JULY 2003

COMMISSION DECISION

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 2003

No cases were filed in which Review was granted during the month of July

No cases were filed in which Review was denied during the month of July

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

July 3, 2003

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. KENT 2002-184 KENT 2002-238
v.	:	
LODESTAR ENERGY, INC.	:	

BEFORE: Duffy, Chairman; Beatty and Suboleski, Commissioners[1]

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Lodestar Energy, Inc. ("Lodestar") petitioned for review of a decision by Administrative Law Judge Gary Melick on the basis that the judge failed to modify an order issued under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), to a citation under section 104(a) of the Mine Act, 30 U.S.C. § 814(a).[2]

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[1] 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 delegated to exercise the powers of the Commission.

[2] Section 104(a) provides in part, "If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator . . . has violated this Act, or any mandatory health or safety standard, . . . he shall . . . issue a citation to the operator." 30 U.S.C. § 814(a).

Section 104(d)(1) of the Mine Act provides in pertinent part:

> 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

25 FMSHRC 13 (Jan. 2003) (ALJ). For the reasons discussed below, the Commission modifies the order.

I.

Factual and Procedural Background

A more detailed factual background is set forth in the judge's decision. 25 FMSHRC at 13-21. On April 4, 2001, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Lodestar Citation No. 7647114, pursuant to section 104(d)(1) of the Mine Act, alleging that Lodestar violated an approved petition for modification by failing to seal circuit breakers, set the circuit breakers to trip at a required amperage, and to provide miner training. *Id.* at 13-17. The citation further alleged that the violation was significant and substantial ("S&S") and caused by the operator's unwarrantable failure. *Id.* at 17. In addition, the inspector issued Order No. 7647121, pursuant to section 104(d)(1) of the Mine Act, alleging an S&S and unwarrantable violation of 30 C.F.R. § 75.342(a)(4). *Id.* at 18-21. The order alleged that the operator failed to provide a properly functioning methane monitor for a continuous miner. *Id.* at 19. Lodestar challenged the section 104(d)(1) citation and order, and the matter proceeded to hearing before Judge Melick. *Id.* at 13.

The judge affirmed both violations, concluded that the violations were not S&S, and reached different conclusions as to the allegations of unwarrantable failure. *Id.* at 16-21. As to the 104(d)(1) citation, the judge concluded that the issue of whether the circuit breaker violation was caused by the operator's unwarrantable failure was moot in the absence of an S&S finding. *Id.* at 18. Accordingly, the judge modified the section 104(d)(1) citation to a section 104(a) citation. *Id.* As to the section 104(d)(1) order, the judge concluded that the methane monitor violation was caused by the operator's unwarrantable failure. *Id.* at 19-20. The judge did not modify the section 104(d)(1) order.

Lodestar filed a petition for review, challenging the judge's failure to modify the section 104(d)(1) order to a section 104(a) citation. PDR at 1-2. The Commission granted the petition.

> 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].

30 U.S.C. § 814(d)(1).

II.

Disposition

Section 104(d) of the Mine Act creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). If an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by the operator's unwarrantable failure to comply with the cited standard, he issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a "section 104(d)(1) citation" or a "predicate citation." *See Greenwich Colleries,* 12 FMSHRC 940, 945 (May 1990). If during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply, the inspector issues a withdrawal order under section 104(d)(1), sometimes referred to as a "predicate order." 30 U.S.C. § 814(d)(1); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector finds upon any subsequent inspection a violation caused by an unwarrantable failure to comply, he issues a withdrawal order for the violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). If subsequent inspections of the mine reveal additional unwarrantable failure violations, withdrawal orders are issued under section 104(d)(2) of the Act until an inspection of the mine discloses no further unwarrantable failure violations. *Wyoming Fuel Co.*, 16 FMSHRC at 1622 n.7; *see also Nacco*, 9 FMSHRC at 1545.

The Commission has further clarified the bases for predicate citations and orders. The Commission has recognized that section 104(d)(1) requires that a predicate citation be based upon both S&S and unwarrantable failure findings. *Youghiogheny & Ohio Coal Co.*, 10 FMSHRC 603, 608 (May 1988) ("*Y&O*"); *Greenwich Colleries*, 12 FMSHRC at 945. It has stated, however, that there is no statutory requirement that a section 104(d)(1) order be based upon an S&S finding. *Y&O*, 10 FMSHRC at 608. Rather, the Commission has listed the following prerequisites for a predicate order: (1) an underlying section 104(d)(1) citation; (2) a subsequent violation of a mandatory health or safety standard found within 90 days after the issuance of the section 104(d)(1) citation; and (3) a finding by the inspector that the subsequent violation was caused by an unwarrantable failure to comply. *Id.*

The Commission also has recognized that the Commission and its judges are authorized to modify citations or orders issued under section 104(d) to citations under section 104(a). *See U.S. Steel Corp.*, 6 FMSHRC 1908, 1915 & n.3 (Aug. 1984); *Southern Ohio Coal Co.*, 10 FMSHRC 138, 143-44 (Feb. 1988). Such authorization is provided for in sections 104(h) and 105(d) of the Mine Act.[3] The Commission has reasoned that such modification is appropriate because the

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[3] Section 104(h) of the Mine Act provides: "[A]ny citation or order issued under this section shall remain in effect until modified, terminated or vacated by the Secretary or his authorized representative, or modified, terminated or vacated by the Commission or the courts pursuant to [section 105 or 106]." 30 U.S.C. § 814(h).

allegation of violation survives the vacation of the section 104(d) citation or order in which it is contained. *Island Creek Coal Co.*, 2 FMSHRC 279, 280 (Feb. 1980). The allegation of violation survives because section 110(a) of the Mine Act, 30 U.S.C. § 820(a),[4] mandates the assessment of a penalty for a violation that has been proven. *Island Creek*, 2 FMSHRC at 250.

Lodestar asserts that the judge was required to modify Order No. 7647121 from a section 104(d)(1) order to a section 104(a) citation because the order lacked the required bases to stand as either a section 104(d)(1) order or 104(d)(1) citation. PDR at 1-2.[5] It requests that the Commission issue an order, making the modification. *Id.* at 2. The Secretary of Labor agrees that the Commission should make such a modification. S. Position Statement at 2. The Secretary further explains that she conducted a survey of violations committed at Lodestar's mine within the 90 days prior to the issuance of the order and that, during that period, no valid citations or orders were issued under section 104(d). *Id.*

We agree with the parties that the judge erred by failing to modify Order No. 7647121 from a section 104(d)(1) order to a section 104(a) citation. The withdrawal order cannot stand as a section 104(d)(1) order because it lacks one of three prerequisites, that is, a predicate citation, since the judge deleted the S&S allegation associated with Citation No. 7647114. *See Y&O*, 10 FMSHRC at 608. Moreover, the Secretary represents that there were no other section 104(d) citations or orders issued at Lodestar's mine 90 days prior to the issuance of Order No. 7647121. S. Position Statement at 2. Furthermore, the withdrawal order cannot be modified to a section 104(d)(1) citation because it lacks one of the prerequisites as a predicate citation, that is, a finding that the violation was S&S. *See Y&O*, 10 FMSHRC at 608. Finally, the judge's finding that Lodestar violated section 75.342(a)(4) should survive the procedural defects associated with the withdrawal

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Section 105(d) of the Mine Act provides:

> If, 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 Commission shall afford an opportunity for a hearing . . . , and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

30 U.S.C. § 815(d).

[4] Section 110(a) of the Mine Act provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard . . . , shall be assessed a civil penalty . . . ."

[5] Lodestar adopted its petition as its brief. Resp. to Position Statement at 1.

order so that Lodestar will be liable for the civil penalty assessed by the judge for its proven and undisputed violation. *See Island Creek*, 2 FMSHRC at 280.

III.

Conclusion

For the foregoing reasons, we hereby modify Order No. 7647121 from a section 104(d)(1) order to a section 104(a) citation.

Michael F. Duffy, Chairman

Robert H. Beatty, Jr., Commissioner

Stanley C. Suboleski, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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July 3, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2003-43
Petitioner	:	A.C. No. 36-07059-03562
	:	
v.	:	
	:	
CHESTNUT COAL COMPANY,	:	
Respondent	:	No. 10 Slope

DECISION

Appearances: Maureen A. Russo, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Petitioner;
Joseph E. Shingara, Chestnut Coal Company, Sunbury, Pennsylvania, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Chestnut Coal Company (Chestnut). Chestnut is a very small mine operator that is a general partnership consisting of seven brothers in the Shingara family. The petition sought to impose an $8,000.00 civil penalty for two alleged violations of the mandatory safety standards in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines, and, for an alleged violation of a 104(d) withdrawal order. All of the alleged violations were characterized as significant and substantial (S&S) in nature. This matter was heard on May 6, 2003, in Harrisburg, Pennsylvania.

The Secretary alleged violations of the provisions of 30 C.F.R. § 75.302 that require operational main mine fans, and 30 C.F.R. 75.360(a)(1) that require a preshift inspection to be performed by a "certified person." The Secretary contends that these alleged violations occurred on April 10, 2002. The cited violations were attributable to Chestnut's unwarrantable failure. Consequently, the mine fan violation was the subject of a 104(d)(1) Citation No. 7004326, and the preshift examination violation was the subject of a 104(d)(1) Order No. 7004337. The remaining 104(a) Citation No. 7004340, alleging a violation of the 104(d)(1) withdrawal order, was issued on May 16, 2002, after the Mine Safety and Health Administration (MSHA) determined that Chestnut resumed operations before 104(d)(1) Order No. 7004337 was formally terminated, although its preshift examinations were then being performed by a "certified person."

At the hearing, Chestnut did not deny that its east section mine fan was not operational on April 10, 2002. With respect to its preshift examinations, a "certified person" is defined in 30 C.F.R. § 75.2 as an individual who has been designated as a certified mine foreman by the State of Pennsylvania. Although, several of the Shingara brothers who were performing the preshift inspections were not state certified on April 10, 2002, the Secretary concedes they were qualified, by virtue of their numerous years of mining experience, to be state certified mine foremen. In fact, at the hearing it was evident that these brothers now possess their state certification.

At the culmination of the hearing, I provided the opportunity for the parties to file post-hearing briefs. At that time, I identified the weaknesses in the parties' cases that should be addressed. For example, I noted that although the preshift requirements of section 75.360(a)(1) apparently were not satisfied because none of the Shingara brothers had been certified, there was no evidence that preshift examinations had not been performed, or, that such examinations were inadequate given the Shingara brothers' longstanding mining experience. Thus, I questioned the unwarrantability of the section 75.360(a)(1) violation. With respect to 104(a) Citation No. 7004340 alleging a violation of the 104(d)(1) order, assuming the 104(d)(1) order was affirmed, I expressed doubt regarding whether Chestnut had "fair notice" that it could not resume mining even though its preshift examinations after April 10, 2002, were conducted by a "certified person." *See Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995).

On June 27, 2003, the Secretary filed a Motion for Decision and Order Approving Settlement. A reduction in the total civil penalty from $8,000.00 to $500.00 is proposed. Although the unwarrantable designation for the mine fan violation remains, the Secretary has agreed to reduce the proposed penalty for 104(d)(1) Citation No. 7004326 from $1,000.00 to $350.00 because of a reduction in gravity. The gravity reduction is based on the fact that normal mining operations had been suspended on April 10, 2002, when MSHA observed that the main mine fan was not operational. The Secretary also has agreed to modify the 104(d)(1) Order No. 7004337 to a 104(a) citation to reflect that Chestnut's preshift examinations were not a reflection of unwarrantable conduct since several Shingara brothers had the requisite qualifications to be "certified persons." Consequently, the Secretary has agreed to a reduction in civil penalty from $1,500.00 to $150.00 for this preshift examination citation. Finally, in light of the modification of the 104(d)(1) Order No. 7004337 to a 104(a) citation, the Secretary has agreed to vacate 104(a) Citation No. 7004340 that alleged a violation of a 104(d) withdrawal order.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(I) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED,** and **IT IS ORDERED** that Chestnut Coal Company pay a total civil penalty of $500.00 in satisfaction of the citations in issue **within 30 days of this decision**, and, upon receipt of timely payment, this case **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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July 7, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-194
Petitioner	:	A.C. No. 05-03836-03692
	:	
v.	:	
	:	Foidel Creek Mine
TWENTYMILE COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Twentymile Coal Company.

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 Twentymile Coal Company ("Twentymile"), 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 the Commission's courtroom in Denver, Colorado. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. STIPULATIONS OF THE PARTIES AND SUMMARY OF THE ARGUMENT

Twentymile operates the Foidel Creek Mine, an underground coal mine, in Routt County, Colorado. On August 30, 2001, MSHA Inspector Michael Havrilla inspected the Foidel Creek Mine. During this inspection, Inspector Havrilla issued six citations to Precision Excavating, Inc., an independent contractor at the mine. He issued six citations to Twentymile for the same alleged violations. Twentymile contested the six citations that it received in this civil penalty proceeding.

The parties entered into a number of stipulations at the hearing. The key stipulations are as follows:

11. This case involves five citations issued for conditions on a Ford 600 service truck and equipment or supplies in that truck and one citation for a condition on a CAT 627B scraper. These two pieces of equipment were being operated at the No. 2 Refuse Pile at the Foidel Creek Mine.

12. These two pieces of equipment were operated by employees of Precision Excavating, Inc. Such equipment was owned or leased by Precision Excavating.

13. Such equipment is not owned or operated by Twentymile. Twentymile has contracted with Precision Excavating to perform work at the No. 2 Refuse Pile area.

14. Precision Excavating has MSHA [Contractor] Id. No. CMY.

15. Citations were issued to Precision Excavating for the same conditions as described in the citations here. . . .

18. The issue before the Administrative Law Judge is whether it was appropriate to cite Twentymile for the conditions described in the citations. The parties agree that the conditions described in the citations would constitute violations of the cited standard, if it is found that it is appropriate to issue citations to Twentymile for these specific conditions. Additionally, the parties agree to accept each designation, including gravity, negligence and all other designations within each of the citations, if in fact it is determined that it is appropriate to have issued the citations to Twentymile. If the Administrative Law Judge does determine that it was appropriate to cite Twentymile for the conditions described within the citations, the parties further agree that the penalty assessments set forth in the Petition for Assessment of Penalty filed in this matter are consistent with the criteria set forth in section 110(i) of the Act.

The only issue in this case is whether the citations were properly issued to Twentymile. The Secretary contends that a mine operator is strictly liable for all violations of the Mine Act that occur at its mine and that MSHA has discretion to cite both a contractor and the mine operator for such violations. She states that Twentymile is in continuous control of the mine and is also in continuous control of everyone and everything that enters the mine. Twentymile has control over every vehicle and piece of equipment that enters its property. Consequently, citing Twentymile for safety hazards presented by a contractor's equipment furthers the objectives of the Mine Act by requiring Twentymile to assure that contractors are complying with the safety standards.

The Secretary also relies on the guidelines that she developed for inspectors to use when determining whether to cite a contractor, a mine operator, or both. These guidelines provide:

> Enforcement action against a production-operator for a violation involving an independent contractor is normally appropriate *in any of* the following situations: (1) when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work; (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor; (3) when the production-operator's miners are exposed to the hazard; and (4) when the production-operator has control over the condition that needs abatement.

(III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 45 ("Guidelines"); Ex. J-1) (emphasis added).

The Secretary contends that the citations at issue fit within these Guidelines because Twentymile failed to examine Precision Excavating's equipment before it entered the mine property. In addition, Twentymile failed to inspect the contractor's equipment at any time while it was at the mine. The Secretary also maintains that Twentymile's employees were exposed to the hazards presented by the violations. Finally, the Secretary argues that Twentymile exercised control over the contractor's equipment as evidenced by the fact that it required Precision Excavating to remove the equipment from the mine after the citations were issued. It could have taken the same action prior to the inspector's arrival at the mine.

The Secretary also relies on Inspector Havrilla's justification for issuing the citations to Twentymile in this instance. Havrilla testified that in 1998-99, he observed a high number of contractor violations at the Foidel Creek Mine. He stated that he discussed this problem with Twentymile management. The number of contractor violations decreased for some period of time. When the inspector found six contractor violations on two pieces of equipment during his August 2001 inspection, he decided that enforcement against Twentymile was necessary to protect miners working at the Foidel Creek Mine.

Twentymile argues that the citations were improperly issued to it. The issuance of these citations was "contrary to the purpose and intent of MSHA's independent contractor regulations and good enforcement practice aimed toward improving mine safety and health." (T. Br. 7-8). The Secretary abused her discretion because there is no rational basis to support the agency's action. In this case, the Secretary's issuance of the citations was inconsistent with her past practices of citing only the contractor at the Foidel Creek Mine. In March 2000, for example, a piece of equipment owned by a different contractor received multiple citations but Twentymile only received one related citation for a condition over which it had assumed control and responsibility under the contract. In addition, Inspector Havrilla issued a citation to Precision Excavating in September 2001 without citing Twentymile.

Twentymile contends that the Secretary abused her discretion in this case because the citations violate "the fundamental purpose and principles of the Act and the Secretary's own regulations which place responsibility upon contractors for their own violations." (T. Br. 11). This improper shifting of responsibility is illustrated by the inspector's testimony that Precision Excavating's lead man told him that he did not know about the violative conditions on the equipment because Twentymile did not inspect the equipment. The issuance of citations to Twentymile under these facts is "directly contrary to MSHA's, the Act's, and the Commission's goal of achieving mine safety [by] refusing to let contractors ignore their responsibility." *Id.* It serves no purpose to cite Twentymile in addition to the contractor when it is clear that the contractor was responsible for the conditions, where the contractor tries to shift responsibility away from itself, and Twentymile has taken all reasonable steps to advise the contractor of its Mine Act responsibilities before it started working on the property. By issuing citations to Twentymile, Inspector Havrilla "legitimized" the efforts of Precision Excavating to avoid responsibility for complying with the Secretary's safety standards. (T. Br. 14). Precision Excavating, not Twentymile, should be held responsible for inspecting its equipment for safety violations. Twentymile had specifically required Precision Excavating to inspect its equipment and to comply with MSHA regulations as set forth in the contract.

Twentymile also contends that the facts of this case do not meet the criteria set out in the Secretary's Guidelines. As interpreted by the Secretary in this case, the Guidelines would require that the mine operator be cited in every instance in which a contractor is involved. The Secretary clearly failed to establish that her Guidelines call for the issuance of citations against Twentymile. In sum, the Secretary abused her discretion because she did not proceed pursuant to objective, ascertainable standards when she cited Twentymile for Precision Excavating's violations.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background

MSHA Inspector Michael Havrilla inspected the surface areas of the mine on August 30, 2001. One of the areas he inspected was the No. 2 refuse pile ("refuse pile"). The material that was on the refuse pile had previously been removed and the area was being reconditioned. Precision Excavating was hired by Twentymile to remove clay from the refuse pile area so that, after additional work was performed, it could be used to store rock and other material that is mined but cannot be sold. (Tr. 15-16, 83-84). Precision Excavating was using a pan type scraper to remove the clay. The refuse pile is on Twentymile property but it is some distance away from the preparation plant and other operations. No Twentymile employees were working at or near the refuse pile. Precision Excavating had been working at the mine for about one week with about four employees.

During his inspection, Inspector Havrilla issued six citations to Precision Excavating for conditions he observed on its equipment and, after discussing the matter with Twentymile employees, he issued six citations to Twentymile for the same violations. The citations can be summarized as follows:

> Citation No. 7618775 states that the pressure gauge in the air compressor on the service truck was inoperative in violation of section 77.412(a). Citation No. 7618777 states that there was a ten by ten inch opening on the compressor which would allow contact with the drive belts and pulley in violation of section 77.400(a). Citation No. 7618786 states that the fire extinguisher on the service truck had not been examined at least once every six months in violation of section 77.1110. Citation No. 7618788 states that the scraper was being operated while in an unsafe condition because the diesel fuel tank was leaking in violation of section 77.404(a). Citation No. 7618884 states that there were three metal containers of gasoline on the service truck that were not labeled in violation of section 77.1103(a). Citation No. 7618886 states that there was a plastic container of gasoline on the service truck that did not meet NFPA requirements in violation of section 77.1103(a).

When Inspector Havrilla discussed the violative conditions on the service truck with Precision Excavating's lead man, he discovered that Twentymile had not examined Precision Excavating's equipment when they were first brought onto the property. (Tr. 31). The lead mine told the inspector that he did not realize that the service truck was out of compliance. Inspector Havrilla decided that he wanted to talk to Diane Ponikvar, a safety representative with Twentymile, and take some actions to "help reduce these hazardous conditions." *Id.* As he was leaving the refuse pile in his pickup truck, he noticed that the scraper was leaking diesel fuel and he told the operator of the scraper to shut it down. After he arrived at the mine office and informed Ms. Ponikvar of the violations, she told Precision Excavating to remove the service truck and scraper to a parking lot near the entrance of the mine. This equipment was not allowed back on mine property until the cited conditions were corrected.

Inspector Havrilla testified that he has been inspecting the Foidel Creek Mine since 1996. In 1998-99, he observed an increase in the number of citations issued to contractors. (Tr. 33). At about this time, MSHA headquarters issued a memorandum discussing the increase in the number of accidents involving contractors at mines. Inspector Havrilla testified that, at a close-out conference in early 1999, he discussed the contractor problem with mine management. Apparently, one particular contractor was overwhelmed with work and was not taking "care of the normal wear and tear on machinery." (Tr. 34). The inspector testified that he warned Twentymile management that he would issue citations to both the contractor and Twentymile if the number of contractor violations was not reduced. He further testified that at a close-out conference in November 2000, he advised Twentymile that there had been a decrease in the number of contractor violations at the mine. When Inspector Havrilla discovered six violations

on two pieces of contractor equipment during his August 2001 inspection, he wanted to find out the "root cause to this problem." (Tr. 35). He testified that:

> In talking to the lead man, finding out that the equipment was just let on the property, . . . the operator, through omission, allowed this equipment to operate, and they had been operating for at least a week so that through omission this condition was allowed to continue, so I felt that I had a serious problem. I also felt that I am meeting the four factors and that I had to take action.

Id. Inspector Havrilla believes that most coal mines in his MSHA field office examine a contractor's equipment before it is allowed to enter the mine. (Tr. 36). He testified that Ms. Ponikvar "is very sincere about safety and taking care of the miners" and that she was "extremely concerned" about these violations. (Tr. 37). Havrilla testified that she told Precision Engineering "in no uncertain terms that equipment is not operated that way on the Twentymile property; that she would not allow it; [and] that the machinery would have to meet all the criteria required by the CFR before she would allow it back on the Twentymile site. . . ." *Id.* She immediately ordered Precision Excavating to remove the equipment until the violative conditions were corrected.

Inspector Havrilla testified that Twentymile met the four factors set out in the Guidelines. First, by not examining the equipment before it was allowed to operate at the mine, Twentymile, through that omission, contributed to the occurrence of the violations. (Tr. 39-40). Second, by not examining the equipment at some time while it was operating at the mine, Twentymile similarly contributed to the violations. Third, Inspector Havrilla believed that Twentymile was exposed to the hazards created by the violations. If any of the conditions created a fire, Twentymile personnel could well respond to put out the fire. The mine's fire brigade was practicing in an area about 1000 to 1500 feet from the refuse pile. They could be injured in fighting a fire. In addition, he believed that Twentymile miners could use the air compressor on the service truck and be exposed to the hazards described in the two citations issued for the compressor. Finally, Twentymile had control over the equipment as evidenced by the fact that Ponikvar immediately ordered that it be removed.

Twentymile contracted with Precision Excavating in August 2001 to perform work at the refuse pile. Twentymile followed its usual procedures when it entered into this contract. Twentymile advised Precision Excavating, both orally and in writing, that it was required to comply with all MSHA safety and health standards. Twentymile also provided Precision Excavating with a safety guide that included specific provisions requiring a preshift examination of all equipment and the repair of all safety defects. (Ex. R-27). The safety guide also contains provisions relating to each of the six cited conditions and it required the contractor to correct these conditions before the equipment was operated at the mine. Twentymile reserved the right to conduct periodic safety inspections of Precision Excavating's work site and to terminate the

contract for safety infractions. Twentymile also required Precision Excavating to present evidence that all of its employees at the site have complied with MSHA training regulations.

