in his testimony regarding the first Citation that he issued, relating to his conclusion that it was significant and substantial, apply

equally to the instant Citation. Thus, essentially for the reasons set forth above, I find that, within the context of that evidence, the violation was not significant and substantial.

Essentially for the reasons set forth above, I find that the level of gravity of the violation as well as the negligence of Fields to have been low. Taking this into account, as well as considering the remaining factors set forth in Section 110i of the Federal Mine Safety and Health Act of 1977, I find that a penalty of twenty-five dollars ($25.00) is appropriate for this violation.

ORDER

It is ordered that, within 30 days of this Decision, Fields shall pay a total civil penalty of fifty dollars ($50.00).

Avram Weisberger
Administrative Law Judge
(703) 756-6215

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 27, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2000-237-M A.C. No. 45-03338-05504
v.	:	Morgan Kame Terrace
PALMER COKING COAL COMPANY, Respondent	:	

DECISION

Appearances: Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
William Kombol, Manager, Palmer Coking Coal Co., Black Diamond, Washington, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Palmer Coking Coal Company ("Palmer"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Seattle, Washington. The parties presented testimony and documentary evidence and made closing arguments.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Morgan Kame Terrace is a sand and gravel mine operated by Palmer in King County, Washington. It has been in operation for about five years and has been inspected by MSHA about twice a year since then. (Tr. 68). Although Palmer retained the words "Coking Coal" in its name, it is no longer in the coal mining business. Palmer employs about 18 people, including managers and partners. Rock is extracted at the mine and there is a crushing plant. About 13 employees are involved in the day-to-day operation of the mine. (Tr. 95). On January 19, 2000, MSHA Supervisory Inspector Dominic Vilona conducted an inspection of the mine along with Russell Argall, an inspector in training. At the time of the inspection, Mr. Argall was not an authorized representative of the Secretary. Mr. Argall accompanied Inspector Vilona as part of his training. During the course of the inspection, Palmer was issued seven citations under section 104(a) of the Mine Act.

The citations were signed by MSHA Inspector Terry Miller, who was not at the mine when the conditions were observed by Inspector Vilona and Mr. Argall. Inspector Miller issued the citations because Mr. Argall was not, at the time of the inspection, an authorized representative of the Secretary. Inspector Vilona testified that "when we returned to the office, I went ahead and took myself off the inspection." (Tr. 38). He apparently did that because he was the supervisor, but he determined that the alleged violations existed at the time of his inspection. He also reviewed the wording of each citation and agrees with the allegations described in each citation. The wording of each citation was based, in large part, on the notes taken by Inspector Vilona. Thus, Inspector Miller simply functioned as a scribe in the writing of the citations. Although this sequence of events is rather unusual, I find that this procedure did not violate the provisions of the Mine Act.

After the Secretary presented her case, Palmer moved to dismiss the case for lack of jurisdiction on the basis that the Secretary failed to prove that Morgan Kame Terrace is a mine subject to the Mine Act or that its products enter into or affect commerce. I denied Palmer's motion at the hearing. (Tr. 65-66). The Secretary established that the mine produces aggregate products that it sells in the open market and that some of the equipment used to mine and crush this product is manufactured outside the State of Washington. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the U. S. Supreme Court held that growing wheat solely for consumption on the farm that grew it had an impact on interstate commerce. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States...." *Fry v. United States*, 421 U.S. 542, 547 (1975). The Commission and the courts have consistently held that Congress intended to exercise its authority to the maximum extent feasible when it enacted the Mine Act. *See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 686 (April 1994); *United States v. Lake*, 985 F.2d 265, 267-69 (6th Cir. 1993). I affirm my denial of Palmer's motion to dismiss.

One fundamental tenet must be kept in mind when analyzing the issues raised by Palmer. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

A. Citation No. 7974794

Citation No. 7974794 alleges a violation of 30 C.F.R. § 56.9300(b). The condition or practice section of the citation provides:

> The berms on the ramp to access the feed hopper were not maintained to mid-axle height of the vehicles using the ramp. The berms were 18" high and should have been approximately 36" high. The ramp is used daily to feed the plant. The elevated ramp had a drop-off of three feet on both sides.... Should the loader accidentally run off the ramp and overturn, a worker could be injured resulting in lost work days or restricted duty.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not of a significant and substantial nature ("S&S"); and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides, in part, that berms shall be "provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn" and that such berms "shall be at least mid-axle height of the largest ... equipment which usually travels the roadway."

The cited ramp is used by the loader operator to feed the hopper for the crushing plant. Inspector Vilona testified that he and Mr. Argall measured the height of the berm and the height of the axles of the loader that uses the ramp. Palmer does not dispute these measurements. Vilona testified that the violation was not serious because the ramp was about 20 feet wide, making it unlikely that the loader operator would drive off the edge, especially since the loader is operated at low speeds on the ramp. He also testified that, because equipment operators wear seatbelts at the mine, it was unlikely that any injuries would be serious.

Mr. Kombol testified that the cited berms were of sufficient height to protect against overtravel and that 36" berms could create an even greater hazard because they would make the drop off greater. He testified that the earthen ramp was about three feet high and, when three-foot berms were added to abate the citation, the drop-off became six feet. He worried that a loader would be more likely to tip over if it went over the berm.

The cited safety standard makes it quite clear that berms must be at least mid-axle height. There is no dispute that the berms did not meet the requirements of the standard. I find that the Secretary established a violation of the safety standard. The photographs introduced by Palmer show the size of the berms after the citation was abated. (Ex. R-1). If Palmer is concerned about the height of the drop off, it can reduce the gradient along the outside edges by adding more material.

I agree with MSHA that the violation did not present a serious safety hazard. Palmer argues that the cited condition existed for five years and, since the mine has been inspected by

MSHA twice a year during this period, Palmer did not have reason to know that the berms were inadequate. Palmer does not understand why these berms, which are readily observable, had been in the same condition for five years, and had been inspected many times by MSHA, were suddenly out of compliance in January 2000, requiring the company to pay a civil penalty. Palmer suggests that, with respect to all of the citations, the MSHA inspection team was "nitpicking" the mine to impress the inspector in training. (Tr. 70).

I cannot vacate the citation based on these arguments. In essence, Palmer is arguing that, although the cited safety standard clearly requires that berms be mid-axle height, it is not at fault because MSHA failed to cite the condition in the past. While that argument has some surface appeal, it fails because of the strict liability nature of the Mine Act. In addition, Palmer is in no worse position than if MSHA had cited the condition five years ago. It simply would have had to correct the condition and paid the civil penalty at that time.

I reduce Palmer's negligence slightly based on these arguments. The negligence should not be reduced to "low," however, because the condition was obvious and the regulation was clear. A penalty of $50 is appropriate.

B. Citation No. 7974795

Citation No. 7974795 alleges a violation of 30 C.F.R. § 56.14100(b). The condition or practice section of the citation provides, in part:

> The brake lights on the 980 Cat loader were not maintained in a functional condition. Also the rear wiper was missing.... The front-end loader works only around the highwall; no other mobile equipment or foot traffic is in the area. The lights should be maintained so that other equipment and workers are aware that this loader is coming to a halt. The wipers could be necessary for safe operation in inclement weather. Either of these conditions could contribute to an accident involving the loader and a worker could be injured resulting in lost work days or restricted duty.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides, in part, that "[d]efects on any equipment ... that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to miners."

There is no dispute that the brake lights were burned out and that the wiper blade was missing. Palmer argues that MSHA's interpretation of its safety standards is illogical. The Secretary's safety standard concerning brakes, section 56.14101, does not require brake lights. In addition, this section does not require that if brake lights are installed, they must be in working order. MSHA admitted at the hearing that if the manufacturer had not installed brake lights on

the loader, it would not have issued a citation. Thus, Palmer argues that the Secretary cannot seriously argue that the burned out lights affected safety. Palmer makes the same arguments with respect to the missing wiper blade.

It is well established that an agency's interpretation of its own regulations should be given "deference ... unless it is plainly wrong" and so long as it is "logically consistent with the language of the regulation and ... serves a permissible regulatory function." *General Electric Co. V EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995)(citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978).

Although there is some tension in MSHA's position, it is not unreasonable. If someone in another vehicle is following a loader with brake lights, he will likely rely on the lights to warn him to stop. If the vehicle he is following is not equipped with brake lights, he will know that he cannot rely on such lights. The driver of a vehicle following a loader with inoperable brake lights may become complacent and not notice that the loader is stopping because the brake lights did not come on. Thus, inoperable brake lights are a defect that affects safety. Other Commission administrative law judges have reached the same conclusion. *See, e.g., Barrett Paving Materials, Inc.,* 15 FMSHRC 1999, 2007-08 (September 1993). I also find that the defect was not corrected "in a timely manner." Neither Inspector Vilona nor Mr. Kombol knew how long the brake lights had been out-of-order. Because Palmer had not been checking the brake lights during pre-shift examinations, it can be safely inferred that the condition had existed for more than one shift.

I reach the same conclusions with respect to the missing wiper blade. The operator of the loader backs up the vehicle on a regular basis. In inclement weather, he may not be able to see clearly out the back, which has the potential of putting himself and others in danger. I find that the Secretary's interpretation of the standard is reasonable and that the missing wiper blade was a defect affecting safety that should have been discovered during preshift examinations. Other Commission administrative law judges have reached the same conclusion. *See, e.g., Mechanicsville Concrete,* 16 FMSHRC 1444, 1451 (July 1994).

Palmer contends that it did not have any notice of the Secretary's interpretation of the safety standard. Actual notice of a standard's requirements is not required. The language of section 56.14100(b) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement*

Co., 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

I find that adequate notice was provided to mine operators as to the requirements of the standard. Mine operators are required to perform preshift inspections of self-propelled mobile equipment before being put into service under section 56.14100(a). Mine operators throughout the country check brake lights and window wipers during pre-operational examinations. It is well known that these items must be checked during these examinations. Equipment operators have been disciplined by mine operators for failing to check brake lights during their preshift examination. *Morales v. Asarco, Inc.*, 22 FMSHRC 659, 662 (May 2000). MSHA has consistently interpreted this safety standard to require that brake lights and wiper blades be checked and, as stated above, Commission judges have held that inoperative brake lights and window wipers are a defect affecting safety.

I find that the Secretary established a violation and that the violation was not serious for the reasons set forth in the citation. I also find that Palmer's negligence was moderate. The safety defects should have been corrected during pre-shift examinations. A penalty of $55 is appropriate.

C. Citation No. 7974796

Citation No. 7974796 alleges a violation of 30 C.F.R. § 56.14107(a). The condition or practice section of the citation provides:

> The tail pulley on the oversize screen belt was not adequately guarded to prevent a worker from being injured. The bottom of the tail pulley was 3½ feet off ground level. The top and sides were guarded but the bottom had an exposed pinch point. A worker could come in contact with the pinch point and possibly receive

> permanently disabling injuries. The area is not usually accessed during production and the foreman stated that machinery is locked out for maintenance.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and takeup pulleys, ... and similar moving parts that can cause injury."

There is no dispute that there was no guard under the tail pulley. The evidence shows that this unguarded area was about 3½ feet above the ground and that contact with the pinch point was unlikely. (Tr. 25; Ex. R-1). Palmer argues that this area had been inspected by MSHA on numerous occasions and no citations were issued for lack of a guard at this location during these inspections. Palmer also maintains that it would be very difficult for anyone to become entangled in the pinch point from underneath the tail pulley and that all maintenance is performed while the plant is shut down and locked out. Consequently, it contends that it did not know that the area under the tail pulley was required to be guarded.

In *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (September 1984), the Commission held that the most logical construction of a guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." The Commission stressed that the construction of safety standards involving employees' behavior "cannot ignore the vagaries of human conduct." *Id.* (citations omitted). As the Commission stated in interpreting another safety standard, "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions...." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Thus, although an injury may have been unlikely in this instance, an injury was possible and the standard is designed to eliminate such injuries.

As stated above, that fact that MSHA did not previously cite the bottom of the tail pulley is not a defense in this strict liability statute. For the reasons discussed above, I find that mine operators were provided with reasonable notice of the requirements of the guarding standard. MSHA's interpretation of this safety standard has been consistent. MSHA has frequently issued citations in similar circumstances and such citations have been affirmed by Commission judges. *See, e.g. Tide Creek Rock, Inc.* 18 FMSHRC 390, 405 (March 1996).

I find that the Secretary established a violation and that the violation was not serious for the reasons set forth above. I find that Palmer's negligence was low, however, because the top and sides of the tail pulley were guarded. The violation was not obvious and Palmer reasonably believed that it was complying with the safety standard. A penalty of $45 is appropriate.

D. Citation No. 7974797

Citation No. 7974797 alleges a violation of 30 C.F.R. § 56.11001. The condition or practice section of the citation provides:

> Safe access was not provided to the storage trailer. Workers access the trailer daily in the performance of their job. The ramp was constructed of smooth plywood and went from ground level to the floor of the trailer which was three feet above the ground level. The ramp was on a steep 45 degree angle. Workers track sand and mud onto the ramp creating a slip hazard. A slip on the smooth surface could injure a worker resulting in lost work days or restricted duty.

MSHA determined that it was reasonably likely that someone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides that "[s]afe means of access shall be provided and maintained to all working places."

The parties dispute the basic facts that gave rise to this citation. The Secretary contends that the floor of the trailer was 36 inches above the ground and that the plywood ramp was at a 45 degree angle. (Tr. 27, 55, 59). Mr. Kombol testified that the floor of the trailer was about 15-16 inches above the ground and that the ramp was at a 28-30 degree slope. (Tr. 88). Palmer placed some gravel in the area soon after the citation was issued and then subsequently added a metal step. (Ex. R-1). I find that the ramp presented a slip and fall hazard, even if I accept Mr. Kombol's measurements. The plywood had a smooth surface so that mud from the boots of Palmer's employees could make the surface slick. Someone could fall and sustain a minor injury, especially if he were carrying supplies.

I find that the Secretary established a violation and that the violation was not serious. I reduce Palmer's negligence slightly because Palmer believed that the ramp provided safe access to the trailer. A penalty of $50 is appropriate.

E. Citation No. 7974798

Citation No. 7974798 alleges a violation of 30 C.F.R. § 56.14100(b). The condition or practice section of the citation provides:

> The brake lights on the 980 Cat front-end loader were not maintained in a functional condition. The front-end loader is used in all areas of the mine. At the time of the inspection, the loader was being used to load over the road trucks that entered the mine. Without the brake lights operating, other mobile equipment operators would not know when the loader would stop. This

> hazard could possibly cause a collision involving mobile equipment. A collision between mobile equipment could possibly cause a worker to sustain injuries that would cause lost work days or restricted duty.

MSHA determined that it was reasonably likely that someone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation.

This citation was issued for the mine's other loader. There is no dispute that the brake lights were not working because the bulbs were burned out. Palmer's arguments with respect to this citation are the same as for Citation No. 7974795 above.

For the reasons set forth for that citation, I find that the Secretary established a violation and that the violation was not serious for the reasons set forth above. I also find that Palmer's negligence was moderate. The safety defects should have been corrected during pre-shift examinations. A penalty of $55 is appropriate.

F. Citation No. 7974799

Citation No. 7974799 alleges a violation of 30 C.F.R. § 56.11001. The condition or practice section of the citation provides:

> Safe access was not provided to a floating deck with a pump mounted on it that supplied water for the wash plant. A 15-foot walkway from the ground out to the deck had handrails of only 18" on both sides of the walkway. The walkway is 2 feet wide. There were several obstacles in the path of the walkway that a worker would have to step over to access the floating deck. This area is accessed daily during cold weather. If a worker should fall or slip from this walkway and enter the deep water, it could be fatal.

MSHA determined that it was reasonably likely that someone would be injured by the violation; that the violation was S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $150 for this violation.

The facts are not in dispute. There is a pump in the pond that is used to provide water for the wash plant. Employees get to this pump via a floating walkway that is about 15 feet long and 2 feet wide. The only time employees have to get to the pump on a regular basis is during freezing weather. The handrails were only 18 inches high. Mr. Kombol testified that, although Palmer's employees considered all of the other citations to be "ridiculous," they "felt that this one was justified" because the higher handrails that were installed to abate the citation were "better." (Tr. 90-91). Mr. Kombol questioned MSHA's moderate negligence determination because Palmer reasonably believed that employees would rarely have to go out to the pump.

I find that the Secretary established a violation. I also find that the Secretary established that the violation was serious and S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... 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." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. Without adequate handrails, an employee might fall into the water if he slipped on the surface of the walkway. Tripping hazards were present. The key issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature, assuming continued normal mining operations. Employees had to travel along the walkway on a regular, but not frequent, basis in freezing weather. If an employee were to slip and fall into the cold water, he could suffer from hypothermia and a fatal accident could result.

Finally, I find that Palmer's negligence was moderate. Given that employees were required to use the walkway from time-to-time, adequate handrails should have been installed. A penalty of $150 is appropriate.

G. Citation No. 7974800

Citation No. 7974800 alleges a violation of 30 C.F.R. § 56.14107(a). The condition or practice section of the citation provides:

> The gearbox on the drive pulley of the scalping screen feeder conveyor was not adequately guarded. An accessory coupling on the side of the gear box had exposed moving parts. On the opposite side of the conveyor, the smooth 2½ inch diameter shaft for the pulley extended out of the bearing for about 4 inches. Both

> of these hazards were located 5 feet above the deck. Should a worker contact either of these hazards, permanently disabling injuries could occur. The foreman stated that this area is accessed only when the plant is shut down.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation.

The facts are not in dispute. The cited areas were in rather remote locations and it was unlikely that anyone would come in contact with the moving machine parts. Nevertheless, these parts were exposed and contact was possible. The areas had not been previously cited by MSHA and Palmer relied on that fact in its defense. Mr. Kombol testified that it would take a deliberate act to put oneself in danger at the cited locations and that Palmer does not employ "imbeciles to work around sand and gravel plants." (Tr. 94).

The Secretary recognized that it was unlikely that anyone would be injured when she made her gravity and S&S determinations. Exposed moving machine parts were present, however, and given the vagaries of human conduct, an injury was possible.

For the reasons set forth with respect to Citation No. 7974796, I find that the Secretary established a violation and that the violation was not serious. I find that Palmer's negligence was low, however, because the unguarded areas were quite small and rather remote. The violation was not obvious and Palmer reasonably believed that it was complying with the safety standard based, in part, on prior MSHA inspections. A penalty of $45 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Palmer was issued six citations during the two years prior to this inspection. Palmer was a small operator. The violations were abated in good faith within a reasonable period of time. The penalties assessed in this decision will not have an adverse effect on Palmer's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
7974794	56.9300(b)	$50.00
7974795	56.14100(b)	55.00
7974796	56.14107(a)	45.00
7974797	56.11001	50.00
7974798	56.14100(b)	55.00
7974799	56.11001	150.00
7974800	56.14107(a)	45.00

Accordingly, the citations contested in this proceeding are **AFFIRMED** as set forth above, and Palmer Coking Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $450.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 28, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-17-M
Petitioner	:	A. C. No. 44-06897-05502 ASI
v.	:	
	:	Low Moor
LOPKE QUARRIES, INC.,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, PC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lopke Quarries, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks a penalty of $55,500.00. A hearing was held in Harrisburg, Pennsylvania. For the reasons set forth below, I vacate four orders, modify one citation and one order, affirm one citation and three orders and assess a penalty of $22,500.00.