For the two years prior to August 2001, Precision Excavating had not received any citations from MSHA despite that fact that it had previously worked for Twentymile and other mines during that period. (Tr. 85, 117; Ex. R-2). It also did not experience any MSHA reportable injuries during the previous four years. (Ex. R-29). When contractors come onto the mine, Twentymile employees make sure that the contractor's employees have all the MSHA-required training. These Twentymile employees provide the site-specific hazard training. These Twentymile employees do not examine equipment or vehicles that contractors bring with them and, according to Twentymile, they are not qualified to do so. (Tr. 106, 120). A significant number of contractor vehicles and equipment enter the mine each day, including 18 to 20 coal haul trucks. Twentymile does not routinely inspect a contractor's equipment as it enters the property. (Tr. 87-88, 123). Instead, it performs safety audits of various portions of its surface and underground facilities on a regular basis. (Tr. 102, 120). If contractor's equipment is within an area that is being audited by the safety department, that equipment is inspected. Twentymile also requires contractors to examine their own equipment for safety hazards and compliance with MSHA safety and health standards. Prior to August 2001, it was not MSHA's normal practice to cite Twentymile for violations that existed on a contractor's equipment. (Ex. R-30).

B. <u>Analysis</u>

The issue of who should be cited for contractor violations has been a source of contention since the passage of the Mine Act. An excellent discussion of the history of this issue can be found in Judge Todd Hodgdon's decision in *Amax Coal West Inc.*, 16 FMSHRC 2489, 2491-95 (Dec. 1994), which I do not repeat in this decision. Although the Commission recognized that the Secretary has wide enforcement discretion, it has held that Commission review of the Secretary's action in citing a production-operator is appropriate to guard against abuse of discretion. The Commission has issued two important decisions discussing this issue since Judge Hodgdon's decision, as discussed below.

In *Mingo Logan Coal Co.*, 19 FMSHRC 246 (Feb. 1997), the Secretary issued a citation to the contractor and to the production-operator because one of the contractor's employees had not received the required new miner training. The MSHA inspector issued a citation to the production-operator because he believed that its employees were affected by the violation. The production-operator contested the citation. The Commission held that in instances of multiple operators, the Secretary has wide enforcement discretion and "may, in general, proceed against either an owner-operator, his contractor, or both." *Id.* at 249 (citation omitted). The Commission determined that substantial evidence supports the conclusion that the Secretary met the standard in the Guidelines for enforcement against a production-operator because its employees were exposed to the hazard. The employees of the contractor and the production-operator often worked together. The Commission went on to hold that "even if the Secretary had failed to abide by the Guidelines, that fact would not prove fatal to his enforcement decision." *Id.* at 250 *citing*

Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986). Finally, the Commission held that "holding owner-operators liable for violations committed by independent contractors promotes safety because 'the owner is generally in continuous control of the entire mine' and 'is more likely to know the federal safety and health requirements.' " *Id.* at 251 *citing Cyprus Indus. Materials Co. v. FMSHRC*, 664 F.2d 1116, 1119 (9th Cir. 1981).

In *Extra Energy, Inc.*, 20 FMSHRC 1 (Jan 1998), the production-operator contracted with a security company to provide a night security guard at the mine on weekend nights. A security guard died of carbon monoxide poisoning at the mine as he sat in his own personal vehicle with the motor running. The Secretary issued citations to the contractor and to the production-operator. The production-operator contested the citations. The Commission noted that the production-operator had substantial involvement in the day-to-day operations at the mine and contracted for services with the security company. *Id.* at 6. The Commission also noted that the production-operator defined the contractor's duties and retained some supervision over the contractor's employees because it regularly reviewed reports from the guards. The Commission stated that the production-operator failed to provide the security guards with a structure to protect them from the elements and took no measures to ensure that their cars were safe, either by inspecting them or requiring that the contractor do so. *Id.* The Commission concluded that "[t]hrough its failure to inspect or ensure that the security guards' vehicles were inspected, Extra Energy contributed to the equipment violation and to the continued existence of the violation." *Id.* The Commission relied on the production-operator's involvement in the mine's affairs and its failure to inspect the vehicle or ensure that the vehicle was inspected in reaching its decision.

I hold that the Secretary did not abuse her enforcement discretion when she cited Twentymile for the six violations committed by Precision Excavating. First, Inspector Havrilla testified that he issued the citations to Twentymile because he believed that there was serious problem with contractor violations at the mine. The cited conditions were rather obvious so he was concerned that safety hazards on contractors' equipment were not being adequately addressed. He believed that by issuing citations to Twentymile, the safety violations would get more immediate attention than if he only cited the contractor.

Second, the citations easily fit within the first factor set forth in the Guidelines. The Guidelines provide that "[e]nforcement action against a production-operator for a violation involving an independent contractor is normally appropriate . . . when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work."[1] As in *Extra Energy*, it is not disputed that the production-operator did not inspect the contractor's equipment when it entered the mine or at any time after it started working at the refuse pile. More importantly, Twentymile did not "ensure that the [service truck and scraper] were inspected" by Precision Excavating before the work began.

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[1] The Guidelines are not binding on the Secretary, as discussed above. In addition, the Guidelines provide that enforcement against a production-operator is appropriate if any of the four factors are met.

There can be no doubt that Twentymile took some important steps in this direction when it advised Precision Excavating that it must comply with MSHA's safety standards. The service contract required such compliance and Twentymile orally advised Precision Excavating at the time it was awarded the contract that it had to comply with MSHA's safety standards. In addition, the safety guide that it gave to Precision Excavating described the inspections that its employees must complete on the equipment. Nevertheless, there was no follow-through by Twentymile to "ensure" that the inspections were actually taking place. There is no evidence that anyone from Twentymile asked Precision Excavating's representatives if the equipment had been inspected for safety compliance when it entered the mine or after it arrived at the refuse pile. Twentymile requires contractors to present evidence that its employees meet MSHA's training requirements, but it does not have a similar policy requiring contractors to present evidence that it has inspected its own equipment for compliance with safety standards. Under these circumstances, it was not an abuse of the Secretary's enforcement discretion to cite Twentymile for the violations that Inspector Havrilla discovered because Twentymile did not take the steps necessary to ensure that the cited equipment was inspected for safety compliance. It was this lack of inspection that lead Inspector Havrilla to conclude that citations should be issued to both the contractor and Twentymile. Twentymile's failure to inspect the equipment or ensure that the contractor inspected the equipment was an omission that contributed to the violations.

The contested citations also fit within the fourth factor of the Guidelines. This factor provides that "[e]nforcement action against a production-operator for a violation involving an independent contractor is normally appropriate . . . when the production-operator has control over the condition that needs abatement." Although Twentymile did not have direct control over the cited equipment, it reserved the right to have any equipment removed from the property if it failed to comply with MSHA's safety standards. Twentymile also inspected contractor equipment on a periodic basis during safety audits. The evidence establishes that Twentymile exercised sufficient control over the scraper and service truck to meet this factor.[2]

Twentymile argues that the Secretary abused her discretion in this case "because she has exercised it inconsistently, in violation of her own policy guidelines, in violation of her promulgated regulations in 30 C.F.R. Part 45 and without considering the factors that the Secretary has identified as important in determining whether to cite a production-operator for an independent contractor's violation." (T. Br. 10). It contends that the Secretary's abuse of her enforcement discretion is confirmed by the fact that she has not proceeded pursuant to "objective ascertainable standards." (T. Br. 21). There must be "a rational, reasoned basis for an agency's action. *Id* at 22.

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[2] I agree with Twentymile that its employees were not exposed to the hazards presented by the violations in any meaningful sense. Its employees would not be using a contractor's compressor. Moreover, a production-operator would always respond to a fire or other emergency involving a contractor's equipment. Under the Secretary's interpretation, virtually all contractor violations would expose the production-operator to citations under this factor.

I agree that the Secretary has generally issued citations to contractors for their violations without citing Twentymile. Nevertheless, the Secretary presented a rational, reasoned basis for her actions here. Inspector Havrilla determined that additional enforcement action was required to "cure" the problem of contractor violations. (Tr. 42). Ms. Ponikvar testified that the inspector told her that "it was time to teach us a lesson like he did at Colowyo," another coal mine in the area. (Tr. 105). Twentymile faults Inspector Havrilla because his decision to cite Twentymile was subjective rather than the result of a reasoned analysis. I disagree that his actions were so subjective as to be arbitrary or capricious. It is true that Inspector Havrilla did not perform any sort of comprehensive analysis of the history of contractor citations at the Foidel Creek Mine. Nevertheless, he observed the obvious conditions on the service truck and scraper; he learned that this equipment had not been inspected by anyone with Precision Engineering or Twentymile; and, on that basis, he determined that the problem needed to be brought to the attention of the production-operator. I find that the Secretary, acting through Inspector Havrilla, did not abuse her enforcement discretion by citing both Precision Engineering and Twentymile for the subject violations.

Twentymile makes numerous other arguments that question the policy of citing a production-operator for violations committed by independent contractors. It believes that the safety of everyone working at mines would be best protected by citing only the contractor for its violations. Twentymile contends that, by shifting blame to the production-operator, the Secretary is failing to adequately impress upon contractors the importance of taking responsibility for compliance with MSHA safety and health standards. Although this public policy issue has been thoroughly discussed by the Commission and the Courts of Appeals, Twentymile's arguments have not been adopted. Consequently, I also reject these arguments. It believes that these prior Commission and court holdings "merit reevaluation and Twentymile preserves its right to challenge such holdings." (T. Br. 8, n. 2). I am required to follow Commission precedent in this decision. All of the arguments made by Twentymile that I have not specifically discussed in this decision are hereby rejected.[3]

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[3] Twentymile filed a proposed list of corrections to the hearing transcript along with its brief. I have reviewed these corrections and grant its request to amend transcript accordingly.

III. APPROPRIATE CIVIL PENALTIES

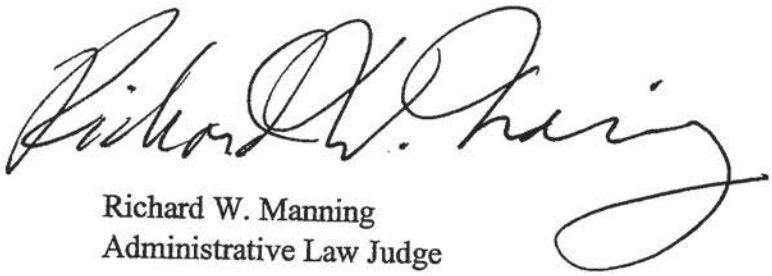
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The parties stipulated, for purposes of this case, that the Secretary's determinations as to the criteria should be applied. The record shows that Twentymile has a history of about 312 paid violations at the Foidel Creek Mine during the 24 months preceding August 2001. (Ex. G-2). The Foidel Creek Mine produced over 7.2 million tons of bituminous coal in 2001. Twentymile and its affiliated companies produced over 61 million tons of bituminous coal in 2001. All of the violations were abated in good faith. The negligence and gravity criteria are as stated in each citation. The penalties assessed in this decision will not have an adverse effect on Twentymile's ability to continue in business. Based on the penalty criteria, I find that the penalties proposed by the Secretary are appropriate.

IV. 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
7618775	77.412(a)	$55.00
7618777	77.400(a)	340.00
7618786	77.1110	55.00
7618788	77.404(a)	340.00
7618884	77.1103(a)	55.00
7618886	77.1103(a)	55.00
	TOTAL PENALTY	$900.00

Accordingly, the six citations at issue in this case are **AFFIRMED** as set forth above and Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $900 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, NW, Suite 9500
Washington, D.C. 20001

July 7, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2001-67-M
Petitioner	:	A.C. No. 30-03254-05508
	:	
v.	:	Docket No. YORK 2002-59-M
	:	A.C. No. 30-03254-05510
	:	
	:	Docket No. YORK 2002-30-M
D.A.S. SAND & GRAVEL, INC.,	:	A.C. No. 30-03254-05509
Respondent	:	
	:	Docket No. YORK 2003-11-M
	:	A.C. No. 30-03254-05511
	:	
	:	D.A.S. Sand & Gravel

DECISION

Appearances: Terrence Duncan, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York, for the Petitioner;
David A. Scheer, President, D.A.S. Sand & Gravel, Inc., Newark, New York, for the Respondent.

Before: Judge Schroeder

These cases are before me on Petitions by the Secretary for the assessment of Civil Penalties for the alleged violation of mine safety regulations. The cases were consolidated without opposition in the interest of economical adjudication. A hearing was held in Rochester, New York, on April 23, 2003. Both sides were given an opportunity to submit written argument on the legal and factual issues raised at the hearing. After giving the record and the several presentations of counsel careful consideration, I make the following findings and conclusions:

Factual Findings

Jurisdiction

D.A.S. Sand and Gravel is a small business engaged in the extraction of sand and gravel from a native deposit for sale to the general public. David Scheer has been the owner, president

and chief executive since 1998. It is not disputed that D.A.S. has sold sand and gravel only to buyers within New York State although purchasers may have used the materials for purposes with multi-state consequences, e.g., road construction. Equipment used in the business has been purchased from suppliers in other states.

An essential element of the D.A.S. operation is the use of a front-end loader. A loader is used to remove native materials and transport them to a sorter. After the sorted material is moved to stockpiles by belt, a loader is used to move material from an appropriate stockpile to a buyer's truck. At least three front-end loaders in various mechanical condition were identified in the record as used by D.A.S. The majority of the citations issued by MSHA in these cases involve mechanical defects alleged to be present in the front-end loaders.

An MSHA inspector visited the Respondent's business on two occasions relevant to these cases, September 19, 2000, and November 8, 2001. There was no apparent change in the way the business was conducted between those two dates. Respondent does not claim any significant changes in the period since the last inspection.

Citations

The facts regarding specific alleged violations of mine safety regulations can be best grouped by business function. The allegations concern (1) front-end loaders, (2) handrails, (3) electric faults, (4) guards, and (5) record keeping. Respondent's evidence was directed more to the potential significance of the violations than to the actual occurrence of a violation.

(1) Front-end loaders

Of the fifteen (15) citations at issue, nine deal with some aspect of the front-end loaders used by the Respondent. Three citations, 7724561, 7741669, and 7741667 allege that back-up alarms were not functional. Back-up alarms are the noise- makers that are intended to alert people other than the driver that the vehicle is in reverse and the driver is probably unable to clearly see the immediate area behind the vehicle. The MSHA inspector, William Korbel, testified that he observed the vehicles in operation backing up and did not hear a back-up alarm. He also testified the vehicles constitute a very significant safety risk to other persons in the area, both those on foot and those in other vehicles. It was his opinion that the operator was at risk even in low speed impacts to other vehicles because of the persistent failure to wear seat belts. Mr. Scheer testified to facts intended not to dispute the violations (failure to have working back-up alarms) but to lessen the perceived risk of injury. He testified the business is small. The customers are usually repeat buyers that are familiar with the operations that involve the front-end loaders. People do not wander around the grounds on foot, but stay in the truck they drove to pick up sand or gravel. Mr. Scheer did not deny knowing the regulatory requirement for a back-up alarm.

Four citations, 7724562, 7724564, 7724574, and 7741668, deal with the brakes on the front-end loaders, either the parking brakes or the services brakes. Mr. Korbel testified he

observed the vehicles, had operating tests performed on both level ground and inclines, and found serious defects in the brakes. Mr. Scheer testified to facts which he believed minimized the likelihood of injury from inadequate brakes. He testified most of the work with front-end loaders is performed on level ground at very low speeds by people familiar with the operation. It was his opinion that the weight of the machines made stopping the engine an effective braking technique. He did concede that some ramps and inclines are part of the area used by the front-end loaders. He also conceded that the area is sometimes wet and slick.

Two Citations, 7741666 and 7724560, deal with the failure to use seat belts in operating the front-end loaders. Mr. Korbel testified that on his first visit to D.A.S. in September 2000, the seat belts were stuffed under the seat to keep them out of the way. A similar scene greeted him on his return in October 2001. Mr. Scheer did not dispute the failure to wear seat belts, but merely testified as to the slow speeds in limited circumstances in which the vehicles were operated as lessening the likelihood of injury from failure to wear seat belts. He did not dispute his knowledge of the regulatory requirement to use seat belts.

(2) Hand Rails

One citation, 7724567, was issued for failure to have adequate handrails on an elevated catwalk. A slack rope was draped across an opening of approximately twenty-five feet. The deck was more than ten feet in the air. Workers were required to be on the deck on a regular basis for service of the sorter. Mr. Korbel testified the rope was more of a tripping hazard than a safety aid for people working on the deck. Mr. Scheer testified he was instructed to use a rope by a MSHA inspector, whose name he could not recall. He testified the risks of injury were small because the deck is used only for short periods of time by people familiar with the location.

(3) Electric Faults

Two citations, 7724568 and 7724570, were issued for electrical problems. One citation involved the alleged failure to include adequate circuit overload protection in the sorter motor circuits. The other citation involved an alleged failure to perform and document ground resistance or continuity tests of the sorter electrical circuits. Mr. Korbel testified the lack of circuit overload protection presented a risk of fire. The lack of testing of the circuits, in his opinion, made monitoring of the adequacy of electrical protection very difficult, and hence, the prevention of serious shock hazards was made more difficult. The electric current levels are sufficient to cause serious injury or death if shock hazards are not avoided. Mr. Scheer testified the electric circuits were created by a qualified electrical contractor familiar with MSHA requirements. He denied instructing the contractor to omit necessary, but expensive, components in the circuits. He attempted to articulate a theory under which ground resistance or continuity tests were unnecessary. He claimed extensive knowledge of electrical circuits and their hazards because of work experience prior to owning a sand and gravel facility. I found his testimony confusing and unpersuasive.

(4) Guards

Two citations, 7741670 and 7741671, were issued for failure to maintain guards on the conveyer belt tail pulleys. Mr. Korbel testified the tail pulleys were at a working level and had exposed pinch points that presented a significant risk of injury to hands and feet of workers. Mr. Scheer did not dispute the lack of guards at the time of inspection and merely testified as to the small number of persons exposed to the risk because of the small size of his business.

(5) Record Keeping

One citation, 7741672, was issued for failure to maintain records of ordering parts to correct previously identified safety risks. Mr. Scheer did not testify as to any reason for failure to maintain the necessary records.

Legal Conclusions

The legal issues in these cases divide easily into two groups: (1) those associated with the jurisdiction of the Secretary over the activities of D.A.S., and (2) those associated with the obligation of the Secretary to provide evidence of particular violations of mine safety regulations with an appropriate sanction. Unless the Secretary is successful on the first issue, the second issue need not be decided.

Jurisdiction

In contesting jurisdiction of the Secretary, D.A.S. argues it does not operate a "mine" as that term is used in the Mine Safety Act. D.A.S. contends its products are not introduced into interstate commerce as required under the Act.[1] Mr. Scheer testified the essential economic realities of transportation costs compared to value make it impossible for a sand and gravel pit to sell to buyers more than a relatively short distance from the material source. The location of the D.A.S. source, goes the argument, makes it economically impossible for any of its product to cross a state line.

With one exception noted below, all of the Respondent's arguments were raised and answered in favor of jurisdiction in the Secretary in the case of *Secretary of Labor v. Tide Creek Rock, Inc.*, 24 FMSHRC 210 (February 2002). *Tide Creek* involved a small, family-run, crushed stone operation quite similar to the D.A.S. facility. Judge Barbour specifically noted:

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[1]Section 4 of the Federal Mine Safety & Health Act of 1977 provides "[e]ach coal or other mine, the products of which enter commerce, or the operations of products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

It is true that Tide Creek is small and most of its product is sold locally. However, even under these circumstances, it has been found that interstate commerce is affected because of the cumulative effect small scale operation can have in interstate pricing and demand.

D.A.S. attempts to avoid the effect of this and similar cases over the years by relying on a recent decision of the Supreme Court in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2003), which involved the use of an abandoned sand and gravel pit for a municipal waste dump. The Supreme Court overturned the position of the Corps of Engineers on the requirement for a permit under the Clean Water Act to allow the filling of the abandoned pit. The language used by the Supreme Court is enticing. Chief Justice Rehnquist discusses limitations on federal power under the Commerce Clause of the Constitution in terms that suggest the Court intends a retreat from prior holdings on the limits of this power. But a careful reading of the case leads to the conclusion the decision was not intended to limit authority of the federal government such as that exercised by the Secretary in this case.

The Supreme Court was faced with the question of whether the jurisdictional definition in the Clean Water Act of "navigable waters of the United States" included the ponds which remained after the abandonment of a sand and gravel pit. The Corps of Engineers argued that the regular use of those ponds by migratory birds supplied a Commerce Clause nexus sufficient for Congress to exercise power to regulate the use of the ponds. Chief Justice Rehnquist responded that the hypothetical limits of the power of Congress were not at issue. At issue were the actual limits of the exercise of the power of Congress with respect to the gravel pit ponds. On this issue the Chief Justice replied that Congress has not expressed an intent to exercise its power over the ponds, assuming it had power to exercise. The opinion is actually limited to a interpretation of the statutory language of the Clean Water Act. Chief Justice Rehnquist specifically notes that the potential constitutional issue is not being decided in this case.

Nothing in the *Solid Waste* decision would inhibit Congress from exercising Commerce Clause power over health and safety in small sand and gravel pits. The question is whether it chose to exercise that power. The legislative history of the Mine Safety Act is very different from the Clean Water Act on the issue of congressional intent to occupy the field.

The Federal Mine Safety and Health Act of 1977, 30 U.S. C. § 801 *et.seq.*, was passed after a series of mine disasters had illustrated the need for consistent and uniform standards for the mining industry that would be enforced at the federal level. Attempts to secure adequate state enforcement of health and safety standards had been unsuccessful, with some states doing more than others. The Congress, in passing the Mine Safety Act, specifically noted that the business of extracting minerals from the earth is an inherently dangerous activity that must be carefully administered if it is to serve the needs of both customers and employees. To assure that consistent and uniform standards and practices would be implemented, Congress included in the Mine Safety Act a very broad definition of a mine. The Senate Committee which drafted the bill that became the Mine Safety Act noted "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it

is the intention of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act. " U.S. Code Congressional and Administrative News, 1977, 3401, 3414. This legislative intent was early recognized and implemented by the courts. *United States v. Lake*, 985 F. 2d 265 (C.A. 6, 1993), *Marshall v. Kraynak*, 604 F.2d 231 (C.A. 3, 1979)

It is clear to me that Congress intended to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine. For the purpose of this case, I conclude that Congress exercised sufficient authority under the Commerce Clause of the Constitution to make the Respondent's sand and gravel business subject to regulation by the Mine Safety and Health Administration and this Commission.

Citations

In evaluating the claims by the Secretary, my responsibility is to follow a two-step process: (1) determine whether a regulation was violated, and (2) determine the appropriate penalty for any violations under the criteria in Section 110(i) of the Mine Safety Act. *Secretary of Labor v. Lexicon, Inc.*, 24 FMSHRC 1014, 1029 (Nov. 2002). D.A.S. is a small company with no established history of prior violations, but which has not established a practice of good faith efforts to abate violations or correct safety problems. The Respondent made no attempt to show that its financial condition is such that payment of any particular level of Civil Penalty would endanger its ability to stay in business.

(1) Front-end Loaders

In Citations 7724561, 7741669, and 7741667, Respondent is alleged to have violated 30 C.F.R. §56.14132, which provides:

> *(b) (1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have - (i) An automatic reverse-activated signal alarm;*

This regulation was violated. The front-end loaders must be equipped with a functioning back- up alarm. It is a mandatory safety standard. It was known by the Respondent to be a mandatory safety standard. Because of the setting in which operations occurred, the gravity of the violation is moderate. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $600.00 for the three Citations.

In Citations 772462, 7724564, 7724574, and 7741668, Respondent is alleged to have violated 30 C.F.R. §56.14101(a)(1) which provides:

> *(1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the*

maximum grade it travels.

This regulation was violated. The front-end loaders must be equipped with functioning brakes that make it possible for the operator to stop a loaded vehicle on a ramp within a reasonable distance. This regulation seems such an obvious mandatory safety standard that the Respondent must be presumed to have been aware of the requirement. Because of the setting in which operations occurred, the gravity of the violation is moderate. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $1,000.00 for the three Citations.