Background

Lopke Quarries, Inc., operates portable rock crushing plants at various locations throughout the eastern half of the United States. In 1997, Lopke was hired by Vulcan Materials to run such an operation at Vulcan's Low Moor Mine, near Covington, Virginia. Lopke began operating in November 1997 and later increased the size of its plant in April 1998. The plant consists of an impactor, which is known as the primary plant, and a double roll crusher and screen, called the secondary plant. Finished product is taken from the plants by conveyor belts and deposited in discrete piles depending on the type of rock. Front-end loaders move the rock from the piles below the conveyors to the area where it is stored for delivery.

Joe Spitzer was hired by Lopke to be superintendent of the Low Moor plant. He began working in January 1998. Spitzer was not able to produce enough crushed stone to meet Lopke's

expectations. He took a week off from the job in late April. In early May, Peter Lockwood, a Lopke superintendent, was sent by the company to see if he could assist Spitzer in getting the plant to meet production standards. Joe McCormack, another superintendent, was also sent to the site to provide advice.

On May 15, 1998, Lockwood was injured on the site. MSHA Inspector James E. Goodale was sent to the mine to investigate the accident. After investigating the accident, Goodale returned to the mine on May 20, to conduct a regular inspection of the mine. Based on his inspection, he issued 14 citations or orders to Lopke. The company contested nine of them, which were the subject of this hearing. The orders and citations will be discussed in the order of their issuance.

Findings of Fact and Conclusions of Law

Citation No. 7713969

This citation alleges a violation of section 56.12008 of the Secretary's Regulations, 30 C.F.R. § 56.12008, because: "The power wires entering the junction box for the 480 volt electric motor of the feeder for the impact crusher were not substantially bushed to prevent electric shock. This area was located at the primary plant. The wires were pulled out the box [*sic*]." (Govt. Ex. 3.) Section 56.12008 requires that:

> Power wires and cable shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The parties have stipulated that Citation No. 7713969 accurately sets out a violation of section 56.12008, which the company committed. (Stip. No. 10, Jt. Ex. 1.) Accordingly, I conclude that Lopke violated the section as alleged.

Citation No. 7713973, Order Nos. 7713974 and 7713975

This citation and two orders involve violations of section 56.11001, 30 C.F.R. § 56.11001, for three different conveyor belts. Citation No. 7713973 alleges that:

> Safe access was not provided to service and maintained [*sic*] the conveyor belt and head pulley of the 57's belt. The foreman stated that he has walked up the elevated belt in the past, also other employees, no safety belt or harness and line being used. The belt was elevated approximately four to fifteen feet above

> ground level. The belt was approximately fourty [*sic*] five feet long. A fall of person hazard exist [*sic*] in this area. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 4.) Order No. 7713974 contains essentially the same language, except for the height and length of the belt and that it deals with the "Fines stacker belt." (Govt. Ex. 5.) Order No. 7713975, for the "8's belt" likewise is the same, except for height and length. (Govt. Ex. 6.)

Section 56.11001 provides that: "Safe means of access shall be provided and maintained to all working places." The company argues that the Secretary did not prove these violations because it did provide a safe means of access to the tops of the conveyors and because the Secretary did not show that the belts provided access to working places. I find that the company violated this regulation.

It is undisputed that at the time the citation and orders were issued none of the conveyor belts, which had been in operation since April 1998, was equipped with handrails or safety cables and that neither a ladder nor a man-lift was being used to access the heads of the belts. When asked how the belt conveyors were serviced, Spitzer testified: "I and everybody else walked up the belt to grease and check the head pulley." (Tr. 195.) This was the same response he gave when Inspector Goodale asked him the question during the inspection. He stated that a safety belt was not used when he and other employees walked up the belt. Spitzer said that the bearings in the head pulley had to be greased at least once a week, that each belt's gearbox had to be checked once a month and that the electric motors had to be checked once a year.

Jason Lewandrowski testified that he became the plant operator at Low Moor in the early part of May 1998. He stated that he serviced the belts once before the citation and orders were issued and that when he did, he used a safety harness and line which he attached to the framework of the conveyor belt. He maintained that he crawled up the belts and had to unhook the safety line and re-attach it several times.

The Commission has held, in construing a regulation worded identically to section 56.11001, that:

> [T]he standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" with the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

The Hanna Mining Co., 3 FMSHRC 2045, 2046 (September 1981); *accord Homestake Mining Co.*, 4 FMSHRC 146, 151 (February 1982).

Lopke asserts that it provided a safe means of access to the head pulley by making a safety belt or harness and safety line available. It disputes that any employee walked up the belt without such safety equipment by attacking the credibility of its superintendent, Joe Spitzer. The Respondent maintains that Spitzer may have been in a frustrated mental state during the inspection because he was unhappy with his pay, the company kept pushing him for more production, he viewed Lockwood as his replacement and he had a confrontation with McCormack. All of this, the company argues, makes his testimony inherently suspect.

The problem with this argument is that it requires speculation into Spitzer's state of mind and conclusions about that state of mind that are not corroborated by any other evidence. In the first place, no one directly contradicted Spitzer's statement that he and others had gone up the conveyor belts without safety belt or harness. None of the witnesses, save Spitzer, had been at the mine before early May 1998. So no one but Spitzer could testify what happened prior to that time.

Secondly, none of the witnesses, except McCormack, testified that they observed anything unusual about Spitzer's manner or behavior at the time of the inspection. McCormack characterized him as being "uptight, talking loud and then he gave me a little punch." (Tr. 366.) He speculated that Spitzer was that way because McCormack was giving him advice concerning the impending inspection and raising production levels. Being uptight in such a situation when you are the one in charge of the plant does not seem that unusual. It is a stretch to conclude that because of this Spitzer intentionally gave false information to the inspector and then repeated it at the trial.

Thirdly, Lockwood and McCormack were present at the mine during the inspection and Lockwood, at least, assisted in abating these violations the next week by installing handrails. Yet, there is no evidence that anyone from the company ever challenged these violations at that time either by advising the inspector that Spitzer's information was suspect or stating that during the period they were at the mine, the head pulleys were accessed with the use of a safety harness.

Fourthly, the matters causing Spitzer's frustration are the types of matters that commonly frustrate many superintendents in Spitzer's position. Beyond the frustrations, Lopke has made no showing that Spitzer bore any animus toward the company, particularly to the extent that he would attempt to sabotage it. Further, it is hard to believe that, if he did have such strong feelings toward Lopke, he would have accepted the company's offer of another position several weeks after he left Low Moor.[1] Indeed, it is hard to believe that, if the company thought that Spitzer had intentionally admitted to violations that did not occur, they would offer him such a

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[1] Spitzer quit in June 1998 and was gone for a month. Lopke contacted him and offered him the position as superintendent of its Rockbridge plant.

job.

Finally, I observed Spitzer's demeanor and manner while testifying and it did not appear that he was dissembling, bore a grudge against Lopke, or was testifying untruthfully. Consequently, I find that he was a credible witness and give great weight to his testimony.

Turning to the Respondent's claim that the belts were not working places when the inspector observed them, because the mine was not in operation at that time, I find this argument to be without merit. Section 56.2, 30 C.F.R. § 56.2, defines a working place as "any place in or about a mine where work is being performed." It is undisputed that work is performed on the head pulleys of the conveyor belts; the pulleys' bearings have to be greased at least once a week, the gearbox has to be checked once a month, and the electric motor has to be checked once a year. All of this work is performed at the head pulley during a mining shift.

The company too narrowly construes the definition when it argues that the work has to actually be being performed in the view of the inspector. The law is well settled that it is not a defense that the inspector was not present when the violation occurred. *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988); *Nacco Mining Co.*, 9 FMSHRC 1541 (September 1987). Furthermore, if the validity of such an argument were upheld, mine operators could avoid liability for violations merely by shutting down operations whenever an inspector arrived for an inspection. Such an interpretation would undermine the purposes of the Mine Act. *Emerald Mines*, 863 F.2d at 58. Therefore, I reject the argument.

Clearly, walking up the belt is an obvious route to the head pulley and, thus, it was incumbent on the company to make it safe. The company did not do this.[2] Accordingly, I conclude that the Respondent violated section 56.11001 in these three instances.[3]

Significant and Substantial

The Inspector found these violations to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a

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[2] Although not necessary to this decision, it is questionable whether the method of using the safety harness testified to by Lockwood and Lewandrowski was, in fact, a safe means of access.

[3] The fact that the "57's" belt had grease lines allowing the head pulley bearings to be greased from the ground does not mean that the company did not violate the regulation on this belt. Neither the gearbox nor the electric motor could be checked from the ground. Furthermore, Spitzer testified that he walked up *all* of the belts.

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 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

With regard to these violations, violations of the safety standard have already been found. The inspector testified that walking up the belts created a hazard of falling off of them. Common sense, as well as the inspector's testimony, indicates that a fall from belts which are four to eighteen feet above the ground will result in a reasonably serious injury, if not death. Consequently, I conclude that these violations were "significant and substantial."

Unwarrantable Failure

The citation and orders allege that these violations resulted from the company's "unwarrantable failure" to comply with the regulation.[4] The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

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[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

The Commission has established several factors as being determinative of whether a violation is unwarrantable:

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g., Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

The evidence on these violations is that miners had been walking up the belts since they were erected in April 1998. Spitzer, the mine superintendent, observed miners walking up the belts without safety devices and, in fact, he walked up the belts without safety devices. Spitzer was aware that this was unsafe. He had suggested to higher management that handrails be installed on the belts. In addition, one of Vulcan's supervisors told Spitzer and Lockwood that handrails should be installed on the belts and this was relayed to higher management. The failure to provide safe means of access to the head pulleys was at best indifference and at worst a serious lack of reasonable care. Accordingly, I conclude that these violations resulted from Lopke's unwarrantable failure to comply with the regulation.

<u>New Holland skid-steer loader</u>

Two orders were issued concerning the company's New Holland skid-steer loader. Order No. 7713976 alleges a violation of section 56.14100(b), 30 C.F.R. § 56.14100(b), because:

> Defects affecting safety on self propelled mobile equipment were not corrected in a timely manner to prevent the creation of an hazard to persons. The safety devices for the seat and seat belts provided on the New Holland skid-steer loader company number

> L-30 were not maintained in a functional condition. The wires for the components were broken allowing the operator to exit the loader while it is still running. The foreman has operated this loader in the past with the unsafe condition existing. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 7.) Section 56.14100(b) requires that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Order No. 7713977 charges a violation of section 56.14100(a), 30 C.F.R. § 56.14100(a), in that:

> The New Holland skid-steer loader company number L-30 was not inspected before putting into [*sic*] operation. Safety defects were found on the loader. The foreman stated he has operated the loader and never conducted an inspection. The loader is used at the plant areas. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 8.) Section 56.14100(a) provides that: "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator on the shift."

Order No. 7713976

Inspector Goodale testified that when he inspected the New Holland loader he had the operator remove his seatbelt and stand up. He related that the safety device connected to the seat and seatbelt that was supposed to lock up the hydraulics so that the loaders lift arms could not be raised or lowered or the loader moved did not work when the operator stood up. He discovered that the wires were broken underneath the seat. The inspector stated that the purpose of the device was to prevent the operator from being struck by the loader's bucket when he exited the driver's cage.

Inspector Goodale further stated, and the other witnesses confirmed, that none of the miners, including Spitzer, was aware that the loader was equipped with such a device. He also testified that such a safety device is not required by the Secretary's regulations and that there were signs posted on the arms of the roll cage warning the operator not to get out of the cage without turning the loader off.

The Respondent argues that this was not a defect affecting safety because the regulations do not require such a device to be present and because of the warning signs. Lopke also argues that the Secretary did not show that it failed to correct the defect in a timely manner since it had to be aware of the defect to correct it.

The Commission has held, with regard to the predecessor to this regulation,[5] that the phrase "affecting safety," "has a wide reach and the 'safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.'" *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (citations omitted). Under this definition, I have little trouble concluding that the failure of the interlock device to activate, when the seatbelts were unfastened and the operator stood up, was a defect affecting safety.

On the other hand, the company is correct that the Secretary did not show that the defect was not corrected in a timely manner. In order to correct a defect, the operator must first be aware that a defect exists. In this case, the uncontradicted evidence is that no one at the mine was aware that the loader had a interlock device. (Tr. 81, 151, 214, 323.) Therefore, no one was aware that the device was defective. Further, in view of the facts that, (a) not all skid-steer loaders are equipped with such a device, (b) the Secretary does not require that skid-steer loaders be equipped with such a device, and (c) the broken wires were hidden under the seat, and, thus, not in plain view, I do not find the miners' lack of knowledge to be unreasonable.

In order to show that the defect was not corrected in a timely manner, the time starts running from the time the operator became aware of the defect, or, as is not present in this case, should have become aware of it. The Secretary did not present any evidence on this issue. Indeed, it is not discussed at all in the Secretary's brief. Therefore, while the evidence demonstrates that this was a defect affecting safety, there is no evidence concerning whether it was corrected in a timely manner. Consequently, the Secretary has failed to prove the violation and the order will be vacated.

Order No.7713977

The company has conceded that the loader was not inspected. (Jt. Ex. 1, Stip. 11.) Accordingly, I conclude that the Respondent violated section 56.14100(a).

Significant and Substantial

The order alleges that this violation was "significant and substantial." The Secretary argues that this is so because the loader operator could be "crushed" by the bucket when exiting the loader. (Sec. Br. at 21.) While that was certainly a possibility, I find that it was not reasonably likely to occur. The evidence is undisputed that the only defect found on the loader

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[5] 30 C.F.R. § 56.9002 (1987) provided: "Equipment defects affecting safety shall be corrected before the equipment is used."

was the non-functioning interlock device. The evidence is also undisputed that there were signs on the loader's cage warning the operator to turn the loader off before getting off of it and that the Respondent's miners routinely followed this practice. Adding this to the facts that not all skid-steer loaders have such a device and that the Secretary does not require that they be equipped with such a device, and I conclude that the failure to inspect the loader was not "significant and substantial."

Unwarrantable Failure

The order charges that the violation resulted from an "unwarrantable failure." The evidence in this case is that the New Holland skid-steer loader was the only piece of self-propelled equipment that was not inspected in accordance with section 56.14100(a). Both Spitzer and Lockwood testified that because the New Holland loader was used for "clean-up" it was not mining equipment and, therefore, did not have to be inspected. There is no evidence that this belief, although clearly mistaken, was not held in good faith. Accordingly, while this was negligent conduct, it does not rise to the level of aggravated conduct necessary for a finding of "unwarrantable failure." The order will be modified appropriately.

Dresser 555b Front-end Loader

Order No. 7713679

This order alleges a violation of section 56.14101(a)(2), 30 C.F.R. § 56.14101(a)(2), because:

> The parking brakes provided on the Dresser 555b company number L41 front end loader would not hold on the maximum grade it travels when tested by the mine inspector. The grade the loader was tested was approximately twelve to fourteen percent. The loader is used at the plant and stock pile areas. The operator of the loader has been reporting this condition to the foreman. The foreman engaged in conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 9.) Section 56.14101(a)(2) provides that: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

The inspector testified that he tested the loader's parking brakes as follows:

> I said well, let's do a brake test. So the loader operator backed the loader back up to the side of me, and I looked at him. And I said

> put it in gear. Let it coast down the hill. Don't use your foot brake, and pull your parking brake. See if it's going to stop you.
>
> When he pulled his parking brake, it just kept on coasting. It slowed down a little bit, but then it started to speed up. So I said okay, stop. So, you know, he applied his foot brake. I said let's do it one more time. So he backed back up the hill. And I said apply your parking brake. When he backed up the hill and applied his parking brake, it started to coast back down the hill again.

(Tr. 93-94.) He further testified that loader rolled for "probably eight seconds or something" and was traveling "I don't know, three, four miles an hour. Four, five miles an hour" before he told the operator to pull the parking brake. (Tr. 94-95.)

The Respondent argues that this was not the appropriate way to test whether the parking brakes would hold. I agree. Section 56.14101(b), 30 C.F.R. § 56.14101(b), sets out the procedure for testing a vehicle's service brakes, but there is no similar provision for testing the parking brakes. However, it is apparent that section 56.14101(a)(2) requires that the vehicle's parking brakes hold on a hill, not stop it on a hill. That there is a difference between the two is evident from section 56.14101(a)(1), 30 C.F.R. § 56.14101(a)(1), which requires that the service brake system be "capable of stopping and holding" the vehicle. Thus, it would seem that the appropriate test would be to stop the loader on the incline, set the parking brake and then see if it holds the loader, that is, that the loader does not move.

Based on the testimony at the hearing, particularly that of Joe Spitzer, that sometimes the brake would work and sometimes it would not and that later it was determined that the brake plate was warped, it may well be that the parking brake would not have held if it had been tested properly. However, there is no evidence before me from which I can conclude that the brake would not hold.[6] Therefore, I find that the Secretary has not proved this violation and will vacate the order.

Order No. 7713980

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[6] When taken out of context, the inspector's testimony, "I said let's do it one more time. So he backed back up the hill. And I said apply your parking brake. When he backed back up the hill and applied his parking brake, it started to coast back down the hill again," (Tr. 93-94), could be interpreted as indicating that the parking brake was tested after the loader had made a complete stop. However, based on all his testimony, I am satisfied that Inspector Goodale did not conduct two separate tests, but had the parking brake applied after the loader had begun coasting in both instances.

This order alleges a violation of section 56.14100(b)[7] because:

> Defects affecting safety on the Dresser 555b company number L-41 front end loader were not corrected in a timely manner to prevent the creation of a hazard to the operator of the loader. The defects were reported to the foreman and signed off by the foreman. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 10.)

Inspector Goodale testified, with regard to this order, that: "The defect was the parking brake on this front-end loader." (Tr. 102.) The company argues that this order is duplicative of the previous order and, therefore, that it should be vacated. While I agree that the order must be vacated, it is not necessary to determine that this violation is duplicative to reach that conclusion.

The Secretary's case that the parking brake was defective rests on the theory that it would not hold on a hill. However, as discussed above, the Secretary has failed to prove that the brake would not hold on a hill. Consequently, there is no evidence that the brake was defective.[8] Accordingly, I conclude that the Secretary has failed to prove this violation and will vacate the order.

Order No. 7713982

This order charges a violation of section 56.18002(a), 30 C.F.R. § 56.18002(a), in that:

> The contractor failed to conduct an adequate examination of work places for the primary and secondary plant areas. Several violations were cited relating to the plant areas. The records were signed by the foreman. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 11.) Section 56.18002(a) provides that: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may

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[7] The requirements of section 56.14100(b) are set out at page 7, *supra*.

[8] The fact that the company's witnesses testified that the parking brake had to be adjusted, does not without more, indicate that it was defective. Brakes commonly have to be adjusted. That does not necessarily mean that they are defective.

adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

Inspector Goodale testified, with regard to this violation, as follows:

> The violation . . . is that the foreman failed to do an adequate examination of workplaces. If he would have done an adequate examination of workplaces, I would not have found all these violations. And where it says several violations cited relating to plant area, it starts with the bushing, and it also starts with several of the other ones that aren't even in here such as a fire extinguisher, the electrical extension cord, three unsafe access standards, and I think that's it. And also under .18002(a) the operator must initiate prompt action to correct these conditions, and he didn't.
>
> Q. In issuing this violation, are you contending that the workplaces were not examined at all?
>
> A. No. I'm just saying they were examined, but he didn't do an adequate examination.
>
> Q. And why was it inadequate?
>
> A. Because all the violations I found.
>
> Q. If the exam had been adequate, what would be required to make it adequate?
>
> A. Well, one thing is you need to have a record that you examined these work areas. And I looked at these records examinations where the foreman signed off on. But there was not --- on these records, there was nothing indicating that the bushing was pulled out of the motor, the fire extinguisher was discharged, an electrical cord was missing a brown lug, the three belts were not accessed safely. They did not have any handrails or whatever to prevent that condition. There was nothing on this report indicating this.