In Citations 7741666, and 7724560, Respondent is alleged to have violated 30 C.F.R. §56.14130(g), which provides:

> *(g) Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.*

This regulation was violated. The operators, including the owner and supervisor, regularly failed to wear seat belts in the front-end loader. This regulation was known to the supervisor and operators. Because of the low speeds involved in the setting in which operations occurred, the gravity of the violation is minimal. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $200.00 for the two Citations.

(2) Hand Rails

In Citation 7724567, Respondent is alleged to have violated 30 C.F.R. §56.11002, which provides:

> *Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.*

This regulation was violated. The catwalk was not provided with a substantial handrail in place of a designating rope. There is a reasonable dispute as to Respondent's knowledge of this requirement, and the gravity of the violation is minimal. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

(3) Electric Faults

In Citation 7723568, Respondent is alleged to have violated 30 C.F.R. §56.12001, which provides:

Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

This regulation was violated. The motor circuits did not include protection against overload in the form or either fuses or circuit breakers. Respondent claimed to have relied upon a qualified electrician in the creation of the circuits. Mr. Scheer claimed, on the other hand, to be knowledgeable on the subject of electrical circuits. The need for overload protection seems so clear as to make it impossible to claim ignorance of the requirement. Mr. Scheer did not claim ignorance but, rather, claimed the equivalent safety factor was provided by other means. His explanation of the other means was unpersuasive. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

In Citation 7724570, Respondent is alleged to have violated 30 C.F.R. §56.12028, which provides:

Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

This regulation was violated. Respondent was quite candid in testifying that the testing was not performed so a record could not be maintained. Mr. Scheer testified as to various theories of electric circuits under which such information would not be required. His testimony on this subject was unpersuasive. No electrical injuries have been sustained in the Respondent's business. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

(4) Guards

In Citations 7741670 and 7741671, Respondent is alleged to have violated 30 C.F.R. §56.14107, which provides:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades and similar moving parts that can cause injury.

This regulation was violated in both instances. The conveyer belt pulleys contain pinch points that can cause injury to people moving in the area. Respondent made no claim the pulleys were guarded, but merely attempted to minimize the risk because of the small number of people exposed to the unguarded machinery. I find the appropriate penalty, after consideration of all the statutory criteria, to be $250.00.

(5) Record Keeping

In Citation 7741672, Respondent is alleged to have violated 30 C.F.R. §56.14100(d), which provides:

> *(d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.*

This regulation was violated. The testimony indicates records were not kept of either brake or back-up alarm malfunctions, and this failure was the reason why records were not produced at the request of the MSHA inspector. I find the appropriate penalty, after consideration of all the statutory criteria, to be $200.00.

Summary

It is my conclusion that the Respondent has violated a variety of mine safety regulations, perhaps in part motivated by his strongly held conviction as to his legal position, with serious consequences for the health and safety of his employees and customers. The total Civil Penalty appropriate to redress these violations is $2,400.00.

ORDER

The Respondent is directed to pay a Civil Penalty of $2,400.00 within 40 days of the date of this Order. The parties are to bear their own costs.

Irwin Schroeder
Administrative Law Judge

Distribution: (Certified Mail)

Terrence Duncan, Esq., Office of the Solicitor, U.S. Department of Labor, 201 Varick St., Room 983, New York, NY 10014

David A. Scheer, President, D.A.S. Sand & Gravel, Inc., 1444 Hydesville, Road, Newark, NY 14513

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

July 14, 2003

TWENTYMILE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEST 2000-480-R
	:	Order No. 7618153; 6/16/00
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Foidel Creek Mine
ADMINISTRATION (MSHA),	:	Mine ID 05-0386
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-131
Petitioner	:	A. C. No. 05-03835-03691
v.	:	
	:	Foidel Creek Mine
TWENTYMINE COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Contestant/Respondent;
Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Barbour

These contest and civil penalty proceedings arise under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 ("Mine Act" or "Act"). They involve the validity of a June 16, 2000, order of withdrawal issued to Twentymile Coal Company ("Twentymile") and the existence of an alleged violation of a mandatory training standard cited in the order. The order was issued under section 104(g)(1) of the Act (30 U.S.C. § 814(g)(1)) in conjunction with an investigation by the Secretary's Federal Mine Safety and Health Administration ("MSHA") of an accident that seriously injured one of Twentymile's miners.[1] The miner fell from a ladder providing access to an underground rock chute and was

[1] The inspector wrote: "The [r]ock [c]hute [is] new to . . . [the] mine and the . . . miners . . . had little, if any, training pertaining to . . . the . . . chute" (Order No. 7618153).

struck by falling rocks escaping the chute. As a result of the investigation, an MSHA inspector found that miners working on the rock chute had not received proper training. The inspector found the miners' lack of training was a violation of 30 C.F.R. § 48.7(c), a mandatory standard requiring miners assigned certain new tasks to be trained in the safety aspects and procedures of the tasks before beginning work.[2] The inspector also found the violation was a significant and substantial contribution to a mine safety hazard ("S&S").

Twentymine contested the order's validity, the alleged violation and the inspector's S&S finding, asserting, among other things, that the order did not conform to the requirements of the Act, that no violation of section 48.7(c) occurred, or alternatively, that the violation was not reasonably likely to contribute to an injury.

On November 9, 2001, the Secretary issued a proposal to assess the company a $6,000.00 penalty for the violation. Twentymile contested the proposal, and in January 2002, the Secretary

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Fn. 1 (continued)

Section 104(g)(1) states in pertinent part:

> If upon an inspection or investigation pursuant to section 103 of this Act . . . [an inspector] . . . find[s] employed at a coal . . . mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the . . . [inspector] shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal . . . mine, and prohibited from entering such mine until an . . . [inspector] determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. §814(g)(1).

Section 103, 30 U.S.C. § 813, requires "frequent inspections and investigations of mines" by inspectors. Section 115, 30 U.S.C. § 825, authorizes the Secretary to promulgate regulations implementing the Act's training requirements.

[2] The standard states:

> Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such tasks.

30 U.S.C. § 48.7(c).

petitioned the Commission for the assessment of the proposed penalty.[3] The company responded, again denying the existence of a violation and challenging the inspector's S&S finding. The company further contended the penalty petition was invalid because it was late-filed.

The proceedings were assigned to Commission Administrative Law Judge August Cetti. Following extensive pretrial submissions, the matters were heard by the judge in Steamboat Springs, Colorado. After the hearing, the parties filed post hearing briefs. Prior to rendering a decision, Judge Cetti retired from federal service. The matter was reassigned to me, and the parties agreed that I should issue a decision based upon the existing record.

THE ISSUES

The issues are whether the order is valid, whether the company violated section 48.7(c), whether the violation was S&S, the proper amount of any civil penalty that must be assessed, and whether the Secretary's delay in filing the penalty petition warrants dismissal of the penalty proceeding.

THE FACTS

The Foidel Creek Mine is a large, underground bituminous coal mine located in Routt County, Colorado. The mine consists of two developing sections and one retreat longwall section. Approximately 300 employees work at the mine, which produces approximately 8.6 million tons of coal per year (Tr. 18, 81; Gov. Ex. 5 at 3). The mine has a low, nonfatal, lost time accident rate (Tr. 81).

The accident that lead to the proceedings occurred after a newly installed rock chute jammed and miners were assigned to unplug it. The chute connects upper and lower levels of the mine. Edwin Brady, the mine's conveyance manager who is responsible for the design, installation, operation and maintenance of the conveyor system, explained that due to the mine's geology, there are times when rock is mined along with coal. The company does not want to mingle the coal extracted elsewhere in the mine with the coal and rock mixture. The company, therefore, diverts the mixed material to the chute, which channels the mixture from an upper level of the mine to a lower level. The material falls through the rock chute and passes onto a separate conveyor system at the bottom of the chute. From there it is transported out of the mine and dumped in a separate pile. Before the rock chute was installed, the mixed material was transferred out of the mine on a series of four conveyor belts. Installation of the rock chute allows a much more efficient transfer of the material.

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[3] The certificate of service states that the petition for assessment was served on Twentymile on January 18, 2001. The year date clearly is a typographical error.

The rock chute is square in shape, measuring approximately 5 feet by 5 feet. It is located inside a circular vertical shaft. There is a belt at the top of the chute that dumps material into a hopper. The conveyor belt has a gate positioned over the chute. When the gate is engaged, the material is diverted into the hopper and then into the chute. Once in the chute, the material falls about 45 or 50 feet to the lower level (Tr. 20). At the bottom of the chute there is a slanted chute (the "rock box") that directs the fallen material to the receiving conveyor belt (Tr. 20, 159–162).

Inside the chute are two devices that activate signals if the chute becomes plugged. One device is at the top and one is at the bottom. Also inside are internal baffles that slow the material's fall so that it does not damage the rock box and/or the receiving belt (Tr. 160). The chute can transfer up to 5,500 tons of material per hour and as much as 20,000 tons per shift (Tr. 196).

A ladder extends vertically along the side of the chute from the top to the bottom of the shaft. Four landings accessed by the ladder are spaced at equal intervals along the side of the chute.[4] At each landing there is an observation door that can be opened to observe or gain entrance to the rock chute's interior (Tr. 21).

According to Brady, the doors are "[m]ainly for inspection" and for getting into the chute when its wear liner is replaced (Tr. 163). The doors are secured by external latches (Tr. 164; see Twentymile Exs. 4 and 5).[5] The latches are held in place with eye bolts, which must be loosened to free the latches.

The chute was first used on May 26, 2000, and was operated without incident for several days thereafter (Tr. 169). However, on June 6, toward the end of the afternoon shift, as a rock mixture was being transferred from the upper to the lower level, the chute clogged and the conveyor belt feeding the chute stopped (Tr. 43, 70). The conveyor is designed to stop automatically if materials no longer can move through the chute.

Brady thought the shut down was due to an overloaded conveyor motor. Brady walked toward the motor. As he approached, he met two electricians who told him the motor was fine, but that the chute was clogged. (Tr. 166, 186). Brady traveled to the top of the chute. He climbed onto the ladder and proceeded down to the landing closest to the top. He loosened the eye bolt on the latch, lifted the latch and opened the access door. He saw jammed rock. He described the rock as "pretty much tight up against" the door (Tr. 168).[6] He closed the door. He secured the latch by tightening the eye bolt (Tr. 167). He climbed down to the next landing.

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[4] The ladder also allows quick transit from one mine level to another (Tr. 185-186).

[5] After the accident, the company added chains to the doors to further secure them (Tr. 164).

[6] Brady stated that when a door to the chute is opened, the door swings outward toward the person opening it. When this happens material can spill onto the platform. To avoid the spilling material, a person must stand back and behind the door (Tr. 187-188).

He loosened the eye bolt, lifted the latch and opened the access door. There was more rock. He closed the door and secured the latch. As he moved down to the other two landings he found that the jam extended all the way to the bottom of the chute. Brady described the jammed rock as "mostly bigger stuff . . . [with] smaller stuff mixed in" (Tr. 168).

When Brady reached the bottom of the chute he met beltmen Craig Bricker and Rick Fadely. Both men were members of the production crew. Brady instructed Fadely to go up on the lowest landing, to open the access door and to try loosening the material by prying it with a steel bar (Tr. 169-171). Brady, who had unplugged other chutes at the mine, explained that to loosen a plug "[y]ou have to start at the lowest point" (Tr. 171).[7]

Fadely did as instructed but could not free the material (Tr. 172). Brady then suggested the men use water. He explained that some material can only be unstuck after it becomes "soupy" (Tr. 172). Bricker and Brady went to get a hose.

In the meantime, around 4:10 p.m., Kevin Olson the acting shift supervisor, also became aware the chute was clogged. Olson assigned Matthew Winey, the production crew foreman, to go to the bottom of the chute to get it unplugged, since mining could not take place until the problem was fixed (Tr. 26, 43, 213-214, 224). Olsen did not tell Winey how to do the job (Tr. 224).

Winey passed on the order to his crew, and the men traveled to the bottom of the chute where they arrived at different times. When Winey got there, Bricher and Fadely were there helping Brady connect the hose, which was in sections (Tr. 173). Once the hose was connected, Fadely and Winey climbed up on the lowest landing (Tr. 173-174, 215). The hose was handed to Fadely, but Winey took it from him and started to spray the stuck material. Fadely took the hose back and showed Winey how to apply the water so it did not splash back on the men (Tr. 216). Meanwhile, Brady began to hit at the bottom of the chute with a hammer (Tr. 82-83). After about 5 minutes of applying water and hitting the bottom of the chute, the material started to move.

Kyle Webb was a member of Winey's crew. At the time of the accident, he was 26 years old, and he had more than four years of mining experience. Webb arrived at the bottom of the rock chute with some of the other members of Winey's crew. At some point, either before or after Winey started to spray the material, Webb climbed the ladder past the men (Tr. 220). Winey did not ask Webb where he was going. Winey stated that he "[j]ust figured . . . [Webb]

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[7] Brady testified that he had previously unplugged many surface chutes. He stated that clogged chutes are a "recurring problem" at the mine because when a fault is driven through, wet, sticky material is mined and transported, and the wet material has a tendency to stick in the chutes (Tr. 190). Brady could not recall any company standard procedure for unclogging stuck chutes, even though they became clogged every four, five or six months (Tr. 190-191).

was . . . looking around" (Id.). Neither Winey nor Fadely tried to stop Webb, and Webb continued up the ladder (Tr. 226).

It is not clear why Webb chose to climb (Tr. 49, 85). No one instructed him to do so (See, e.g., Tr. 201). In fact, in Brady's opinion, there was no need for anyone to go up the ladder, since there was nothing to do above the access door where the men were working (Tr. 203).[8]

At almost the same time as the rock started to move in the chute, Webb fell from above. In addition to Webb falling, rock started to fall around the ladder, between the chute and the shaft (Tr. 175). Later it was learned that the top access door had opened.[9] The material spilled out of the open door and off the platform. The rock tumbled down the chute after Webb (Tr. 49). Webb hit the bottom landing, and rock fell on top of him.

Brady heard miners yelling. He looked around and saw Webb lying injured (Tr. 176). At first Brady thought the injured person was either Fadely or Winey. However, both men had taken cover under the landing and were safe (Tr. 192). An electrician who was working at the top of the chute also heard the yelling. He climbed down the ladder and closed the open access door. The material stopped falling, and efforts to aid Webb commenced (Tr. 176).

R. Lincoln Derick, the mine's technical safety manager, was called at home and told of the accident. He immediately contacted MSHA Inspector Philip Gibson to report it (Tr. 259). Then, Derek went to the mine where he made sure that Webb was air-lifted to a hospital (Tr. 160).[10]

Gibson also went to the mine. He arrived around 6:30 p.m. He met with Michael Ludlow, the mine manager, Diana Ponikvar from the mine's safety department and Gary Sigman, of the Routt County Sheriff's office (Tr. 19). Sigman already had collected written statements from those with first-hand knowledge of the accident and of the conditions surrounding it. Gibson acquired copies of the statements (Tr. 19-20).

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[8] Robert Breland, MSHA's Western Regional Manager for Educational Field Services, who assisted in the accident investigation, was of the opinion that Webb "probably [didn't] know himself" what he was doing (Tr. 140).

[9] Winey speculated that Brady might not have sufficiently secured the latch after closing the door or that the door might have opened on its own due to a design flaw (Tr. 234-236). There also was speculation that Webb might have opened it, but no one knew for sure (Tr. 140, 49).

[10] Webb suffered significant head injuries (Tr. 83, 115; Gov. Ex. 11). First, Webb was treated in an intensive care unit. Later, he was taken to a rehabilitation hospital in Denver where he required extensive rehabilitation therapy (Tr. 260-261).

Gibson proceeded underground with Ludow, Ponikvar, Sigman, and others (Tr. 20). They went to the top of the chute (Tr. 51). Gibson noticed rocks extending along the belt near the hopper. The rocks ranged in size from one inch to eight inches in diameter (Tr. 23). Gibson and the others then traveled to the bottom of the chute. At the lower conveyor belt, Gibson noticed more loose rock and dirt (Tr. 23). Gibson and Sigman proceeded up the ladder to look more closely at the chute and the landings. Gibson could not recall if he and Sigman went all the way to the top (Tr. 23, 51). As a result of what he found, Gibson issued an order to Twentymile requiring it to obtain MSHA's approval before resuming normal operations. Shortly thereafter, Gibson left the mine.

Gibson returned the next morning and met with Derick and other company officials. Officer Sigman again was present (Tr. 25). According to Gibson the group "talked about the chute being plugged [,] . . . where various folks were and how many were there[,] . . . where . . . [Webb] may have been [, and] . . . the debris that had come from the open . . . door" (Tr. 25-26).

In the meantime, Twentymile, in compliance with Part 50 of the Secretary's regulations, which requires an operator to notify MSHA of an accident and to investigate it (30 C.F.R.§ 50.1), completed and filed an investigation report form with MSHA (Gov. Ex. 11; Tr. 116). Although, the form stated that the "task being [p]erformed at [the] time of [the i]ncident" was "cleaning plugged chute" Twentymile did not complete the line where it was asked to state whether the person involved in the accident was experienced in the task and whether the person had been task trained (Gov. Ex. 11; Tr. 115).

On June 8, the day after Twentymile sent the form to MSHA, Gibson returned with other MSHA officials (Tr. 26-27). The MSHA party and company personnel measured the accident site and company officials photographed it (Tr. 27, 48).[11] On June 9, Gibson and other MSHA officials were back at the mine (Tr. 28). They and company personnel discussed what could be done to lessen the hazards that the accident evidenced.

On June 13, Gibson returned, accompanied by MSHA Inspector Ed Vetter. Gibson and Vetter drew up a list of mine personnel to interview. On June 14, they interviewed Brady (Tr. 31). On June 15, they interviewed Fadely, Winey and two other miners on Brady's crew (Tr. 32). The inspectors also reviewed the company's training records. As a result of the investigation, the interviews, and the review, Gibson concluded the company had violated section 48.7(c), and he issued Order No. 7618153 (Tr.39).

Gibson "did not believe . . . the miners who . . . participated in the unclogging or the attempt to unclog the chute had received the task training . . . they . . . required" (Tr. 39). In Gibson's view the miners who needed training were Brady, as well as Winey, Fadely, Webb,

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[11] Seven of the photographs were entered into evidence (Gov. Ex. 3).

Bricker, and another member of Winey's crew, Eric Hough. In fact, Gibson believed that all of Winey's crew who were sent to help unplug the rock chute should have been trained (Tr. 59-65).

Gibson noted that there were other chutes (transfer chutes) that were a part of the conveyor belt system and that the other chutes previously had clogged. Indeed, Winey testified that the other chutes clogged "pretty regularly" (Tr. 222-223). Miners, including members of Winey's crew, had been assigned to unplug the other chutes (Tr. 67, 222-223). Gibson acknowledged, however, that the transfer chutes were much smaller (three to four feet high and two to three feet across) and most of them were located on the surface. Therefore, while the skills acquired in unplugging transfer chutes would to some extent be useful in unplugging the rock chute, the miners unplugging the rock chute still needed task training for the job (Tr. 67).

Gibson found the alleged violation to be S&S because "if . . . [persons] were struck by that rock material [, they] could . . . be injured [seriously,]" and "it was reasonably likely that a person could be injured and that [the] injury would be severe" (Tr. 42). He also was concerned that miners could be injured by falling off of the ladder (Id.). In his opinion, miners on the ladder and landings "[c]hecking out the doors" are exposed to falls and slips if they are not trained (Tr. 43, 44).[12]

One month after the accident, Gibson and three other MSHA employees finished an accident report which they submitted to William Denning. Denny is the staff assistant to the MSHA district manager. He also is the MSHA district accident investigation coordinator (Tr. 75). After reviewing the report, Denning agreed with Gibson that there had been a violation of section 48.7(c). Denning believed that crew members sent to unplug the chute should have received task training because, "[t]hey could be expected to work on this rock chute any time it would plug up or . . . need maintenance" (Tr. 86) . Denning added, "It's pretty obvious they put the four doors in there so they would have access to that chute in order to keep it maintained and keep the material flowing properly through that chute" (Tr. 86).

Denning acknowledged that Webb went up the ladder on his own, but Webb "was assigned to help unplug the chute because he worked for . . . Winey" and Webb, like the other members of Winey's crew, should have been trained (Tr. 94).[13]

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[12] After the issuance of the order, the company took several steps to remedy Gibson's concerns. The landings were reconfigured by offsetting them. This limited the length any material or person could fall (Tr. 37; See Gov. Ex. 3 at 6). The company also put gratings over the doors and, as previously noted, installed chains on the doors to better secure them from opening all the way (Tr. 55-56). Finally, the company adopted safe work procedures for work on and around the chute and instructed miners in the procedures (Tr. 45; Gov. Ex. 4).

[13] Not surprisingly, Denning's opinion was disputed by Winey, who maintained that unplugging the rock chute is not a part of his crew's regularly assigned duties, and noted that he and his crew had not unplugged the chute prior to or since the accident (Tr. 219, 242).

Breland also reviewed the report (Tr. 105). He agreed with Gibson that the company violated section 48.7(c). The individuals assigned the task of unplugging the chute were not given "any kind of training relating to . . .[the] . . . chute" (Tr. 106).[14] To Breland, it was "inconceivable that . . . [the company] would allow people in the area [of the chute] without giving them some instructions" (Tr. 132-133; See also Tr. 146-147).

Brady, on the other hand, believed that the purpose of task training was to "familiarize people with routine jobs" and that unplugging the rock chute on June 6 was not "routine" (Tr. 194). Derick, who was responsible for the supervision of all Part 48 training at the mine, agreed with Brady (Tr. 246). Derick stated, "the definition of [']task['] in [P]art 48 is very clear[,] . . . it is a job that is done on a routine basis as part of the normal job duty" (Tr.272-271). Unplugging the chute was not thought to come within the definition, because there was nothing routine or normal about the job (Tr. 272-273). The company had "no anticipation [the] chute would plug" because the chute was "designed to avoid" clogging (Tr. 271-272). Derick also explained that the plug was caused by the fact that a large amount of rock from the roof was taken down and the material sat "quite a bit longer than it normally would." The only place to store the material was the mine floor, where the material became damp and sticky (Tr. 277).

THE VALIDITY OF ORDER NO. 761853

Twentymile challenged the validity of the Section 104(g)(1) order by arguing it was impermissibly vague in identifying those who needed training and in describing the task for which training was needed (Tr. 13-14). At the hearing, counsel for the Secretary amended the order to include the names of six persons who lacked the required training (Tr. 71). Counsel for Twentymile did not object to the amendment but reserved his right to continue to challenge the validity of the order, maintaining that it still was not sufficiently specific in identifying the task requiring training (Tr. 71; Twentymile Br. at 16, n.10). The Secretary countered that the order was valid as written and amended (Sec. Br. at 6-8).

The requirement for specificity in a section 104(g) order is in general the same as that for a section 104(a) citation. 30 U.S.C. § 814(a). The order must allow the operator to ascertain the conditions that require correction and prepare adequately for a hearing. See, Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993). Section 104(g) states that if an inspector "find[s] employed at a mine a miner who has not received the requisite safety training . . .the . . . [inspector] shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal . . . mine."

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[14] The Secretary offered into evidence the available Forms 5000-23 of Kyle Webb and other miners who were involved in unplugging the chute (Gov. Ex. 8). The forms are the training records MSHA requires an operator to fill out upon completion of miners' training (See, 30 C.F.R. § 48.9). Breland noted that training for unplugging the rock chute was not mentioned on the forms (Tr. 125, 128).

30 U.S.C. § 814(g). As initially written, the order applied to "[p]ersonnel . . . who had reason to work from or travel on the ladders and landings of the 'Rock Chute'. " Twentymile, not the inspector, controlled work assignments at the mine. Presumably, the company knew whom it would assign "to work from or travel on the ladders and landings." Of course, listing specific names of such persons would have been permissible, and might even have been preferable, but a class description also was permissible because of the operator's presumed knowledge. Therefore, I conclude the order as originally written was not deficient in identifying those to whom it applied.

Even had it lacked sufficient specificity, the flaw was corrected when the order was amended without objection, to include the names of those who were not given the requisite task training. While Twentymile questioned inclusion of supervisors Winey and Brady in the group, the Secretary's Program Policy Manual ("PPM") makes clear that "if non-supervisory work is performed [by supervisors], the appropriate training must have been completed" (III PPM 48.2(a)(1)/48.22(a)(1) at 13 (1990)). Both Brady and Winey worked to unplug the chute.

Regarding the task for which training was required, it should be remembered that the order was issued in the context of the accident investigation. Everyone at the mine knew the accident occurred during Twentymile's attempts to unplug the rock chute. The order described the subject task by describing what the subject miners were doing: "These persons entered the area to work at unplugging the chute before they had received safety training." There was no doubt as to the task for which training was required.

Finally, the record is devoid of evidence that the wording of the order in any way hindered Twentymile in its ability to present a cogent case.

For these reasons, I conclude that the order is valid as written, and as amended.

THE VIOLATION OF SECTION 48.7(c)

Twentymile challenges the alleged violation of section 48.7(c) by asserting that the work of unplugging the rock chute is not a "task" as the word is used in section 48.7(c) and, therefore, that task training pursuant to regulation was not required (Tr. 11-12; Twentymile Br. at 7-8). Twentymile points out that the word "task" is defined in part as "a work assignment that involves duties of the job that occur on a regular basis", and it argues that "[b]y definition, an activity that is not a part of a miner's regular duties, but that the miner may be called upon to do on an occasional or episodic basis, if that often, is not a 'new task' for which the miner must be task trained"(30 C.F.R. §48.2(f); Twentymile Br. at 9). According to Twentymile, because the chute had not previously clogged, unplugging it was not a duty to which miners regularly were assigned (Twentymile Br. at 9).[15]

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[15] Twentymile cites Bridger Coal Co., 23 FMSHRC 887 (August 2001) (ALJ Weisberger), in which Judge Weisberger held that a miner who operated an overhead crane by

Twentymile further points out that the Secretary, in revising the wording of the regulation requiring task training for miners working in sand and gravel mines (30 U.S.C. § 46.2(n)), eliminated the phrase "duties of a job that occur on a regular basis" from the definition of "task" because, "[A] literal reading . . . suggest[ed] that task training would not be required" in instances "where a miner [was] assigned to perform a task on a one-time basis" (Twentymile Br. at 11, quoting 64 Fed. Reg. 53097 (September 30, 1999)). However, the phrase was retained in the definition of "task" that applies to underground miners. Therefore, in Twentymile's view, the definition can (and should) be read as not requiring task training for one-time jobs.

The Secretary responds that unplugging the rock chute was a part of the larger overall task of maintaining the mine's conveyor belt transport system. Because the chute was an integral part of the conveyor belt system, and because maintenance of the system, including the chute, occurred on a regular basis, the men assigned to unplug the chute should have been trained how to do the job safely before they went to work on the chute. Or, as the Secretary put it, "Conveyor system maintenance, is appropriately categorized as a 'task'. Unplugging the chute would be a task within this larger category" (Sec. Br. at 11, See also, Sec. Br. at 12-13). The Secretary also states that she is entitled to "great deference" in her interpretation on the regulation (Sec. Br. at 16-18).

It is clear that none of the miners who was assigned to unplug the chute was trained in the job prior to being sent to do it (Tr. 32, 39, 125, 128; Gov. Ex. 8). Section 48.7(c) applies to "[m]iners assigned a new task not covered in [section 48.7(a)]." 30 C.F.R. § 48.7(c). Section 48.7(a) sets out the training requirements for "[m]iners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor system operators, and those in blasting operations." The miners who were sent to unplug the rock chute were not operating mobile equipment, drilling machines, or the haulage and conveyor system. Nor were they blasting. If they were required to be trained at all, it was under section 48.7(c), and then only if sending them to unplug the rock chute was a "new task, " that is a "work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." 30 C.F.R. § 48.2(f).

Because the question of when a job occurs on a "regular basis" may depend on the conditions and work practices existing at the particular mine involved, it must be resolved by application of the "reasonable prudent person" test. Would a reasonably prudent operator

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fn. 15 (continued)
removing slack from the crane's rigging cables was found not to need task training because the Secretary did not prove the miner was assigned to do the job "on a regular basis" (23 FMSHRC at 890; see also Tr. 15). The case is inapposite. Here, the Secretary offered proof that was missing in Bridger.

familiar with the mining industry and the protective purposes of the standard, have recognized that unplugging the rock chute would occur on a regular basis and, therefore, that training was required prior to sending miners to unplug it?

I conclude that the answer is, yes. While the chute was newly installed and had not previously clogged, it was reasonable for Twentymile management to anticipate that the chute would clog as mining continued. Indeed, there is evidence the company actually foresaw the event. As Denning persuasively testified, the fact that the chute was provided with four observation doors which, inter alia, allowed access to the interior of the chute when it malfunctioned, is inferrentially indicative that management not only anticipated routine maintenance would be needed, but also that the chute would malfunction (Tr. 86). These, of course, are the very doors that allowed Brady to assess the extent of the jam. Further, the fact that Twentymile installed two internal devices to indicate when material stopped flowing in the chute, is another indication that Twentymile anticipated the kind of problem that led to the alleged violation (Tr. 163).

Moreover, although the rock chute had not clogged previous to June 6, the phenomenon of clogged and blocked chutes was not new to the mine. There were other chutes, transfer chutes, that served as part of the conveyor belt system. Inspector Gibson testified, and Twentymile did not dispute, that these chutes had clogged in the past and that miners had been assigned to unplug them (Tr. 67-68). Although the transfer chutes were far shorter and of a much smaller capacity than the rock chute, like it, their function was to serve as a conduit in transferring material, and it was reasonable to expect the rock chute also to jam. This was especially true because both kinds of chutes at times handled the same type of wet, sticky material, that had a known propensity to jam chutes. It was, as Brady testified, a "recurring problem" (Tr. 190).

Was it also reasonable for Twentymile to anticipate that the rock chute would clogg on a regular basis? Again, I conclude the answer is, yes. Brady testified that the transfer chutes became plugged every "four months, five months, six months" (Tr. 190). Given the fact the rock chute was used to transfer similar material, it was reasonable to expect the rock chute would clog at least as frequently.

"Regular" is defined as "recurring . . . at stated, fixed or uniform intervals." Webster's Third New International Dictionary (2002) at 1913. The phrase "regular basis" connotes repetition and recurrence. While there may be a point at which a recurrence is so distant as to render it outside the standard, a job that recurs as much as two or three times a year is of the kind that I find contemplated within its meaning. Training required by the standard is intended to protect miners from repetative hazards. Miners are not likely to forget safety procedures and precautions they are taught for jobs that recur every four, five or six months. For example, refresher training is required annually. See, 30 C.F.R. § 48.8. Therefore, I find it was reasonable for Twentymile to conclude the task of unclogging the rock chute was one that would occur on a "regular basis" and that in failing to train the miners assigned to unplug the rock chute prior to sending them to do the work, Twentymile violated section 48.7(c).

S&S AND GRAVITY

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory 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, 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).

I have no difficulty concluding that the violation was a significant and substantial contribution to a mine safety hazard. The purpose of section 48.7(c) is to ensure that miners assigned a repetitive job with which they have had no previous experience understand the hazards associated with the job and the safety measures necessary to guard against the hazards. The miners must learn these lessons before they embark on the job. Twentymile's failure to provide the required training made it reasonably likely the miners assigned to unplug the rock chute would not have sufficient knowledge of available techniques and procedures to protect themselves from the hazards associated with the job. Rather than being trained in hazard avoidance as the standard contemplates, Winey's crew was sent to face the unknown.

Several dangers were inherent in unplugging the chute. The landings and the ladder presented the potential that the miners could slip and fall. Moreover, as the accident showed, if an access door opened, clogged material could spill out of the chute and present a tripping and stumbling hazard, or could fall and hit miners working below. The miners' lack of training made it reasonably likely an accident would occur. Moreover, given the heights at which miners could be traveling or working and the heavy material that could spill from the chute, any such accident was reasonably likely to cause a serious injury.

In addition to being S&S, the violation was serious. While I am not holding that the accident was caused by a lack of task training – the record does not permit conclusions regarding what Webb was doing, what caused him to fall, or why the material escaped from the chute – it is clear to me that the lack of training in applicable safety procedures created conditions under which a miner could have fallen from the chute's ladder or landing or could have stumbled on or been struck by escaping material and, as I have found, the resulting injury could have been serious. Moreover, the lack of training endangered not only Webb, but all who were sent to unplug the chute, a fact that augmented the violation's gravity.

NEGLIGENCE

The company was negligent in causing the violation. Twentymile was aware that as mining continued its mining process was likely to yield wet, sticky material. It also knew that this material would tend to clog the mine's chutes (Tr. 190). Even though previous clogs happened in chutes of decidedly less length and volume, I have found that the company's installation of doors to access the chute and two clogging signal devices are inferential evidence that Twentymine anticipated the clog. Despite this, the company failed to provide the necessary task training to miners who were assigned to free the chute. Had it exercised reasonable care, it would have done so.

OTHER CIVIL PENALTY CRITERIA

There is no indication in the record that the size of any civil penalty assessed will affect Twentymile's ability to continue in business, and I find that it will not.

The mine is very large with 331 employees and coal production of approximately 8.6 million tons per year (Tr. 81).

The company abated the violation in good faith by issuing written instructions in safe work procedures and by instructing the miners who work at the rock chute in those procedures (Tr. 45; Gov. Ex. 4).

In proposing a civil penalty for the violation, the Secretary indicated that there were a total of seven violations that were applicable to Twentymile's history of previous violations (Petition for Assessment of Penalty at Ex. A). This is a minimal history of prior violations. In addition, while not necessarily indicative of the company's history of previous violations, the company's very low nonfatal, lost time accident rate is instructive (See Tr. 81).

VALIDITY OF THE PENALTY PETITION

The section 103(k) order in which the violation was alleged was issued on June 16, 2000. Twentymile contested the order and alleged violation on July 11, 2000. The penalty assessment for the alleged violation was issued on November 9, 2001, almost 17 months after the order was issued. Twentymile asserts the Secretary's delay in proposing a civil penalty for the violation

should invalidate the civil penalty proceeding (Tr. 13). The Secretary counters that the penalty was proposed within a "reasonable time" and that Twentymile was not prejudiced (Sec.'s Closing Arg. at 20-25).

I conclude the delay does not warrant dismissal of the petition. Section 105(a) of the Act requires the Secretary to notify an operator of a proposed civil penalty "within a reasonable time after the termination of . . . [an] inspection or investigation." 30 U.S.C. § 815(c). The Act gives no guidance regarding the duration of a "reasonable time," but MSHA provides some direction in its PPM, there defining "reasonable time" as "normally . . . within 18 months of the issuance of a citation or order" (III PPM, Part 100.6(f) at 49 (July 3, 2001). The Secretary met this definition.

In addition, the Senate Committee, when drafting the Mine Act, commented on the concept of "reasonable time." It stated, "[T]here may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does *not* expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding" S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978) (emphasis added). In light of the Senate Committee's reluctance to nullify a penalty proceeding when the Secretary has delayed notifying the operator of a proposed penalty, the Commission has stated that if a proposal is delayed, the judge must consider: (1) the reason for the delay and, (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary's delay in filing the penalty petition. Steele Branch Mining, 18 FMSHRC 6, 14 (January 1996).

The testimony reveals that the primary reason for the delay in proposing a penalty to Twentymile was a changed in MSHA personnel and a failure by the new employee to understand his duties. MSHA would not propose a penalty until its accident report was issued and until information based on the report was sent to MSHA's Assessment Office. The accident report would not be issued until it was reviewed by its author's supervisor.

Denning, who was the primary author of the report, explained:

> [P]robably it took [me] until October to get started working on . . . [the report] . . . because of other items that I had to do. I remember in November contacting Mr. Derick to get some additional information. He faxed me some sketches sometime in November.
>
> So I think it was near the end of November when I . . . had the investigation report fairly completed and then . . . it . . . [went through] a review process . . . . [T]here are two assistant district managers [that] have to review it[,] plus the district manager.

> [O]nce I get their feedback on the report I finalize it and it goes to the district manager for his signature.

(Tr. 75-76).

Because the district manager, Mr. Kuzar was away from the office, the report was reviewed and signed by Gary Worth who was the acting assistant district manager for technical programs (75. 89). The report was issued on January 4, 2001 (Tr. 46, 89; Gov. Ex. 5).

Almost seven months, then, elapsed before the report and the violation alleged in the subject order were forwarded to MSHA's Assessment Office on July 31, 2001 (Tr. 91-92). According to Denning, this delay was due to a personnel change in the office which put a new person into the job of completing the special assessment form that accompanied the report. The person did not realize he was supposed to complete the form, and it was not until much later that Denning and others realized the form had not been completed (Tr. 77, 91). Denning stated: "[The] special assessment review form got waylaid" (Tr. 92). After the report and form reached the Assessment Office, it took the Assessment Office approximately three and one half months to issue the proposed penalty.

It is understandable that MSHA did not propose penalties while the report and the special assessment form remained unfinished. Findings regarding the validity of the alleged violation, its gravity and Twentymile's negligence could have been impacted by the report and the form.

It also is understandable that there was a delay in sending the report and form to the Assessment Office. The delay was caused by a shift in personnel and by the failure of the person who should have completed the form to understand that it was one of his duties. Personnel shifts and the instruction of employees in their new duties are ongoing facts of the life in the agency and, although infrequent, instances in which new employees fail to comprehend the full extent of their duties occur.

In addition, the lapse in time between the citation of the violation and the proposal of the penalty was not prejudicial to Twentymile. The company presented a complete and cogent defense to the Secretary's allegations, and at no time during the proceedings did it show that its defense was hindered by the delay.[16]

For these reasons, I decline to dismiss the petition.

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[16] Twentymile's assertion that the witnesses' faded recall may have prejudiced it is not persuasive (Twentymile Br. at 26-27). The only specific witness singled out by the company is Inspector Gibson, whose lack of recall is asserted to have "raised the potential for prejudice, if not actual prejudice" (Twentymile Reply at Br. 21). Gibson was the Secretary's witness not Twentymile's, and it is by no means clear to me how his testimony or lack thereof was detrimental to Twentymile.

CIVIL PENALTY

The violation was serious, the operator is large, and the size of the penalty will not affect Twentymile's ability to continue in business, all of which warrant a large penalty. However, these criteria are countered, in part, by Twentymile's minimal history of previous violations.

Considering all of the civil penalty criteria, I find that the Secretary's proposed civil penalty of $6,000.00 is excessive, and I conclude that a penalty of $1,500.00 is warranted.

ORDER

Within 30 days of the date of this decision, Twentymile **SHALL** pay to the Secretary a civil penalty of $1,500.00 for the violation of section 48.7(c) and upon payment of the penalty, Docket No. WEST 2000-131 is **DISMISSED**.[17] In addition, because I have found Order No. 7618153 is valid, Twentymile's contest of the order is **DENIED** and Docket No. WEST 2000-480-R is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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[17] Payment may be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 360250M, Pittsburgh, Pennsylvania 15251.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 15, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-33
Petitioner	:	A. C. No. 46-07537-03557
v.	:	
	:	
VANDALIA RESOURCES, INCORPORATED,	:	
Respondent	:	Alloy / 4 Mile Mine

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and James F. Bowman, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Mt. Hope, West Virginia, on behalf of Petitioner;
David Hardy, Esq., Spilman, Thomas & Battle, Charleston, West Virginia, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," charging Vandalia Resources, Incorporated (Vandalia) with three violations of mandatory standards and proposing civil penalties of $1,948.00, for those violations. The general issue before me is whether Vandalia violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation No. 4642772, issued pursuant to Section 104(d)(1) of the Act, alleges two "significant and substantial" violations of the standard at 30 C.F.R. § 77.1713(a) for which the Secretary seeks a single civil penalty of $1,500.00.[1] The citation charges as follows:

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[1] 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

After the certified mine foreman examined the Black Top Roadway at the mine between 5:15 a.m. and 6:15 a.m. he noted in the Preshift-Mining Examiners Report book that the roadway was "snow covered, slick." The report was dated 01/18/02. The condition of the roadway was not corrected and the foreman did not report the condition to anyone else. The foreman did not stop traffic from using the roadway. At approx. 8:30 a.m. a tractor-trailer slid out of control on the same slick roadway and went into the roadway ditch. Approx. 30 minutes later a second truck slid out of control on the roadway and slid backwards into the first truck that wrecked. The foreman knew the roadway was hazardous and did not make any effort to correct the condition.[2]

The cited standard, 30 C.F.R. § 1713(a), provides that "[a]t least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator."

The Alloy/4 Mile Mine is a surface coal mine with about 12 miles of roadways. Most of the roads are gravel but some have been paved with blacktop. The area at which the cited accidents occurred was the upper and steeper portion of the blacktop roadway. Certified Mine Foreman Grover Waggoner arrived at the mine around 5:15 a.m., on January 18, 2002, and began his preshift examination traveling all 12 miles of roads. He observed while driving the gravel road along the ridge, the highest area, that it was cold, probably 30 degrees to 32 degrees, and

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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.

[2] According to the citation the first violation occurred based on snow conditions extant between 5:15 and 6:15 a.m., and the second violation occurred based on conditions extant 2 ½ to 3 hours later when Foreman Waggoner learned of the first accident caused by the tractor-trailer sliding on ice, and continuing to the second accident. The credible evidence shows that, by the time of the accidents, the road conditions had changed from merely snow covered to icy - - presumably from compaction of the snow by vehicular traffic.

was snowing but not "hard." It continued to snow for another 10 or 15 minutes. Waggoner maintains that he nevertheless had no trouble driving the area. He then met with the road grader operator and directed him to continue working on the roads and to "take care of the snow problems." (Tr. 295).

Waggoner then drove to the blacktop road, passing at around 6:00 a.m., the area where the accidents later occurred. The road was snow-covered with, according to Waggoner, about one-half inch of snow. Waggoner admitted at hearing that such roads, when snow covered, are usually slippery. After completing his preshift examination, Waggoner filled out his preshift report. He noted on this report under the heading "Violations and Other Hazardous Conditions Observed and Reported," and the under the subheading "Location," that "haul roads-snow covered, slick." In addition, under the "Remarks" subheading he noted "LT. snow." (Gov't Exh. No. 6).

There is no evidence that snow was cleared from the blacktop road after Waggoner filed his preshift and onshift reports and before the accidents. Moreover, Waggoner did not stop traffic from using the road or notify the guard shack at the mine entrance to bar entry. Shortly after 8:30 a.m., a tractor-trailer slid on ice on the blacktop road and went out of control into a ditch. About 30 minutes later, a second truck slid out of control in the same area and struck the first truck.

Within the above framework of evidence I find that Waggoner indeed, found and reported that between 5:15 a.m. and 6:15 a.m. on January 18, 2002, the haul roads, including the blacktop road, were hazardous and that such conditions, at least in the area of road where the accidents later occurred, were not corrected. It is undisputed that the road was still slippery from ice at around 8:30 a.m. to 9:00 a.m., when the truck accidents occurred. (Tr. 29, 40; 185-186). Indeed, based on the credible testimony of Inspector Slaughter, of the Department of Labor's Mine Safety and Health Administration (MSHA) I find that even after more than an hour following the second accident, evidence of ice was still present. (Tr. 63, 72).

Under the circumstances I find that the first violation has been proven as charged. In reaching this conclusion I have not disregarded Waggoner's claims that when he made the entry in the preshift examination book "haul roads - snow covered, slick" he meant only the "haul road down toward the pit area, near the bottom" and not the area of blacktop haul road where the accidents occurred (Tr. 258). I can give such self-serving testimony but little weight, however, in light of Waggoner's contemporaneous and contrary written preshift and onshift report. A certified mine foreman such as Waggoner must be held accountable for the wording and accuracy of such reports and he is at peril for any lack of specificity or undisclosed intent.

Within the above framework of evidence it is also clear that the violation was "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious

nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory 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, 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).

The slick conditions of the road could have and, indeed, did result in at least two truck accidents. Based on the credible and largely undisputed testimony of Inspector Slaughter, I find that these trucks were reasonably likely to have struck other vehicles using the haul road, to have passed over the berm or caused a fire by rupturing a fuel tank. Under such circumstances it is reasonably likely for serious injuries or fatalities to be expected.

The Secretary also alleges that the first violation alleged in the citation was the result of "unwarrantable failure." In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined 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). The Commission has also stated that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, the Commission rejected such an interpretation. A breach of a duty to know is not necessarily an unwarrantable failure. The thrust of *Emery* was that unwarrantable failure results

from aggravated conduct, constituting more than ordinary negligence. *Secretary v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

I find as to the first violation alleged in the citation that the Secretary has failed to sustain her burden of proving "unwarrantable failure." I accept the undisputed testimony of certified Foreman Waggoner that, after he discovered the snow conditions on the haul roads between 5:15 and 6:15 a.m., he instructed the road grader operator to continue working on the roads and to "take care of the snow problems." I further note that Waggoner also wrote in his on-shift report that the grader had been operating since 5:40 that morning. Under these mitigating circumstances I do not find Respondent chargeable with that high degree of negligence required to constitute "unwarrantable failure."

In reaching this conclusion I have not disregarded the Secretary's claims that a road grader could not, in any event, adequately remove snow from a paved road. I do not, however, find these claims sufficient to discredit the mitigating efforts of Waggoner. Administrative notice may be taken of the fact that public agencies often use similar equipment for snow removal on paved roads.[3]

The second violation alleged in Citation No. 4642772 is based upon the road conditions extant some 2 ½ to 3 hours later, at the time of the first accident and continuing to the time of the second accident. Contract truck driver Doug Hassler arrived at the mine around 8:30 a.m. and proceeded up the haul road (Tr. 68, 184). As he was approaching the top of the hill he felt that he was on ice. According to Hassler his truck broke traction and, with its brakes locked, slid backwards on the ice into a ditch next to a berm. Hassler then called Foreman Waggoner on the CB and told him that the road was "too slick, and I slid back over against the bank into the ditch" (Tr. 186-187). Waggoner responded by sending a grader to pull the truck out of the ditch. According to Hassler, the grader later arrived but could not stop because the road was "too slick." The road was so slippery Hassler had difficulty even walking on it. Hassler also testified that a logging truck also failed to make the hill, sliding back into the left-hand ditch.

Waggoner acknowledged that he was notified of the first accident involving Hassler's ammonium nitrate truck around 9:00 or 9:15 that morning. He sent the grader to pull the truck out of the ditch. Waggoner also went to the accident scene about 30 minutes after it was reported to him. According to Waggoner, he never left his truck to observe the road conditions but he "didn't think there was any snow to be cleared in that area" (Tr. 298). He thought the road was

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[3] The Secretary appears to also argue in her post-hearing brief that this violation, based on conditions extant between 5:15 and 6:15 a.m., *i.e.*, snow on the road, was the result of "unwarrantable failure" based upon the knowledge of conditions present when Foreman Waggoner was at the cited area following the first truck accident at around 9:00 or 9:15 a.m., *i.e.*, ice on the road. However, such knowledge of conditions extant some three hours after the alleged violation could not show that the earlier violation, based on knowledge of different conditions, was the result of "unwarrantable failure" (or of high negligence).

"mostly just wet at that time" (Tr. 297). Waggoner acknowledged that even after notice of the accident and visiting the accident scene he did nothing to clear the road.

According to the undisputed testimony of Walter Carte, a truck driver employed by an independent contractor, when he approached the top of the haul road (apparently after 9:15 a.m.) he observed the tanker truck stuck in the ditch. After passing this truck, Carte's tires started to spin on the icy road. He "killed" his engine but began sliding backwards on the ice. Carte's truck then slid into the tanker containing ammonium nitrate. According to Carte, the road did not appear to have been treated and he could not even see the blacktop beneath the ice (Tr. 30-32, 40, 44, 50). Indeed, even later, at around 10:30 that morning, when Inspector Slaughter arrived, he could see slide marks in the ice beneath the truck and melting ice on the road (Tr. 72). This credible testimony is not disputed.