(Tr. 106-08.)

In connection with section 57.18002, 30 C.F.R. § 57.18002, which is identical to the regulation in this case, the Commission has held that there are three requirements to the regulation: "(1) daily workplace examinations are mandated for the purpose of identifying

workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1989). Significantly, there is no mention of the word "adequate" either in the regulation or the Commission's setting out of the regulation's elements.

Nor is it mentioned in the Secretary's Program Policy Manual discussion of the regulation. *Program Policy Manual* Volume IV, Subpart Q, (last updated July 25, 2000)<http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL4E.HTM#77. With regard to alleging a violation of the standard, it states:

> Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken will result in a citation for violation of §§ 56/57.18002(a) or (c). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found. Although the presence of hazards covered by other standards may indicate a failure to comply with this standard, MSHA does not intend to cite §§ 56/57.18002 automatically when the Agency finds an imminent danger or violation of another standard.

Id. While this does not preclude the Secretary from alleging that an examination was inadequate, the language clearly tracks the elements of the offense set out in *FMC Wyoming* in indicating that the standard is violated if the examination is *not conducted* or *corrective action not taken*. More importantly, it indicates that a violation should not be charged every time there is an imminent danger, which was obviously not present here, or violation of another standard.

Judge Richard W. Manning vacated a nearly identical citation which relied on the issuance of other citations as proof that the examination was inadequate, finding that: "Moreover, it is not uncommon for an MSHA inspector to issue multiple citations at a mine that cite conditions which should have been detected by the operator's examiner. Citations under section 56.18002 are generally not issued under such circumstances." *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1136 (October 1999). In this case, it is undisputed that examinations were being conducted and that the operator was keeping a record of them. Nor is there any evidence that the examinations were not being conducted by a competent person.

While there may be cases where the violations are so obvious and so egregious that a finding that section 56.18002(a) was violated is appropriate, such is not the case here. I agree with Judge Manning's reasoning and will vacate the order.

Civil Penalty Assessment

The Secretary has proposed penalties of $33,500.00 for the citation and four orders found to constitute violations. 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 penalty criteria, the parties have stipulated, and I so find, that the proposed penalties will not adversely affect the ability of Lopke to remain in business. (Jt. Ex. 1, Stip. 5.) I also find that Lopke's operation at the Low Moor site was a small one and that Lopke Quarries, Inc., is a small to medium size company. I further find that the operator's history of violations is relatively good and that it demonstrated good faith in rapidly abating the violations.

Turning to the specific violations, the Secretary has proposed a penalty of $5,000.00 because of the company's "high" negligence for Citation No. 7713969. This is based on the belief that Spitzer knew about the problem with the wires not being bushed for about two months and made little effort to correct it. I find, however, that the violation was the result of "low" negligence on the part of the company. The wires were located in a junction box on a feeder. The evidence indicates that the feeder vibrates and that it is not unusual for the bushing and wires to vibrate out of the box. It is a continuing problem. Further, Spitzer testified that he fixed the problem at least twice and had a new part on order at the time of the inspection. The inspector testified that he found that an injury was unlikely to result from this violation. I concur and find that the gravity of the violation was not serious. This was not a high priority problem nor was it a problem that was being ignored. Accordingly, I will modify the citation by reducing the level of negligence from "high" to "low' and assess a penalty of $500.00.

On the other hand, Citation No. 7713973 and Order Nos. 7713974 and 7713975 clearly involved "high" negligence on the part of the operator. Walking up the conveyor belts without handrails or safety belts was highly risky. The gravity of these violations was serious. The Secretary has proposed a penalty of $7,000.00 for each of these violations and I agree with that assessment.

Finally, the Secretary proposed a penalty of $7,500.00 for Order No. 7713977. However, I have found that the violation was not "significant and substantial" and did not result from the operator's "unwarrantable failure" to comply with the regulation. Consistent with those findings, I find that the gravity of the violation was not serious and that the operator was "moderately" rather than "highly" negligent in committing it. Consequently, I assess a penalty of $1,000.00 for the violation.

Order

Order Nos. 7713976, 7713979, 7713980 and 7713982 are **VACATED**. Citation No. 7713969 is **MODIFIED** by reducing the level of negligence from "high" to "low" and is **AFFIRMED** as modified. Order No. 7713977 is **MODIFIED** to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation, is further modified by deleting the "significant and substantial" designation and by reducing the level of negligence from "high" to "moderate, and is **AFFIRMED** as modified. Citation No. 7713973 and Order Nos. 7713974 and 7713975 are **AFFIRMED**.

Lopke Quarries, Inc., is **ORDERED TO PAY** a civil penalty of **$22,500.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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/nt

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 2000

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-96-D
ON BEHALF OF ROYAL SARGENT,	:	DENV CD 99-03
Complainant	:	
v.	:	
	:	
THE COTEAU PROPERTIES CO.,	:	Freedom Mine
Respondent	:	Mine ID 32-00595

ORDER DENYING MOTION TO COMPEL, IN PART, AND CONDITIONALLY GRANTING MOTION TO COMPEL, IN PART

This case is before me on an amended complaint filed by the Secretary of Labor on behalf of Royal Sargent, alleging that Respondent, The Coteau Properties Co, had discriminated against him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1). Respondent has moved to compel production of certain documents, to which the Secretary has asserted claims of privilege, and responses to two interrogatories that the Secretary has objected to on grounds of relevance and privilege. For the reasons set forth below, the motion is denied, in part, and granted, in part. However, before ordering production, the Secretary is afforded an opportunity to supply evidence demonstrating the applicability of privileges with respect to certain withheld documents. The evidence may consist of the documents themselves and/or an affidavit and may be submitted *in camera* to the extent necessary to preserve a privilege.

In response to discovery requests, the Secretary interposed objections on grounds of privilege to some twenty-nine documents that were later identified in a "Privilege Log." The privileges asserted were the deliberative process, investigative and informant's privileges. Upon further review, eight of those documents were supplied to Respondent. The Secretary also objected to two interrogatories on grounds of relevance and privilege, although the deliberative process and investigative privileges are no longer asserted. This Order will first address the documents, which will be discussed in two groups, "confidential employee interview statements" and the "investigative report package."

Confidential Employee Interview Statements

The Secretary claimed the informant's privilege and declined to produce sixteen witness statements described as "confidential employee interview statements." Respondent has moved to

compel production of those documents. The Commission has recognized the importance of the informant's privilege in effectuating the purposes of the Act. *Secretary obo Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (Nov. 1984). It is the identity of the informant that is protected by the privilege, not the contents of a statement, except for those portions of the content that would tend to identify an informant. *ASARCO, Inc.*, 12 FMSHRC 2548, 2553-54 (Dec. 1990) (*ASARCO I*). It is the Secretary's burden to establish that the privilege applies. *Id.* Because the privilege is qualified, a party may seek to overcome it by demonstrating that the information is necessary for a fair determination of the case and that its need for the information outweighs the Secretary's need to maintain the privilege. Here, Respondent challenges only application of the privilege and does not seek any information to which the privilege properly applies.

The Secretary asserts, in opposition to the motion, that:

> The contents of these statements, while factual in nature, are so intertwined with the identity of the employee that release of the statement would undoubtedly identify the employee. In focusing on the allegations set forth by the complainant in his complaint, MSHA interviewed a select number of employees at Respondent's mine site. The ensuing interviews contain numerous references to information that is specific to certain employees, such as job titles, individual duties and responsibilities, shift assignments, supervisors, personnel actions and, in some cases, the identity of other informants. * * * It is simply not possible for the Secretary to provide Respondent with meaningful portions of the statements without revealing the identity of one or more informants.[1]

As the Commission observed in *ASARCO, Inc.*, 14 FMSHRC 1323, 1329 (August 1992) (*ASARCO II*):

> It is the judge, not the Secretary, who must determine whether the privilege obtains with respect to a particular document or group of documents and he must be provided with evidence sufficient to make such a determination. In this case, the judge was required to determine whether the statement, which did not contain the name of an informant, would tend to reveal the identity of the informant. Such an analysis may not be possible unless the party invoking the privilege provides the judge with facts that explain how disclosure of the subject material would tend to reveal that informant's identity. In general, a "bald assertion of privilege is insufficient . . . since a trial court must be provided with sufficient information so as to rule on the privilege claim." 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.60[1] (2d ed. 1991). * * *

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[1] Opposition at p. 5.

While the Secretary's argument may go somewhat beyond a bald assertion of the privilege, it falls far short of presenting factual evidence from which application of the privilege can be determined, aside from information directly identifying an informant, e.g. name, address, etc. Several of the statements withheld are quite lengthy. The Secretary argues, for example, that all parts of twelve and sixteen page statements that are admittedly "factual in nature" are so intertwined with the identity of the informant as to be covered by the privilege. Information, such as, job title and duties and responsibilities may be privileged if unique to the informant, or to such a small group of persons that the informant would tend to be identified. Without competent evidence establishing that the entire statement consists of such information and that it would disclose an informant's identity, however, the Secretary clearly has not satisfied her burden. Portions of a statement that disclose the identity of other informants would also be privileged. However, if a statement identifies other individuals who may have knowledge of certain matters, the names of such individuals would not be privileged, solely because they may also have been interviewed in conjunction with the investigation.

Because the Secretary has not satisfied her burden of establishing that the entirety of each statement is covered by the privilege, the motion to compel as to the statements is conditionally granted. Before ordering the Secretary to produce the statements, with only directly identifying information redacted, however, the Secretary will be given an opportunity to provide evidence that any other portion of each of the withheld statements is covered by the privilege. The Secretary may submit copies of the statements for *in camera* review and/or may submit an affidavit by a person with knowledge of the facts relied upon. If the contents of an affidavit would tend to disclose privileged information, it too could be submitted *in camera*. *See, ASARCO II*, 14 FMSHRC at 1330, 1333. The Secretary's representatives will determine the precise nature of any evidence to be submitted in support of the privilege claim. However, because of the volume of material involved, it would appear difficult to sustain the burden as to the entirety of each of the statements without submitting both copies of the statements and an affidavit.

The Investigative Report Package

The other documents at issue consist of a 41 page "Special Investigation Report" and related documents; a summary analysis; a list of exhibits; a list of persons interviewed; and, the assignment control worksheet. In addition to the informant's privilege, the deliberative process and investigative privileges were variously interposed as objections to the production of these documents.[2]

The deliberative process privilege was first discussed by the Commission in *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992).

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[2] Respondent contends that the deliberative process and investigative privileges have not been properly invoked. The Secretary submitted an affidavit by Marvin W. Nichols, Administrator for Coal Mine Safety and Health, Mine Safety and Health Administration, U.S. Department of Labor, invoking privileges with respect to the five documents at issue. I find that the affidavit is sufficient to invoke the claimed privileges. *See, In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 999-1001 (June 1992).

Following a brief review of the origin of the privilege the Commission observed:

> The breadth of the privilege is described by the court in *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753 [772] (D.C. Cir. 1978):
>
> > This privilege protects the 'consultative functions' of government by maintaining the confidentiality of 'advisory opinions, recommendations and deliberations comprising part of the process by which governmental decisions and policies are formulated' (citations omitted). The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy.

To be covered by the privilege, the material must be both "pre-decisional" and "deliberative." *Id.* Purely factual material that does not expose an agency's decision making process is not covered by the privilege, unless it is so inextricably intertwined with deliberative material that its disclosure would compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary's burden to prove that the privilege applies to material it seeks to protect from disclosure. *Id.* 14 FMSHRC at p. 993. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1246-47 (July 1997). A party seeking to overcome the privilege has the burden of demonstrating that its need for the information outweighs the governmental interest in protecting it from disclosure.

Respondent contends that the privilege applies only to writings directly involved in the formulation of agency "policy" -- that the decisions made with respect to a discrimination complaint involve only "the application of already-established law and policy to facts"[3] and are not covered by the deliberative process privilege. I reject that contention and hold that the Secretary's decision making process, by which a determination is made whether or not to initiate a discrimination proceeding under the Act, is the type of governmental decision to which the deliberative process privilege applies. *See, In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC at 993.

The Secretary has represented, preliminarily, that none of the documents associated with the report contains factual information that is not also contained in the report.[4] This representation should be confirmed, by affidavit, in response to this Order. Because it appears that there is no additional factual information contained in the other documents, the major portions of which clearly appear to be covered by the informant's and deliberative process privileges, the motion as to those documents is denied, with one exception.[5] The exhibit list

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[3] Motion to Compel, at p. 6.

[4] A conference call was held with the parties' representatives on June 26, 2000.

[5] The Secretary has also interposed an objection on grounds of "investigatory files privilege" to production of the report, the summary and the list of exhibits. Respondent argues that the investigative privilege is no broader than, and is subject to the same limitations as, the

identifies all exhibits in the investigative file, not just those that may have been referenced in the report. As a consequence, it is possible that the list may include items in addition to those at issue in this motion that have not already been produced. The Secretary is directed to provide, for *in camera* review, a list of any such items along with any evidence that the existence of such an item on the exhibit list is protected from disclosure.

The Secretary has described the Special Investigative Report as consisting of an introduction, a summary of witness statements and a conclusion. The conclusion section appears likely to be protected by the deliberative process privilege, in that it would normally consist of the recommendations, analysis and conclusions of the investigators. However, the factual portions of the report, the summary of witness statements and other information, would appear to be information to which Respondent is entitled, at least to the extent that it does not disclose the identity of an informant. Aside from the portion of the report consisting solely of the investigators' analysis, recommendations and conclusions, the Secretary has not satisfied her burden of demonstrating the applicability of the privilege and the motion, as to the report, is conditionally granted.

Before ordering the Secretary to produce the report, with only the investigators' analysis, recommendations and conclusions redacted, however, the Secretary will be given an opportunity to provide evidence that any other portion of the report is covered by the privilege. The Secretary may submit a copy of the report for *in camera* review and/or may submit an appropriate affidavit.

The Interrogatories

Interrogatory numbered 7 consisted of the following request:

> Describe the complete basis for the Secretary's determination, communicated to Royal Sargent and Coteau in the letter from Sandra L. Yamamoto, dated December 30, 1998 * * * , "that a violation of Section 105(c) has not occurred."

The Secretary objected to the interrogatory on grounds of relevance and deliberative process, investigative and informant's privileges. The deliberative process and investigative privileges are no longer asserted.

Interrogatory numbered 16 read:

> Identify each person * * * who participated on behalf of the Secretary in the determination, after the reopening of the investigation, that a violation of Section 105(c) of the Mine Act had occurred. If the determination that discrimination had occurred is claimed to ultimately have been made by one

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deliberative process privilege. As to the documents at issue here, I agree with Respondent. The issues raised by the motion to compel will be decided upon application of the deliberative process and informant's privileges.

person, specifically identify that person.

The secretary objected on grounds of relevance and deliberative process privilege. Only relevance is now asserted as an objection.

The fact that the Secretary initially concluded that no discrimination had occurred and later reached an opposite conclusion, as well as the particular rational for each conclusion and the identities of individuals who participated in the latter decision are not relevant. However, factual information, including potentially exculpatory facts known to the Secretary at the time of the initial decision, would certainly be relevant and cannot be withheld unless protected by the informant's privilege.

It is likely that all factual information known to the Secretary at that point in the process is included in the investigative report and the witness statements and/or in the information already produced in response to discovery. As noted above, the statements must be produced except to the extent that they are protected by the informant's privilege and factual information contained in the report must be disclosed, except to the extent that it is protected by the informant's or deliberative process privileges.

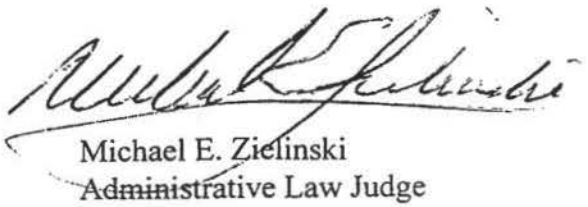
If the Secretary can establish, by affidavit, that the facts known at the time that the initial determination was made are included in the report and statements, Respondent will have received all factual information to which it is entitled. Accordingly, the motion to compel responses to interrogatories numbered 7 and 16 is denied, at this time, subject to a demonstration that pertinent factual information responsive to interrogatory numbered 7 is included in the report and statements.

Conclusion and Order

Respondent is generally entitled to relevant factual information in possession of the Secretary that has properly been requested through discovery. The informant's privilege may bar access to factual information, but only to the extent that it identifies or tends to identify a person who has provided information to the Secretary. The deliberative process privilege protects from disclosure information regarding the Secretary's pre-decisional deliberations, information that is of marginal, if any, relevance and unlikely to be factual in nature. It is possible that some factual information may properly be withheld pursuant to the deliberative process privilege, if it would disclose privileged information, however, at this stage of the litigation it is unclear whether any of the materials at issue fall within that category.

The motion to compel as to the Special Investigative Report, a portion of the exhibit list and the Confidential Employee Interview Statements is conditionally granted. On or before Friday, July 7, 2000, the Secretary may submit evidence establishing the applicability of the informant's and deliberative process privileges to any portions of the report, exhibit list and statements that the Secretary continues to object to producing. That evidence should also address whether there are additional facts known to the Secretary at the time of the initial decision that are not included in the report and statements. On consideration of any such evidence, a further order will be issued with respect to those documents.

As to the remainder of the documents and interrogatories numbered 7 and 16, the motion is denied.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

July, 12, 2000

RICHARD L. WILSON, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. SE 99-292-DM
v.	:	
	:	SE MD 99-10
C S R SOUTHERN AGGREGATES, Respondent	:	Dogwood Quarry

ORDER REQUESTING CLARIFICATION

This case is before me on an amended complaint filed by Richard Wilson, alleging that Respondent, CSR Southern Aggregates ("CSR") had discriminated against him in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Wilson alleged that, on June 26, 1997, CSR terminated him from employment for having reported numerous safety violations to CSR.

Wilson filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") on August 27, 1997, and was issued a Right to Sue letter by the EEOC on February 26, 1998, pursuant to the EEOC's determination that Wilson had not been discriminated against on the basis of his race. Subsequently, on May 18, 1999, pursuant to contact from Wilson the previous day, MSHA forwarded a discrimination complaint form to Wilson, along with a letter urging him to complete and return the form as quickly as possible and to attach a letter of explanation for failure to timely file his complaint, if 60 days had elapsed. Wilson filed his discrimination complaint with MSHA on July 6, 1999, without providing the requested explanation for his delayed filing. Despite this deficiency, MSHA investigated Wilson's complaint and on August, 26, 1999, issued its determination that no violation of the Mine Act had occurred, and advised Wilson of his right to file a discrimination claim with the Commission on his own behalf and the time limitation applicable thereto.

Wilson, *pro se,* filed his complaint of discrimination with the Commission on September 24, 1999, and subsequently obtained counsel, whose appearance was entered on March 3, 2000. Thereafter, pursuant to unopposed Motion to Amend Complaint, filed April 24, 2000, Wilson was permitted to amend his complaint to allege protected activity under the Mine Act, which had never been raised previously, and a hearing on the merits was rescheduled for June 27, 2000.