Within this framework of evidence I conclude that, under the cited standard, Waggoner had a duty, after having knowledge of the circumstances of the first accident and knowledge of the extant conditions when he was on site shortly thereafter, to correct the slippery road conditions. His failure to correct those conditions, which led to the second accident, constituted the second violation of the cited standard. In light of the credible testimony of both truck drivers and Inspector Slaughter and the fact that both trucks slid on the icy road, I do not find credible Waggoner's self-serving testimony that when he saw the road after the first accident he thought the road only looked "wet" and that he "didn't think there was any snow to be cleared." This violation was also "significant and substantial" and of high gravity for the same reasons previously stated.

This violation was also the result of "unwarrantable failure" and of high negligence. The law regarding "unwarrantable failure" has previously been discussed. Here, Waggoner's failure to assure that corrective measures were taken to remedy the slippery road conditions, after specific notice of such conditions causing the first accident and having observed the road conditions first-hand, clearly constituted an aggravated omission equivalent to reckless disregard, indifference and a serious lack of reasonable care.

Citations No. 4642773 and 4642774 allege "significant and substantial" violations of the standard at 30 C.F.R. Section 77.1607(b). That standard provides that "mobile equipment operators shall have full control of the equipment while it is in motion."

More specifically, Citation No. 4642773 charges as follows:

> The driver of the Freightliner tractor -trailer truck (Car No. 1167) being used at the mine to haul ammonium nitrate over the Black Top Road did not have full control of the truck while it was in motion. It slid backwards out of control and wrecked because the roadway was snow covered and slick. The driver was a contractor employee. The foreman for this production operator examined the roadway before the accident occurred and noted the "snow covered and slick"

roadway in the examiner's report but the company did not correct the hazardous condition. The truck slid out of control near the top of the grade of the Black Top Road near the parking area and maintenance area at the mine.

Citation No. 4642774 charges as follows:

> The driver of the Ford LTL 9000 tandem gravel truck (Veh. ID No. A45270) being used at the mine did not have full control of the truck while it was in motion in that the driver lost control on the snow covered, slick Black Top Road near the top of the grade near the parking lot and maintenance area and the truck slid backwards out of control down the grade and stopped when it hit another truck that had already slid out of control at the same location. The driver was a contractor employee. The foreman for this company examined the roadway before the accident occurred and noted the "snow covered and slick" roadway in the examiner's report but the company did not correct the hazardous condition.

It is undisputed that both of the cited truck drivers were employed by independent contractors and not Vandalia. Vandalia claims that it was an abuse of the Secretary's discretion to therefore charge it for violations of its independent contractors. It is well-established law, however that the Secretary may hold an operator strictly liable for all violations of the Act which occur on its mine site, whether committed by its own employees or those of its contractors. *Mingo Logan Coal Company,* 19 FMSHRC 246, 249 (February 1997), *aff'd* 133 F.3d 916 (4th Cir. 1998)(table)(citing *Bulk Transportation Services*, 13 FMSHRC 1354, 1359-60) (September 1991).

The Commission has also recognized the Secretary's discretion in proceeding against an operator, its independent contractor, or both, for violations committed by a contractor. *Id.* (citing *Consolidation Coal Co.*, 11 FMSHRC 1439, 1443 (August 1989). An operator challenging the Secretary's enforcement discretion bears a heavy burden of establishing that there is no evidence to support the Secretary's decision or that the decision is based on a misunderstanding of the law. *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (January 1998)(citing *Mingo Logan*, 19 FMSHRC at 249-250 n.5). The Commission has considered various factors in determining whether an enforcement action constitutes an abuse of the Secretary's discretion, including the operator's day-to-day involvement in the mine's operations, whether the operator is in the best position to effect safety, and whether the action is consistent with the purpose and policies of the Act. *Extra Energy, Inc.*, 20 FMSHRC at 5.

Vandalia has cited no evidence and presents no argument to support its bald claim that the Secretary abused her discretion in citing it, as well as its contractors, for these two violations. In any event it is clear in this case from the prior discussion of credible evidence that Vandalia was in the best position to maintain its roads in safe condition and that Vandalia's agent, foreman Waggoner, was negligent in failing to correct the known hazardous road conditions. Thus, the failure of truck drivers Hassler and Carte to maintain full control of their vehicles was clearly a

foreseeable result of Vandalia's action and negligent inaction. Accordingly, the Respondent's claims of Secretarial abuse are, in any event, without merit.

In essence, the citations allege that the drivers of the two trucks that slid out of control on the morning of January 18, did not have full control of the trucks, in violation of the cited standard. The testimony of truck driver Doug Hassler is undisputed. It has previously been discussed in reference to Citation No. 4642772 but is necessarily again reviewed herein. On the morning of January 18, 2002, he was employed as a driver by independent contractor Nelson Brothers. According to Hassler, because of the snow conditions that morning, he checked at the guard shack upon entering mine property to determine the best way to travel in the mine and to obtain hazard training. He inquired of the returning truck drivers and was advised that the road was slick but that he should not have any trouble. Hassler testified that he geared down as he approached the top area of the road but found that he was on ice and "broke traction." He locked his brakes and slid backwards into a ditch. Hassler further testified that the road did not look icy where he had slipped.

Walter Carte testified that he was at the mine premises on January 18, 2002, driving a Ford LTL 2000 dump truck for another independent contractor, the Morton Trucking Company. His testimony was also previously discussed, but is also necessarily again reviewed herein. He was loaded with crushed stone to be delivered to the pit. He had been at the mine 15 to 20 times before and was well acquainted with it. He initially had no difficulty with traction and proceeded around the ditched truck. As he began climbing the steepest part of the hill around 9 or 9:15 that morning his wheels started to spin, the brakes locked, the engine stalled and the truck slid backwards striking the ditched truck. Carte also slipped on the ice as he exited his truck. There was about 1 inch of snow on the ground and road had not been plowed or treated with salt. Carte admitted that some "driver error" was involved and acknowledged that when he saw the truck in the ditch he could have stopped his truck. Within the above framework of evidence it is clear that the violations were proven as charged and that the violations were "significant and substantial."

Inspector Slaughter opined in this regard that any of the trucks slipping backwards could have passed through the berm and rolled over. Under such circumstances it would be highly likely for the driver to be seriously injured or killed. Slaughter also noted that the fuel tanks on the trucks could have been punctured in such an accident and ignited. The aluminum nitrate carried by the tractor trailer was also flammable. Finally, he observed that pedestrians could have been crushed between the trucks. Within this framework of evidence I conclude that indeed, the violation was "significant and substantial."

I find the operator chargeable with moderate negligence for these violations. The failure of these truck drivers to have full control of their vehicles was a direct result of Vandalia foreman Waggoner's negligent failure to remedy the hazardous road conditions. The negligence of its agent, its foreman, is imputed to the mine operator, Vandalia. *Fort Scott Fertilizer-Cullor, Inc.*,

17 FMSHRC 1112 (July 1995); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 (February 1991).

Civil Penalties

I find that the first violation charged in Citation No. 4642772 was of high gravity and the result of moderate negligence and the second violation was of high gravity and the result of high negligence. I further find that both violations in Citation No. 4642773 and 4642774 were the result of moderate negligence and involved high gravity. The violations were apparently abated to the Secretary's satisfaction. The operator is large in size and does not have a significant history of violations. It has been stipulated that penalties would not affect the ability of the operator to remain in business. Under the circumstances I consider the Secretary's proposed civil penalties of $1,500.00, $224.00 and $224.00, to be appropriate for the violations charged in Citations No. 4642772, 4642773 and 4642774, respectively.

ORDER

Citations No. 4642772, 4642773 and 4642774 are affirmed and Vandalia Resources, Incorporated, is directed to pay civil penalties of $1,948.00, to the Secretary within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 16, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2003-40-M
Petitioner	:	A. C. No. 09-00076-05533
v.	:	
	:	
WORLEY BLUE QUARRY, INC.,	:	
Respondent	:	Worley Blue Quarry

DECISION

Appearances: Dana L. Ferguson, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Petitioner;
Eric Higginbotham, Elberton, Georgia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the "Act," charging Worley Blue Quarry Inc. (Quarry) with one violation of the mandatory standard at 30 C.F.R. § 56.15005, and proposing a civil penalty of $14,000.00, for that violation. The general issue before me is whether the Quarry violated the cited standard and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

The citation at bar, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the noted standard and charges as follows:[1]

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[1] 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

At 13:15 pm, January 14, 2002, James R, Thornton, Ledge Foreman, sustained several broken bones (leg, shoulder, ribs) and massive head trauma when he fell twenty-eight feet from the edge of the working ledge and landed on the quarry floor. At the time of the accident, the victim was not wearing fall protection and other means of fall protection, such handrails, were not provided. Other employees stated that they were not required and did not wear or use fall protection at anytime when they worked on the quarry ledges.

The owner / operator Eric Higginbotham engaged in aggravated conduct constituting more than ordinary negligence in that he was aware that his employees worked in areas with potential fall hazards without wearing and using the necessary fall protection. This violation is an unwarrantable failure to comply with a mandatory standard.

The citation was modified on February 7, 2002, to note the that the victim of the accident, James R. Thornton, died on February 1, 2002, as a result of the injuries sustained in the January 14, 2002 accident.

It is undisputed that ledge foreman James Thornton, suffered fatal injuries when he fell 28 feet from the edge of the working ledge of the quarry and landed on the quarry floor. It is further undisputed that, at the time of the accident, Thornton was not wearing fall protection and that other means of fall protection such as handrails were not provided at the site of the fall.

Frederick Moore, an inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) investigated the accident beginning on January 15, 2002, the day after the accident. The mine is a dimensional stone quarry where blocks of granite are removed and made into monuments. Photographs taken in the presence of Inspector Moore depict the accident scene (Petitioner's Exhibits 2 thru 6). According to Moore's investigation, ledge foreman Thornton and four other miners had been working on the ledge since seven that morning and none were wearing fall protection. The surviving employees purportedly told Moore that they had not had fall protection for the entire preceding week while working on that ledge. At the time of the accident, at around 1:30 p.m., they were in the process of cleaning up loose rock. There were no handrails at the edge of the ledge at the time of the accident.

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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."

Ledge worker, Anthony Pass, testified that just before the accident, a pan had been moved into position and that they began cleaning rocks off the ledge and tossing them into the pan. The handrails had been removed prior to beginning that work and neither he nor any of the other workers had been provided any personal fall protection that day. According to Pass, in the four months he had been working at the quarry he had never been provided any personal fall protection. Pass also testified that the two safety belts that appeared in one of the photographs taken in the presence of inspector Moore on January 15, were not present when they were working on January 14. Pass also testified that he had never seen safety belts in the tool box depicted in that photograph. Pass surmised that Thornton was attempting to go down the ladder situated near the pan when he fell. The pan had been in position for about ten or fifteen minutes.

The cited standard, 30 C.F.R. § 56.15005, provides that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling . . . ." The reasonably prudent person test for this standard is "whether an informed, reasonably prudent person would recognize a danger of falling warranting the wearing of safety belts and lines." *Secretary of Labor v. Great Western Electric Company*, 5 FMSHRC 840, 842 (May 1983). Under 30 C.F.R. § 77.1710(g), a standard similar to 30 C.F.R. § 56.15005, the Commission also explained that the standard must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Secretary of Labor v. Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

A reasonably prudent person would easily recognize a danger of falling while working near the edge of a 28-foot quarry ledge lacking handrails or other means of fall protection. The credible record shows that Respondent's employees were not wearing safety belts and indeed, were not even provided safety belts while working at a height of 28 feet (Tr. 68, 69, 98, 99, 161). While two safety belts were found on a nearby toolbox the day after the accident, the credible evidence shows that they were not present on the day of the accident and would, in any event, have been of no value without safety lines or lanyards which were not present (Tr. 50-52, 69, 98). Furthermore, Higginbotham himself acknowledged that he had not seen belts (harnesses) in the toolbox for about three and a half weeks (Tr. 138), and had not seen lanyards in the toolbox for six months (Tr. 139). Within the above framework of evidence I find that the Secretary has proven the violation as charged.

In reaching this conclusion I have not disregarded Respondent's evidence that the deceased, Mr. Thornton, had marijuana and the controlled substance benzodiazepines, in his system within eight hours of his fall. However, there is no evidence in the record to show that the substances were present in sufficient amounts to significantly impair Thornton. In addition, this Commission has held that such evidence is not a defense to liability for a violation of the standard at issue. See *Secretary v. Mar-Land Industrial Contractors, Inc.*, 14 FMSHRC 754, at 756 (May 1992).

The violation was also clearly "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts

surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory 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, 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).

Mine owner Eric Higginbotham, while apparently not disputing the violation itself or the seriousness of the violation, argues that he was not negligent in that he had provided training to his employees in the use of personal fall protection. Moreover, Higginbotham claims that Thornton, even though a company foreman, was acting contrary to his training and specific instructions. It appears under the circumstances that Respondent is raising the so-called "Nacco" defense. See *Nacco Mining Co.,* 3 FMSHRC at 849-50. It is, of course, well established law that a supervisor's violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure or negligence purposes. See *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 194 (February 1991). In *Nacco,* however, the Commission declined to impute a supervisor's negligence to the operator for the purpose of assessing civil penalties because it had taken reasonable steps to avoid an accident and the supervisor's conduct did not expose other miners to the risk of injury. 3 FMSHRC at 850. In the instant case however, the *Nacco* defense is unavailable because Thornton's violation did indeed expose other miners to a risk of injury - - for example, if another miner had also fallen in an attempt to save Thornton. In addition, mine owner Higginbotham acknowledged that he was aware that lanyards had not been at the work site for six months.

Moreover, independent of Thornton's negligent failure to wear a safety belt himself, he permitted four of his other crew members to work with the same exposure to fall injuries without

providing safety belts and lanyards or other fall protection. Indeed, according to the undisputed testimony of Anthony Pass, the miners had been working on the ledge from 7 a.m. that morning until the accident at about 1:30 p.m., without safety belts - - although during part of that time a fence barrier was provided. Moreover, Pass had never been provided a safety belt over the entire four months he had been working at the quarry. Under the circumstances it is clear that the negligence of ledge foreman Thornton is imputable to the mine operator. Indeed, Thornton's, and, therefore, the operator's negligence was high and may be characterized as reckless disregard, indifference and a serious lack of reasonable care.

For the same reasons the violation herein was the result of "unwarrantable failure." In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission determined 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, the violative condition herein was both obvious and posed a high degree of danger, See *Midwest Material Company*, 19 FMSHRC, 30, 34-35 (January 1997). It is also noted that the Commission held in *Secretary v. Capital Cement Corporation*, 21 FMSHRC 883 (August 1999) that it would not extend the *Nacco* defense to violations that are the result of "unwarrantable failure" pursuant to Section 104(d) of the Act. 21 FMSHRC at p. 893.

In reaching my conclusions herein I have not disregarded the copies of training certificates submitted into evidence by the Quarry. It is clear however, that either the training was grossly inadequate or completely ignored by both management and employees over an extended period of time and, accordingly, I can give such evidence but little weight. I have also not disregarded Respondent's apparent claims that the presence of marijuana and benzodiazepines in Thornton's body should mitigate its negligence. There is no evidence in the record, however, to show that the level of these drugs was sufficient to significantly impair Thornton's ability to use a safety belt and lanyard or to properly supervise others in his work crew on their use. The evidence shows, moreover, that at least one member of Thornton's crew had not been provided such safety devices for the four months he had been working at the quarry. Accordingly, I do not find Respondent's negligence to be mitigated in this regard.

Civil Penalties

In assessing a civil penalty under Section 110(i) of the Act, the Commission and its judges must 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 affect 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. Respondent herein has a moderate history of violations. It is a small to medium size business and abated the violation in compliance with the Secretary's directions. As noted, the violation was of high gravity and the operator was grossly negligent in causing the violation. No evidence was presented at the evidentiary hearing to show what affect the penalty would have on Respondent's ability to continue in business. In this regard I cannot lawfully or fairly consider representations of fact made only in Respondent's post-hearing brief and unsupported by the evidentiary record. Under all the circumstances I find that a civil penalty of $10,000.00, is appropriate.

ORDER

Citation No. 6075455 is affirmed and Worley Blue Quarry Inc., is directed to pay a civil penalty of $10,000.00, within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, Suite 9500
Washington, DC 20001
July 16, 2003

COLORADO LAVA, INC., Contestant,	:	CONTEST PROCEEDING
	:	Docket No. WEST 2001-27-RM
v.	:	Citation No. 7941183;9/28/00
ELAINE CHAO, SECRETARY, OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION Respondent.	:	Antonito Plant
ELAINE CHAO, SECRETARY, OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner,	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 2001-537-M
	:	A.C. No. 05-04232-05525
v.	:	
COLORADO LAVA, INC., Respondent.	:	Antonito Plant

DECISION

Appearances: Lydia S. Tzagoloff, Esq., Edward Falkowski, Esq., U.S. Department of Labor, Denver, Colorado, attorneys for the Secretary of Labor;
Mark W. Nelson, Esq., Harris, Karstaedt, Jamison & Powers, PC, 282 Inverness Drive South, Suite 400, Englewood, Colorado, attorney for the Operator.

Before: Judge Avram Weisberger

These cases are before me based upon a Notice of Contest and Petition for Assessment of Civil Penalty filed pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815. At issue is whether the Mine Safety and Health Administration ("MSHA") had jurisdiction over Colorado Lava Inc.'s ("Colorado Lava") operation at the subject site, and whether Colorado Lava violated a mandatory safety standard. A hearing was held before Administrative Law Judge August Cetti on Tuesday, May 21, 2002, in Denver Colorado. Subsequent to the hearing, Judge Cetti retired, and these cases were reassigned to me. The parties waived the opportunity to seek a new trial, or to proffer additional evidence, and agreed to submit these cases for decision based upon the record that has been adduced before Judge Cetti.

Findings of Fact

Colorado Lava excavates and sells volcanic rocks of various sizes. Its operation includes two sites: the Red Hill Mine and Antonito Plant, which are approximately 23 miles apart and employs nine workers. Colorado Lava acquired these sites from Mountain West Colorado Aggregate ("MWCA") on June 6, 2000. MSHA has exerted jurisdiction over both Red Hill Mine and Antonito Plant ever since their inception. Red Hill Mine is a surface mine from which lava rock is crushed, screened, and sized. Once the product is sized, it is transported to Antonito Plant to be prepared for shipping to customers.

Antonito Plant consists of two sites which are located approximately one mile apart; the rail loadout facility and the bagging plant. At the rail loadout facility, rocks are loaded onto a hopper, screened, sprayed with water and, finally, loaded onto rail cars. Rocks are screened to at least three approximate sizes: "fines," ¾ to 1 inch, and 1 ½ inch. Colorado Lava Plant Manager, Ronald McCarroll, characterized "fines" as "dust." At the bagging plant, rocks are screened, sprayed with water, and then bagged. The fines, although considered waste by Colorado Lava, are sometimes sold to customers from the bagging facility of the Antonito Plant.

After Colorado Lava's acquisition of Red Hill Mine and Antonito Plant, Colorado Lava instructed its attorney, Mark Nelson, to request that MSHA reconsider its assertion of jurisdiction over Antonito Plant. Nelson wrote letters on July 28, 2000, August 14, 2000, and October 5, 2000 to MSHA's South District Office requesting that MSHA reassess its claim of jurisdiction. In the letters, Nelson asserted that there was neither sizing nor washing being performed at Antonito Plant. He also noted that Colorado Lava had removed its secondary screen from its bagging facility at Antonito Plant, although there is a discrepancy between the parties as to the date on which this removal occurred.[1]

On September 12, 2002, MSHA Inspector Ronald Simpson, employed in the Lakewood Colorado Office, was sent to Antonito Plant to determine whether MSHA had jurisdiction. Based upon his observations, he concluded that MSHA had jurisdiction over the plant. The inspector returned to the plant on September 28, 2000 and issued a citation to the company for failing to file a Legal Identity Report pursuant to 30 C.F.R. § 41.13. He visited the site again on October 11, 2000 and terminated the citation based upon Colorado Lava's October 6, 2000 filing of the Legal Identity Report.

Conclusions Of Law

I. Jurisdiction

The threshold issue in this case is whether MSHA had jurisdiction over Antonito Plant to issue a citation for Colorado Lava's failure to file a Legal Identity Report. The more specific issue

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[1] The terms "secondary screen" and "double-decker screen" are considered interchangeable.

is whether Colorado Lava engaged in "milling" within the meaning of the Act.

Section 4 of the Act provides, in pertinent part that "[e]ach coal or other mine, the products of which enter commerce, . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. The Act includes in the definition of a "coal or other mine" "facilities . . . used in . . . milling of . . . minerals." 30 U.S.C. § 802(h)(1)(C). While the term "milling" is not defined in the Act, it is defined in the Interagency Agreement ("Agreement") - an agreement between MSHA and the Occupational Safety and Health Administration ("OSHA") delineating areas of authority between the two agencies. 44 Fed. Reg. 22827 (Apr. 17, 1979). The Agreement defines milling as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated," *supra* at 22829. The Agreement further lists definitions of milling processes over which MSHA has authority to regulate, including "washing" and "sizing," which are the processes presently at issue, *supra* at 22829, 22830.

As a preliminary matter, I conclude that the Agreement is a reasonable interpretation of the Act and is not in derogation of the Act. Accordingly, I find the Secretary of Labor's ("Secretary") definition of milling to be controlling in the case at bar. *See, Watkins Engineer & Constructors*, 24 FMSHRC 669, 673 (Jul. 2003). Accordingly, I accept the Secretary's interpretation of "milling" as defined in the Agreement.

The Secretary's argument is that Colorado Lava was washing and sizing at Antonito Plant, and, therefore, it is subject to Mine Act regulations. I conclude that the Secretary has failed to establish the occurrence of "washing," but she has established the occurrence of "sizing," and, thus, has established jurisdiction.

A. <u>Washing</u>

"Washing," as defined in the Agreement, involves "cleaning mineral products by the buoyant action of flowing water," *supra* at 22830. Colorado Lava concedes spraying water on its products before they enter the bag house at the plant. However, the company contends it was not "washing" the product, but, rather, was using the water as a means of dust control. On the other hand, Inspector Simpson testified that he observed the "washing" of rocks by a "high pressure-type wash system." (Tr. 55-56).

The Secretary's argument rests on Inspector Simpson's observation of "wash-type nozzles" at the rail loadout site. Jake DeHerrera, Acting Assistant District Manager in MSHA's Denver Office, testified that the difference between washing and dust control is that washing requires a high-pressure water system, while dust control requires a low-pressure water system. DeHerrera also testified that if washing were occurring, there would be an accumulation of water. The Secretary contends that even though Inspector Simpson did not observe a "big accumulation" of water on the ground, he did observe some water under a screen where there was a "heavy concentration of water [being] sprayed." (Tr. 378). Colorado Lava essentially argues that the Secretary failed to establish a "buoyant action of flowing water" because there was no accumulation of water on the ground.

The issue to be resolved is whether the evidence established that the operation at the site involved the "cleaning" of materials by the *buoyant* action of flowing water. (Emphasis added), *supra* at 22830. For the following reasons, I conclude that the Secretary has not demonstrated the occurrence of washing as defined in the Act, but not for the reasons proffered by Colorado Lava.

"Buoyant," is defined in *Webster's Unabridged Dictionary* 278 (2nd ed. 2001) as "tending to float in a liquid." Hence, "washing," i.e., the cleaning of particles by the buoyant action of flowing water, requires the finding of particles *floating* in water. Even assuming there was a high-pressure water system, no testimony or exhibits were offered that tended to show particles *floating* in water. I find that it is to speculative to conclude that the mere presence of an accumulation of water establishes the existence of particles actually floating in water. Therefore, as the Secretary has failed to establish this fundamental fact, she has not demonstrated the occurrence of washing.

B. <u>Sizing</u>

"Sizing," as defined in the Agreement, is "the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes." 44 Fed. Reg. 22827 at 22829. At trial, Colorado Lava president Ronald Bjustrom admitted that screening was performed at the plant, however, he claimed the company did so for dust control purposes. He stated that if the company did not screen out the fine particles, it would have to soak its product, in order to control dust, which would add a significant amount of weight. Further, the company contends that because the screens at Antonito Plant were the same size as those at Red Hill Mine, no sizing could have taken place at the plant. Moreover, Inspector Simpson was unable to identify either the "maximum" or "minimum" size to which the rocks were sized at the plant, which, the company further argues, is required by the Agreement.

Contrary to Colorado Lava's arguments, Inspector Simpson testified that he actually observed the rocks being separated into various sizes at the subject site's bagging plant. He testified that employees used a caterpillar to load material out of a pile brought from Red Hill Mine and then dumped the material into a feed hopper. The material flowed first through a triple-decker screen, which separated out the oversized product. The sized material dropped down to the product belt. Finally, the remaining material dropped down a bit further and went through the double-decker screen, which produced products of *two different sizes*. In sum, the inspector testified to have observed four different sized materials: the oversized material screened through the triple-decker, the sized product from the triple-decker screen, and two materials screened through the double-decker screen. Inspector Simpson also testified that he observed sizing occurring at Antonito's rail loadout facility. He observed raw, unsized material going into the feed hopper and then down into a screen. He saw three separate sizes of rocks produced: ¾ to 1 inch, 1 ½ inch, and fine. The 1 ½ inch rock went onto rail cars as a finished product, and the other two sized materials went into separate piles.

Although Colorado Lava disputes there having been a double-decker screen present at the mine during the September 28, 2002 visit, Ronald McCarroll, Plant Manager of the Antonito Plant,

conceded that materials were screened at the plant, which produced the ¾ inch to 1 inch material and the fine material, although, he contended these materials were waste products. McCarroll also admitted to screening out as many nuggets as possible before loading the product into the railroad out cars.

The Secretary has demonstrated that sizing occurred at Antonito Plant. The definition of sizing, as set forth in the agreement, *supra*, clearly indicates that sizing occurs if particles of mixed sizes are grouped into particles of the same size or into groups of particles ranging between maximum and minimum sizes. Inspector Simpson testified to having seen materials going into the feed hoppers and separated into four different sizes at Antonito's bagging plant and into three different sizes at the rail loadout facility. This activity falls squarely in line with the first part of the definition of sizing. Colorado Lava admits to having screens at Antonito Plant and to separating out fine material and ¾ to 1 inch material. Whether those materials were waste or actual saleable products is irrelevant to the determination as to whether sizing occurred. Upon the company's own admission, rocks went into the feed hoppers and came out of the screens separated into different sizes.

I am also unpersuaded by Colorado Lava's argument that sizing could not occur because the screens at Antonito Plant are the same size as the screens at Red Hill Plant. The company asserts that the product was not screened to produce rocks of a smaller size, but, rather, was screened to minimize dust. The company further contends that the rock products are "fragile" and tend to break apart en route from Red Hill Mine to Antonito Plant. Also, it asserts that the screening process reduces dust, not only for the integrity of the product, but also for the safety of Antonito employees and neighbors of the plant. While I am unconvinced that screening was occurring at Antonito Plan solely for dust control purposes. However, even if that were the case, that screening process, the separating out of dust, is encompassed within the term "sizing," which relates to the separation of *particles* of mixed sizes into groups of particles of the same size, *supra*. In this connection, I note that Dust, according to *Webster's*, *supra*, is defined as "earth or other matter in fine, dry *particles*," *supra* at 608 (Emphasis added). Dust, therefore, is included within the ordinary meaning of the word "particle" as defined in the Act. Therefore, even if the screening were just for dust control purposes, it would still be "sizing."

i. <u>Elam Exception</u>

Colorado Lava argues, in the alternative, that even if sizing occurred at Antonito Plant, MSHA has no jurisdiction pursuant to the Commission decision in *Secretary of Labor v. Oliver P. Elam*, 4 FMSHRC 5 (Jan. 1982). In*Elam*, the Commission held that a company's coal crushing was not "coal preparation" within the meaning of the Act if it performed those activities solely to facilitate its loading business, and not to meet its customer's specifications, nor to render the product for any particular purpose. *Id.* at 8. Colorado Lava claims that even if its product were being sized at Antonito Plant, the sizing was not for any particular purpose, and, therefore, it was not engaging in mining activities.

I conclude that the *Elam* exception is inapplicable to the instant case. The issue at hand

involves "milling," which is specifically addressed in the Agreement. The Agreement unequivocally states that milling activities, including sizing, are under MSHA jurisdiction. In *Elam*, the court addressed the issue of coal preparation, which is not addressed in the Agreement. As discussed above, Colorado Lava's activities constitute sizing at the plant, which, subjects the plant to MSHA jurisdiction.

II. The Citation

The final issue is whether MSHA alleged a violation of the wrong standard as assessed by the company, and if so, whether the citation should be vacated. I conclude that the Secretary has established a violation of the correct standard.

On September 28, 2003, Inspector Simpson issued Citation No. 7941183 to Colorado Lava pursuant to 30 C.F.R. § 41.13 for the company's failure to timely file a Legal Identity Report upon change of ownership of the mine. The standard provides:

> Failure of the operator to notify the Mine Safety and Health Administration, in writing, of the legal identity of the operator or any changes thereof within the time required under this part will be considered to be a violation of section 109(d) of the Act and shall be subject to penalties as provided in section 110 of the Act. 30 C.F.R. § 41.13.

Section 41.12, which identifies the time period within which operators are required to comply with section 41.11, provides:

> Within 30 days after the occurrence of any change in the information required by § 41.11, the operator of a coal of other mine shall, in writing, notify the appropriate district manager of the Mine Safety and Health Administration in the district in which the mine is located of such change. 30 C.F.R. § 41.11.

Colorado Lava concedes it failed to file a legal identity report within 30 days of its acquisition of the Antonito Plant. However, the company submits it *did* timely file the report in compliance with 30 C.F.R. § 41.20 (Subpart C), which, it contends, is the applicable provision. This section provides:

> Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Review Administration by properly completing, mailing, or otherwise delivering form 2000-7 "legal identity report" . . .
> 30 C.F.R. § 41.20.

Colorado Lava argues that since it was not aware it was a "mine" subject to MSHA jurisdiction, it would have had no idea it was required to comply with 30 C.F.R. §§ 41.10 - 41.13

(Subpart B). It is Colorado Lava's position, in essence, that all the sections in Subpart B, supra, should be read together. Section 41.11(a) requires the operator of *a new mine* to file a legal identity report with the appropriate MSHA district office. 30 C.F.R. § 41.11(a). Section 41.12, *supra*, requires the operator to file the report within 30 days of the occurrence of any change. The company argues that section 41.13, *supra*, applies only to a "new mine," not a new operator taking over the operation of an existing mine. The company contends the applicable standard is set forth in section 41.20, *supra*, which refers to notification requirements of an operator of *a mine* in contrast to a *new mine*. Colorado Lava points out that section 41.20 does not have a specific time period for compliance. The company argues, in essence, that since it did ultimately file the legal identity report, and there is no time period set forth in section 41.20, *supra*, no violation exists.

In contrast, the Secretary argues that Colorado Lava failed to timely file a legal identity report notifying MSHA of its acquisition of Antonito Plant pursuant to section 41.13, *supra*. The Secretary asserts that whether Colorado Lava knew it was operating a mine is irrelevant because knowledge is not a required element of the regulation. Furthermore, she contends that section 41.12, *supra*, requires the reporting of any changed information, regardless of whether the mine is "new."

I am unconvinced by Colorado Lava's argument, and I conclude that the Secretary has established a violation of section 41.13, *supra*. First, the Secretary is correct in stating the Colorado Lava's lack of "knowledge" that Antonito Plant was a mine is irrelevant. The Commission has held that a company's lack of knowledge that it is in violation is not a defense because the Mine Act is a strict liability statute, having no regard for fault. *Watkins Engineers*, 24 FMSHRC 669, 680-81 (Jul. 2003). Second, Subpart B of Part 41 of the Code of the Federal Regulations (sections 41.10 – 41.13), *supra*, requires the operator to inform MSHA of its legal identity and any subsequent changes. It also sets forth that failure to notify shall be considered a violation of Section 109(d) of the Act, and subject to the penalties imposed by Section 110(i) of the Act. Subpart C (sections 41.20, *supra*, and 41.30), deals with the administrative mechanics for implementing Subpart B, *supra*, i.e., what document to file, what information, and to whom. There is no indication that Subpart B, *supra*, is limited to "new mine[s]." Colorado Lava correctly notes that section 41.11(a), *supra*, specifically mentions "new mine[s]." This limitation, however, does not appear in any other subsection of section 41.11, *supra*, or in any other section of Subpart B. In fact, section 41.10 - which sets forth the scope of Subpart B - requires *all* mine operators to file their legal identities and any subsequent changes. Thus, section 41.12, *supra*, - the 30 day notice requirement - is triggered by changes at the mine, not necessarily by the opening of a "new mine."

Colorado Lava also argues that the citation must be vacated because of Colorado Lava's agreement with DeHerrera that the company would not be cited for its failure to comply with part 41 until the jurisdictional issue had been resolved. However, Inspector Simpson visited the mine on September 12, 2002 and gathered evidence, which, according to MSHA, established that MSHA had jurisdiction. The Secretary reasonably concluded that MSHA, not OSHA, was the proper regulatory agency.

Accordingly, I conclude the citation is valid, and, because Colorado Lava failed to file the legal identity report on or before July 28, 2003, the company was in violation of section 41.13,

supra. I also find that, considering the criteria set forth in section 110(i) of the Act, a penalty of $200.00 is appropriate for this violation.

Order

It is **ORDERED** that Colorado Lava pay a civil penalty of **$200.00** within 30 days of the date of this decision.

Avram Weisberger
Administrative Law Judge

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

July 21, 2003

RONALD D. GEISLER,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-481-D
	:	DENV CD 2002-9
	:	
v.	:	Mine I.D. 05-04452
	:	Sanborn Creek Mine
OXBOW MINING, LLC,	:	
Respondent	:	

DECISION

Appearances: Ronald D. Geisler, Hotchkiss, Colorado, pro se;
Andrew W. Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Ronald D. Geisler against Oxbow Mining, LLC, ("Oxbow"), under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). Mr. Geisler alleges that Oxbow terminated him for raising safety issues and drug abuse problems at the mine. An evidentiary hearing was held in Delta, Colorado.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

Oxbow operates the Sanborn Creek Mine, an underground coal mine, near Somerset, Colorado. Geisler was hired by Oxbow on November 7, 1991, as a utility man. (Tr. 26). He worked in various positions at the mine and he received his foreman papers in 1996. He was a section foreman for several years before he became a longwall production foreman in 1998. (Tr. 27). He was a longwall production foreman when he was terminated on April 4, 2002. (Tr. 25). Geisler filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA") which alleged as follows:

> In my opinion I was terminated for being a leader and pointing out personnel and safety problems over a period of 2 years. I went from one of the mine's top section foremen to termination. I have had personal problems from Nov. [2001] to my termination date.

> The day I was fired, Jim Cooper said I wasn't performing my duties, but now I hear through the grapevine he said I refused to get help for my personal problems due to stress from the job from them not following MSHA regulations or trying to enforce them. By taking this action, I feel I won't be able to work in the North Fork Valley or maybe in this profession anymore.

(Ex. R-16). After MSHA determined that Geisler was not discriminated against, he brought this case on his own behalf. At the hearing, Geisler raised a number of instances in which he believes that he complained about safety and drug abuse. Geisler and Oxbow witnesses also testified about other events that led up to his termination. I discuss all of these events in chronological order.

In June or July 2001, there was a bounce at the mine. (Tr. 30). An MSHA inspector was at the mine taking dust samples. The ribs had blown out and the entry was reduced from a nine foot ceiling to a five foot ceiling. The beltline was blown out for 300 feet. (Tr. 31). Geisler's crew had to clean up the area and get the belt running. Geisler believes that mine management put too much attention on production and not enough on safety. (Tr. 33).

On May 14, 2001, Jim Cooper, Oxbow's mine manager, had a meeting with Geisler in his office. Randy Litwiller, Oxbow's mine superintendent, and Joe Ternyik, Geisler's immediate supervisor, also attended the meeting. According to Geisler, Cooper asked him why he was taking personal days off without giving sufficient notice. (Tr. 22). At the end of this meeting, Geisler was given five days off without pay for unsatisfactory performance. (Ex. R-12). Geisler testified that he was treated differently than other employees because he pointed out personnel and safety problems. (Tr. 27). Specifically, he believes that he was harassed for not having the section in production despite the fact that he was not given the materials that he needed to get any repairs completed on time. (Tr. 25, 27). He states that he gave management three hours notice that he was going to take two personal days off and he was only required to provide two hours notice. Geisler testified that he needed to take the personal days off because of stress. *Id.*

Cooper testified that the events leading up to the May 14 meeting occurred during a longwall move. (Tr. 199). He stated that during a longwall move some crews may be required to work on a different rotation than normal. Geisler's crew was "extremely upset that they were going from teardown to setup and were staying on the same shift they had been on through the teardown."
(Tr. 199-200). Cooper testified that Litwiller and Ternyik told him that, as a consequence, Geisler "had cleaned out his locker, filled up his clothes bag, and said I'll get my days off, and he left the mine." (Tr. 200). The next two days, he called the mine and said he would not be in because he was taking leave. *Id.* When Geisler returned to the mine on May 14, 2001, Cooper met with Geisler, Litwiller, and Ternyik. Cooper testified that Geisler was told that his behavior was not appropriate for a supervisor. *Id.* Cooper further testified that Geisler admitted that he

set a bad example but he had a lot of personal problems. Geisler was given a week off without pay. (Tr. 200; Ex. R-12).

Geisler testified that the mine had to move a longwall in September 2001. Geisler testified that 77 out of 87 flippers on the longwall shields were not functioning. (Tr. 34). He stated that these flippers extend the shields to help hold the top up at the end of the mining cycle in a section. (Tr. 36). He states that when he complained about the defective flippers, he was accused of worrying too much and being a crybaby. (Tr. 35). Geisler testified that it is unsafe to operate the longwall just before it is moved when the flippers are not working. (Tr. 36-37). He stated that "[w]e did get the flippers done by the time we moved, but my crew did 57 of them out of 87." (Tr. 40-41). Litwiller testified that flippers generally have to be repaired at the time of a move so the events of September 2001 were not unusual. (Tr. 174). He denied ever telling Geisler not to report broken flippers on his production reports. (Tr. 181).

Geisler testified that on December 27, 2001, he arrived on his section on time at 11:00 p.m., did the onshift examination, and then realized that his mind was not on his work. (Tr. 29). He was scheduled to work the graveyard shift that day. He tried to contact Mike Morgan, the shift foreman, without success. Instead, Geisler talked to Kevin Lee, a maintenance foreman, and told him that he was going home. Geisler walked to the "top of the section" at about 12:30 a.m. and Lee gave him a ride out of the mine. *Id.* He arrived at the surface at 1:00 a.m. and Lee was back on the section by 1:30 a.m. Geisler testified that he notified his crew that he was leaving, he told them what they were expected to do during the shift, and told them that Lee would be taking over. Geisler testified that he left the mine that night because he and his wife were having personal problems and his mind was not on his work. (Tr. 30). Cooper talked to Geisler the next day and advised him that his performance as a supervisor was not acceptable. (Tr. 202). Cooper told Geisler that he was upset that he had left his crew. (Tr. 202, 238). Cooper testified that he advised Geisler that "he had to separate home and work and . . . start applying himself diligently to his work responsibilities or be removed from Oxbow employment." (Ex. R-13). He said that he warned Geisler that he "didn't have any more flexibility to offer him." (Tr. 202). Geisler and Cooper talked about Geisler's personal problems. (Tr. 203). Geisler denies that Cooper gave him such a warning and he left the meeting believing that Cooper was satisfied with his response. (Tr. 40).

On February 25, 2002, Geisler injured his ear. When he showed his ear to his shift foreman the next day, Geisler was sent home. (Tr. 42-43). Geisler testified that it was injured when calcium chloride pellets stuck to his outer ear. When he put a cold pack on it at home, the pack leaked, further injuring his ear. On March 4, 2002, Geisler met with Litwiller to show him the infected ear. On March 7, 2002, Geisler saw a dermatologist about his ear. The dermatologist wrote him a note excusing him from work. (Tr. 44). Geisler did not return to work until March 20, 2002.

On Thursday, March 28, 2002, Geisler testified that he met with Litwiller to ask for vacation time so that his ear could completely heal. *Id.* According to Geisler, Litwiller kept

telling him that the mine needed him at work and denied his request. Geisler kept telling Litwiller that he could not work underground. The time that Geisler wanted off included the Easter weekend.[1] (Tr. 63-64). Litwiller testified that Geisler merely asked for personal days off that weekend. (Tr. 158). Litwiller testified that, although Geisler may have mentioned his ear, he asked for personal (vacation) days off. (Tr. 158, 183-84, 188-89). Litwiller also testified that he denied Geisler's request because he was needed at work. (Tr. 159). Geisler worked on March 29. (Tr. 159; Ex. R-41).

On Saturday, March 30, 2002, Geisler went to the mine to tell Annette MacDonald, a secretary at the mine, that he would not be working that day. (Tr. 44-45). He provided this notice 30 minutes before the start of his 3:00 p.m. shift. (Tr. 44-45). Geisler explained that he had debated "whether or not to go to work, back and forth, back and forth." (Tr. 45). He testified that he knew that he was needed at work but that his ear was deteriorating. His dermatologist sent a fax to the mine on April 1, 2002, excusing him from working.

Annette MacDonald testified that Geisler came to the mine at 2:30 p.m. on March 30, 2002, to report off on his shift that began that day at 3:00 p.m. (Tr. 151; Ex. R-33). She testified that Geisler did not tell her that he was sick or that he could not work underground because of the injury to his ear. (Tr. 152). She filled out Geisler's absentee slip that day. *Id.* MacDonald told Geisler to inform the foreman that he would be absent, but he did not do so. (Tr 153-54).

Geisler testified that he had a fight with his wife on Monday, April 1, 2002, and the police were called. (Tr. 70). He further testified he told Officer Neil Schweiterman of the Paonia, Colorado, police department about his personal problems, his drug use, and the fact that there is a problem with drug abuse at the mine.[2] (Tr. 14, 71). Officer Schweiterman called Litwiller on April 2, 2002, and told him that "he was really concerned about [Geisler's] behavior, and knowing that coal mining was a dangerous business he was concerned . . . about [Geisler] returning to work and thought that [Litwiller] should know about it." (Tr. 13-15, 72,160). Geisler testified that the officer also told Litwiller that Geisler had complained that miners were abusing illegal drugs at the mine. (Tr. 12-13). Geisler further testified that because it is unsafe for miners to be using illegal drugs underground, he was acting as a whistle-blower when he told Officer Schweiterman about drug abuse. (Tr. 18).

Litwiller testified that Officer Schweiterman did not mention drug abuse at the mine during his April 2, 2002, conversation with Litwiller. (Tr. 161, 178, 184, 187). Litwiller testified that he was very concerned about the call from Officer Schweiterman and believed that it warranted further attention because police officers are experienced in evaluating people with problems. (Tr. 161-62). Litwiller believed that Geisler's attitude had changed to "the negative" for at least the previous six months. (Tr. 163). Litwiller discussed the officer's call with Cooper.

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[1] The mine was closed Easter Sunday, but was open Saturday and the following Monday.

[2] At the time he was employed by Oxbow, Geisler lived in Paonia, Colorado.

(Tr. 168). They decided that they would have a meeting with Geisler at the mine to see if Geisler would seek some professional help. If Geisler refused help or was blind to the fact that he needed help, then they believed that Oxbow would have no choice but to terminate him. (Tr. 168-69). Litwiller and Cooper testified that they did not know, prior to his termination, that Geisler abused illegal drugs at the mine. (Tr. 173, 178, 204). Cooper stated that he was unaware that Geisler complained of drug abuse by mine employees. (Tr. 205, 229, 232). Oxbow was generally aware that illegal drugs were being used by employees and it had instituted a mandatory drug testing program prior to Geisler's termination. (Tr. 214).

Geisler did not work at the mine April 1-4, 2002. On April 4, Geisler was called at home and told to come to the mine to meet with Cooper and Litwiller. At Geisler's request, he met privately with Cooper. Geisler's testimony about what happened at the meeting differs from Cooper's testimony. It is clear that Cooper told Geisler that he was not performing his duties. (Tr. 47). Geisler replied that he had been off work because of stress and an injury, but that he was performing his duties. According to Geisler, after the two men discussed the matter for a few minutes, he asked Cooper if he was being fired. Cooper told Geisler that he was going to fire him. Geisler testified that he then started telling Cooper about problems he was having at home including a clothes dryer that was leaking carbon monoxide. Geisler then turned on his tape recorder and told Cooper everything that he thought was wrong at the mine. (Tr. 48). Geisler testified that he told Cooper about the drug abuse problems at the mine. (Tr. 72). He also testified that Cooper talked about his management philosophy. (Tr. 51).

Cooper testified that at this April 4 meeting, he advised Geisler that Oxbow would be relieving him of his responsibilities at the mine because of his mental state and that he should get help to work through his problems. (Tr. 191; Ex R-1). Cooper told Geisler that he could get information about professional help from the mine office. Cooper testified that Geisler told him that he did not need any help, that he was "the best supervisor on the property," and a great Oxbow employee. (Tr. 192, 233). Geisler told Cooper about his problems he was having with his wife, carbon monoxide poisoning at home, and teenagers in his back yard. (Tr. 192; Ex. R-1). Cooper said that Geisler was agitated and kept saying that he was not crazy. *Id.* Cooper also testified that Geisler talked about "invisible miners." (Tr. 193-94). After Geisler refused to seek any help, Cooper advised him that he had no choice but to terminate him. *Id.* Cooper testified that if Geisler had agreed to seek professional help at the meeting, Geisler would have been put on leave of absence without pay, but that his medical benefits would have continued.[3] (Tr. 195). Cooper further testified that, prior to returning to work, Oxbow would have required Geisler to provide a letter from the professional person stating that Geisler was "in a stable position." *Id.* Cooper testified that Geisler was terminated from his employment because he refused to consider the offer of help and he continued to act in an agitated and irrational manner during the meeting.

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[3] The cost of at least part of this professional help would have been covered under Oxbow's medical plan. (Tr. 226).

Carol Edwards, a secretary for Oxbow, testified that prior to the April 4, 2002, meeting Cooper asked her to try to get information about counseling that might be available for Geisler. (Tr. 142; Ex. R-11). She testified that, after the meeting, Geisler was very agitated and upset. Geisler seemed out of sorts, he did not talk in coherent or complete sentences. (Tr. 143-44). She encouraged him to seek help for his marital and personal problems and gave him the names of counselors. He also complained that mine management never listened to him and he talked about drug use at the mine. (Tr. 144-45). They discussed his ear, but Edwards testified that it looked like it had improved and Geisler told her that it was "doing better." (Tr. 146).

Officer Schweiterman called Kathy Welt, an Oxbow employee, on April 7, 2002, and told her that Geisler was in jail, that Geisler told the police that miners were abusing drugs at the mine, and that Geisler admitted that he used methamphetamine while underground in June 2001. (Ex. R-2). Officer Schweiterman also told Welt that Geisler told the police that drug use is rampant underground. At the hearing, Geisler admitted that he used methamphetamine, often called "speed," with a miner on his crew in June 2001. (Tr. 55). He also admitted that he used methamphetamine away from the mine, "on and off," between June 2001 and April 2002. (Tr. 56).

Geisler testified that his use of methamphetamine had a severe impact on his personal life. (Tr. 58). The methamphetamine make Geisler paranoid and, beginning in November 2001, he wrongly suspected that his wife was having an affair.[4] (Tr. 59). He discussed his personal problems with Cooper and others at the mine during this period. He had serious conflicts with his wife over the Easter weekend and the following week. (Tr. 71, 83). Geisler tested positive for cocaine, methamphetamine, and marijuana on April 5, 2002.[5] (Tr. 81, 84; Ex. R-34).

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[4] Oxbow sought to introduce into evidence numerous exhibits concerning criminal charges that Geisler and his wife filed against each other. I did not admit these proposed exhibits. Geisler has apparently reconciled with his wife; she sat at counsel's table and assisted him during the hearing.