On June 15, 2000, CSR filed a Motion for Summary Judgment, seeking dismissal of Wilson's discrimination complaint for untimely filing with MSHA. Wilson's Response to Respondent's Motion for Summary Judgment, filed July 3, 2000, essentially alleges that Wilson was unaware of his right to file a discrimination complaint under the Mine Act until May 18, 1999, when MSHA so advised him and sent him a discrimination complaint form. CSR filed its Reply on July 7, 2000, noting, among other things, that Wilson's EEO complaint was also untimely filed, that Wilson never provided any explanation to MSHA for failure to file within the proscribed time, and that CSR would be greatly prejudiced by continued processing of Wilson's complaint.

Wilson's Response raises more questions than it answers. By affidavit, Wilson asserts that, as Quality Control/Site Safety Coordinator at CSR, he had been involved in a previous MSHA investigation of a terminated employee, and because the MSHA investigator had told him that the EEOC had forwarded the discrimination complaint to MSHA because the employee had filed with the wrong agency, he (Wilson) assumed that "filing a complaint through the EEOC was the same as filing an MSHA complaint." Aside from the question of whether Wilson's assumption was reasonable, it would seem curious, at first blush, that Wilson did not initially file his complaint with MSHA, the agency with which he had some familiarity, until one considers that Wilson raised, as CSR's sole motive for terminating him, a basis protected by Title VII of the Civil Rights Act, rather than any safety related activity protected by the Mine Act. Troubling, as well, is Wilson's assertion that sometime around the filing of his EEO complaint, he had contacted MSHA, outlined the facts of his termination and, upon advising MSHA that he had filed a discrimination complaint with the EEOC, was at no time advised that he needed to file a different complaint with MSHA. Assuming that Wilson's rendition of his case to MSHA was consistent with the substance of his EEO race discrimination complaint, it is conceivable and reasonable that he would not have been advised to file a complaint with MSHA at that time. There is no getting around the fact that Wilson selected the proper forum in which to file his discrimination complaint, given his belief that CSR terminated him because he is Black. Equally evident is that, had Wilson initially raised any safety related complaints as bases for his termination, the EEOC, lacking jurisdiction, would have transferred those allegations to MSHA for administrative processing.

In any case, before ruling on CSR's Motion for Summary Judgment, Wilson shall be afforded the opportunity to provide the reasons, with specificity, for the following course of action on his part: 1) selection of the EEOC, rather than MSHA, for filing his discrimination complaint; 2)failure to allege the safety related complaints raised in his amended discrimination complaint before the Commission, when he initially filed his discrimination complaint with the EEOC; 3)failure to provide written explanation to MSHA , as directed, for untimely filing his discrimination complaint; and 4) filing his discrimination complaint with MSHA seven weeks after he had received the complaint form and instructions.

ORDER

Accordingly, it is **ORDERED** that Wilson respond to and/or provide information on the questions specified above **on or before July 21, 2000**. Filing by facsimile is permissible, accompanied by mailed original. Failure to timely and completely respond to this Order may result in issuance of an Order to Show Cause Why the Complaint Should Not Be Dismissed.

Jacqueline R. Bulluck
Administrative Law Judge
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2000

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-96-D
ON BEHALF OF ROYAL SARGENT,	:	DENV CD 99-03
Complainant	:	
v.	:	
	:	
THE COTEAU PROPERTIES CO.,	:	Freedom Mine
Respondent	:	Mine ID 32-00595

AMENDED[1]
ORDER DENYING MOTION TO COMPEL, IN PART, AND GRANTING MOTION TO COMPEL, IN PART

This case is before me on an amended complaint filed by the Secretary of Labor on behalf of Royal Sargent, alleging that Respondent, The Coteau Properties Co, had discriminated against him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1). Respondent moved to compel production of certain documents, to which the Secretary asserted claims of privilege, and responses to two interrogatories that the Secretary objected to on grounds of relevance and privilege. By Order dated June 27, 2000, the motion was denied, in part, and conditionally granted, in part, and the Secretary was afforded an opportunity to submit evidence establishing claims of privilege and addressing other issues. On July 10, 2000, the Secretary's response to the Order was received. The Secretary's submission included; copies of the investigative report and the report summary; a listing of exhibits in the file, indicating whether they had been produced or withheld; copies of the sixteen witness statements at issue, with proposed redactions and an explanation of the proposed redactions for one of the statements; and, a Declaration addressing other issues discussed in the Order.

For the reasons set forth below, the motion to compel is granted in part and the Secretary

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[1] The original order was entered on July 11, 2000. Counsel for Respondent subsequently advised that the footnote describing the operations at the Freedom Mine was inaccurate. In fact, the Freedom Mine has approximately 450 employees. It is the group of employees who might have knowledge or information relevant to the issues in this case, primarily the dragline crews, that is limited, though not as limited as described in the footnote. The inaccurate footnote has been eliminated and the related text has been amended. The changes do not affect resolution of the motion.

is ordered to produce copies of the witness statements and the investigative report, with privileged portions redacted, as indicated below.

Confidential Employee Interview Statements

The Secretary claimed the informant's privilege and declined to produce sixteen witness statements described as "confidential employee interview statements." As noted in the Order, it is the identity of the informant that is protected by the privilege, not the contents of a statement, except for those portions of the content that would tend to identify an informant and it is the Secretary's burden to establish that the privilege applies. *ASARCO, Inc.,* 12 FMSHRC 2548, 2553-54 (Dec. 1990).

Waiver as to Dale Sargent

Though not included in its motion papers, Respondent argued during the conference call that the informant's privilege has been waived as to Complainant's brother Dale Sargent. The basis of the argument is that it was disclosed in litigation of Respondent's motion to dismiss that Dale Sargent contacted MSHA on behalf of his brother, and discussed both the substance of the discrimination complaint and the process for submitting a complaint to MSHA. I am constrained to agree. The informant's privilege protects from disclosure the identity of individuals who furnish information on matters such as safety or discrimination complaints to government personnel. As noted in the June 27, 2000, Order, it is the identity of the informant, i.e. the fact that an individual has furnished such information, that is protected.

Here Dale Sargent's roll in assisting his brother pursue his discrimination complaint is well known. The materials submitted by the Secretary in opposing the motion to dismiss disclose that he contacted MSHA on more than one occasion and discussed both the process for filing a complaint and the substance of the complaint, including the claimed protected activity his brother engaged in and the adverse action. The Secretary argues, in response, that disclosure of the fact that Dale Sargent contacted MSHA to discuss the process for filing a discrimination complaint would not waive the informant's privilege as to any involvement he may have had in the subsequent investigation of the complaint. If Dale Sargent's efforts to assist his brother in filing the complaint were limited to inquiries about a miner's rights, the process for obtaining and submitting complaint forms, and the like, the Secretary's position might be well founded. However, that is not the case here. It has been disclosed that Dale Sargent's efforts went well beyond the procedural issues involved in filing a complaint. He was authorized by Complainant to pursue the complaint on his behalf. Exhibit D to Complainant's response to the February 28, 2000, Order to Show Cause, consists of a fairly detailed statement of the substance of the complaint attributable to Dale Sargent. He clearly has been identified as a person who furnished substantive information to MSHA on the merits of his brother's discrimination complaint. Under the circumstances, his identity is not protected by the informant's privilege and any statements made by Dale Sargent must be produced in their entirety.

Other Statements

The Secretary submitted copies of the statements and represented that "those portions of the statement[s] which fall within the scope, in the Secretary's opinion, of the Informant's Privilege" were underlined in red. The Secretary's submission appears to indicate, quite clearly, that the Secretary does not contend that the other portions of the statements are protected by the privilege. Nevertheless, counsel for Complainant stated, in a conference call this date, that the Secretary continues to maintain that the statements, in their entirety, are protected by the privilege. The Secretary's position appears attributable to a practice of withholding the entirety of witness statements, unless ordered to produce them after *in camera* review, and/or concerns that some protected portions of the statements may not have been underlined through inadvertence. As to the former, the Secretary is strongly encouraged to review any such practice. Clearly, objections should not be interposed or maintained to the disclosure of information that cannot properly be objected to. As to the latter, as indicated in the Order, none of the materials at issue here will be directly delivered to Respondent. Rather, the Secretary will be ordered to produce materials that are deemed not to be covered by privilege. The Secretary may then decide how to respond to the order.

After a careful review of the statements, I am satisfied that the redactions proposed by the Secretary cover material that either would directly identify, or would tend to identify, the informant. The universe of employees and former employees at Respondent's mine who may have knowledge or information relevant to the issues in this case, primarily the dragline crews, is relatively small. Information such as a person's work assignments, presence at certain events, whether or not he had made safety complaints and the nature of any such complaints, would, individually and in combination, tend to identify a particular person. While some of the information that is proposed to be redacted appears to pose a relatively small potential of identifying the person who made the statement, that information is also generally of limited, if any, relevance to the issues involved in this proceeding. On the whole, I am satisfied that the un-redacted portions of the statements provide Respondent with all of the factual portions of the statements that it is entitled to at this stage of the litigation.

The Secretary will be directed to produce copies of the witness statements, with the portions underlined in red redacted. The Secretary is also invited to inquire of persons who have submitted statements, whether or not they wish to take advantage of the privilege. It is possible that significant discovery disputes might be avoided and the litigation process significantly advanced. This is particularly true of any witnesses who will be deposed.

The Investigative Report Package

The other documents at issue consist of a 41 page "Special Investigation Report" and related documents; a summary analysis; a list of exhibits; a list of persons interviewed; and, the assignment control worksheet. In addition to the informant's privilege, the deliberative process and investigative privileges were variously interposed as objections to the production of these

documents.