[5] Geisler maintains that he never used cocaine but that some cocaine must have been mixed in with the methamphetamine. Methamphetamine is often taken through the nose like cocaine.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). "Whenever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

A. Summary of the Parties' Arguments

At the end of his testimony, Geisler summarized his case by saying:

> Basically, your honor, I just want to say that I am a certified, qualified foreman. I did my job. Safety came first, and as I pointed this out – and the last thing I pointed out was to an officer of the drug abuse going on there. It's not only against their policy but it's against the law. And when they stated – when he went there to investigate it, I feel that is the sole reason I got fired. Everything else was building up over the year, I said, but when that one came in that was it.

(Tr. 51-52). At the end of the hearing, Geisler said the following:

> You know, I pointed out the drug problems at the mine. I feel I was fired for it. And I was here to state, to hope they would have a

> drug policy where they don't forewarn the men that they're going to have a urinalysis, and I don't really . . . care if I win, your Honor. I was wanting somebody to keep an eye on it because the drugs are rampant through the valley. Not just in that mine, they're everywhere, but they are in that mine bad.

(Tr. 246).

Oxbow argues that Geisler did not carry his burden of proof in this case. The evidence establishes that Geisler and Officer Schweiterman told management at Oxbow about drug abuse at the mine after Geisler was terminated from his employment. Geisler had two run-ins with the police the first week of April 2002 and it was during that second run-in that the police had a detailed conversation with mine personnel about Geisler's accusations. Geisler's allegations about drug use at the mine and his earlier safety complaints played no part in Oxbow's decision to terminate him.

B. Protected Activity

A miner who complains about safety conditions at the mine engages in protected activity. In addition, a miner who complains about alcohol or drug abuse by his fellow employees engages in protected activity if he fears that these employees could injure him because of their impaired condition. *See Fletcher v. Morrill Asphalt Paving*, 24 FMSHRC 232, 239 (Feb. 2002) (ALJ). In this case, Geisler testified that he complained about safety conditions at the mine. Litwiller testified that Geisler did not complain about safety conditions to him. (Tr. 173). Cooper testified that Geisler did not raise safety issues with him any more than any other foreman raised safety and operations issues. (Tr. 205). I find that Geisler had some safety concerns at the mine. He discussed safety with management, but that was part of his job as a longwall production foreman. For example, his concerns about the flippers on the longwall supports were addressed. The fact that his crew had to do most of the work repairing them is irrelevant. Nevertheless, I give Geisler the benefit of the doubt and assume, for purposes of my analysis, that Geisler raised several safety issues during the last two years of his employment.

By the end of the hearing, Geisler had shifted his emphasis from his safety complaints to his complaints about drug abuse at the mine. The parties' evidence on this issue directly conflicts. Geisler maintains that he had discussions with management about drug abuse prior to his termination. More importantly, he believes that Officer Schweiterman told Litwiller on April 2, 2002, that he had complained about drug abuse at the mine. Geisler testified that he called Officer Schweiterman on May 2, 2003, six days before the hearing, and Officer Schweiterman told him that he "talked to the superintendent and his main investigation was the allegations I had made that the mine has a drug abuse and drug dealings going on and he let my name out and he apologized to me about it." (Tr. 12-13). Oxbow denies that Geisler complained about drug abuse at the mine and denies that Office Schweiterman discussed it with Litwiller prior to

Geisler's termination. Both Litwiller and Cooper testified that Geisler did not mention drug abuse at the mine until the meeting of April 4, 2002.

Geisler testified that it was "unsafe for people to be doing drugs underground at the mine." (Tr. 18). Geisler was one of the employees who was under the influence of illegal drugs while at work and he used methamphetamine underground on at least one occasion. The anti-discrimination provisions of the Mine Act were designed to protect a miner from having to work in the face of hazards created by his employer. By using illegal drugs, Geisler helped create the unsafe conditions. As a front line supervisor, Geisler was expected to set an example for the miners on his crew. Instead, he sanctioned the practice of working while under the influence of methamphetamine. I take official notice that miners can endanger themselves and others if they work while under the influence of illegal drugs. For purposes of my analysis of this case, I assume that Geisler was concerned about drug abuse at the mine for safety reasons. I make this assumption despite the fact that he was personally involved in drug abuse at the mine.

C. Adverse Action

In determining whether a mine operator's adverse action is motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

The resolution of this case depends entirely on an examination of the evidence and an analysis of the motivation of management. As stated above, it has not been established that Oxbow management knew about his protected activities. Neither Litwiller nor Cooper believed that he had raised any particular safety concerns while he was a longwall production foreman. In addition, Litwiller and Cooper denied that they knew that Geisler was concerned about drug abuse at the

mine. Oxbow tested employees for drugs and alcohol on at least one occasion.[6] Cooper and Litwiller were unaware that Geisler had been using illegal drugs since at least June 2001. Litwiller testified that Officer Schweiterman did not tell him that Geisler had complained about drug abuse at the mine during his April 2, 2002, telephone call. Geisler's testimony that the police officer told him on May 2, 2003, that he informed Litwiller, prior to April 4, 2002, that Geisler complained about drug abuse at the mine is not reliable and is inconsistent with other evidence. When the police were called to Geisler's home on April 1, 2002, Geisler and others were interviewed about the reported domestic disturbance. When Geisler was taken into police custody on April 6, he was questioned more extensively. (Ex. R-23). Drug use issues were raised during the police questioning and methamphetamine was found in his garage. *Id.* I credit the testimony of Litwiller and Cooper that they were not aware on April 4, 2002, that Geisler had complained to the police about drug abuse.

There is no indication that Oxbow was hostile to any safety complaints that Geisler may have made. Oxbow repaired the flippers on the longwall supports. Most of the concerns he expressed at the hearing were that management put production before safety. It appears that these concerns were raised after the fact and he often complained that his crew bore the brunt of safety-related work. That his crew had to do more work than other crews to keep the longwall section safe does not establish that Oxbow ignored his safety concerns. I also find that there is no evidence to suggest that Oxbow was hostile to complaints made about drug abuse at the mine. It is obvious that Oxbow did not want miners abusing drugs on its property or coming to work impaired by drugs. I find that Geisler did not establish hostility or animus toward his protected activity. There is a coincidence in time between the protected activity and Geisler's termination.

Geisler attempted to establish discrimination by showing that he was treated differently than other similarly situated miners. Disparate treatment can be evidence of discrimination. Many of the comparisons Geisler tried to make were with hourly employees. He attempted to establish that another foreman, Kevin Swisher, was absent from work as frequently as he was. (Tr. 126-27; Ex. C-5). Cooper explained that Swisher had a number of mitigating circumstances including a death in the family. (Tr. 227). He further explained that Geisler took leave at inappropriate times for someone in his position as a longwall production foreman. It was Geisler's attitude toward leave and his use of it to avoid his supervisory responsibilities that concerned Cooper. Litwiller and Cooper testified that in January 2001, Geisler put in for personal leave around every holiday. They decided that Geisler would not be permitted to do that in 2002 because it would be unfair to other employees who might want to take leave at those times. Litwiller believes that Geisler called in to take personal leave over the Easter weekend in

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[6] Geisler testified that after Oxbow began testing for drugs, he and other employees switched from marijuana to methamphetamine because it stays in the body only 72 hours while marijuana can be detected for a longer period of time. (Tr. 56). Thus, Geisler was trying to thwart Oxbow's efforts to eliminate drug use among its employees. This fact contradicts his testimony that he was concerned about drug use at the mine.

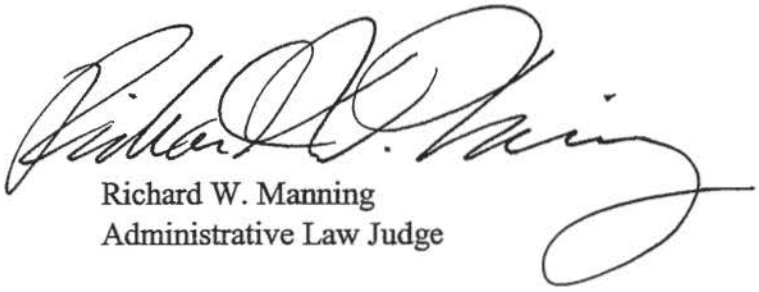
2002, not because of his ear, but to get around the fact that he was denied such leave earlier in the year. (Tr. 157-59). I find that Geisler did not establish disparate treatment.

I find that Geisler failed to establish that his termination was caused, in any part, by his protected activities. In addition, Oxbow affirmatively established Geisler's protected activities played no part in its to terminate him. The evidence shows that Oxbow was genuinely concerned about Geisler's performance as a longwall production foreman. In May 2001, he took personal leave during a longwall move when it was clear that Oxbow needed him at work. The fact that he gave three hours notice each day that he called off does not eliminate Oxbow's concern. In December 2001, Geisler left the mine because his mind was not on his work. Geisler was warned that he could not bring his personal problems to work and that if he did not start working diligently, he could lose his job. Geisler was denied a request to take personal leave Easter weekend, but he took leave anyway. When an officer with the Paonia Police Department told Litwiller that Geisler's behavior concerned him, Oxbow decided that he needed professional help. At the April 4, 2002, meeting, Geisler not only denied that he needed any help, he asserted that he was the best supervisor at the mine. Unknown to Cooper and Litwiller, Geisler had been using methamphetamine since June 2001, which may help explain his erratic and paranoid behavior.

Cooper testified that he made the decision to terminate Geisler at the April 4, 2002, meeting because of his lack of management skills, his failure to follow company rules, and his unwillingness to admit that he had a problem that needed to be addressed. I credit the testimony of Cooper and Litwiller concerning the reasons for Geisler's termination. All of the arguments and evidence presented by Geisler that I have not specifically discussed in this decision have been considered and are hereby rejected.

III. ORDER

For the reasons set forth above, the discrimination complaint filed by Ronald D. Geisler against Oxbow Mining, LLC, under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 25, 2003

BENNIE PITTMAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. SE 2003-39-DM
v.	:	SE-MD 2002-10
	:	
SOUTHERN EQUIPMENT CO., INC.,	:	White Pit II Mine
Respondent	:	Mine ID No. 31-01154

DECISION

Appearances: Bennie Pittman, Farmfield, North Carolina, *pro se*;
C. Matthew Keen, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., Raleigh, North Carolina, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint of discrimination filed by Mr. Bennie Pittman, pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," alleging that he was discharged on April 23, 2002, purportedly in violation of Section 105(c)(1) of the Act.[1] At hearing Mr. Pittman alleged that he was terminated in violation of the Act because of seven purported safety complaints and because he did not get along with a co-worker, Jerry Harrell.

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[1] Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (1980), rev'd on grounds, *sub nom. Consolidated Coal Co. V. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc., Coal Corp. V. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under Nation Labor Relations Act).

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

At the time of his termination, Pittman had been working for the Southern Equipment Company, Inc. (Southern) for twelve years, running the sand pit and operating excavators, loaders and dump trucks. Pittman was also the lead man, overseeing other workers in the pit. As noted, he alleges seven purported protected activities. The first allegedly occurred in the Spring of 2000. According to Pittman, Ricky Gray, Southern's regional manager, sent to the pit a front-end loader which had no brakes. Both the loader operator, Jerry Harrell, and Pittman complained to Gray about the defect but were purportedly told to operate the loader anyway. Harrell then called North Carolina State Inspector, Scott Hartness who shut the loader down. Pittman speculated at hearing that he may have been blamed for the complaint made by Harrell because he, Pittman, was in charge of the pit.

There is no dispute that Harrell continued to be employed by Southern as of the date of hearing more than three years later and there is no evidence that he suffered any adverse consequences as a result of this complaint. Pittman also continued to work for Southern for two years after this incident without any apparent adverse action. Under these circumstances I do not find that Pittman has sustained his burden of proving that his discharge was motivated in any part

by any such complaints or by any mistaken belief by management that he, Pittman, had made a complaint to the North Carolina inspector. There is neither direct nor adequate indirect evidence from which unlawful motivation may be inferred.

The second purported safety complaint allegedly occurred in February 2002. Pittman testified that upon arriving on the job one morning he found that there were no pre-trip inspection forms on his excavator. Each equipment operator was required to fill out his own report each morning but Pittman had left his forms on his truck. Pittman therefore went to the loader operated by Harrell and removed Harrell's inspection forms. According to Pittman, Harrell then tried to take the forms back and, in an ensuing argument, grabbed Pittman's arm. Pittman later complained about this incident to his supervisor Buddy Davis, and called the "Federal Mine people" to see if they could reprimand Harrell for "putting his hands on me" (Tr. 49). The latter purportedly told Pittman that they could do nothing about it and that it was up to the company to resolve the argument. Under these circumstances I do not find that Pittman has established that this incident constituted any activity protected by the Act. Moreover, even assuming, *arguendo*, that such activity was protected, there is no direct nor sufficient indirect evidence that Pittman's subsequent discharge was motivated in any part by any possible safety related aspect of the incident.

The third alleged safety complaint occurred in February 2002. According to Pittman, he and Harrell were loading trucks and he observed that Harrell was digging up sand the wrong way. Pittman purportedly then jumped onto Harrell's loader to tell him to stop the loader. Harrell purportedly "drove off" with Harrell hanging onto the loader and Pittman had to cut the switch and disengage the gear to stop it. Pittman claims that he reported this incident to Quinn Vaughn, a supervisor over Davis. Vaughn purportedly told Pittman to "just get along" with Harrell. While Pittman's action in jumping onto an operating loader was clearly a dangerous act it was the result of Pittman's own intemperance. In essence then, Pittman is complaining that he reported his own unsafe activities and now asserts that this was protected under the Act. I do not however find the reporting of one's own unsafe acts as an activity intended to be protected by the Act. In any event, even assuming, *arguendo*, that the reporting of his own unsafe acts were protected, I do not find any direct or indirect evidence that Southern was motivated to discharge Pittman in any part by the fact that Pittman reported his own unsafe acts.

The fourth purported safety complaint alleged by Pittman followed the above incident when Davis and Vaughn purportedly told Pittman that it "probably would be the best thing if I just stayed off the loader" so I would stay away from Jerry Harrell. I do not find this statement by Davis and Vaughn to be a protected activity by Pittman. I also note that Pittman does not claim this statement to be an "adverse action" and, under the circumstances, I do not, in any event, find that it did in fact constitute an "adverse action."

The fifth purported safety complaint involved another incident with Jerry Harrell. Apparently sometime during March 2002, Pittman was attempting to use a grease gun mounted on Harrell's loader while Harrell was purportedly racing the motor. Pittman then proceeded to

cut the disconnect switch for the battery. According to Pittman, every time he would cut the disconnect, Harrell would get off the loader and reconnect it. Pittman complained about the incident to Buddy Davis the next day and complained that he could not get Harrell to do what he wanted him to do. Davis apparently told Pittman "either learn how to get along with him or leave" (Tr. 63). Even assuming, *arguendo*, that his report of this incident to Davis constituted a protected safety complaint it is apparent, based on Pittman's testimony alone, that Davis would not have been motivated to retaliate based on any safety related aspect of this incident. It is clear that, if anything, Davis was concerned about Pittman's continuing inability to get along with Harrell.

The sixth incident reported by Pittman allegedly occurred some four month's before his discharge, in November or December 2001. Pittman described the incident at hearings in the following colloquy:

A: . . . I was loading haul trucks for E.R. Lewis with the excavator.

Q: So you were operating a haul truck?

A: I was loading - - with the excavator, loading haul trucks. We had a contractor in there. E.R. Lewis does a lot of stripping for them. And it was a incident of where I was loading trucks and he was also loading haul trucks that haul the finished material to the plant.

Q: Who was this now?

A: Jerry Harrell.

Q: Harrell was also loading something?

A: He was loading with payload. Well, anyway, what I done was - - is I had the haul trucks coming in one way and him going out the other way.

So I told him, I said, "Jerry," I said, "you're going to have to fix another path," I said, "because there ain't no - - there's no way that I can send them trucks in there with me trying to load them the way the situation is. You're going to mess around and back into one of the haul trucks of E.R. Lewis's."

Well, instead of him stopping what he was doing and building a ramp the other way to load the trucks, he kept backing down in front of the haul trucks that were coming by where I was having to load them at.

So, anyway, when I done that, what he done is he just kept right on

to the point that I finally just throwed dirt - - reached over there and moved the excavator, throwed dirt and filled the hole up where that he couldn't load the haul trucks out of there, the trucks that were loading the finished product to carry to the plant.

Well, he goes and he calls Ricky, or he calls somebody, whoever he calls. I don't know where it was Buddy, Ricky or what it was. But, anyway, I was told by them that - -

Q. Wait. Who's "them" again? He called somebody and somebody called you?

A. They come out there.

Q. Well, who's "they"?

A. Buddy or Quinn Vaughn one come out this day.

Q. Buddy and Quinn?

A. Quinn or Buddy.

Q. You're not sure who?

A. No, Sir. I don't remember which one of them it was. But they come out there and they wanted to know the situation of why I couldn't load the haul trucks with him backing in and out of there, you know.

So, anyway, they told me the best thing to do was just move from where I was at and let him load the trucks where he was . And, I mean, it was holding up a lot - - it was costing a lot of time and everything else to do that, but I went on and done it.

And I had been told before, you know, that - - that particular day when they come out there, they told me, said, "Look" - - they had already told me about making trouble with Jerry was just going to cost me my job.

So, really, basically, what I'm saying is my hands were tied with anything I said or done because of the way Ricky was over him and - - and - -

Q: What do you mean, again? Ricky over him, what do you mean?

A: Ricky was - - Ricky always looked out for Jerry because Jerry looked out for Ricky's - - Ricky's cousin, Ricky Teal. Ricky Gray being the man sitting over there and Jerry being the man sitting back yonder. (Indicating)

Q: So you think this was another reason why you were fired, that you couldn't get along with - -

A: Yes, sir. That I wouldn't get along with them. I couldn't get along with them, so there won't be no use in me working out there.

I do not find from this evidence that this disagreement between Pittman and Harrell or the reporting of this disagreement constituted a safety complaint. Again, even assuming, *arguendo*, that it was protected safety complaint there is no evidence to conclude that there was any retaliation for any safety related aspect of the incident. It is clear however that management continued to be concerned about Pittman's inability to get along with Harrell.

Finally, Pittman alleges, as his seventh protected activity, that he complained "so many times" to federal inspector Ron Lilly and to his own supervisors about Harrell working with "one eye." It is not clear exactly what concern Pittman had in this regard but the record shows that while Harold had one eye that was "weaker," he nevertheless was found qualified by the North Carolina motor vehicle authorities to obtain a license as a truck driver. There is no record evidence that Harrell's condition was unsafe or resulted in any citations. Under the circumstances it is not reasonably likely that Southern Management would have retaliated against Pittman for these complaints.

I also note that even assuming, *arguendo*, that Southern was motivated in part by any or all of the alleged protected activities in terminating Pittman, it is clear that Southern would have terminated Pittman in any event based on evidence that he was attempting to steal diesel fuel from the company. In this regard, Ricky Gray, Southern's regional manager testified that, based on past activity they had already suspected Pittman of taking diesel fuel off mine property. In this regard, in November 2001, division manager Quinn Vaughn told Pittman that three fuel containers found in Pittman's truck were not OSHA approved and warned him not to bring his own fuel cans onto mine property.

On April 23rd, 2002, Harrell reported to Gray that Pittman had received two five-gallon cans from Briggs (Briggs was a contractor on mine premises) and had filled one with diesel fuel and placed it in the back of his truck. Gray later saw Pittman with one five-gallon Briggs' can in his truck containing oil. Jerry Harrell later told Gray that Pittman had earlier had two five-gallon Briggs' cans in his pickup truck. Harrell also told Gray that he observed Pittman exiting in his truck from a side road. Gray later followed the truck tracks and foot prints from a point along that road and found a Briggs' five-gallon can containing diesel fuel hidden behind a tree. Harrell identified the can as one he had seen on the back of Pittman's truck earlier that day.

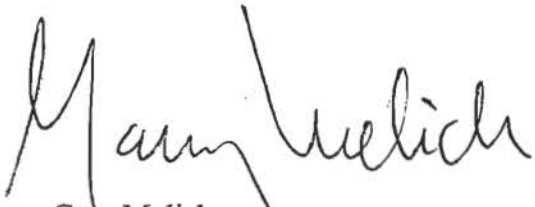
When confronted, Pittman told Gray that "I never had two five-gallon buckets." At the same time he said he rinsed one out and could not explain the one he had filled with oil. The Briggs contractor also told Gray that he did indeed give Pittman two five-gallon cans and one was empty and one had oil in it. Gray also explained that there was no work-related reason for Pittman to be on the side road where the five-gallon can of diesel fuel was found behind the tree. Gray forwarded this information to Tom Morgan, Southern's human resources manager, who then discussed the matter with Jay Lofton, Southern's president. Based on that information, Lofton decided to terminate Pittman.

In *Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982), the Commission discussed several indicia of legitimate of non-discriminatory reasons for an employer's adverse action - - including the violation of personnel rules forbidding the conduct in question. The Commission has also stated that an affirmative defense should not be "examined superficially or preapproved automatically once offered," *Harro v. Magma Copper Company*, 4 FMSHRC 1935, 1938 (November 1982), and has further enunciated that, in reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. Southern in this case has established such an affirmative defense by abundant credible evidence. Clearly it was motivated to discharge Pittman by evidence of his participation in the attempted theft of Southern property.[2]

Under all the circumstances this Discrimination Complaint must be dismissed.

ORDER

Discrimination Proceeding Docket No. SE 2003-39-DM is hereby dismissed.



Gary Melick
Administrative Law Judge

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[2] I find that there was a credible basis for Southern's belief in Pittman's attempted theft of diesel fuel in spite of the clearly inadequate comparison of footprints shown in the photographs (See Exhibits R-5E and R-5-6).

Distribution: (Certified Mail)

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C. Matthew Keen, Esq., Ogletree, Deakins, Nash, Smoak & Steward, P.C., 2301 Sugar Bush Rd., Suite 501, P.O. Box 31608, Raleigh, N.C. 27622

\mca

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 17, 2003

JAMES WOMACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-138-DM
v.	:	WE MD 01-17
	:	
GRAYMONT WESTERN US,	:	
Respondent	:	Tacoma Plant
	:	Mine ID 45-03290

INTERIM DECISION APPROVING SETTLEMENT

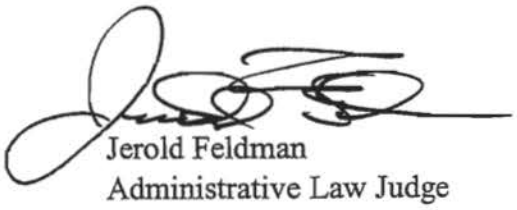
Appearances: James Womack, *pro se*, Tacoma, Washington, for the Complainant; Robert Leinwand, Esq., Stole Rives, LLP, Portland, Oregon, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on December 14, 2001, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(3) (1994). The complaint was filed by James Womack against Graymont Western US Inc. ("Graymont"). Following an evidentiary hearing, it was determined that Graymont's termination of Womack's employment violated section 105(c) of the Act. *Decision on Liability*, 25 FMSHRC 235 (May 2003) (ALJ). The parties were directed to agree on the specific relief that should be awarded, or, alternatively, to file documentation in support of their separate proposals for relief. After filing proposals for relief, the parties agreed to settle this matter. On July 8, 2003, the parties filed a joint motion seeking approval of the terms of their settlement agreement.

The settlement agreement contains provisions concerning the withdrawal of the discrimination complaint, re-employment rights, consideration, release of claims and other agreements the parties wish to remain confidential. I have reviewed the settlement terms and I conclude the parties' agreement is reasonable and in the public interest.

ACCORDINGLY, the parties' motion for approval of settlement **SHALL BE GRANTED** upon a demonstration that the parties have substantially performed the terms of their agreement. Performance shall be completed within thirty (30) days of the date of this Interim Decision. Upon receipt of documentation of substantial performance, a Final Order will be issued dismissing this matter.