The motion was denied as to the documents associated with the report, with the exception of the file's exhibit list, because of the possibility that it might identify items in addition to those at issue in the motion that have not already been produced. The listing of exhibits submitted by the Secretary establishes that all of the exhibits have been produced, with the exception of the sixteen witness statements and the list of persons interviewed. Consequently, the motion as to the exhibit list is denied, as set forth in the June 27, 2000, Order.

The Special Investigative Report consists of an introductory statement, a summary of supporting evidence for complainant, a summary of supporting evidence for respondent, and a conclusion and recommendation. The conclusion section is protected by the deliberative process privilege, in that it consists of the recommendations, analysis and conclusions of the investigators and the District Manager. However, the other portions of the report, the introductory statement and supporting evidence discussions, contain factual information that is not protected by the deliberative process or investigatory files privileges. Respondent is entitled to that information to the extent that it does not disclose the identity of an informant.

Pages 1 through the third paragraph of page numbered 13 contain a brief introductory statement and largely verbatim recitals of statements of the complainant and his brother. Complainant's statements were produced and I have concluded that any statements by Dale Sargent are not protected by the informant's privilege. The portion of the report from the discussion of Exhibit No.24 on page numbered 26 up to the last paragraph on page numbered 38, consists of a factual discussion of documents and statements that have been produced to Respondent. The Secretary will be directed to produce those portions of the report.

The material after the third paragraph on page numbered 13 up to the discussion of Exhibit No. 24 on page numbered 26 and the last paragraph on page numbered 38 and the remainder of that section of the report ending on page numbered 39, consists of a discussion of statements made by individuals whose identity is protected by the informant's privilege. That information, to the extent Respondent is entitled to it, is contained in the redacted witness statements that I have directed the Secretary to produce. No purpose would be served by requiring the Secretary to make corresponding redactions to the report's discussion of the statements. The motion as to those portions of the report will be denied.

The Interrogatories

The Declaration of Sandra L. Yamamoto, Chief of the Technical Compliance and Investigation Division for Coal Mine Safety and Health, establishes, to my satisfaction, that all factual information known at the time that the initial determination was made is included in the report and statements. The motion as to interrogatories numbered 7 and 16 is, therefore, denied, consistent with the discussion in the June 27, 2000, Order.

Conclusion and Order

The motion to compel is granted as to those portions of the Special Investigative Report identified above and any Confidential Employee Interview Statements of Dale Sargent and other witness statements redacted as described above. In all other respects, the motion is denied.

The Secretary is directed to produce to Respondent within five business days: the following portions of the Special Investigative Report — page 1 through the third paragraph of page numbered 13 and the discussion of Exhibit No.24 on page numbered 26 up to the last paragraph on page numbered 38; and copies of witness statements, redacted as proposed by the Secretary.

The Secretary is directed to produce to Respondent prior to the close of the deposition of Dale Sargent, scheduled for July 12, 2000, any Confidential Employee Interview Statements by Dale Sargent, in their entirety.

Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-133
Petitioner	:	A. C. No. 01-01401-04327
	:	
v.	:	Docket No. SE 2000-134
JIM WALTER RESOURCES	:	A.C. No. 01-01401-04328
INCORPORATED,	:	
	:	
Respondent	:	Mine No. 7

ORDER ACCEPTING LATE FILING

Before: Judge Barbour

On July 3, 2000, this office received the Secretary's Petition for Assessment of Civil Penalty accompanied by a Motion to Permit Late Filings. In her motion, the Secretary states that the petition was due no later than June 26, 2000. She further states that her support staff consists of two legal assistants, one of whom was out of the office during the week of June 19, 2000. This meant that one legal technician assumed responsibility for all the administrative, clerical, and office management tasks, including the preparation of litigation case materials. According to the Secretary, during this week, the above captioned cases were inadvertently overlooked.

On July 10, 2000, Counsel for the Respondent filed a Statement in Opposition to Petitioner's Motion to Permit Late Filings. In the statement, Counsel disputes that MSHA received the Notice of Contest on May 10, 2000, claiming that an agent of the Secretary received the Contest on May 5, a reasonable delivery time from the alleged May 2, mailing date plus one additional day. Counsel for the Respondent argues that the Respondent's time to contest any citation elapsed on May 7, so if the Secretary did not receive the Contest until May 10, she should have moved the Commission to issue an order requiring the Respondent to pay the proposed penalties, pursuant to 29 C.F.R. § 2700.27. She did not do so. Therefore, Counsel states that the Secretary's failure to make such a request is either an admission that MSHA received the Contest earlier than May 10, or that the Secretary failed to handle the cases properly.

Counsel for the Respondent further argues that the Secretary does not have adequate cause for the late filing, as required by *Salt Lake County Road Department*, 7 FMSHRC 1714, 1716 (July 1981), because the Secretary has not alleged any heightened or unusual caseload. Counsel proffers that the Secretary has attempted to place the blame for the late filings on the legal technician, but Commission rules place the burden on the Secretary and the Secretary alone. Counsel charges that such displacement of blame constitutes "legal malpractice" on behalf of the Solicitor, that the reason given for the delay is not an excuse, that the delay was in the control of the Secretary, and that in filing the Motion to Permit Late Filings, the Secretary did not act in good faith.

Finally, Counsel for the Respondent argues that the delay presents a danger of unfair prejudice to Respondent and that "[r]ewarding the Solicitor's malpractice and the Secretary's negligence in these cases would be... improper, unfair, and unjust." [1]

Counsel for the Secretary filed a response to the Respondent's Statement of Opposition, which included a signed affidavit from a supervisor from the Civil Penalty Compliance Office, swearing that MSHA received the Notice of Contest on May 10, 2000.

DISCUSSION

Date of Contest

I conclude that Respondent's contentions regarding the date on which MSHA received the Contest are without merit. First, Counsel fails for provide any evidence that MSHA received the Contest before May 10, 2000. He seems to argue that because the Respondent mailed the Contest to MSHA on May 2, that the Contest should have arrived sooner that May 10. However, the Secretary has filed with the Commission a copy of the Notice of Contest with a May 10 stamp date. Moreover, a Civil Penalty Compliance Office supervisor has sworn that May 10 was in fact the date of receipt. Ordinary experience teaches that the postal service is not infallible, and it is conceivable that something mailed on May 2, could have been received on May 10. Further, I do not believe that MSHA fraudulently would date the Notice of Contest or that the supervisor would swear falsely. Therefore, I find that the Contest was received on May 10, and that the Secretary had until June 26, to file the penalty petition.

Second, the Secretary's failure to move the Commission to issue an order requiring the Respondent to pay the proposed penalties is not evidence that the Contest was received earlier than May 10, or that the Secretary mishandled the cases. As Counsel for the Secretary points out, Commission Rule 7(c), 29 C.F.R. § 2700.7(c), states in pertinent part: "service by mail . . . is effective upon mailing." Thus, whether the Notice of Contest was mailed on May 2, as Counsel

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[1]Counsel for the Respondent's accusations of "legal malpractice" are surprising. His words express neither the realities of the record nor the civility the Commission demands of those who appear before it. In the future Counsel should not allow the inevitable irritations of litigation to impinge upon the courtesy he owes (and usually shows) his fellow litigators.

for the Respondent argues, or on May 4, as the Counsel for the Secretary maintains, it was not overdue regardless of when the Secretary received the Contest.

Adequate Cause

Respondent's Counsel next argues that the Secretary did not have adequate cause for the late filing. Section 105(d) of the Mine Act states in pertinent part: "[i]f, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104 . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing." Further, Commission Rule 28, 29 C.F.R. § 2700.28, states that, "within 45 days of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for section 105(d)." *Salt Lake*, 7 FMSHRC at 1715. Although the purpose of Section 105 (d) and Rule 28 are to effectuate swift enforcement, *Salt Lake* at 1715, the Commission has made clear that they should not be interpreted "to create a statute of limitations nor should the term immediately in Section 105(d) be construed as a procedural strait [jacket]." *Id.* at 1716. The Commission has held that the Secretary may request permission for late filing if the request is based upon "adequate cause." 7 FMSHRC at 1716.

Legal precedent dictates that clerical errors, including those committed by agents of the Secretary, are adequate cause for delay, especially where the delay is short. In *Apac Company*, Docket No. CENT 97-187, unpublished (Dec. 16, 1997) (attached to *Patterson Materials Corp.*, 21 FMSHRC 463, 466 (April 1999)), a petition that was filed 24 days late because of a filing error was accepted. In *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982), the Commission ruled that insufficient clerical help was adequate cause for the 15 day delay. Even in *Salt Lake*, the seminal case, the Commission deemed a lack of clerical personnel to be adequate cause for the approximate 2 month delay.

Although Counsel for the Respondent argues otherwise, the instant case is similar to *Jerry Hudgeons*, 22 FMSHRC 272 (Feb. 2000), in which I held that there was adequate cause for delay where a staff member inadvertently misfiled a case because in both situations the delay was caused by the mishandling of files by a staff member. I have stated that "adequate cause is based upon the reasons offered and the extent of the delay." *Id.* at 273. The Secretary's explanation for why the petition was delayed was not a shifting of blame but was the "[reason] offered." In addition, the delay in this case was a mere 6 days. Accordingly, I find that the Secretary did not file her motion in bad faith but had adequate cause for the delay.

Prejudice

Finally, Counsel for the Respondent argues that allowing the late filing "would work a manifest unfair and unduly prejudiced harm" upon the Respondent. In *Salt Lake*, the Commission stated that even if the there is adequate cause for the delay "the operator has an opportunity to object to the late filing on the grounds of prejudice." 7 FMSHRC at 1716. Counsel, however, fails to offer any specific evidence of prejudice. Absent such a showing, I find that there is no prejudice.

ORDER

In light of the foregoing, it is **ORDERED** that the Solicitor's late filed penalty petition is **ACCEPTED**.

It is further **ORDERED** that the Respondent file its answer to the penalty petition within 30 days of the date of this order.

David F. Barbour
Chief Administrative Law Judge

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