Jerold Feldman
Administrative Law Judge

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601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-434-9958
Telecopier No.: 202-434-9949

July 29, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2002-144
Petitioner,	:	A.C. No. 01-01322-04240
v.	:	
	:	Docket No. SE 2002-145
JIM WALTER RESOURCES, INC.,	:	A. C. No. 01-01322-04256
Respondent.	:	
	:	Docket No. SE 2002-148
	:	A. C. No. 01-01322-04247
	:	
	:	Docket No. SE 2002-150
	:	A.C. No. 01-01322-04245
	:	
	:	Docket No. SE 2003-1
	:	A.C. No. 01-01322-04241
	:	
	:	Docket No. SE 2003-2
	:	A.C. No. 01–01322-04242
	:	
	:	Docket No. SE 2003-3
	:	A.C. No. 01-01322-04243
	:	
	:	Docket No. SE 2003-4
	:	A.C. No. 01-01322-04244
	:	
	:	Docket No. SE 2003-5
	:	A.C. No. 01-01322-04246
	:	
	:	Docket No. SE 2003-6
	:	A. C. No. 01-01322-04248
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	:	Docket No. SE 2003-7
	:	A.C. No. 01-01322-04249
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	:	Docket No. SE 2003-8
	:	A.C. No. 01-01322-04250
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:	Docket No. SE 2003-9
:	A.C. No. 01-01322-04251
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:	Docket No. SE 2003-10
:	A.C. No. 01-01322-04252
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:	Docket No. SE 2003-11
:	A.C. No. 01-01322-04253
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:	Docket No. SE 2003-12
:	A.C. No. 01-01322-04254
:	
:	Docket No. SE 2003-13
:	A.C. No. 01-01322-04255
:	
:	No. 5 Mine

ORDER DENYING CROSS MOTIONS FOR SUMMARY DECISION;
ORDER DISSOLVING STAY OF DISCOVERY;
ORGANIZATIONAL REQUIREMENTS AND;
ORDER SCHEDULING PREHEARING CONFERENCE

In these consolidated cases the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") alleges that Jim Walter Resources ("JWR" or "the company") violated numerous mandatory safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977. 30 U.S.C. § 801, et seq. The Secretary seeks a civil penalty for each alleged violation, many of which arose out of the Secretary's investigation of two explosions that occurred at the company's No. 5 Mine on September 23, 2001.[1] The explosions took the lives of 13 miners and seriously injured three others.

After the cases were filed and assigned, I issued a pre-hearing order which, among other things, required the parties to confer and discuss settlement. While in the process of conferring, but prior to engaging in substantive settlement discussions, the parties instituted discovery. In response to the Secretary's discovery efforts, JWR filed a motion for partial summary decision, arguing that as a matter of law it is not responsible for many of the alleged violations because it did not control the mine at the time the citations were issued. JWR also filed a motion to stay discovery, asserting that a favorable ruling on its summary decision motion would obviate the need for discovery in many instances. I agreed with the company and stayed discovery. Subsequently, the Secretary filed a motion for partial summary decision asserting that there is no

[1] The No. 5 Mine is an underground bituminous coal mine located in Brookwood, Alabama.

basis for ruling in the company's favor, that JWR does not contest the factual allegations leading to the alleged violations and that the violations exist as charged.

The parties have briefed the issues thoroughly, and the motions are before me for decision.

SCENARIO OF EVENTS

The company asserts in pertinent part:

> 1. [O]n the evening of September 23, 2001, an accident involving a rock fall and two separate explosions occurred in the No. 4 section of the No. 5 Mine;
>
> 2. [O]n September 23, 2001, MSHA Inspector Edward Nicholson issued Order No. 7676787[[2]] pursuant to section 103(k) of the Act (30 U.S.C. §813(k)[[3]]);
>
> 3. [A] few hours later, on September 23, 2001, Nicholson modified the order to cover the entire mine;
>
> 4. [T]he first JWR rescue team entered the mine at approximately 8:05 p.m., September 23, approximately two hours after the second explosion;
>
> 5. [D]uring the remainder of September 23 and into the early morning of September 24, two JWR mine rescue teams advanced to the mouth of the No. 4 section to search for survivors, but the teams were removed at 6:25 a.m. on September 24 due to increased methane and C02 levels in the mine;

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[2] The order states: "A non-fatal explosion has occurred on the No. 4 section . . . [the order] is being issued to protect miners until the investigation is completed."

[3] Section 103(k) provides that in the event of an accident occurring in a mine an inspector "may issue such orders as he deems appropriate to insure the safety of any person in the . . . mine, and the operator . . . shall obtain the approval of . . . [MSHA] . . .to recover any person in such mine or to recover the coal . . . or to return the affected areas of such mine to normal." 30 U.S.C. §813(k). Orders issued pursuant to section 103(k) are referred to as "control orders."

6. [O]n September 24, a decision was made to flood the mine inby the 3 East Section (an area that included the No. 4 Section) to extinguish any remaining fires and to isolate the explosion area;

7. [F]rom September 25 to September 29, MSHA allowed JWR to pump water into that area of the mine;

8. [F]rom October 20 to November 3, JWR removed the water from the No. 4 Section;

9. [O]n November 21, . . . JWR removed the remaining water from the No. 6 Section, which is located east of the entry to the No. 4 Section;

10. [O]n December 10, . . . JWR received permission to send miners on regular shifts into the mine to begin rehabilitation of the mine;

11. [O]n May 27, 2002, MSHA allowed coal production to resume on the H Panel Longwall.

13. [B]etween September 23, 2001, when . . . [the order] was issued and June 11, 2002, when the order was terminated, the order was modified 33 times[4];

14. [D]uring the same period, JWR and MSHA approved 49 addenda to the order which detailed specific steps JWR and MSHA personnel would take to recover the victims and return to normal mining operations[5];

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[4] In fact, MSHA modified the order 32 times. The thirty third "modification" (Order No. 7676787-33) terminated rather than modified the order (see JWR Mot., Exh. B at 34).

[5] The addenda were prepared by JWR and were approved by MSHA pursuant to section 103(k) of the Act which requires the operator to "obtain the approval of . . . [MSHA] of any plan to recover any person . . . in [the] mine or to recover the coal . . . or return affected areas of such mine to normal." 30 U.S.C. § 813(k). The addenda follow the same general format. Each states a purpose, the estimated time to accomplish the purpose, and the personnel needed for the purpose. Forty one of the addenda are signed by representatives of JWR, MSHA, the union, and the state. Six are signed by representatives of JWR, MSHA, and the union. One is not signed (No. 17) and one (No. 48) is missing from the submissions that accompany the motion (JWR Br. 5, Exh. D).

JWR states that for almost one month after the explosions, its and MSHA's focus remained on the recovery of miners killed in the accidents. The company asserts that because of the order it could not detect and correct violative conditions. Nor could it maintain the mine (JWR Br. 10). Indeed, a large part of the mine was still flooded (Id. at 11).

In early November the miners' bodies were located and removed. Following that, the focus turned to removing the remaining water from the mine (Id. 12). It was not until the last week in November, that conditions reached the point in some areas of the mine where rehabilitation work could be planned. During the last week in November, MSHA modified the order to allow a three day examination by JWR and union representatives of the area outby the 3 East section in order to create "detailed work schedules . . . for all . . . [miners] to return to those areas and repair and correct those hazards and or damages which [were] identified" (JWR Br. 12, quoting Addendum No. 42). The examination began on December 3, and Addendum No. 42 was followed by several other MSHA-approved addenda and modifications, which allowed repair and recovery work gradually to resume.

On December 4, Addendum No. 43 allowed some miners to begin repair work on the light system. On December 5, Addendum No. 44 allowed JWR and union personnel to examine the N. 5-9 shaft area to assess which areas could be rehabilitated. Miners entered the shaft area on December 6. On December 7, Modification No. 11 released for rehabilitation all areas outby the 3 East turnout (JWR Br. 13, Mod. No. 11, Exh. L).[6]

On December 8, the first portion of the surface area of the mine was released from the section 103(k) order. On December 9, Addendum No. 46 allowed JWR "to begin the reconstruction process at the No. 5 Mine by correcting hazards, repairing damage, and doing other mine related activities" (JWR Br. 13, quoting Exh. D, Addendum No. 46).[7]

On January 2, 2002, MSHA allowed company volunteers to work in areas still covered by the section 103(k) order. The miners were to remove debris prior to supporting a coal pillar near the 5-9 Shaft. On January 26, Modification No. 16 allowed the company access to all areas of the mine except for specified parts of the No. 4 Section and the No. 6 Section, which were not

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[6] In addition to releasing the area, the modification states that the returned area is "subject to the provisions of the Mine Act and 30 C.F.R." (JWR Br. 13, Exh. B, Mod. No. 11). JWR argues that "the language returning part of the mine to JWR for the purposes of the Mine Act and 30 C.F.R. . . . demonstrates that MSHA did not consider the controlled area to be subject to the normal laws and regulations before . . . [Modification No. 11] was issued" (JWR Br. 13, n. 6).

[7] Addendum 46 also states JWR must comply with "the provisions and examination requirements of 30 C.F.R. in this work area" (JWR. Br. 14, quoting Exh. D, Addendum 46). JWR asserts the language requiring compliance makes clear that MSHA did not view the area outby 3 East as subject to 30 C.F.R. prior to December 10 (JWR Br. 14).439

released to JWR until April 4, 2002 (JWR Br. 14, citing Exh. B, Mod. No. 16, n.7).[8] Also on January 26, MSHA allowed miners to perform reconstruction work in areas inby the 3 East Turnout (JWR Br. 15, Exh. D, Addendum 49).

On March 19, Modification 25 returned portions of the mine inby the 3 East Turnout to the quarterly MSHA inspection process (JWR Br. 15, citing Exh. B, Mod. 25). On April 4, Modification 28 allowed rehabilitation work to begin in the No. 6 Section and the No. 5-9 Shaft in fifty-foot increments (JWR Br. 16, citing Exh. B, Mod. 28). On April 26, Modification 29 allowed the company to begin rehabilitation work in the controlled portion of the No. 4 Section near the rock fall site (JWR Br. 16, Exh. B, Mod. 29).

On May 27, Modification No. 30 allowed JWR to resume coal production on the H panel long wall (JWR Br. 16, Exh. B, Mod. 30). On May 28, Modification No. 31 allowed JWR to remove the continuous mining machine from the No. 4 section of the mine and transport it to the surface (JWR Br. 16, Exh. B, Mod. 31). Finally, on June 5, 2002, Modification 32 allowed JWR to resume normal operations in the No. 4 section (JWR Br. 16, Exh. B, Mod. 32). MSHA terminated the section 103(k) control order on June 11, 2002 (JWR Br. 16, Exh. B., Mod. 33).

JWR'S ARGUMENTS

The company argues that the order, its modifications and its addenda show that MSHA, controlled "virtually every activity that occurred at the No. 5 Mine from . . . the date [the o]rder . . . was issued [until] the date the order was terminated" (JWR Br. 16). After the order was issued, its addenda and modifications released only specified portions of the mine to JWR, and MSHA continued to control all areas still covered by the order (Id. 22-23). Because of MSHA's control, JWR should not be held responsible for conditions which existed in parts of the mine over which it had no authority. Although the language in various modifications indicates that some inspectors believed that that until a part of the mine was released, the part was not subject to the Act and its mandatory standards, other MSHA's inspectors issued citations to JWR for conditions that existed in areas areas under MSHAs control.[9] Since JWR did not have access to these areas and since the areas were not bound by the requirements of 30 C.F.R., the citations should be vacated.

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[8] Modification No. 16 also states that from January 26 on, the area is to be governed by the Mine Act and 30 C.F.R. (JWR Br. 14-15, Exh. B No. 16).

[9] JWR asserts there are 45 such citations (see JWR Br. 17-18, 24-28), but it is careful to state that its motion does not cover: (1) citations issued for conditions that probably existed prior to the accident; (2) citations issued for violations that occurred during the recovery operation; and (3) citations issued for conditions existing in areas of the mine that had been released from the control order and which JWR had "ample time" to rehabilitate (JWR Br. 24).

THE SECRETARY'S RESPONSE AND CROSS MOTION

The Secretary's argues that the Act imposes on an operator strict liability for all violations and that nothing in the language or the legislative history of the Act indicates that an exception arises when a section 103(k) order is in effect (Sec's Mem. In Support of Cross Motion for Partial Summary Decision and In Opposition to Respondent's Motion for Partial Summary Decision ("Sec. Mem.") 5-6). If JWR had no control over a particular area, the company's negligence may be reduced and, hence, any civil penalty assessed may be less, but the company still is liable. (Sec. Mem 7). Because MSHA had the authority to issue the challenged citations and because the company is responsible for the cited conditions and does not contest the existence of the conditions, partial summary decision should be granted in the Secretary's favor (Sec. Mem. 17-19).

Alternatively, if the section 103(k) order relieved JWR of liability for violations occurring after imposition of the order, MSHA was not precluded from citing violations which occurred prior to the order but which were observed after the order was imposed, and the company has not established that the subject cited conditions occurred after the order was imposed (Sec. Mem. 8-9).

LIABILITY AND SECTION 103(K)

JWR's argument is premised on the proposition that an operator who does not control its mine or parts of its mine, can not examine, monitor, prevent and/or correct conditions that would violate the Act and regulations and, therefore, should not be held liable for them. This proposition is not new to the Act. It is a variant of an affirmative defense to liablity that the Commission and the courts have recognized – the impossibility of compliance defense.

The defense predates the Mine Act. It was enunciated by the Commission's predecessor, the Interior Board of Mine Operations Appeals ("IBMA"), which held that under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801, et sec. (1969) ("Coal Act"), "Congress did not intend that a . . . notice [of violation] be issued or a civil penalty assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials or qualified technicians." Buffalo Mining Co., 2 IBMA 226, 259 (September 20, 1973).

A variant of the defense was argued by Sewell Coal Company ("Sewell") when its mine was closed due to a strike and the company was able to employ only supervisory personnel underground. Due to the lack of union personnel, the mine deteriorated rapidly. An MSHA inspector, who was underground during the strike, cited Sewell for two conditions that violated Mine Act safety standards. The company did not contest the conditions but argued that its strike-caused lack of manpower made compliance impossible and therefore, that the citations should be vacated. A Commission Administrative Law Judge agreed, but the Commission reversed, finding the company had not established an impossibility of compliance defense as set forth in

Buffalo Mining. The Commission, adopting a case-by-case approach to the defense, found that compliance by Sewell was "difficult but not impossible." Sewell Coal Co., 3 FMSHRC 1380, 1382 (June 1981). The Commission stated, "the judge erred in recognizing an affirmative defense of impossibility of compliance in this case." 3 FMSHRC at 1382 (emphasis added).

The United States Court of Appeals for the District of Columbia Circuit affirmed the Commission and approved the Commission's approach of defining the scope of the defense on a case-by-case basis. Sewell Coal Co. v. FMSHRC, 686 Fed. 2d 1066, 1070 (D.C. Cir. 1982). The Court noted that neither the Coal Act nor the Mine Act exempt struck mines from safety standards and that neither the acts nor the regulations expressly recognize the defense.[10] Nevertheless, the Court approved the defense, finding it consistent with "principles that are implicit in the . . . Act." 686 F2d at 1070.[11]

I conclude the Court's approach in Sewell is applicable to JWR's asserted defense. A defense based on a lack of control due to the issuance of a section 103(k) order is not recognized in section 103(k), elsewhere in the Mine Act, or in the regulations. However, like the impossibility of compliance defense, it is consistent with "principles that are implicit in the . . . Act". 686 F2d at 1070.

The Act places the primary responsibility for preventing unsafe and unhealthy conditions in the nation's mines on "operators . . . with the assistance of the miners". 30 U.S.C. §801(e). The Act defines an "operator" in part as "[a]ny owner, lessee, or other person who operates, controls or supervises a . . . mine." 30 U.S.C. §802(d) (emphasis added). Therefore, by definition, operators must participate in and/or have authority over the operation, control or supervision of a mine. The purpose of the statutory definition is to assign responsibility for health and safety upon those entities that have actual authority over the conditions in the mine and/or who exhibit "substantial participation in the running of the mine," on the theory that such responsibility furthers compliance. National Industrial Sand Ass'n v. Marshall, 601 F2d 689, 701 (3rd Cir. 1979). When an owner, lessee or other person loses control or the authority to control the mine, the rationale no longer holds, and an affirmative defense based on the loss of control is implied.

Section 103(k) grants to the Secretary the extraordinary authority to take control of all or part of the mine away from the operator. Use of the authority can effectively place the Secretary in the shoes of the operator, and result in a disruption of the nexus between responsibility and

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[10] In Sewell the triggering notices of violation were issued under the Coal Act, but the Secretary's petition for assessment of penalty was filed after the Mine Act had taken effect, and the case was decided under the latter act (see 3 FMSHRC 1380 n.1).

[11] Thus, it is not accurate to state, as does the Secretary, that an operator always is liable for a violative condition. There are exceptions, impossibility of compliance being one.

compliance, a nexus that is a basis for the operator's liability. For this reason, I will recognize an affirmative defense based upon the Secretary's imposition of the section 103(k) order, provided the record establishes in each instance that the section 103(k) order as originally imposed or as subsequently modified and amended, deprived the company of its authority and control in the part of the mine where the cited condition existed, and that the condition would not have existed but for the presence of the order and its restrictions.[12]

THE CROSS MOTIONS

A motion for summary decision may be granted where: (1) there are no genuine issues of material fact; and (2) the movant is entitled to a decision as a matter of law. 29 C.F.R. §2700.67(b).

On JWR's part, the questions to be answered are whether the undisputed material facts establish the scope of the section 103(k) order at the time the conditions were cited and whether the cited conditions would have existed but for the imposition of the order. Put another way, did the order limit JWR's authority and control in the area cited and if so would the conditions have existed if the limitations had not been imposed? Obviously, the answer to the questions depends upon the particular conditions alleged in the subject citations and the impact of the restrictions of the order, its modifications, and its amendments on the conditions.

JWR argues that under the order and its modifications, MSHA controlled what work, if any, could be performed in areas covered by the order and that MSHA's inspector's issued citations for conditions they encountered before MSHA allowed JWR to perform rehabilitation and report work in the mine (JWR Br. 19). Even if true, this does not establish that the specific cited conditions would not have existed but for the restrictions imposed by the order and its modifications. For me to make these determinations, the record must be complete. The Secretary must present the testimony of her inspectors regarding the scope of the order and its modifications and their effect on the particular cited conditions. JWR then may offer the defensive testimony it believes is warranted. Therefore, I cannot grant JWR's motion.

Nor can I grant the Secretary's motion. As stated above, I do not agree with the Secretary that the issue of JWR's liability is resolved by rote application of the "strict liability" doctrine. I also disagree with her assertion that JWR does not dispute the existence of the conditions cited in the subject violations (Sec. Mem. 5-8). As I read JWR's motion, it is premised upon its argument that as a matter of law it may not be held liable for conditions in areas it could not access or maintain due to the section 103(k) order (JWR Br.4 n.1). If its argument does not lead to the partial summary decision it seeks, JWR reserves its right to challenge the merits of the citations (See e.g., Id. 12 n. 6).

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[12] I note, as JWR has pointed out, that at least some of MSHA's inspectors appear to agree. See e.g., Modification No. 11 (restoring the company's obligation to comply with the Act and the regulations in areas removed from the order).

The Secretary also argues that even if the JWR is not liable for conditions cited when the section 103(k) order was in effect, it is still liable for conditions pre-dating the order ("pre-existing conditions") (JWR Br.12). I agree, provided the facts, as subsequently determined, provide the basis for finding the existence of the alleged conditions, that the conditions violated the cited standards, and that the conditions occurred before the order took effect. I cannot make these findings without hearing from the inspectors and most likely from JWR's witnesses too.

For the foregoing reasons, the motions for partial summary decision are **DENIED.**

DISSOLUTION OF STAY ORDER

In view of the denial of the motions, the stay of discovery cases is **DISSOLVED** .

ORGANIZATIONAL REQUIREMENTS AND ORDERS

To facilitate the determination of these proceedings, counsels are **ORDERED** as follows:

1. **Master File and Docket**. The Commission's docket office will maintain a master docket and case file under the caption:

Secretary of Labor, Mine Safety	)
and Health Administration,	)
	)
Petitioner	)
	)
v.	)Docket No. SE 2002-144, etc.
	)A.C. No. 01-0132204235
	)
Jim Walter Resources, Inc.,	)
	)
Respondent	)

All orders, pleadings, motions and other documents will, when filed and docketed in the master case, be deemed filed and docketed in each individual case to the extent applicable.

2. Captions; Separate Filing. Orders, pleadings, motions, and other documents applicable to all cases will bear the above caption and the notation "ALL CASES". They will be filed and docketed only in the master file. Documents intended to apply only to

a particular case will indicate in their caption the docket number of the case(s) to which they apply.

3. Discovery. The parties may engage in discovery, without regard to the limitations imposed by Commission Procedural Rule 56, 29 C.F.R. §2700.56, so long as it does not delay or otherwise interfere with the final disposition of these matters. Discovery requests and responses thereto, pursuant to Rule 58, 29 C.F.R. §2700.58, shall be served upon other counsel but shall not be filed, except as provided herein with the administrative law judge. The party responsible for service of the discovery material shall retain the original and become its custodian and, with respect to depositions, the deposing party shall retain the original deposition transcript and become its custodian and shall make it available for inspection by any party upon request. Any motion concerning discovery matters shall be accompanied by a copy of, or shall set forth verbatim, the relevant portion of any nonfiled discovery materials to which the motion is addressed. All discovery shall be completed no later than November 1, 2003.

3. Organization of Counsel. Counsels for the Secretary and counsels for the Respondents shall advise me within 10 days of the date of these orders who is to be designated as lead counsel and who is to be designated as liaison counsel for each party (name, address, telephone and fax number). Copies of all pleadings, motions, and other documents filed in these matters shall be served only on the lead and liaison counsels.

4. Trial. Subject to further order, the parties are directed to be ready for trial on all issues by November 14, 2003. Counsels are advised that the trial stage of the proceedings will be completed no later than February 15, 2004. Counsels are advised further that the undersigned intends to set a date for commencement of the trial at the Pretrial Conference scheduled below.

5. Pretrial Conference. It is **ORDERED** that a pretrial conference will be held at 8:30 a.m. in Birmingham, Alabama on September 5, 2003. (A specific site will be designated later.) At the conference the parties may be represented either by lead or liaison counsel, but only one counsel will speak for each party. The conference will be held for the following purposes:

a. Issue identification. Prior to the conference counsels are directed to confer and to identify for each other the issues

the parties contend must be addressed at trial. Counsel for the Secretary will offer a written stipulation, signed by lead counsels, of the issues upon which the parties jointly agree. Each counsel will offer a written statement of the issues he or she alone contends must be addressed. In addition, counsel for the Secretary orally will state the jointly agreed upon issues for the record, and each counsel will orally state the issues he or she alone contends must be addressed.

b. Discovery schedule. Prior to the conference Counsels are directed to confer and to agree upon a discovery schedule, recognizing that all discovery must be completed no later than October 31, 2003. Counsel for the Secretary will offer for the record a written discovery schedule, signed by lead counsels, and orally will read the agreed upon schedule into the record. If counsel are unable to agree, the judge arbitrarily will set a schedule for the parties.

c. Trial plan. There are 16 dockets in these cases (Docket No. SE 2002-140 has been severed and will be tried separately), and approximately 304 alleged violations. Prior to the conference, counsels are directed to confer and agree upon a structured plan for the trial all issues. In general, issues common to all dockets should be tried prior to allegations specific to particular dockets, and counsels will be expected to identify such issues in their statements of issues. Counsels are directed to be mindful that it may make for a more cogent record to try the alleged violations in a sequence dictated by the date the citations were issued or in a sequence dictated by the issuing inspectors rather then by the numerical sequence of the docket numbers. Counsel for the Secretary will orally describe the trial plan at the conference and will offer a written statement of the plan signed by lead counsels for inclusion in the record.

d. Appointment of settlement representatives and settlement deadline. Within 10 days of the date of these orders, each party shall appoint a representative to be responsible for its settlement negotiations. Prior to the conference counsels and the representatives are directed to confer and to agree upon a schedule for settlement discussions. Counsel for the Secretary orally will describe the schedule at the conference and will offer a written description of the schedule, signed by lead counsels, for inclusion in the record. The settlement discussions must be completed and a final report submitted, with appropriate motions to approve settlement, no later

than November 14, 2003, two weeks after the close of discovery. Settlement agreements will not be accepted after that date and all unresolved issues will be tried.

e. Other topics. At the close of discussions of the specified agenda, counsels may raise other matters they believe will aid in the disposition of these cases.

David Barbour
Chief Administrative Law Judge

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